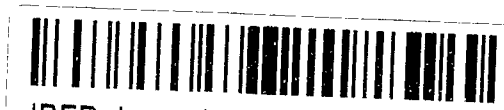
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A NEW TVA PARADOX

The refund of turnover tax upon exportation and the imposition of turnover tax upon importatation of goods have been changed in the Netherlands as of January 1, 1968. This modification is aimed at facilating the transition to the system of tax on value-added, especially in view of non-simultaneous introduction thereof in the EEC countries. The TVA system brings about, as is stated in an explanationary note to the Dutch draft, an improvement in the international competitive position of the domestic industry. Under the TVA system the exported goods—in the absence of transitional arrangements—will be completely exempt from the tax, and the tax imposed on imports will equal exactly that on a domestically produced and consumed good. If some countries introduce the TVA prior to others, the following situation arises: Goods exported from a non TVA country to a TVA country are fully liable to TVA in that country upon their importation, whereas in the non TVA country of production their exemption from turnover tax is not complete. In the opposite case, goods exported from a TVA country to a non TVA country are completely exempt from tax in the TVA country, but are subject to less turnover tax in the non TVA country than that imposed on domestic products.

Particularly in view of the introduction of the TVA in Germany as of January 1, 1968, as is stated in the explanation, the Netherlands proposes to modify their cumulative tax in the following manner, that in the granting of refunds in respect of goods exported from the Netherlands not only the turnover tax imposed on raw and auxiliary materials is to be taken into account, as is the case prior to 1968, but also the tax imposed on investments and services associated with its production. Correspondingly, the turnover tax on imports is to be raised by a percentage in order to compensate for the burden on domestic goods resulting from the tax on investment goods, and services.

This measure means that utilizing a lump-sum procedure a complete refund of cumulative tax is given at export, and, again utilizing a lump-sum procedure the tax burden at import is made equal to the burden on domestic products.

As a result of the transitional arrangements in the Dutch TVA draft, which is expected to enter into force on January 1, 1969, the refund at export is not complete. In the Dutch draft credit in respect of investment goods shall be restricted to 40% (1969), 60% (1970) and 80% (1971). This restriction can be compared with the German investment tax imposed during the German transitional period.

The paradox therefore results that the export refund under the cumulative turnover tax is complete, albeit utilizing a lump sum procedure, due to the impossibility of calculating the real burden on each individual good; and the export refund under the TVA is not complete, because of the transitional rules, thereby making the TVA cumulative.

DR. J.C.L. HUISKAMP

* * * * ARTICLES * * * *

PROF. DR. MARIJAN HANŽEKOVIĆ*:

THE TAXATION OF FOREIGN ENTERPRISES IN YUGOSLAVIA

I ESTABLISHMENT AND TAXATION OF FOREIGN ENTERPRISES IN YUGOSLAVIA TILL 1967

The Yugoslav government policy concerning establishment and taxation of foreign enterprises underwent various changes in the period between 1947 and 1967.

1. Between 1947 and 1962, the foreign enterprises were entitled to establish their offices in Yugoslavia, provided they got the necessary permit from the Ministry for Foreign Trade. Only a few foreign firms established their branch offices in Yugoslavia during that time. These branch offices of foreign enterprises had to organize their book-keeping in accordance with the Yugoslav rules and had to conduct their business in conformance to the existing laws.

During the period the foreign enterprises were taxed in the same manner as Yugoslav private persons and private corporate bodies.

2. From 1962 until 1966 no branch office of a foreign enterprise could be established in Yugoslavia. The interest of foreign firms could only be represented by a Yugoslav enterprise for foreign trade.

3. In 1966 the Federal Executive Council (the equivalent of the government cabinet in western democracies) was authorized to enact rules concerning establishment of foreign firms in Yugoslavia.

However, Art. 34 of the Basic Law on Citizens' Contributions and Taxes (Official Gazette No 31/1964), that has been applied since January 1st, 1965, prescribes that all foreign citizens, foreign private corporate bodies and foreign organizations realizing either certain revenue or income in Yugoslavia or having and/or acquiring certain property are liable to payment of contributions and taxes in accord with the Basic Law. Until the present moment the Yugoslav authorities have given no permission for establishment of foreign enterprises in Yugoslavia.

If a foreign firm should obtain the permission to establish its branch office in Yugoslavia, its profits would be computed in the same manner as prescribed for the Yugoslav citizens and/or Yugoslav private corporate bodies. This means that the following expenditures will be deducted from realized receipts: costs of production and foreign services, overhead costs (i.e. executive and general administrative expenses), and other costs necessary for realization of total receipts. Though proved, the following costs cannot be deducted from the total receipts: (a) losses from previous years; (b) value of the owner of the firms' labour as well as value of his family members' labour; (c) household costs of the firm's owner; (d) non-contracted gifts and premiums; (e) interests on own invested capital; (f) paid contributions and taxes; (g) such part of overhead costs (executive and general administrative expenses) of the foreign head office abroad that burdens the income of the branch office in Yugoslavia, as no part of the head office's profit abroad is included in the

* Faculty of Economics, University of Zagreb.

total receipt of the branch office in Yugoslavia; (h) expenditures for increasing the assets of the enterprise, directly or by sinking the debts.

The profit of a foreign firm in Yugoslavia can be taxed in the following ways: (a) taking a yearly lump-sum profit as tax base; (b) assessing a yearly lump-sum contribution (tax); (c) assessing the contribution (tax) as percentage of each realised gross receipt; (d) assessing the actually realized net profit.

A foreign firm's profit in Yugoslavia shall be assessed by local tax with a progressive tax rate.

II TAXING OF FOREIGN CONSTRUCTION AND BUILDING FIRMS IN YUGOSLAVIA

In pursuing her policy of economic growth, Yugoslavia has asked for and has received several credits from the International Bank for Reconstruction and Development. In order that these credits be utilized with maximum benefit, construction works for some of the development projects were – at international auctions – allocated to the best bidder.

The profit realized in Yugoslavia by foreign citizens, foreign private corporate bodies and foreign organizations by means of construction work allocated to them on the grounds of an international auction are taxed by the flat rate of 35% (Art. 34 of the Basic Law on Citizens' Contributions and Taxes, Official Gazette No 15/1967). This tax is levied by the Federal Government. In addition to this tax, foreign enterprises performing construction work in Yugoslavia are subject to the payment of: (a) a contribution for reconstruction and development of Skopje by a flat rate of 1% on the total sum of wages and salaries; and (b) a contribution for changed house rents by a flat rate of 2%, this also on the total sum of wages and salaries.

Total revenues of foreign construction and building enterprises contain the following: (a) value of the work performed, (b) value of the material used, (c) value of the services rendered, regardless of whether these values were paid for or not and regardless of whether the bill was issued or not. Total revenues contain also the value of all services rendered gratuitously as well as value of premiums (awards) for completion of construction before due time.

The assessable profit is computed from total revenues by deducting all costs of production, including wages and salaries. The foreign construction and building enterprises are obliged to set up balance sheets at the end of each year in accordance with the rules of the Law on Social Bookkeeping (Official Gazette No 23/1965 and No 57/1965). In the course of the year the enterprise is obliged to pay quarterly advance payments of the profits tax on the basis of quarterly periodical financial statements, set up in the same manner as prescribed for Yugoslav enterprises. Foreign enterprises that fail to comply with these prescriptions are liable to be fined by 500 to 100,000 New Dinars (1 US dollar = 12.50 New Dinars).

Foreign construction and building enterprises must keep their books according to the prescriptions of the Yugoslav Enterprise Bookkeeping Law (Official Gazette No 12/1965 and No 29/1966) under the penalty of fine from 500 to 50,000 New Dinars.

III TAXATION OF FOREIGN TRANSPORTERS OF PERSONS AND GOODS

When transporting persons and goods from Yugoslavia, foreign transporters are liable to pay a tax, deducted at the source, if Yugoslav

transporters are taxed similarly in their respective countries (Art. 73 of the Basic Law on Citizens' Contributions and Taxes, Official Gazette No 32/1964). This tax is to be paid at the flat rate of 3% of the gross receipts and is considered a revenue belonging to the Federation (Art. 73 of the Basic Law on Financing the Socio-Political Communities, Official Gazette No 31/1964). However, if the foreign transporters have their own agency in Yugoslavia, they are liable to the profits tax regardless of whether the Yugoslav transporters are taxed in their respective countries or not.

IV TAXATION OF PROFITS DERIVED FROM FOREIGN INVESTMENTS IN JOINT VENTURES IN YUGOSLAVIA

In July 1967 the existing Law on Assets of the Enterprises (Official Gazette No 31/1967) was amended so that foreign private persons and private corporate bodies may now contract longterm investments with Yugoslav enterprises with the aim to realize joint business goals at joint risk.

Yugoslav enterprises do not own the assets they work with; instead, such assets are owned by the whole society. The enterprises only have the right to make use and manage such assets. The rule that no private person can own means of production in Yugoslavia is also valid for foreigners. The enterprises in Yugoslavia are managed by Workers' Councils; any infringment of that institution automatically means a serious offence of the existing public order.

However, the development of Yugoslav economy has reached the stage when further growth depends on closer connections with the world market. In order to obtain more efficient production and marketing of its products, the Yugoslav economy needs an improved internal organization, use of the latest technological methods and facilities of a ready-made sales organization on the world market. The Yugoslav enterprises seek, therefore, such foreign partners that would invest not only their capital (as foreign capital could also be acquired by way of credits), but also their know-how; those who would place at the disposal of Yugoslav enterprises the existing sales organizations and who would be prepared to share the risk of a joint undertaking.

Such economic collaboration with foreign investors could have not have been achieved in the form of joint companies, since no foreigner being allowed to acquire means of production in Yugoslavia; thus was the form of joint ventures adopted.

Total value of a foreign contractor's assets invested into a Yugoslav enterprise should not – as a rule – exceed the total value of assets of the Yugoslav enterprise. In special cases, however, when an Act passed by the Federal Assembly expresses a special interest for the development of a certain branch of national economy, the total value a foreign contractor invests into a Yugoslav enterprise might be allowed to exceed the value of assets invested by a Yugoslav enterprise.

The contract concerning investments for joint ventures cannot stipulate that the foreign contractor has rights greater or other than a Yugoslav enterprise. Foreign contractors may be either persons or corporate bodies.

Profit gained from joint ventures is assessed by the federal tax authorities.

The tax base in assessing the profit of a foreign investor is his share in the income arising from the joint venture during the calender year, regardless of the form the profit was realized in. The tax base contains even hidden profit, realized by the foreign investor through the performance of business with the Yugoslav enterprise into which

he has invested by selling goods and/or services to it at prices higher than those on the world market. It must be emphasized that the foreign investor's revenue from interest on that part of his profit which must be deposited with a Yugoslav bank, does not belong to the tax base and is taxfree.

The profit arising from a joint venture is taxed at a flat rate of 35%.

In case the foreign investor uses at least 25% of his profit realized in one year in order to (a) increase his share in the joint venture assets; (b) invest such profit into some Yugoslav enterprise for another joint venture; or (c) deposit this profit with a Yugoslav bank, the tax on this part of his profit will be reduced by 15%. For example, if the assessable profit of the foreign investor amounts to 400,000 New Dinars and he uses 100,000 New Dinars in order to:

(a) increase his share in the joint venture assets;
(b) invest into a joint venture with still another Yugoslav enterprise; and
(c) deposit them with a Yugoslav bank,

the tax—which on this 100,000 New Dinars would amount to 35,000 New Dinars—will be reduced by 15%, i.e. instead of 35,000 New Dinars, the foreign investor will be liable to pay only 30,750 New Dinars. In other words, instead of a tax amounting to 140,000 New Dinars on a profit of 400,000 New Dinars, the foreign investor will have to pay only 135,750 New Dinars.

If the foreign investor reinvests between 25% and 50% of his profit, the tax on the 25% of his profit will be reduced by 15%, and the tax on reinvested profit above the 25% will be reduced by 30%. For instance, if a foreign investor reinvests 50% of his profit amounting to 400,000 New Dinars, he will be taxed only 125,250 New Dinars, instead of 140,000 New Dinars.

If the foreign investor reinvests more than 50% of his profit, the tax assessed on the part of his reinvested profit exceeding 50% will be reduced by 50%. This means that a foreign investor realizing a profit of 400,000 New Dinars and re-investing 300,000 New Dinars, will be taxed only 107,750 New Dinars, instead of 140,000 New Dinars.

Not all deposits of a part of realized profit with a Yugoslav bank entitle the investor to tax reductions. If a foreign investor wants to enjoy a tax reduction on a certain part of his profit deposited with a Yugoslav bank, his profit must be deposited as a time deposit for a period of at least 5 years. In case the notice period is shorter than 5 years, the investor shall not be entitled to any tax benefit for the part of his profit deposited with the bank. When the notice period ranges between 5 and 10 years, the investor is entitled to only 50% of the tax benefit. Only when the notice period exceeds 10 years, is the investor entitled to the full amount of tax reduction. It is evident that foreign investors will be stimulated to deposit part of their profits gained through joint ventures with Yugoslav enterprises only and if the purchasing power of the Dinar remains relatively stable.

Rights and liabilities of a foreign investor, deriving from a joint venture contract with a Yugoslav enterprise may be transfered to his partner or another Yugoslav enterprise. In case such transfers have been realized before 5 years of reinvesting a part of the profit have elapsed, the foreign investor forecloses his rights to tax reduction and will be subsequently assessed the full tax amount. When the foreign investor transfers his rights deriving from the joint venture contract with a Yugoslav enterprise to his partner or another Yugoslav enterprise after 5 but not after 10 years after he has reinvested a part of his profit, he will foreclose 50% of tax relief and will be subsequently taxed with only 50% of the tax reduction taken into account.

If the foreign investor has reinvested a part of his profit, and this part of profit is returned to him for whatsoever reason before the time necessary for enjoyment of tax reduction has elapsed, the tax will be assessed subsequently on the returned part of profit, with respect to the time of reinvesting. For instance, assume that the investor's profit amounted to 400,000 New Dinars and 50% of it, i.e. 200,000 were reinvested. Let us suppose that these 200,000 New Dinars are returned to the investor after 4 years. The tax reduction to which the investor is entitled amounts to 14,750 New Dinars. The investor will subsequently be required to pay not the total amount of the tax reduced, but only one fifth of it, i.e. 2,950 New Dinars. If the reinvested part of the profit amounting to 200,000 New Dinars is returned to the investor after 9 years, 50% of the tax relief will be accorded to him and the reinvestment period taken into account. The tax relief again amounts to 14,750 New Dinars; after 5 years' period the foreign investor is entitled to 50% of the tax relief, i.e. 7,375 New Dinars. As the returned part of his profit was reinvested for 9 years, the investor will subsequently be assessed for only one year or one tenth of 7,375 New Dinars, i.e. he will have to pay only 737.5 New Dinars.

The tax base for the assessment of the foreign investor's profit is determined utilizing the annual financial statement of the Yugoslav enterprise into which he has invested. In its financial statement the Yugoslav enterprise must distinguish the profit realized from the joint venture from other revenues. The profits tax on the foreign investor must be determined and paid in due time by the Yugoslav enterprise in which a foreign investor has invested. The unpaid tax is a joint liability of the Yugoslav enterprise and foreign investor.

Each month the Yugoslav enterprise must make an advance payment towards the profits tax to which the investor is subject; this advance payment amounts to one twelfth of the tax assessed on the last year's profit. If the Yugoslav enterprise in the course of the year sets up quarterly periodic settlements of accounts concerning joint venture with foreign investor, the tax advance payments depend upon results shown in quarterly periodic settlements of accounts.

In case the Yugoslav enterprise does not pay the profits tax at all or does not pay such tax due by the foreign investor in time, the enterprise will also be liable to pay, besides the regular tax, a surcharge of.1% per day for the non-paid or not-in-time paid tax.

The fiscal authorities' right to assess and collect the profits tax ends five years after the tax collection should have been performed. The right of the investor to ask for repayment of the unduly paid or overpaid tax also ends five years after the claim should have been raised.

The foreign investor and the Yugoslav enterprise who embark upon a joint venture may wish to employ a foreign expert in order to improve the organization, technology, production, etc. of the Yugoslav enterprise. Such a foreign expert could be hired on a temporary or a permanent basis. If hired to perform some special work, the foreign expert will pay the identical tax on his salary paid as by Yugoslav citizens performing intellectual services (doctors, lawyers, engineers, etc.). If hired on a permanent basis, the foreign expert will be taxed in the same manner as are the Yugoslav professional workers. The tax rate for both taxes is flat and identical; in 1967 it amounted to 12.9%. On the amount of their gross wages workers pay the contribution on personal inome from employment a at flat rate of 12.9%, the contribution for social security at a flat rate of 19.0%,

the contribution for the employment service at a flat rate of .4%, the contribution for the reconstruction of Skopje at a flat rate of 1.0% and the contribution to the housing fund at a flat rate of 4.0%. If the salary of a foreign expert exceeds a certain total amount, he must pay—in like manner as a Yugoslav citizen—the total income tax including progressive tax rate as well as the personal income contribution. In 1966 the first 20,000 New Dinars of the citizen's total income were exempt from the progressive taxation and the rest was taxed according to the following schedule:

If the tax base amounts to more than	less than	the tax amounts to	
	10,000	3%	
10,000	15,000	300 + 6%	on the surplus over 10,000 to 15,000
15,000	20,000	600 + 9%	on the surplus over 15,000 to 20,000
20,000	25,000	1,050 + 12%	on the surplus over 20,000 to 25,000
25,000	30,000	1,650 + 15%	on the surplus over 25,000 to 30,000
30,000	35,000	2,400 + 20%	on the surplus over 30,000 to 35,000
35,000	40,000	3,400 + 25%	on the surplus over 35,000 to 40,000
40,000	50,000	4,650 + 35%	on the surplus over 40,000 to 50,000
50,000	60,000	8,150 + 45%	on the surplus over 50,000 to 60,000
60,000	70,000	12,650 + 55%	on the surplus over 60,000 to 70,000
70,000	80,000	18,150 + 65%	on the surplus over 70,000 to 80,000
80,000		24,650 + 70%	on the surplus over 80,000

A foreign expert is entitled to an additional tax relief: he is entitled to deduct 30%, from the amount of his personal income exceeding 20,000 New Dinars; this being supposed to cover the social security expenses and other costs in connection with the expert's stay in Yugoslavia.

V. MEASURES FOR AVOIDING DOUBLE TAXATION

Yugoslavia has not yet concluded any bilateral conventions for avoiding double taxation since the World War II, while strictly preserving the principle of territoriality in her tax system. That means that Yugoslavia taxed and taxes all income realized on her territory and she abstained and abstains from taxing any income realized abroad. Foreign persons or corporate bodies were taxed in the same manner as were Yugoslav citizens. Applying the principle of territoriality protected Yugoslav residents from double taxation. However, residents from abroad, who realized income in Yugoslavia were taxed here but could, of course, be taxed again in their respective countries of residence.

It is rather difficult to forecast the trends in Yugoslav economic development. However, the closer the economic connections with other economies, the more it will be necessary to cooperate with other countries with respect to avoiding double taxation.

For the time being, the existing Yugoslav laws do not conform with some provisions of the O.E.C.D. Draft Double Taxation Convention on Income and Capital of 1963. According to paragraph 1, Art. 7 of the Draft Convention, profits of an enterprise

can be taxed in another contracting state only if such profits arise from a permanent establishment. The term "permanent establishment" has been defined in paragraph 1, Art. 5 of the Draft Convention as "a fixed place of business in which business of the enterprise is wholly or partly carried on". A Yugoslav enterprise in which a foreign contractor has invested his capital, can hardly be considered his permanent establishment. Though the foreign investor invests his capital into the Yugoslav enterprise, participates in the management and is entitled to a share of income, the enterprise remains a Yugoslav one and all its assets are owned by the whole Yugoslav society and not by the enterprise or foreign investor. It seems that the prescriptions of Art. 9 of the Draft Convention concerning taxation of associated enterprises could be applied to taxation of joint ventures. However, Art. 9 foresees that the basic taxation of each associated enterprise be conducted in its respective country, whilst the Yugoslav law taxes the foreign investor's profit in Yugoslavia.

Commentary on paragraph 2, Art. 5 of the Draft Convention expresses the opinion that a building site or assembly project shall be deemed a permanent establishment only if existing for more than twelve months. A part of the period of twelve months may fall into more than one fiscal year. Yet, according to the provisions of the present Yugoslav law, profits of foreign enterprises having a building site or an assembly project in Yugoslavia are taxed regardless of the duration of their existence in Yugoslavia.

The existing prescriptions of the Yugoslav law are in some respects more favourable for the foreign investor than are the clauses of the Draft Convention dealing with interest taxation. Paragraph 1, Art. 11 foresees that interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state. However, paragraph 2 stipulates that the tax so charged should not exceed 10 per cent of the amount of the interest. According to the now existing prescriptions in Yugoslavia, interests arising from saving deposits and other deposits with banks in Yugoslavia are not taxed. A foreign enterprise will pay no tax on interest derived from money deposited with a Yugoslav bank.

It remains to be seen whether the Yugoslav government and governments of foreign investors in Yugoslavia will be interested in negotiating bilateral conventions for prevention of double taxation. In that case will the foreign governments be faced with the fact that; by the existing Yugoslav laws—foreign investors are taxed in Yugoslavia though not having a permanent establishment in the sense the O.E.C.D. Draft Convention defines it and that contrary to the stipulations of the O.E.C.D. Draft Convention a foreign building site in Yugoslavia is considered a permanent establishment and therefore taxed even if it exists in Yugoslavia for a period shorter than twelve months.

TERENCE J. GROVE:

TAXATION IN IRAN
THE 1345 TAX ACT

INTRODUCTION

1. On the 28th Esfand 1345 (March 19, 1967) a law was passed by the Parliament (Majlis) after being passed a week earlier in the Senate. The law contains 319 sections and 175 notes to sections and represents the culmination of several years of effort by the Ministry of Finance, other ministries and commercial and financial organisations to produce a comprehensive more acceptable and more easily applicable tax law. At the date of this article there have been issued 32 amending decrees indicating the validity of certain criticisms to the effect that the original law contains conflicting provisions.

2. Strenuous efforts are now being made to implement the various provisions amongst which can be cited:

(a) the establishment of district tax offices in Tehran and formulation of plans to increase the present number from 6 to about 30.

(b) the delegation of much work formerly executed at the main Ministry offices to district offices in Tehran and provincial offices. Remittance of the tax withheld now made to these offices and settlement of many outstanding tax cases including former inheritence taxes has been delegated.

(c) the introduction of a computer-based system at the main Ministry offices by which a tax file will be retained for all taxpayers to assist in ensuring better control over tax collections in future.

(d) establishment of regular training programmes and conferences as part of a general programme to raise standards of work of Ministry officials acquaint taxpayers with the provisions of the law and to eliminate as soon as possible the remaining corrupt methods in use for settlement and collection of taxes.

(e) finalisation of the rules and regulation which will govern persons recognised as official accountants. (Chapter 3—Part VII)

3. At this time the law has been in effect for five months (the first five months of the Iranian fiscal year 1346) and its full effect will not be felt until declarations of income for 1346 have been submitted to the Ministry (sometime after the first 4 months of 1347—July 1968). This article therefore will merely attempt to outline the law, highlight some of its main features and indicate main changes from the previous situation. It is suggested that my article entitled "Direct Taxation in Iran—An Outline" published in the September 1966 edition of the Bulletin might usefully be read before continuing with this brief article.

CONTENTS OF 1345 LAW

A list of contents of the new law is given at Appendix "A".

GENERAL RULES

5. It is as well to start in the middle of the law with the general rules (sections 148-173). Sections which are of most general interest are summarised below:—

(a) a legal person can elect to submit accounts for a fiscal year other than the official one (ending March 20 each year) but no

provisions dealing with changes in year-end are included in the general rules. The time limit for submission of declarations of taxable income and tax payable remains at four months after the end of a fiscal year. Declarations not reviewed and accepted, or in respect of which a differing assessment notice has not been issued by the tax assessor within 15 months of the date of submission, will be considered final unless the taxpayer deliberately conceals any source of income, which income may then be taxed... within a period of 3 years from the due date of declaration or payment of the tax. The three year limit applies also whenever a taxpayer fails to submit a declaration.

(b) In calculating tax payable only sums actually paid to the Ministry of Finance or effectively paid by purchase and cancellation of stamps will be taken into account. Sums paid in excess of tax due may be refunded; in the case of the tax on salaries this will only be done if the tax payer actually requests a refund within four months of the end of any fiscal year. The Ministry is given a general power to request deduction of tax at source, which may be due from foreign nationals and Iranians resident abroad, the Ministry is also authorised to open an account at Bank Melli Iran (government owned and the principal commercial bank), to facilitate payment of taxes and effectively reduce contact between taxpayers and Ministry officials.

(c) any taxpayer who has several places of residence must choose one as his principal place of residence. Iranian nationals who have paid tax to a foreign country on their income for a fiscal year will be considered as resident abroad for the fiscal year, except in certain instances (for example when a person has a place of residence in Iran, not necessarily his main place of residence, at his disposal during the fiscal year).

(d) of all taxes collected by registration offices 8% will be retained as a collection expense allowance. This provision should strenghten official efforts being made to ensure that stamp duties and other taxes on transaction recorded at registration offices are collected in full.

(e) a surcharge of 3% will be imposed on all incomes at the time of collection of the applicable tax and paid over to the local municipality by the tax office. This surcharge will not be applied to salaries and wages, agricultural income, property income and income of government companies and government affiliated organisations. A further surcharge will be applied (and used for the benefit of the guilds and chambers of commerce and industry and mines) at the rate of 0.3% on companies incomes, merchants, industrialists and contractors whose income is subjected to a 5% tax deducted at source (Section 76).

(f) Section 169 provides that the Ministry can issue non-transferable tax vouchers which will bear tax-free interest.

(g) the regulations of the act concerning the tax on incomes will not apply to oil companies whose activities are governed by contracts providing for tax to be imposed in accordance with Article 35 of the Tax Law of 1328 (1951). Tax in such cases will be assessed on the basis of the 1328 law and provisions of laws applicable to each individual company.

ASSESSMENT AND COLLECTION ORGANISATION

6. The law outlines the organisation to be adopted for enforcing the law utilising the posts of chief assessor, head assessor, tax assessor, under-assessor and a tax district concept for this purpose. Disputes are to be dealt with by a tax assessment commission and the high tax council.

Article 227 permits a tax assessor (head of a tax district) subject to the approval of the chief assessor to request an official accountant to audit a taxpayer's accounts.
Article 229 allows officials to demand that third parties including government offices, agencies and the like, (under threat of penalty) produce documents and papers held by them which could be used as evidence in determining the taxable income of another person.
Officials are now empowered and are exercising the right to inspect the official accounting records of taxpayers without notice.

OFFICIAL ACCOUNTANTS

In accordance with the 1335 Tax Law (as amended) an institute of sworn accountants was established in 1340.
The intention was that members of this institute would audit taxpayers accounts and that taxpayers could use the report of the auditors for the purpose of determining their taxable income and tax liability.
Reports prepared by the members of this institute were not accepted, in practice, by Ministry of Finance officials because of a general lack of confidence as to the effectiveness of audit examinations carried out.
The provisions of the 1345 law which have still to be fully implemented provide for:—
(a) the establishment of a council to elect accountants and approve regulations dealing with the qualifications, method of selection and duties of accountants, the method of audit review and audit fees receivable by accountants;
(b) the establishment of a body of the official accountants to review cases referred to it by a head assessor;
(c) review by the head assessor of reports of accountants to decide whether these are false and to the detriment of the government or otherwise; in the former case the head assessor will refer each case to the board noted in (b) above;
(d) the reports of accountants containing comments as to the legality and completeness of a tax-payer's book sof account, whether these can be relied upon for the assessment of the true income of the taxpayer, and, for the purposes of the audit, whether all information and explanations required for a statement of opinion as to whether the balance sheet and profit and loss account and other statements and records represent a true state of affairs or otherwise, and for an assessment by the accountant of the taxable income of the taxpayer have been received.

PERSONS SUBJECT TO TAX

A most important aspect of the law is that many persons formerly exempt are now subject to tax on their income, particularly government employees. Iranian persons are subject to tax on their total income (with the exception of a real person resident abroad in which case foreign income is not subject to tax) and foreign persons resident in Iran are subject to tax on incomes earned in Iran. Among the various exemptions of persons from tax, the exemption of municipalities (and municipal bodies other than companies) and foreign employees of Iranian embassies and consulates should be noted.

SOURCES OF INCOME

Appendix "B" to this article summarises the detailed provisions concerning taxes on various classes of incomes specified in the law. I wish to draw the readers attention at this point to sections 131 to 134 of the law. These sections deal with calculation of tax

and apply, in the case of real persons, to those who either:—
(a) with the exclusion of Rls 300,000 p.a. of salary or wage or other regular income have an income in excess of Rls 400,000 p.a.
(b) have benefitted from exemptions in excess of those allowed by the law or;
(c) who are Iranian nations residing in Iran receiving an income from abroad.

The persons above are obliged to submit to their local tax office within 4 months of the end of the Iranian fiscal year a declaration of total income for the preceding year and to pay the tax due based on the rates set out in Article 134 (see Appendix "C") less amounts previously paid. In calculating total income taxpayers can deduct allowances in accordance with the law except for Iranian nationals resident abroad. The latter taxpayers must submit declarations to the Tehran Tax Office and are subject to tax on income actually received without deductions allowed to Iranians resident in Iran.

If a taxpayer has income which by nature is delayed or exceptional and in order to earn this it has been necessary for him to expend five years continuous effort or to retain an immovable asset for this period of time, this income will be divided into five parts and, four parts thereof will be added to and taxed with income of the four years following receipt. The act specifies that a list of incomes to be covered by the provision will be issued by the Council of Ministers but indicates that the provision will apply to literary and patent royalties, exploration royalties or income, sale of property, and proceeds of the transfer of the right to utilise a residence or place of business (key money), improvements to rented property in the form of additions or fixtures which in accordance with the rental agreement revert to the less or at the termination of the lease (and which in accordance with Section 20 (4) are to be valued at the current price at the date of transfer and treated as income) and the like.

APPENDIX ,,A''

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APPENDIX „B"

SUMMARY OF PROVISIONS CONCERNING SOURCES OF INCOME

A, B, and C below summarise the provisions which relate to income of real persons only.

A. PAYROLL TAX (TAX ON WAGES AND SALARIES

1. The definition given in Article 3 of the law of incomes taxable under this schedule is as follows:
Income earned by any real person while in the service of another person (real or corporate) against offer of labour and employment within Iran on the basis of time or amount of work performed, whether this income is receivable in cash or kind. An exception to the general definition is made to include income receivable from Iranian sources by a person on assignment abroad. The definition given is more comprehensive than that in the old law and directors fees and the like formerly taxed at 12% are now included here.

2. In calculating non-cash income the following rules apply (Article 4);
Free housing furnished or unfurnished 10% of basic salary;
Free use of car with or without driver and fuel Rls. 5,000 per month.
Other non-cash benefits will be specified by the Ministry of Finance and approved by the Council of Ministers. The basis of calculation will be cost. Specific mention is made in the law that non-returnable pension contributions made by an employer in excess of 15% of the employees pay will be subjected to tax (see also 5 below).

3. The tax is to be withheld by employer at the following rates:
For salary not exceeding Rls. 60,000 p.a. no tax is payable. In calculating tax payable it is to be presumed that the relief to which a person is entitled is at the rate of Rls. 5,000 per month. There are provisions to allow individuals who have paid tax but whose income does not exceed Rls. 60,000 a year to obtain refunds of the tax paid.
For the balance of salary to a limit of Rls. 300,000 p.a. (Rls. 25,000 a month) withholding tax at 10%.
For salary from Rls. 300,001 to Rls. 700,000 withholding tax at 15% p.a. and for amounts in excess of Rls. 700,001 at rates given in Appendix "C" (Section 314).

NOTE: In the case of government employees and others exempt from payroll tax under the old law 60% of income tax on incomes of up to Rls. 700,000 will not be collectible.

4. The employer is required to distinguish in his payrolls (a copy of which is to be submitted to the Ministry with the tax due) between regular and non-regular payments. The latter are taxable without deduction of any allowance at a flat 10%. A point of interest is that all persons in receipt of salary or wage from persons having no official branch or representative in Iran must pay over the tax on sums received within thirty days of receipt in accordance with the rates noted in paragraph 3 above. Such persons must then submit a declaration of income within 4 months at the end of the fiscal year. This requirement is in contrast to the fact that many other taxpayers need not submit such

a declaration. (See paragraphs 13 & 14 of the article).

5. Specific exemptions mentioned in article 95 relate to certain payments to laywers from the Lawyers Co-operative Fund, travel allowances and expense allowances of government officials in certain instances, free housing and car facilities and other non-cash benefits received at a factory location and all non-cash benefits received by labourers, insurance compensation for physical injury and the like and annual (New-Year) bonuses not exceeding Rls. 30,000.

6. Although tax is now collectible from government employees the net effect of present regulations is not such so as to impose any significant additional burden on this class of taxpayers.

7. It is useful to note here the exemption from tax of payments under life assurance policies to beneficiaries stated in the life assurance contract.

B. AGRICULTURAL INCOME TAX

1. Article 8 of the law states that income of real persons from agricultural activity in Iran is subject to agricultural income tax. However agricultural income is not defined and it is to be expected that matters of doubt if such arise will be dealt with by decree of the Council of Ministers.

2. It is to be remembered that the number of land-owners in Iran has increased considerably in recent years as a direct consequency of the distribution of Crown Lands and of the effects of the Land Reform Laws. In addition it is official policy to encourage rapid economic development in the agricultural sector and therefore it is not surprising to find that the law contains a considerable number of exemptions. These are noted in 3 below. Many farmers are now members of co-operative societies and whilst the income of such societies will be subjected to tax in accordance with Section 7 of Part II of the law (tax on the income of legal persons), it is not clear whether the profits distributed will, in the hands of the farmers, be deemed agricultural income or will be required to be stated in the annual declaration of income and taxed in accordance with rates given in Appendix "C" to this article.

3. For the purpose of computing taxable income a distinction is made between owned and leased lands. Produce from owned lands is taxable as noted in 4 below whilst in the case of leased lands taxable income is:
(a) the equivalent of rental paid or
(b) crop value less the landlord's share.

4. In principal, the tax on income derived from the produce of owned lands and other agricultural income except that of leased land is deemed to be the equivalent of 10% to 45% of the total income arising from agricultural activities. Derived income is to be computed on the basis of assessed quantities of produce evaluated at rates determined by local commissions specially formed for this purpose. An exception to the general rule is that persons who maintain acceptable accounting records and farmers who sell their produce through shops established by them, will be assessed on the basis of net profits (in the same manner as is laid down for merchants—see C below).

5. Whilst agricultural income is not clearly defined it includes income from the sale of water for agricultural purposes and the like.

The various specific exemptions summarised below indicate other classes of income which are considered as agricultural income.
Specific exemptions are set out in Part III and can be summarised as follows:
(a) income from handicrafts produced in villages is totally exempt
(b) income of farmers who are either owners or tenants of land in accordance with the land reform laws in respect of income from such land
(c) income of owners of not more than 20 hectares of land received as a result of the distribution of the Pahlavi lands in respect of income from such land
(d) income from trees other than fruit trees
(e) income from newly established enclosed orchards for a period of five years from establishment
(the exemptions in (d) and (e) are subject to other conditions not of importance for the purposes of this article)
(f) income arising from the construction of dams, construction of underground water channels (qanats) irrigation networks and deep wells in origin lands or cultivated lands for the general purpose of agricultural development or sale of water for agricultural purposes is exempt for 10 years except that income from dams constructed in accordance with plans of the Ministry of Water and Power will be exempt for 20 years. Income arising from agricultural development will for the purposes of the exemption here be considered es the whole income in the case of virgin lands and the increased income as compared with that of prior years in the case of developed lands.
(g) a sweeping 10 year exemption of income arising from products considered necessary for the country's agricultural development is given although a list of such products has yet to be officially announced
(h) 50% of the income in excess of that derived from a yield per hectare normally obtained. (This exemption is an outgrowth of the general policy by which farmers have been and are being encouraged to improve yields by the greater use of fertilizers, insecticides and better seeds)
(j) cattle-breeding establishments approved by the Ministry of Agriculture for a period of 10 years from the date of the law or date of establishment
(k) agricultural income from islands and undeveloped frontier areas and coasts for a period of 15 years.

6. With regard to the submission of declarations of agricultural income, taxpayers who receive such income must submit a declaration by the end of the sixth month of each fiscal year (approximately the beginning of autumn). The purpose is to enable the Ministry to collect a sum on account of tax at a time when this class of taxpayers should have adequate cash funds available.

C. INCOME FROM PROFESSIONS AND TRADES

1. The tax on income from professions and trades applies to all income of real persons from a trade or professional activity which is not subject to tax under any other section of the law. Real persons who have income from agricultural activities, or who receive interest or rents from property (or who as a result of trading in land receive profits) or whose income consists of a salary or wage will not therefore be subject to tax under this particular part of the act. There is one exception to the general rule in as much as farmers who maintain acceptable official books of account or who receive income by sale of their produce from a shop which they established will be assessed as if the income was trade income (Article 18).

2. One important aspect of the new law in respect of the class of taxpayers dealt with here is that almost without exception official books of account are to be maintained. Such books are either sealed general ledgers and journals in accordance with Section 6 of the 1335 Commercial Code or specially ruled sealed books provided by Ministry of Finance and other documents which a class of taxpayers may be directed to maintain in accordance with Section 161. These will be simpler to maintain and will consist basically of a record of receipts and payments. A further and perhaps more important provision is that as stated in notes 12 to article 58: "Taxpayers may choose any currently acceptable accounting method but must apply this consistantly in future years."

3. Real persons taxable under this part of the law on the basis of profits shown by their legal books are entitled to benefit from allowances and deductions given in the law.

4. Persons who are receipients of income from a trade or profession whenever the trade or profession has been specifically deemed to be included in the section of the law and in all cases where a persons annual gross income exceeds Rls. 60,000) must submit a tax declaration. All persons who have income from more than one activity are required to fill separate returns for each one. Failure to submit a declaration will involve the taxpayer in penalties. The Ministry will base the tax assessment on rates schedules and standards.

5. To facilitate the assessment of the tax payapble on the income of those taxpayers taxable under this section of the act who are not required to maintain official books, or whose official books are declared as not acceptable, the tax payable is to be based for the year 1346 on the basis of the tax declaration; and the income tax payable during the four subsequent years will be the tax payable for 1346 increased in accordance with tax increases schedules to be published by the Ministry. There are, naturally provisions to penalise persons making false declarations and to cover cessation of a trade and exceptional reductions in income of taxpayers. The declarations are in principle to be submitted every five years.

6. In various sections of the act special provisions are included which determine the taxable income of doctors, lawyers and contractors. The taxable income of the latter class of taxpayers (see 7 below) is 12% of total income and this percentage will also be used as a temporary measure for the purpose of computing taxable income of taxpayers noted above.

7. Contractors mentioned in 6 above are dealt with in article 76. This section requires all government and non-government organisations to forward a copy of all contracts entered into by them with a contractor (if the contract relates to construction, technical installations, transportation, or contracts for design, drawing, survey, topography, supervision or technical assessment and calculation and the like) to the local finance office within 30 days of the date of signing. The employer is further required to withhold 5.165% (5%+3%+0.3%) on account of tax from all payments made and to forward this within 30 days to the local tax office. Contractors making payments to sub-contractors will be considered as employers but are required to withhold only 2.5825% (2.5%+.075%+ .0075%) from payments. The law distinguishes fairly clearly between various types of contractors which the previous law failed to

do and in respect of payments made by organisations (mentioned above) to doctors, hospitals, for auditing services, and many others 10.33% is to be withhold on account of the tax due not 5.165% (see 75)

8. In requiring withholding on account of the tax due there is no distinction made between real and legal persons and therefore whilst the tax on income from trades or professions applies to real persons only, the tax on account is deducted from income specifically noted in sections 75 and 76 of this part of the law whether received by an Iranian or non-Iranian legal or real person (Section 91).

APPENDIX „C"

RATES OF TAX – ARTICLE 134

The income tax will be applied at the rates set out below except with regard to the following types of incomes:

(a) accumulated income received in a lump sum and special income which is the result of five years continuous activity or the result of retaining an immovable asset for five years or more such as author's royalties, etc. (See paragraph 15 of the article)

(b) the tax on income of foreign shipping and airline concerns which is at a fixed 5% of gross income

(c) the tax on property which is at a fixed 2% of sale price of property (Note that in respect of the first Rls. 300,000 p.a. of salary or wages, this is exempt from total tax for purpose of calculating liability based on the following rates and is subject to a 10% tax only after deduction of a Rls. 60,000 exemption)

	INCOME TO BE					
	From	To	Taxed	Rate (%)	Amount	Cumulative
Rls.	0	400,000	400,000	15	60,000	60,000
	400,001	600,000	200,000	18	36,000	96,000
	600,001	800,000	200,000	20	40,000	136,000
	800,001	1,000,000	200,000	22	44,000	180,000
	1,000,000	2,000,000	1,000,000	24	240,000	420,000
	2,000,001	4,000,000	2,000,000	26	560,000	1,080,000
	4,000,001	7,000,000	3,000,000	28	840,000	1,920,000
	7,000,001	10,000,000	3,000,000	30	900,000	2,820,000
	10,000,001	15,000,000	5,000,000	35	1,750,000	4,570,000
	15,000,001	20,000,000	5,000,000	40	2,000,000	6,570,000
	20,000,001	30,000,000	10,000,000	45	4,500,000	11,070,000
	30,000,001	50,000,000	20,000,000	50	10,000,000	21,070,000
	50,000,001	and above	—	55	—	—

DENIS DEBOST AND STANLEY I. RUBENFELD*:

TAXATION OF UNITED STATES CITIZENS EMPLOYED IN FRANCE

This article discusses the French and United States income and estate taxes imposed on United States citizens living in France and employed either by a United States or French enterprise. Three categories of U.S. persons living in France will be considered: (1) U.S. citizens present temporarily, (2) U.S. citizens resident but not domiciled in France, and (3) U.S. citizens who are considered to be French domiciliaries. The provisions of the Income Tax convention between the United States and France executed on July 28, 1967 (the "Convention") will also be considered, although at the time of publication the Convention was not yet in effect.

I. INCOME TAXES

A. U.S. CITIZENS TEMPORARILY IN FRANCE

1. FRENCH TAXATION

U.S. citizens who are neither residents nor domiciliaries of France are subject to French income tax only on their income from French sources.[1]

Income from personal services rendered in France is treated as income from French sources, regardless of where or by whom payment is made.[2]

Article 15 of the Convention provides, however, that a resident of the United States shall be exempt from French income taxes on compensation for personal services performed in France if:

(a) The recipient is present in France for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned;
(b) The remuneration is paid by, or on behalf of, an employer who is not a resident of France, and
(c) The remuneration is not borne by a permanent establishment which the employer has in France.

The purpose of this provision is to exempt from French income tax U.S. citizens not resident in France who are temporarily in France on behalf of their U.S. employers. However, it has the effect of exempting from French taxation U.S. citizens who are in France for less than 184 days during the taxable year at the outset of a prolonged assignment in France.

If a U.S. citizen is an employee of a French enterprise (as distinguished from the permanent establishment in the United States of a French enterprise), the Convention exemption does not apply. It would also not apply to a U.S. citizen who is an employee of a

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1. Code Général des Impôts, hereinafter referred to as "CGI", Arts. 4 (2) and 165; See also Art. 4 bis (2).
2. CGI, Art. 79.

U.S. corporation if the U.S. corporation has a permanent establishment in France and the compensation of the employee is charged to the permanent establishment.

For purposes of the computation of the French tax due by non-resident foreigners, the latter are considered as married taxpayers without children.[3] Their taxable income is split in two, and the tax is twice the tax on one share.[4] The minimum tax rate, however, is 24%.[5]

2. U.S. TAXATION

If a U.S. citizen is present in France only for a part of one taxable year, the United States will tax his income earned in France at the usual rates without benefit of the exemption discussed below for U.S. citizens resident or present abroad.

A U.S. citizen can credit against his U.S. income taxes the amount of any French income taxes paid or accrued during the course of the taxable year, subject to applicable foreign tax credit limitations.[6] The credit is claimed by filing Form 1116 as an attachment to the taxpayer's Federal income tax return. If the full amount of French taxes paid is not available as a credit because of foreign tax credit limitations, the unused portion may be carried back two years and carried forward five years,[7] again subject to foreign tax credit limitations.

It should be noted that the credit for foreign income taxes and the standard deduction may not both be claimed by the taxpayer. If the taxpayer claims a credit for foreign taxes, he must itemize his deductions.[8]

B. U.S. CITIZENS RESIDENT IN FRANCE

1. FRENCH TAXATION

(a) What constitutes residence in France

Under Article 3 of the Convention, the term "resident of France", in the case of individuals, is defined as meaning "any person who is resident in France for purposes of its tax". Thus one must look to the internal law of France to determine whether a U.S. citizen is a resident of France.

There are two ways in which a person may be held to be a resident of France for French income tax purposes:

(1) The first is if such person has at his disposal one or more "abodes" in France, whether as owner or as usufructuary (for any

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3. CGI, Art. 197-III.
4. CGI, Arts. 193 & 194.
5. CGI, Art. 197-III.—Many tax treaties with France, including the old treaty with the United States (Convention of July 25, 1939, Protocol, Arts. V & VI) which is still temporarily in effect, provide that foreigners will be taxed in the same way as French nationals in the same situation. Under the old treaty, therefore, U.S. citizens, whether or not residents of France, benefit from the additional split income provisions available to taxpayers with children (these allow income to be split into one further half share per child. CGI, Art. 194) and are not subject to the 24% minimum rate. The Convention, however, does not extend national treatment to U.S. citizens not resident in France (See Art. 24 thereof). Nor does the Convention of Establishment between France and the United States of November 25, 1959 (See Art. IX thereof).
6. Int. Rev. Code of 1954, as amended, §§901, 904.
7. Int. Rev. Code of 1954, as amended, §904 (d).
8. Int. Rev. Code of 1954, as amended, §36.

length of time, even for less than one year), or as lessee for a continuous period of at least one year.[9]

Conversely, if a person is an owner, usufructuary or lessee of an abode in France but does not have it at his disposal (for example if it is let or sublet to another), the mere fact that he is an owner, usufructuary or lessee will not cause him to be treated as having a residence in France, even though he may visit there as a guest of the person entitled to occupy the premises.

(2) A person will also be considered resident in France for tax purposes, even if he does not have an abode at his disposal, as described in (1) above, if he makes France the "place of his principal sojourn" (lieu de son séjour principal).[10] The term "sojourn" means physical presence[11] and "principal" means for most of the time, i.e., for a period or periods aggregating more than six months during the taxable year.[12] This, for example, would include persons living in hotels in France for the requisite period.

(b) Taxable Income of U.S. Citizens Resident in France

A U.S. citizen having a residence in France, without being domiciled in France as well, is annually taxable on his French-source income, or on the basis of an imputed income equal to five times the rental value of his abode or abodes, whichever is higher.[13]

For purposes of this provision, the following, inter alia, are considered as income from French sources:

(a) Income from real estate situated in France.
(b) Income from French securities, as well as income from all other capital invested in France.
(c) Income from services rendered in France, including any overseas premium and cost of living allowance.
(d) Retirement pensions and annuities paid by persons or entities established in France.

In principle, the rental value taken into consideration for taxation on the imputed income basis is the actual rental value of the premises, unfurnished.[14]

In the case of lessees, rental value is ordinarily the amount of rent actually paid.[15] If the rent is abnormally low or abnormally high, however, the tax authorities or the taxpayer may argue that the rental value is in fact higher or lower than actual rent paid.[16]

In the case of owners or usufructuaries, or in the case of lessees when there is a dispute as regards whether the amount of rent paid corresponds to actual rental value, the French tax authorities generally use one of two rules of thumb, depending on whether or not the premises in question are subject to the 1948 rent control law, which applies to certain pre-1948 residences:

(i) If the premises are subject to the rent control law, the tax authorities will compute rental value in accordance with such law.[17]
(ii) If the premises are not subject to the rent control law, the tax authorities will compute rental value by comparison with the rental value of similar premises or, in the absence of elements of comparison, by assuming the

9. CGI, Art. 4 (1) (1).
10. CGI, Art. 4 (1) (2).
11. See Lefebvre, Feuillets de Documentation Pratique, Impôts Directs, IRPP, Div. I, Sec. 98.
12. Id. at Sec. 100.
13. CGI, Art. 164 (2).
14. See Lefebvre, op. cit., IRPP, Div. V, Sec. 195 et seq.
15. Id. at Sec. 202.
16. Id. at Sec. 210.
17. Id. at Sec. 200.

rental value to be equal to 7% of the market value of the property.[18]

The computation of rental value pursuant to either of the above rules of thumb is normally more favorable to the taxpayer than that based on actual rental value would be. As a result, taxation on the five times rental value basis usually places more of a burden on lessees than on owners or usufructuaries. On the other hand, lessees are not taxed on this basis if they have premises in France at their disposal for less than one year at a time, whereas owners and usufructuaries are taxed on this basis even if they have premises in France at their disposal for shorter periods. The Convention has changed the imputed basis of taxation but the extent of the change is unclear. According to Article 23 (3), a resident of the United States who maintains one or several abodes in France shall not be subject in France to income tax according to an imputed income based on the rental value of that or those abodes.

The above language would not appear to cover the usual situation of a U.S. citizen living and working in France if such U.S. citizen claims that he is a bona fide resident of France for U.S. income tax purposes in order to benefit from the exclusion from gross income under Internal Revenue Code, Section 911 (a) (1), discussed below. It appears that such person would therefore continue to be subject to French income tax on the basis of the greater of his French source income or five times the rental value of his abode. On the other hand, if the exclusion from gross income is based on the "17 month rule" of Internal Revenue Code, Sec. 911 (a) (2), discussed below, or if no exclusion from gross income is claimed, such U.S. citizen might be able to claim a residence in the United States and, in such case, it would seem he would be entitled to claim the benefits of Article 23 (3) of the Convention. Article 23 (3) seems intended to cover the case of U.S. citizens who have their primary residence in the United States and a secondary residence in France. Such persons would qualify for the benefits of Article 23 (3) and, unless they had French source income, would not be subject to French income tax.

It should be noted that in practice the French tax authorities rarely apply the imputed income basis of taxation in cases in which a U.S. citizen files a French income tax return reporting substantial French source income.

(c) COMPUTATION OF FRENCH TAX

French law provides for several substantial deductions from gross income. First, an individual may deduct French pension, social security and employment insurance contributions.[19]

An employee is also allowed to deduct expenses incurred in earning salary income, to the extent such expenses are not reimbursed by the employer. The employee has the option of deducting actual expenses or of using a standard deduction of 10%.[20]

From the net amount, all salaried taxpayers are allowed an additional deduction of 20% of the remaining income from employment.[21] Finally, salaried taxpayers are allowed a tax credit

18. Note—Circulaire No. 89 of May 25, 1966; Bulletin Officiel des Contributions Directes ("BOCD") 1966, II, 3342. Previously, the tax authorities used another rule of thumb for premises not subject to the rent control law, which consisted in computing the rental value as equal to 50 times the property's revenu cadastral (a theoretical income figure used for the purpose of real estate tax assessment). This method was abandoned for the years 1965 and following.

19. CGI, Art. 83 (1) &(2).

20. CGI, Art. 83 (3).

21. CGI, Art. 158 (5).

equal to 5% of their net taxable income from employment after all the above deductions.[22] U.S. citizens assigned to France by U.S. employers have usually been allowed a supplemental deduction of up to 20% of gross income on the assumption that they receive a higher compensation by reason of their transfer and in order to cover increased expenses such as for maintenance of a house in the United States.[23] However, this special deduction may no longer be available under the new Convention.[24]

The French tax system, instead of allowing personal exemptions for dependents, provides a substantial tax advantage for families with children by allowing a married taxpayer to split family income into two parts plus an additional half part for each child.[25] One part is then taxed at the rate appropriate for the amount of income represented by the part. The result is multiplied by the number of parts allotted to the family. As the French tax system is steeply progressive, this system results in a tax advantage for married taxpayers with children that is much greater than the joint return advantages available to families under the U.S. tax system. This advantage, which is not ordinarily available to foreigners, is available to U.S. citizens resident in France pursuant to Article 24 (1) of the Convention.

2. U.S. TAXATION

A U.S. citizen resident in France must file Federal income tax returns and is subject to U.S. tax on his income from all sources including any overseas premium and cost of living allowance. However, a U.S. citizen will receive an exemption from gross income of up to $20,000 of his earned income if:

(a) He is a bona fide resident of France for an uninterrupted period which includes an entire taxable year; and

(b) His earned income is for personal services rendered outside the United States.[26]

The U.S. Internal Revenue Service will determine whether a U.S. citizen qualifies as a bona fide resident of France on the basis of facts submitted on Form 2555 which should accompany the taxpayer's Federal income tax return. The possession of a French visa, residence permit (carte de séjour) or work permit (carte de travail), together with actual presence in France, ordinarily are sufficient to establish residence in France. The payment of French taxes is helpful but not essential to the establishment of residence in France for U.S. income tax purposes. However, a claim of non-residence in France for tax purposes made by a U.S. taxpayer, when accepted by the French tax authorities, will preclude use of the exemption from gross income.[27]

Frequently, a taxpayer does not establish residence on January 1 of the taxable year. Accordingly, the $20,000 exemption is prorated on the basis of $54,79 per day for the days of residence in France during the taxable year. Also, since the period of residence must include a full taxable year, the taxpayer ordinarily requests an extension to file his income tax return for the taxable year until 30 days after the end of the following taxable year.

When one has been a bona fide resident of

22. CGI, Art. 198.
23. Exchange of letters of May 6 and May 31, 1946.
24. See Convention, Art. 31 (2) and Preamble to the Convention.
25. CGI, Arts. 193 & 194.
26. Int. Rev. Code of 1954, as amended, §911 (a) (1).
27. Int. Rev. Code of 1954, as amended, §911 (c) (6).

France for an uninterrupted period of three consecutive years, the earned income exclusion rises to $25,000.[28]

If a U.S. citizen does not qualify under the bona fide residence test, he can exclude from gross income up to $20,000 per year on the basis of "physical presence" outside the United States. One is considered to have fulfilled the physical presence test if one is present outside the United States for a total of at least 510 full days during any period of 18 consecutive months.[29]

If the taxpayer has taxable income in excess of his $20,000 or $25,000 exemption, he may claim his French taxes as a credit against the U.S. income taxes on the taxable income in excess of that amount, subject to applicable foreign tax credit limitations.[30] The combination of the exemption and the foreign tax credit ordinarily results in the elimination of or in a substantial reduction in the U.S. tax obligations of a U.S. citizen resident in France.

C. U.S. CITIZENS DOMICILED IN FRANCE

1. FRENCH TAXATION

(a) What constitutes domicile in France

A U.S. citizen will be considered domiciled in France for income tax purposes if (a) he has the "center of his interests" (centre de ses intérêts) in France or (b) he has made his "place of principal sojourn" (lieu de séjour principal) in France for five consecutive years.[31]

Whether one has the "center of his interests" in France is a factual determination, based principally on economic considerations. A U.S. citizen will be deemed to have the center of his economic interests in France if he either exercises most of his business activity in France or has most of his assets in France.[32] Other considerations, such as the location of a foreigner's family interests, are given secondary weight. A foreigner is not deemed to be domiciled in France by reason of having the center of his economic interests there unless he is also a resident of France for French tax purposes.[33]

As indicated previously, a person is deemed to make France his "place of principal sojourn" if he is physically present in France for a period or periods aggregating more than six months during the taxable year. An absence from France of more than six months in any year may therefore break the continuity of residence for purposes of the five-year residence test for domicile in France.

(b) Taxable income of U.S. citizens domiciled in France

A U.S. citizen who is domiciled in France is subject to French income tax on his worldwide income, less such non-French income as is subject to a personal income tax on total income in the foreign country of which he is a citizen.[34] The U.S. Federal income tax, as it applies to U.S. citizens, is acknowledged by the French authorities to be such a

28. Int. Rev. Code of 1954, as amended, §911 (c).
29. Int. Rev. Code of 1954, as amended, §911 (a) (2).
30. Int. Rev. Code of 1954, as amended, §§901, 904 and 911.
31. CGI, Art. 164 (1).
32. BOCD, 1947, II, p. 45; see Lefebvre, op. cit., IRPP, Div. V, Sec. 69 et seq.
33. See Lefebvre, op. cit., IRPP, Div. V, Sec. 70.
34. CGI, Art. 164 (1).

personal tax on total income[35] and, accordingly, if a U.S. citizen were considered to be domiciled in France, he would not be subject to French tax on his non-French source income.

Non-French income of U.S. citizens domiciled in France which is exempt from French taxation includes all non-French income which is taxable in the United States, even though the actual tax may be lower than the corresponding French tax, or nil, because of personal exemptions; however, income that is exempt from U.S. taxable income, such as income eligible for the $20,000 or $25,000 exemption, or income from tax exempt securities, is not exempt from French taxable income under the above rule.[36]

2. U.S. TAXATION

The U.S. income tax considerations in the case of a U.S. citizen domiciled in France are the same as those applicable to a U.S. citizen resident in France.

II. ESTATE AND INHERITANCE TAXES

A. FRENCH INHERITANCE TAXES

For French inheritance tax purposes, there are only two categories of taxpayers, decedents domiciled in France and those not domiciled in France.

1. U.S. DECEDENTS NOT DOMICILED IN FRANCE

The estates of U.S. decedents not domiciled in France are subject to French inheritance taxes only with respect to those assets which are deemed situated in France pursuant to the Estate Tax Convention of October 18, 1946 between the United States and France (the "Estate Tax Convention"). This includes, inter alia, real estate and tangible personal property situated in France and securities of French companies.[37]

2. U.S. DECEDENTS DOMICILED IN FRANCE

Domicile for French inheritance tax purposes is determined in accordance with the Civil Code, under which a person is considered to be domiciled where he has his "principal establishment".[38] The location of a decedent's principal establishment is a question of intent, as evidenced by reference to all relevant circumstances.[39] Such factors as family and personal ties are given more weight than for income tax purposes. Thus, a U.S. citizen considered a mere resident in France for French income tax purposes might be treated as domiciled in France for inheritance tax purposes, especially if he should die in France. A U.S. citizen treated as domiciled in France for income tax purposes would most cases also be treated as domiciled in France for inheritance tax purposes.

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35. BOCD, 1952, II, p. 484.
36. Conseil d'Etat, February 23, 1966, Req. No. 65. 633, 8ème s.s.; BOCD, 1966, II, 3445; See Lefebvre, op. cit., IRPP, Div. V, Sec. 40.
37. Estate Tax Convention, Arts. 3 & 4 (b).
38. Civil Code, Art. 102.
39. Ibid., Arts. 103-110.

Being considered domiciled in France for inheritance tax purposes can substantially increase the burden of French inheritance taxes. The reason is that, under French internal law, the assets subject to French inheritance taxes, in the case of a decedent domiciled in France, include not only those which are either physically situated or deemed situated in France but also all securities, French or foreign, owned by the decedent.[40] Article 3 of the Estate Tax Convention sets forth rules determining where assets will be deemed situated for purposes of the Estate Tax Convention. For example, shares of stock are deemed situated in the country of incorporation of the issuer. This, however, does not change the French rule whereby all securities of a person domiciled in France are subject to French inheritance tax. Double taxation is avoided, however, under rules which are set forth in Article 5 of the Estate Tax Convention, discussed below.

A question arises as to how trusts of which a decedent was the beneficiary would be treated for purposes of French inheritance taxes. The likelihood seems to be that the French tax authorities would look through the trust and attempt to claim inheritance tax on whatever trust assets were deemed to be included in the estate by the U.S. tax authorities.

Support for such a "transparency theory" derives, first, from Subparagraph 3 (g) of the Estate Tax Convention, which includes with shares of stock "all securities of such nature held by another for the account of the decedent". The French tax authorities in Paris seem to consider that this covers stock held in trust as well as stock held by nominees Moreover, the language of the French Tax Code which extends French inheritance taxes to foreign securities appears broad enough to include any interest or claim which a decedent's estate would have in the trust. Finally, the French Tax Code establishes a rebuttable presumption that any security or other real or personal property of which the decedent was the life beneficiary and of which his presumptive heirs or descendants thereof, or his legatees, or the parents, children or spouses of such persons, are the remaindermen is an asset of the estate.[41]

In this connection, it should be noted that pursuant to Article 9 of the Estate Tax Convention, the U.S. tax authorities are required to transmit automatically to the French tax authorities all information revealed by the U.S. Federal estate tax files relating to the U.S. assets of decedents domiciled in France.

3. COMPUTATION OF FRENCH INHERITANCE TAX

The rate of French inheritance taxes depends upon the family relationship between the decedent and his successors. If the latter are the decedent's spouse, or his ancestors or descendants in direct line, the spouse, each ancestor and each child living or represented has an exemption of 100,000 French francs,[42] and the tax rate on the excess is 5% on the first 50,000 francs, 10% on the next 50,000 francs, and 15% on the excess.[43]

As between brothers and sisters, the rate is 30%; as between uncles and aunts, etc., the rate is 50%; and between more distantly related or unrelated persons, the rate is 60%.[44] Moreover, none of these relatives has any exemption.[45]

40. CGI, Art. 752.
41. CGI, Art. 766.
42. CGI, Art. 774 (I).
43. CGI, Art. 770.
44. Id.
45. Except single brothers and sisters, aged over 50 years or infirm, who lived with the decedent for at least five years, who have an exemption of 30,000 francs each. CGI, Art. 774 (II).

B. U.S. ESTATE TAXES

The United States imposes an estate tax on the assets of its citizens wherever located. A credit is allowed against the U.S. estate tax for French inheritance taxes paid to France but only with respect to property which is located in France and which is included in the decedent's gross estate. The credit is limited to the smaller of the following amounts:[46]

(a) The amount of the foreign death tax attributable to the property situated in France and included in the decedent's gross estate for Federal estate tax purposes; or

(b) The amount of the Federal estate tax attributable to the particular property situated in France, subject to death tax in that country, and included in the decedent's gross estate for Federal estate tax purposes.

C. AVOIDANCE OF DOUBLE TAXATION

Under Article 5 of the Estate Tax Convention, a credit is allowed in the country of domicile for the amount of tax imposed in the other country on property deemed situated in that other country pursuant to Article 3 of the Estate Tax Convention and taxed by both countries.[47]

If the decedent is claimed as a domiciliary by both countries, Article 5 of the Estate Tax Convention provides that each country shall allow a credit for the tax imposed by the other country with respect to property taxed by both countries and considered by both countries to be situated either outside of both countries or in the territory of both countries. The total credit under this rule is equal to the lowest of the two tax figures assessed. The tax is then divided by the two countries in proportion to the taxes originally assessed.

46. Int. Rev. Code of 1954, as amended, §2014 (b); see also Estate Tax Convention, Art. 4 (b).

47. It should be noted that no credit is allowed by the United States for French inheritance taxes levied on a U.S. decedent domiciled in France if such tax is imposed with respect to property located outside of France.

R.G. HOLLOWAY:

U.K.: THE REFORM OF LOCAL RATES

With an anticipated yield of about £1,500 million during the current financial year, rates are second only to income tax as a source of government revenue[1] and represent a quarter of all taxes on expenditure. Changes brought into force during 1967 constitute the most important reform of local government finance for more than a hundred years. The background to these measures and the probability of further radical reform are discussed below.

THE BASIC ISSUE

Levied on property, rates constitute the only significant tax which local authorities have at their complete disposal but various inherent weaknesses in the tax have prevented its yield from expanding fast enough to maintain local financial autonomy. Over half the expenditure of local authorities is now provided from central government funds and there can be little doubt that over half the control has passed out of local hands.

The principle of local democracy is the isue from which much of the discussion of rating stems. It should be remembered, however, that central control would not be abolished by the restoration of local financial autonomy since Parliament could still legislate to remove functions from the local government sphere or impose restrictions on their administration in addition to those limitations which already exist. These restrictions are frequently supported by means of delegated legislation and applied to matters of detail through the exercise by Ministers of quasi-judicial powers and administrative discretion. In view of the necessity for Parliamentary sovereignty and for the retention of such powers in the hands of Ministers who are able to exercise them to maintain the rights of the individual against the local community and to preserve importants aims of national policy, it is clear that the principle of local democracy is far from sacrosanct. What is of importance is the exact degree of shading between local democracy and local administration which is desired. In this context, the failure of the rating system to meet even the greater part of the financial needs of local government provides a prima facie case for its abolition or radical reform.

INELASTICITY

The complaint that rates are an inelastic source of revenue is, however, technically misleading since increases in the rate per pound levied can be expected to yield proportionate increases in rate revenues. Additionally, increased yields arise from the higher valuations which accompany the development of particular properties and which follow both the development of neighbourhoods and the general trend of rising incomes.

The inelasticity is of a different character: the rate is an unpopular tax and large increases in the poundage threaten the political position of councils.

The causes of this unpopularity are not hard to find. The local rate has been the largest and most noticeable lump sum indirect tax which most people have had to pay and the fact that the rate assessed bears no fixed relation to the payer's income or direct benefits makes it a particularly objectionable tax to those who feel they are being dis-

1 Third if excise duties are grouped together.

criminated against and to those whose social conscience is disturbed by the thought of a burden imposed on the relatively poor. Reporting in 1965, the Allen Committee found the rate an undoubtedly regressive tax; being negligible at the upper income levels while at the lower end of the scale not uncommonly amounting to 5 per cent or more of total income. But regressiveness is not, of itself, an important objection to a tax; what matters is the progressiveness of the tax system as a whole when linked with compensating subsidies. The regressive effect of the rating system on large families with low incomes has, over a number of years, been countered by housing subsidies while financial assistance has been available to the needy under the National Assistance Acts. Additionally, the Rating Act of 1966 established the right to rebate where the occupier's income is low. The difficulty of finding the cash for rate payment has also been eased by the establishment, in this Act, of the right to pay domestic rates by monthly instalments.

The Allen Committee conducted special studies into the burden of the rates on low-income households. The highest burden was naturally felt by those who had not applied for National Assistance although apparently eligible for it; and, secondly, by those who would have been eligible if they had used up capital in excess of £600 or if the head of the household had not been in full-time employment. It was also evident that the problem of hardship was largely one of a rising rate burden in the face of the rigid incomes of retired families.

Relatively high rates on retired households are not, however, merely a question of rigid incomes. They are also due to the under-utilisation of houses. The special study analysis revealed that 31 per cent of single person households were occupying six or more rooms. This is an obvious waste of a scarce resource. It is, however, not easy for old people to move and, from the economic point of view, it would be better for local authorities to help them to do so rather than to faster this misallocation of resources by rate rebates.

More generally, hardship arises not from the rates but from the cost of living. The better remedy is, therefore, not to rebate rates but to increase the allowances for old age, sickness, unemployment and dependent children.

Apart from the politico-psychological limitations on rate revenues, some part of their inelasticity is a reflection of the social phenomenon that people tend to spend a decreasing proportion of their income on rents or house ownership as their total income increases. But far more important limitations result from Acts of Parliament which have restricted the rents of some working-class housing to artificially low levels and which have derated certain classes of property. Since rateable values are based on rental values, the depression of the rents of privately-owned properties to uneconomic levels necessarily reduces their contribution to the rates. In addition, the rateable values of council housing tend to be under-assessed. Agricultural land and buildings (other than houses) have not been subject to rates since 1929. The Government's stated reason for the continuance of this derating is that, since there has been no valuation of such property for over thirty years, it would be impracticable with present resources to carry it out. There, is, however, no indication that the Government intend that it should be made practicable. This relief from rates benefits farmers who are well able to afford to pay a contribution to the local services from which they benefit; and, since the rural and county authorities are by far the larges losers, it

cannot even be claimed that the cost of this relief (estimated at £100 million) is fairly distributed among ratepayers. If it is in the national interest to subsidise agriculture, the whole of the subsidy should be borne directly from national funds.

The 1961 Rating and Valuation Act made it mandatory upon local authorities to give relief of at least 50 per cent to certain classes of charity and gave discretionary powers to relieve others. The universities, learned societies, specialist libraries and youth clubs which are among the bodies which may benefit are not generally wealthy and their activities should certainly be encouraged. But this is not the best way to do it, even if the total cost at present is probably less than £5 million. The provision for mandatory relief means that the cost will fall upon local ratepayers who, in most cases, have nothing to do with the institutions concerned. To take one example, the derating of the Oxford colleges adds well over £100,000 to the burden of the City's remaining ratepayers. To make matters worse in this instance, one of the colleges has more money than it has so far been able to usefully employ.

A third and very major class of property has now been derated. The Local Government Act requires the rate levied in each rating area to be reduced for dwelling houses by a prescribed number of pence in the pound which is fixed nationally by the Minister of Housing and Local Government. While the justification for this would seem to be political, it was perhaps inevitable with households bearing nearly half the total burden of the rates. The annual cost of this partial derating is likely to be £25 million. In addition to these complete or partial deratings, a loss of revenue of about £150 million results from the present formula arrangements for charging rates on the property of the nationalised utilities and transport undertakings. A possible loss also arises from the arrangements for contributions in lieu of rates from Crown property. The inadequacy of the yield has been cited as a major weakness of the rates. But before substituting or adding new taxes, an obvious method of increasing revenue is to ensure that all properties pay their full due in respect of rates.

It can also be argued that the inelasticity of the rate revenue is less a weakness than a corollary of one of its main strengths. Much the greater part of a local authority's expenditure takes the form of rather long-term commitments. It cannot suspend the service of its debts nor can it easily reduce the number of its employees without severely disruptive effects. The wages and salaries it pays are, moreover, generally nationally determined. It is therefore very difficult for it to contract its expenditure to meet sudden shortfalls in income. If local revenues were related to income, a fall in the general level of economic activity might lead to local authorities experiencing a financial crisis. The central Government can run into short-term debt but this solution is not open to local authorities to any important extent and it does not seem desirable that it should be since the control of local borrowing is one of the most important economic controls at the disposal of the Government and if local authorities were obliged to borrow, not for capital purposes but merely to meet deficiencies in finance for recurrent expenditure, either the central control of borrowing would have to be abandoned or the autonomy of local government would have to be further circumscribed.

The first requirement of a major local tax is, therefore, that it should be a very stable source of revenue. Rates are a very stable source of revenue; and while there are other taxes whose yield is very reliable, these do

not include the progressive forms of taxation. The main objection to other consumption taxes as sources of local finance is the ease of evading them by making purchases in a neighbouring district where they are lower. The stability of rateable value as a source of revenue is probably the decisive argument in favour of rates, though a strong case can also be put forward on the grounds that a tax on land and buildings leads to greater economy in their use.

UNEQUAL RESOURCES

The second major criticism of the rates is that rate resources are unevenly distributed among the local authorities. Inequality between areas is, however, bound to exist under any system of local taxation. Nevertheless, it is important to note that this inequality would be greater under a more progressive tax such as a tax on income.

The answer to this problem of unequal revenue resources is, of course, the Government grant. Part I of the Local Government Act authorised changes in the system of Exchequer grants to local authorities in England and Wales for 1967-68 and subsequent years. The aggregate amount of all Exchequer grants in aid of local 'revenue' expenditure for each year is now based on estimates of the amount of that expenditure (with housing subsidies and contributions to the housing revenue and trading accounts being excluded and certain other receipts being offset). The estimated amount of the specific grants for the year in aid of revenue expenditure is deducted from the aggregate and the balance is the amount of the new rate support grants. The Act provides for the distribution of these grants in three parts: a needs element based on population and certain other factors, payable to county and other major authorities; a resources element payable to any authority with rate resources lower than the national average in proportion to its population; and a domestic element to compensate for the partial derating of housing. The aggregate amounts of the rate support grants and each of the three elements will be prescribed in advance for periods of two or more years. The Act also provides for specific grants for comprehensive development, for the acquisition of land for public open spaces, for the reclamation of derelict land and for special expenditure due to the presence in an area of substantial numbers of immigrants; and gives statutory authority for existing grants paid to port and airport health authorities.

BRAKE ON DEVELOPMENT

The third major criticism of the local rates is that it militates against good housing and other property development since every improvement tends to increase the rateable value of the property. There have been cases where families, moved as the result of slum clearance schemes, have objected to paying the higher rentals inclusive of the rates, but it does not seem likely that the existence of rates significantly discourages people generally from buying or renting the houses they want or improving them. The same reasoning applies even more strongly to business enterprises whose property improvement is likely to result in higher productivity or who can otherwise pass on higher costs in the form of higher prices. There is also the strong possibility that any reduction or abolition of the rates would be followed by rent and purchase price increases.

There does, however, seem to be a case for substituting site valuation as the basis of the rates. A pilot survey of the feasibility of site value rating was carried out in this country in 1963. Under this system, land ownership is rated instead of occupation and, with the

annual value of any existing buildings ignored, the annual values of sites alone are assessed, the assessment being on their full permissible development value. The considerable economic advantage of this system is that it penalises any use of land which falls below its authorised use potential, the penalty being proportionate to the waste. To introduce such a system would, however, seem to require a massive administrative effort.

Nonetheless, one step in the direction of improved economic allocation has been taken. The existing system of rating has, until now, relieved property from rate charge so long as it was unoccupied. This has assisted owners to demand high selling prices as well as resulting in the waste of resources. Part II of the Local Government Act provides for owners to be charged half the normal rates after their buildings have been unoccupied for three months (six months in the case of newly-built dwellings). This provision only applies, however, if it is adopted by the rating authority.

Further criticisms of the rating system are its technical complexity (with such esoteric terms as 'tone of the list' valuation) and the relatively high cost of collection (1.05 per cent of the total rate revenue compared with 0.84 per cent for customs and excise).

PROSPECTS

While the improvements contained in 1966 legislation constitute the most important reform of rating for a hundred years, the Government does not maintain that these will achieve a viable system of local taxation, Introducing the second reading of the Local Government Bill, the Minister described it as an interim rescue operation and added that he was convinced that radical reform must be undertaken as soon as possible. But, as the Minister pointed out, the reform of local finance must follow the reform of local government. As long as there are, in England alone, over 1,000 units of local government, each with the right to raise their own taxes, it is unlikely to be possible to get rid of rates.

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RASHID AHMED:

TAX LIABILITY OF FOREIGNERS ON BUSINESS TRANSACTIONS IN PAKISTAN

It is the purpose of this article to survey the present position in Pakistan pertaining to income profits or gains accruing or arising to foreigners by virtue of business transactions partly or wholly carried out in Pakistan. The position is different from that of an enterprise carrying on business in Pakistan either through a branch or a subsidiary. In the latter case the tax liability can be specifically determined as the quantum of income is directly measurable. Where, however, a non-resident enterprise derives any income directly or indirectly from any "business connection" in Pakistan, the measurability of the taxable entity becomes subject to different criteria because of the fact that assessment on receipt basis would involve extra territoriality. It is with the intention of catching such income and profits that Section 42 was enacted and has continued to exist on the statute book with amendments made from time to time. In its present form it is reproduced as an appendix to this article.

As will be observed from the marginal note (appearing in block capitals in the appendix), Section 42 deals with income deemed to accrue or arise within Pakistan. It does not refer to accrual to a person but to mere accrual. Thus, even remote or indirect accrual from sources in Pakistan which is receivable abroad is caught by this Section. The income concerned is obviously receivable outside Pakistan, for otherwise it would be covered by Section 4 of the Income-tax Act on the basis of receipt.

In a sense Section 42 is of the nature of a charging Section, although it should be read in conjunction with Section 4 which imposes the charge generally. Section 42 gives the general charge a particular application by referring to a person liable to tax in respect of sources of income to which he would not otherwise be liable. Where there is actual receipt of profits in Pakistan by or on behalf of a non-resident, Section 4 read with Section 43 applies and there is no need to invoke Section 42.

Let us now look at the charging part of the Section:

"All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in Pakistan or through or from any property in Pakistan or through or from any asset or source of income in Pakistan or through or from any money lent at interest and brought into Pakistan in cash or in kind, or through or from the sale, exchange or transfer of a capital asset in Pakistan shall be deemed to be income accruing or arising within Pakistan and where the person entitled to the income, profits or gains is not resident in Pakistan shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax:"

Directly or indirectly, through or from.

These words have been set out in this construction obviously to cast the net as widely as possible. The effect is augmented further by the expression "any asset or source of income in Pakistan".

Business connection.

This expression is dangerously vague, although its intent does not allow much room for doubt. For, the context shows that reference is to such profits and gains as may be attributable to a connection the non-resident person concerned has with a business in Pakistan.

While considerable case law is available in India on this subject, there is little to go upon in Pakistan as this section has never been extensively used here. Since the section has continued largely unchanged from its form in undivided India, this case law can be referred to as a guide.

According to these, in determining accrual of income or profits one must not look at the last stage alone, but must take into account the previous stages. The proposition that profits arise at the point of sale merely defines the time of accrual; it does not preclude the accrual of profits at more than one stage, Sub-section (3) recognizes this position. Thus a non-resident selling rice abroad which he purchased through an agent in Pakistan would be liable under Section 42 on the profits made.

Property.

This is to be given its ordinary meaning subject to the context of the rest of the section. But the property should be tangible. It would for instance include furniture the hire of which is paid outside Pakistan.

Asset or source of income.

One of the alternatives appears to be superfluous, and has evidently been put down out of abundant caution.

Money lent at interest brought into Pakistan.

The section applies to such cases even when there is no business connection as a result of the lending. The net is widened to catch loans in kind, because interest on money brought into Pakistan in kind is also caught by this section.

Transfer of a capital asset.

This is intended to collect tax on capital gains which may be so organised as to make the gain receivable outside Pakistan.

In actual practice Section 42 has been little used in Pakistan. The main reason appears to be Pakistan's keenness in its desire to provide a favourable climate for private investment (including foreign investment), not to encumber the smooth flow of business by a relentless pursuit of the parties involved in business transactions.

It is with this end in view that Pakistan's double taxation avoidance treaties with various countries specifically exclude industrial or commercial profits unless the foreign enterprise is engaged in trade or business in Pakistan through a permanent establishment. Thus, in effect, Section 42 is inoperative in the case of countries with which Pakistan has double taxation avoidance treaties. At present these include United Kingdom, U.S.A., West Germany, Switzerland, Denmark, Sweden and Japan. Treaties with France, Belgium, Italy and Holland are either under negotiation or await ratification.

APPENDIX

INCOME DEEMED TO ACCRUE OR ARISE WITHIN PAKISTAN

(1) All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in Pakistan or through or from any property in Pakistan or through or from any asset or source of income in Pakistan or through or from any money lent at interest and brought into Pakistan in cash or in kind, or through or from the sale, exchange or transfer of a capital asset in Pakistan shall be deemed to be income accruing or arising within Pakistan and where the person entitled to the income, profits or gains is not resident in Pakistan shall be chargeable to income tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax:

Provided that where the person entitled to the income profits or gains is not resident in Pakistan the income tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that any arrears of tax may be recovered also in accordance with the provision of this Act from any assets of the non-resident person which are, or may at any time come within Pakistan:

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non-resident person a sum equal to his estimated liability under this sub-section, and in the event of any disagreement between the non-resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount:

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non-resident person.

(2) Where a person not resident or not ordinarily resident in Pakistan, carries on business with a person resident in Pakistan and it appears to the Income-tax Officer that owing to the close connection between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom, or which may reasonably be deemed to have been derived therefrom, shall be chareable to incometax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

(3) In the case of a business of which all the operations are not carried out in Pakistan the profits and gains of the business deemed under this section to accrue or arise in Pakistan shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in Pakistan.

EMERGENCY LAW NO. 89

RE: PERMANENT ESTABLISHMENT IN GREECE OF FOREIGN COMMERCIAL AND INDUSTRIAL ENTERPRISES

CONSTANTINE
KING OF THE HELLENES

At the instance of Our Council of Ministers we decide and ordain:

ARTICLE 1

Foreign commercial and industrial enterprises operating lawfully in their home country under any form of business organization that engage exclusively in trade or business pursuits outside of Greece may have a permanent establish in Greece subject to special approval to be granted by decision of the Minister of Coordination. The relevant application should be filed with the Foreign Investments Service of the Ministry of Coordination. In the application should be mentioned the company's nationality, form of business enterprise in its home country, the form in which it will operate in Greece, viz branch office, agency or office of the parent corporation, business pursuits, and the name of the company's top executive in Greece. The company applying for the approval must also state whether it is inclined to post a bank letter of guarantee to be issued by an established Greek or foreign bank. Such guarantee shall be forfeited to the Public Treasury in case the provisions of the present law are violated by the foreign company's personnel. The Minister of Coordination shall decide in favor or against the issuance of the permit of establishment within eight days from the date the relevant application is filed.

ARTICLE 2

1. When the permit of a permanent establishment provided for in the preceding article is obtained, foreign commercial and industrial enterprises are entitled, without further formalities, to the following tariff, tax and other accommodations on condition that they will conduct business activities, promoting company interests exclusively outside Greece, namely:

(a) The foreign personnel of these enterprises shall be entitled to Greek residence and work permits for a period of up to two years, such period being extendable for another two years, with the possibility of multiple entries into and exits from the country.

(b) A tax clearance certificate valid for one year may be issued to the above personnel.

(c) Foreign enterprises shall be exempted from import duties and cuncomitant taxes and charges, revenue stamp tax, turnover tax, luxury tax and in general from any dues or retentions in favor of the State, and from any other taxes and charges currently existing or that may be imposed in the future on any imported items considered to be equipment necessary for the operation of their offices in Greece.

(d) Income earned by foreign enterprises

whose business pursuits are outside of Greece shall be exempt from income tax and in general from any dues, taxes, charges or retentions in favor of the State or of any third party currently existing or that may be imposed in the future. Likewise, the foreign employees of these enterprises who do not have their permanent residence in Greece are exempt from taxes on compensation for services performed in the employ of such enterprises.

(e) The duty-free importation and circulation in Greece of automobiles owned by foreign employees of the above enterprises, without the requirement of having the vehicle sealed at the time of their exit from Greece, is permitted on condition that the enterprise concerned will certify, that the employee involved is leaving the country temporarily and that the contract of employment with the company remains in force. Likewise, the household effects of the foreign personnel of the enterprise may be imported duty and tax-free for the duration of their term of duty assignment in Greece subject to a written statement from the company to the effect that the items to be imported comprise the household effects of the employee involved.

(f) The above foreign enterprises when mailing registered letters to addresses abroad are not required to present their letters to the Post Office for inspection provided the name of the enterprise posting the letter, is mentioned on the envelope and its seal has been affixed thereto and innitialled by the enterprise's Manager.

(g) Samples and advertising material having no commercial value may be imported and exported freely without any formalities by these enterprises. If any doubts arise, the appropriate authorities must request a statement in that connection from the enterprise involved. The personnel of these enterprises in general may work overtime in the event company exigencies should so demand on condition that the amount of compensation provided under standing laws is paid to the personnel thus employed.

(h) the provisions of Article 53 (a) of Law 2190/1920 recorporations pertaining to the keeping of books of account in the Greek language shall not be applicable with respect to the implementation of the present Emergency Law.

2. Articles imported duty and tax-free in accordance with subparagraphs (c) and (e) of paragraph 1 of the present Article may be exported freely or, upon approval by the Ministers of Coordination and Finance, be transferred to other persons entitled to the same duty and tax exemptions. With the exception of the foregoing cases, should the articles mentioned in this paragraph be disposed of in Greece at the time of final departure from the country of the person entitled to the duty exemption, such articles shall be subject to the applicable duties and taxes.

3. The form and the amount of the letter of guarantee the Minister of Coordination may require of the foreign company shall be determined by ministerial decision to be issued at the instance of the company involved and upon the recommendation of the Foreign Investment Service and of the State Legal Advisor at the Ministry of Coordination.

Article 3

1. By Royal Decree to be promulgated at the instance of the Ministers of Coordination and Finance further privileges and accommodations may be extended to the foreign enterprises mentioned in Article 1 hereof and the details of its implementation determined.

2. All government services and authorities must promptly provide any relevant information and assist the Foreign Investment Service of the Ministry of Coordination in the smooth implementation of the present law.

Article 4

The present law which shall take effect on the date of its publication in the Government Gazette does not affect the provisions of Article 9 of Law 4171/1961 entitled "Institution of General Measures to Encourage the Development of the Economy of the Country" and the provisions of Article 50 of Law 2190/1920 concerning corporations.

Publication and implementation of the present law is hereby delegated to the Chairman of our Council of Ministers[1]

Athens, July 31, 1967

CONSTANTINE
R.
The Council of Ministers

1. This Law promulgated on Official Gazette No. 132 on 1st August, 1967

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EDITORIAL:

TVA AND PRICES

"Meanwhile, the mysterious case of the rise in whisky prices in France has finally been cleared up. One whisky dealer, asked why Scotch had gone up two francs a bottle, replied simply: "TVA". Asked whatever happened to the 14 percent British devaluation that was supposed to show up in whisky reductions, he said simply: "You know, that sort of things seldom gets passed along".

A woman shopper in Germany declared that "this thing (the TVA) is being used as a big swindle on the customers"."
The above are quotes from the International Herald Tribune of January 6/7, 1968, giving public reaction to the TVA, introduced in Germany on January 1, 1968 and substantially modified in France on the same date.

The TVA, which is the number one topic of fiscal conversation in the two mentioned states and Denmark, which introduced the tax in July 1967, and which will be, within one or two years, the number one topic in nearly all West European states, including Sweden, Norway and Austria, may be caracterized as the "big economic unknown". Nobody can say exactly or estimate with any degree of accuracy how the tax will affect prices. This is not a defect of the TVA; on the contrary the TVA, once instituted, makes it relatively easy to calculate prices. The difficulty is the result of the transition from the old turnover tax system to a completely new one. The TVA starts as an economic adventure. At the heart of this adventure lies the new price calculation by the entrepreneurs. If the TVA is a pure one, the new calculation can be pure, that is to say, the TVA is then not an element of cost. However, as a result of the transitional rules contained for budgetary reasons in e.g. the German and French tax laws, the TVA will not be pure for a number of years. A portion of the TVA therefore will continue to constitute an element of cost. This makes it especially difficult for the entrepreneur to calculate in a commercial correct manner. The danger of miscalculation is great. Consequently it is not unrealistic to conclude that as a result of these transitional rules, price increases tend to be fostered to a much greater extend than is necessary.

DR. J.C.L. HUISKAMP

LA LEGISLATION FISCALE CAMBODGIENNE*

La législation fiscale cambodgienne, telle qu'elle existe à l'heure actuelle, est constituée par un ensemble de textes et de codes réunis et classés dans des volumes différents pour les besoins des administrations fiscales: Administration des Douanes et Régies, Administration Générale des Impôts, Services Financiers locaux. Il n'existe pas encore de code général des impôts malgré les efforts entrepris jusqu'ici. La plupart des impôts ont été institués par des textes nationaux, mais certains d'entre eux datent de l'époque du Gouvernement général français en Indochine. Pour ces derniers impôts, plusieurs lois sont intervenues depuis l'accès du Cambodge à l'indépendance soit pour modifier les tarifs, soit pour adapter certaines dispositions aux nécessités de l'heure.

Nous donnerons dans la première partie un aperçu sur la législation fiscale au Cambodge que nous essaierons d'étoffer par une étude descriptive générale des impôts. Nous indiquerons dans la deuxième les faits essentiels qui ont entraîné son développement.

PREMIERE PARTIE

APERÇU SUR LA LEGISLATION FISCALE AU CAMBODGE

Dans les tableaux joints aux lois de finances annuelles, les impôts cambodgiens sont classés par chapitres et par articles. Cette classification, purement administrative, distingue entre les impôts établis perçus par l'Administration Générale des Impôts (et parmi ceux-ci entre les impôts perçus sur rôles (et ceux qui le sont sur ordres de recettes), ceux perçus par l'Administration des Douanes et Régies, et les droits et taxes d'importance secondaire perçus par les autres services administratifs. Cette classification n'est pas très satisfaisante, car elle mélange des impôts très différents et sépare des impôts de même nature. Il semble donc plus rationnel de procéder à un reclassement à partir des critères économiques. Dans l'étude qui va suivre, nous regroupons les impôts d'Etat sous trois rubriques: les impôts sur les revenus, les impôts sur la dépense et les impôts sur le capital. Nous complèterons cette étude par un bref aperçu sur les impôts qui profitent aux budgets des collectivités secondaires.

IMPOTS D'ETAT

I-LES IMPOTS SUR LE REVENU-

Le système actuel compte un certain nombre d'impôts considérés comme frappant directement les revenus des individus ou des sociétés. Il comporte d'abord une série d'impôts cédulaires, l'impôt sur les bénéfices industriels, commerciaux, non commerciaux, agricoles et fonciers, l'impôt sur les traitements et salaires, l'impôt sur les revenus et capitaux mobiliers, jadis superposés par un impôt général progressif appelé impôt général sur le revenu. La réforme de 1956 a soumis les bénéfices industriels, commer-

* Our correspondent Mr. Phan Thul sent us this paper, prepared on behalf of the 'Direction Générale des Impôts' at Cambodia.

ciaux, non commerciaux, agricoles et fonciers des personnes physiques ainsi que les traitements, pensions et rentes aux impôts progressifs assez lourds, mais les a dégagés du champ d'application de l'impôt général. Ce dernier ne s'applique plus qu'aux revenus des associés, des administrateurs, des gérants, etc... des sociétés. Nous incluons aussi dans la catégorie des impôts sur les revenus certains impôts spéciaux comme la patente qui frappe le revenu à travers les professions et la taxe exceptionnelle d'équipement assise sur les bénéfices transférés à l'étranger.

L'IMPOT DES PATENTES

L'impôt des patentes frappe le revenu à travers la profession, le commerce ou l'industrie et leurs signes extérieurs. Il est dû en raison de l'exercice effectif d'une activité lucrative et le fait générateur réside dans l'exercice habituel, permanent ou périodique d'une profession, d'un commerce ou d'une industrie.
La patente n'est pas une autorisation d'exercer une profession, une industrie ou un commerce. Elle n'est que la résultante financière de cette activité. Elle est due pour l'année entière sur les faits existant au premier Janvier et combine deux éléments: un droit fixe dont le montant est établi en fonction de la nature et de l'importance de la profession ou de l'activité exercée, et un droit proportionnel à la valeur locative établi en fonction du classement qu'implique le paiement du droit fixe. Le Tableau B énumère des professions imposables et le droit fixe pour chaque profession, lequel comporte un maximum et un minimum.
Connaissant le droit fixe établi d'après le Tableau B, l'agent d'assiette se réfère au Tableau A qui lui fournit le taux du droit proportionnel à la valeur locative. Les contribuables sont classés en 79 classes suivant l'importance du droit fixe.

L'IMPOT SUR LES BENEFICES INDUSTRIELS, AGRICOLES, COMMERCIAUX, NON COMMERCIAUX ET FONCIERS

Cet impôt frappe les bénéfices réalisés par les industriels, les commerçants, les personnes exerçant des professions libérales, les agriculteurs ou les propriétaires fonciers, que leurs titulaires soient des personnes physiques ou des personnes morales.
L'impôt s'établit sur les bénéfices de l'année précédente, soit au nom de l'exploitant, soit au lieu de principal établissement, s'il s'agit d'une société. Le bénéfice imposable est le bénéfice net déterminé d'après les résultats d'ensemble des opérations de toute nature effectuées par les entreprises, y compris les plus values réalisées sur les cessions d'éléments d'actif soit en cours, soit en fin d'exploitation. Il s'applique aux sociétés quelle que soit leur forme juridique, selon un taux uniforme de 25% pour les bénéfices commerciaux, non commerciaux, industriels et agricoles et de 40% pour les bénéfices fonciers. Pour les personnes physiques, il se calcule selon un tarif progressif de 13 à 62% sur le bénéfice net diminué de certains abattements pour charges de famille, et de 14 à 80% pour les bénéfices fonciers.

L'IMPOT SUR LES TRAITEMENTS PUBLICS ET PRIVES, LES INDEMNITES ET LES EMOLUMENTS, LES SALAIRES, LES PENSIONS ET RENTES VIAGERES

L'impôt est dû par toute personne qui a au Cambodge sa résidence ou son domicile et qui perçoit des rémunérations pour son travail, des pensions ou des rentes viagères. Certains revenus lui échappent: les indemnités et les allocations forfaitaires destinées à couvrir les frais inhérents à la fonction dans la limite de 10% du revenu avec un maximum de 10.000 riels, les indemnités au titre de charges

de famille, les pensions militaires d'invalidité, des rentes viagères aux victimes d'accidents du travail, les bourses d'étudiants, les pensions de retraite et les indemnités parlementaires.
Des exonérations sont également prévues en faveur du Corps diplomatique et consulaire à charge de réciprocité pour les agents cambodgiens, des bonzes et des hommes de troupe jusqu'au grade de caporal-chef.
L'impôt s'établit sur le montant mensuel net des traitements, indemnités, salaires, pensions et rentes viagères, selon un tarif progressif de 1 à 40%. Il est calculé et précompté par l'employeur public ou privé sur chaque paiement effectué et versé au budget entre le 1er et le 10 de chaque mois. La loi impose les primes, les gratifications de fin d'année, les indemnités de licenciement et celles de fin de contrat suivant un autre tarif progressif de 1 à 40%. Pour la détermination des taux applicables à ces derniers revenus, l'agent du fisc doit tenir compte des traitements et salaires perçus de l'année précédente ou de ceux perçus du premier Janvier de l'année en cours à la date du licenciement ou de la fin du contrat.

L'IMPOT SUR LE REVENU DES VALEURS MOBILIERES

C'est un impôt institué depuis l'époque du protectorat français et maintenu en vigueur au Cambodge par la loi du 13 Novembre 1946, et perçu par le bureau de l'Enregistrement. Il frappe les revenus des valeurs et capitaux mobiliers dont on peut distinguer les sources suivantes:
- les produits des actions et parts sociales émises au Cambodge ou par des sociétés étrangères installées au Cambodge ainsi que les revenus assimilés;
- les tantièmes, jetons de présence et autres rémunérations allouées aux membres du Conseil d'Administration ou aux gérants des sociétés;
- les revenus des obligations émises au Cambodge ou par des sociétés étrangères installées au Cambodge;
- les revenus des valeurs mobilières émises hors du Cambodge (coupons étrangers).

La loi du 24 Février 1955 a soumis à cet impôt une cinquième catégorie de revenus, les revenus des emprunts de toute nature, même stipulés en compte courant, ainsi que ceux des dépôts de sommes effectués dans les sociétés assujetties.

L'IMPOT GENERAL SUR LE REVENU

Cet impôt est exigé des personnes physiques ayant au Cambodge une résidence habituelle ou un centre d'exploitation industrielle, commerciale, non commerciale, agricole ou foncière ou y exerçant une profession libérale, à l'exception des indigents et, sur la base de réciprocité, des agents diplomatiques et consulaires étrangers. Il se propose d'atteindre tous les revenus à l'exception des intérêts des bons du Trésor, des lots de la loterie nationale, des bénéfices passibles de l'impôt sur les bénéfices des personnes physiques et des traitements, salaires, pensions et rentes viagères déjà soumis à l'impôt sur les salaires.

TAXE EXCEPTIONNELLE D'EQUIPEMENT

La taxe exceptionnelle d'équipement, créée par la loi du 27 Février 1957 et modifée par celle du 6 Août 1958, initialement destinée exclusivement au financement des travaux d'équipement d'intérêt national et à des investissements susceptibles de développer et de renforcer le potentiel économique national, n'a pas résisté à la règle de l'universalité budgétaire. En effet, depuis 1963, elle est tombée dans la masse des recettes du budget comme les autres impôts.

Cet impôt frappe
- les bénéfices transférés à l'étranger conformément à la règlementation des changes en vigueur par les sociétés étrangères installées au Cambodge avant le 31 Mai 1956; celles autorisées après cette date d'après la loi nationale d'investissements étrangers en sont exemptes;
- les dividendes correspondant à des parts étrangères apportées avant le 31 Mai 1956 aux sociétés cambodgiennes à capital mixte.

Un arrêté du Ministre des Finances fixe chaque année les quotités applicables, lesquelles varient suivant la nature et l'utilité économique des entreprises assujetties. Pour l'année 1965, elles sont de 28 à 48% avec réduction de 5 à 10% en faveur des sociétés étrangères ayant 30 à 40% des capitaux nationaux.

II – LES IMPOTS SUR LA DEPENSE –

Au Cambodge, les impôts sur la dépense constituent la totalité des contributions indirectes. Si l'impôt sur les revenus frappe directement les revenus réalisés distribués ou transférés à l'étranger, les impôts sur la dépense en suivent l'emploi. De ce fait, ils frappent indistinctement les individus quelles qu'en soient les classes sociales, les situations de famille ou de fortune. Ils permettent d'atteindre de la façon la plus commode les revenus de la population dont la majorité échappe à l'impôt sur les revenus soit parce que le revenu individuel est trop faible, soit parce que ce dernier est mal connu du fisc etc... Ils réalisent le double avantage du grand rendement et de l'anesthésie fiscale.

Devant obéir à l'impératif de rendement, ces impôts négligent dans une certaine mesure le critère de justice. Cependant cette situation est quelque peu atténuée par l'institution des taux différentiels suivant qu'il s'agit des produits de consommation de la masse et de ceux réservés normalement à l'usage des personnes riches (produits de luxe).

La fiscalité khmère compte principalement, au titre d'impôts sur la dépense,
- les droits de douanes et de régie,
- la taxe sur le chiffre d'affaires,
- la taxe sur les spectacles,
- la taxe sur la production de la glace.

LES DROITS DE DOUANES ET DE REGIE

Les droits de douane

Jusqu'en 1955, la législation douanière au Cambodge comprenait un ensemble de textes français régissant l'Union Douanière des Etats associés de l'ex-Indochine, le Cambodge, le Laos et le Vietnam. Maintenue par la Convention de Pau de 1950, cette Union institua un système de répartition des recettes communes qui devait en donner 7% au Laos, 22% au Cambodge et 71% au Vietnam. En décembre 1954, se tint la Conférence Quadripartite de Paris dont la résolution finale fut la dissolution de l'Union Douanière. Cette rupture devait donner lieu à l'institution de barrières douanières, par le Cambodge qui, pour des raisons d'urgence, ne pouvait que reconduire l'ancienne législation française par la loi du 1er Mars 1955.

La législation douanière comprend dans ses grandes lignes le code de douanes, le tarif douanier, les traités internationaux.

Les progrès accomplis dans le domaine de l'industrialisation consécutifs à l'essor du Port de Sihanoukville devaient amener le pays à se doter d'un nouveau code qui lui permît non seulement de solutionner les problèmes économiques de l'heure mais encore d'en suivre les évolutions en perspective. Ce qui fut fait par la loi du 12 Mai 1962.

A côté du code, le tarif douanier fixe les droits à percevoir sur les produits importés et exportés et prévoit les produits dont l'importation est prohibée. Le tarif cambodgien qui s'inspire en grande partie de la "Nomenclature de Bruxelles", comprend 21 sections, 99 chapitres et 1.096 positions. Il prévoit un tarif général pour les pays non membres du GATT ou qui n'ont pas conclu avec le Cambodge un accord commercial, et un tarif minimum. Le tarif général est fixé au triple du tarif minimum.

L'existence des droits à l'exportation sur les principaux produits agricoles tels que le riz, le caoutchouc, le fait que l'industrie cambodgienne n'est encore qu'à son début, montrent bien que les droits de doaunes jouent encore un rôle essentiellement fiscal et non protecteur. Par ailleurs, l'institution d'un tarif généralement ad-valorem répond bien à l'objectif financier puisque dans l'économie moderne les produits destinés à la consommation sont très nombreux, complexes, différenciés et pour lesquels la notion de coût et de prix est un élément essentiel.

Malgré sa rigueur, le code douanier cambodgien prévoit des régimes suspensifs grâce auxquels les marchandises étrangères sont admises, sous certaines conditions, à traverser le territoire national ou à y séjourner sans avoir à acquitter les droits d'entrée normalement exigibles. Ces régimes visent à faciliter les échanges internationaux (régime de transit), l'organisation des centres de transactions internationales (régime d'entrepôt, zone franche de Sihanoukville) ou à favoriser l'implantation des industries de transformation (régime de l'admission temporaire, celui du draw back).

— Les droits de régie —

Les droits de régie ont le caractère d'impôts indirects intérieurs. Ils comprennent les droits de reconnaissance ou d'exercice, ceux de circulation et de consommation qui s'appliquent à certains produits de grande consommation: le sel, l'alcool, la bière, l'opium (produit maintenant prohibé), le tabac, les allumettes, les hydrocarbures.

Le protectorat français exerçait ce pouvoir jusqu'en 1946 lorsque furent créées, par la loi du 2 septembre 1946, les Régies Nationales dont la compétence s'établit seulement sur le sel, l'alcool et l'opium tandis que les droits frappant le tabac et les allumettes continuaient de relever de l'autorité fédérale. La coexistence de ces deux services national et fédéral devait prendre fin à la suite du transfert de compétence en matière de douane et de régie au Gouvernement Royal en 1951.

Les droits de régie sont généralement spécifiques, sauf pour les tabacs manufacturés pour lesquels la loi prévoit un droit ad-valorem. Perçus par l'Administration des Douanes et Régies, ces droits, dus en raison de la mise en circulation et en consommation des produits taxés, représentent une importance presque équivalente à celle des droits de douane.

LA TAXE SUR LE CHIFFRE D'AFFAIRES

La taxe sur le chiffre d'affaires (T.C.A.) est un impôt indirect frappant les premières ventes de marchandises réalisées au Cambodge et les prestations de service. C'est le type le plus éloquent de l'impôt sur la dépense.

Instituée par la loi du 1er Mars 1949, la taxe sur le chiffre d'affaires, qui était à l'origine un impôt dû en cascade à chaque vente ou livraison de marchandises, est devenu un impôt dont la perception est limitée au stade de première vente à la suite de la réforme entreprise par la loi du 22 Février 1958. Cette réforme, en rétrécissant notablement le champ d'application de la taxe, constitue un atout de premier ordre contre les fraudes; le nombre d'assujettis a beaucoup diminué du fait qu'elle ne s'applique plus aux commerçants demi-

grossistes ou détaillants, rendant ainsi plus aisées les vérifications fiscales.

Pour l'application du principe de taxation unique des produits et marchandises, un prakas (arrêté) a règlementé l'imposition des entreprises de transformation: celles-ci sont autorisées à déduire du chiffre d'affaires imposable la valeur des produits qui ont déjà supporté l'impôt, qu'ils soient importés ou locaux. On peut donc considérer cette règlementation comme un premier glissement vers la conception fiscale de certains pays d'Europe en ce qui concerne la taxation de la valeur ajoutée.

La loi du 1er Mars 1949 prévoit certaines exonérations pour des raisons soit politiques (vente de journaux), soit économiques (vente de produits agricoles par les producteurs, exportateurs, vente des produits d'artisanat aux touristes). Le législateur a également pris soin d'exclure du champ d'application de l'impôt les ventes des produits faisant l'objet du monopole fiscal de l'Etat, les opérations de banque, d'assurance, les spectacles, la glace alimentaire, qui doivent être soumis à d'autres impôts tels que le droit de timbre, celui d'enregistrement, la taxe sur les spectacles, la taxe sur la glace.

Pour les petits contribuables, qui ne sont pas en mesure de tenir une comptabilité, la loi prévoit deux systèmes de forfait:

Forfait conventionnel pour ceux ayant un chiffre d'affaires annuel égal ou inférieur à 2.000.000 riels;

Forfait obligatoire pour les très petits commerçants, étalagistes, marchands sous halles etc...

LA TAXE SUR LES SPECTACLES

La taxe sur les spectacles est une variété de l'impôt sur le chiffre d'affaires. Instituée par la loi du 9 Août 1949, cette taxe, à taux unique de 40% du prix net des billets d'entrée vendus par les établissements ou organisations de spectacles de toute nature, frappe les théâtres, cinémas, cafés-concerts, music-halls, dancings, skatings, concerts symphoniques ou vocaux, établissements forains, salons ou expositions divers, bals de sociétés, bals forains ou occasionnels, courses de chevaux, tirs de pigeons, etc... et, d'une manière générale, tous les établissements de spectacle à entrée payante. Pour les établissements de spectacle ou de divertissement à entrée non payante, la taxe s'applique aux majorations sur les prix des repas ou boissons.

Des exonérations sont prévues pour les spectacles à entrée payante organisés au profit des établissements publics, des oeuvres de bienfaisance ou d'assistance reconnue d'utilité publique, des fédérations ou des associations sportives.

La réforme de la fiscalité des spectacles a fait l'objet d'un projet de loi déposé devant le Parlement. Cette réforme, conçue dans le sens de l'allègement du poids fiscal sur les recettes des spectacles, est proposée compte tenu de la situation encore peu stable des producteurs nationaux de films et des organisateurs de concerts classiques ou folkloriques. La réforme vise certains divertissements publics jusqu'ici non atteints par la taxe sur les spectacles: casino, appareils de musique etc...

LA TAXE SUR LA PRODUCTION DE LA GLACE

Toute personne ou toute société fabriquant industriellement la glace paie une taxe unique à la production de 20% instituée par la loi du 28 Septembre 1948. Cette taxe, qui est aussi une variété de l'impôt sur le chiffre d'affaires, se calcule sur le produit brut des ventes de la glace. Depuis son institution, le taux de 20% n'a pas varié.

III – IMPOTS SUR LE CAPITAL –

L'expression "Impôt sur le capital" revêt plusieurs formes d'imposition du capital. Il s'agit ici d'atteindre les richesses acquises à l'aide soit d'un impôt mesuré d'après le capital, soit d'un impôt sur les transmissions de capital, à titre gratuit ou à titre onéreux. En prenant le capital comme base d'évaluation, le fisc vise réellement et surtout le revenu du propriétaire ou du détenteur, que ce revenu provienne du capital lui-même ou d'autres sources.

La fiscalité cambodgienne offre quelques exemples typiques d'impôt sur le capital: droits d'enregistrement et de timbre, impôt sur les terres à hévéas, taxe unique sur les engins de transport.

DROITS D'ENREGISTREMENT

Les droits d'enregistrement se perçoivent à l'occasion de la formalité de l'enregistrement qui consiste en l'analyse des principales dispositions d'un acte ou la "relation d'une déclaration" sur un des registres du Receveur des Impôts.

Outre son objet essentiel qui est de procurer des recettes fiscales à l'Etat, la formalité produit un certain nombre d'effets civils:

elle donne date certaine aux actes sous-seing privés;

elle est nécessaire à la validité de certains actes: contrat de gage, publications de ventes de fonds de commerce;

elle assure une certaine publicité aux actes par l'exercice du droit de recherche et de communication et contribue, éventuellement, à fournir un commencement de preuve.

L'impôt de l'enregistrement apparaît comme un impôt indirect si l'on considère les conditions dans lesquelles il est perçu et les opérations accidentelles qu'il frappe. Toutefois, par la périodicité de l'imposition, et aussi par la nature de certains faits générateurs, tels que les mutations des biens, les successions, il revêt souvent le caractère d'un impôt sur le capital.

Si l'on classe les droits d'enregistrement d'après leur mode de calcul, on distingue les droits fixes, les droits proportionnels et les droits progressifs.

Les droits fixes s'appliquent aux actes, soit civils, soit judiciaires, ou extra-judiciaires qui ne contiennent ni obligation, libération, condamnation de sommes et valeurs, ni transmission de propriété, d'usufruit ou de jouissance des biens meubles ou immeubles. Ces droits varient de 20 riels à 1.000 riels.

Les droits proportionnels sont établis sur les actes portant obligation, libération, condamnation de sommes et valeurs, et sur ceux de transmission de propriété, d'usufruit ou de jouissance de biens meubles et immeubles. Ils varient de 0,25% à 15%.

Les droits progressifs sont limités aux mutations par décès, celles entre vifs à titre gratuit, cessions d'office de notaire. Le code d'enregistrement prévoit le tarif suivant pour chacune de ces opérations juridiques.

Le tarif de ces droits varie de:

– 6% à 30% pour les mutations par décès: après déduction des abbattements de:

200.000 riels pour les successions en ligne directe et entre époux;

100.000 riels pour les successions entre frères et soeurs.

– 6% à 30% pour les mutations entre vifs à titre gratuit: après déduction des abattements de:

200.000 riels pour les donations en ligne directe et entre époux;

100.000 riels pour les donations entre frères et soeurs.

– 4% à 8% pour les cessions à titre onéreux d'un office de notaire.
– 3% à 7% pour les transmissions d'un office de notaire s'opérant par suite de "disposition gratuite entre vifs ou à cause de mort."

DROITS DE TIMBRE

Le droit de timbre est un impôt de consommation acquitté d'une façon irrévocable au moment de la rédaction de tout acte devant ou pouvant faire titre. Il est acquis au Trésor par la seule existence de cet acte. L'exigibilité du droit ne dépend ni de l'utilité juridique de l'acte, ni de sa validité entre les parties. Comme il ne s'applique pas spécifiquement aux opérations sur la fortune ou sur le capital, la classification du droit de timbre comme impôt sur le capital paraît quelque peu arbitraire.
Les droits de timbre se calculent tantôt d'après la dimension de l'écrit (timbre de dimension) tantôt proportionnellement aux sommes énoncées sur l'écrit (timbre proportionnel) tantôt d'après la seule nature de l'écrit (droit fixe).
Le timbre de dimension a un champ d'application extrêmement large et englobe tous les actes, écrits, extraits, copies et expéditions, soit publics, soit privés devant ou pouvant faire titre, ou être produits pour obligations, décharges, justification, demande en décharge. Le code soumet également à cet impôt les requêtes, les affiches sur papier ordinaire, les affiches peintes, les panneaux réclames etc...
Le timbre proportionnel ou gradué a un caractère commun de varier suivant les sommes exprimées dans l'écrit. On peut retenir à titre d'exemple le timbre proportionnel des effets à ordre ou au porteur, des titres non négociables (0,20% du montant des effets), le timbre gradué sur les écrits qui emportent libération ou qui constatent des paiements ou versements de sommes (timbre de quittance de 0,30% avec minimum de 0 riels 50).
Pour les titres des valeurs mobilières, chaque titre ou certificat d'actions dans une société, compagnie et entreprise quelconque, financière, commerciale, industrielle ou civile, est assujetti au timbre proportionnel calculé suivant deux modes différents. Si la personne morale assujettie veut régler au comptant cet impôt, ce dernier se calcule à raison de 1,20% du montant nominal du capital. Si elle opte pour le règlement par abonnement, le droit est de 0,20% par an.
Le droit fixe de timbre est réglé d'après la nature des écrits, abstraction faite de leur dimension, Comme écrits soumis à ce droit, on peut citer les bulletins de bagages, les colis postaux, les lettres de voitures, les bulletins du casier judiciaire, les connaissements.

IMPOT SUR LES TERRES A HEVEAS

Cet impôt, institué par la loi du 13 Février 1956 modifiée par celle du 13 Novembre 1957, est exigible sur toutes les personnes physiques ou morales, propriétaires, locataires ou occupants des terres plantées d'hévéas ou concédées pour la culture des hévéas. Etabli sur des rôles nominatifs, cet impôt comporte le tarif suivant:

Terres plantées d'arbres mis en saignée	400 riels par Ha.
– Terres plantées d'arbres non encore mis en saignée.....	65 riels —id—
– Terres supportant les constructions ou y attenant.....	200 riels —id—
– Terres en friches.....	35 riels —id—

Les concessions nouvelles sont exonérées de l'impôt pendant les trois premières années. La loi du 29 Janvier 1960 a prolongé cette période d'exonération jusqu'à sept ans.

TAXE UNIQUE SUR LES ENGINS DE TRANSPORT

Institué par la loi du 6 Septembre 1955, cet impôt frappait tous les engins de transport public ou privé en circulation ou simplement de passage sur le territoire du Cambodge. La loi du 30 Mars 1959 a exclu du champ d'application de cet impôt les engins fonctionnant à l'essence, mais celle de 1963 y a inclu de nouveau les voitures de tourisme.
La législation en vigueur soumet à cet impôt les voitures de tourisme, les autres voitures automobiles fonctionnant au gas-oil, les cyclos-moteurs et vélomoteurs, les cyclos-pousse, cyclos à remorque, les voitures hippomobiles, les embarcations, les aéronefs. Calculé soit par véhicule, soit en tenant compte de la charge utile de l'engin ou de sa puissance, cet impôt se perçoit annuellement pour les engins de transport privé, trimestriellement pour les engins de transport en commun, et par passage pour les engins de passage au Cambodge.
La loi prévoit des exonérations en faveur des engins appartenant aux collectivités publiques, aux communautés religieuses, aux représentations diplomatiques et aux pays amis en mission officielle au Cambodge.

IMPOTS LOCAUX

Les collectivités publiques secondaires, provinces, municipalités et certaines communes, jouissent de l'autonomie financière et disposent chacune d'un budget annuel alimenté essentiellement par les impôts et taxes dits locaux, par les produits domaniaux et dans une certaine mesure par les subventions de l'Etat.
Parmi les principaux impôts et taxes locaux en vigueur on a l'impôt foncier de la propriété rurale, l'impôt sur le paddy, l'impôt sur les terrains de culture et la taxe foncière.

L'IMPOT FONCIER DE LA PROPRIETE RURALE

L'impôt foncier de la propriété rurale a été créé par la loi du 30 Juin 1945, laquelle remplace l'Ordonnance Royale du 3 Novembre 1938. Il se substitue, pour les communes immatriculées et les communes soumises au régime des déclarations, à l'ancien impôt des paddys et à l'impôt sur les terrains de culture lesquels ont pour base le rendement réel ou supposé des terres imposables. L'impôt foncier sur la propriété rurale, par contre, est liquidé suivant leur classement et leur surface.
Le classement comporte dix catégories. Dans chaque commune, une commission effectue le classement des terres en tenant compte, pour chacune des parcelles, de la fertilité, de la nature des cultures pratiquées, du rendement moyen, etc...
Les terres des berges, celles à cultures riches sont généralement comprises dans les quatre premières catégories, celles de rizières rangées dans les cinquième, sixième, septième et huitième catégories, celles défrichées mais non cultivées dans la neuvième catégorie, celles non défrichées dans la dixième.
Le taux applicable à chaque terrain varie suivant son classement de 2 riels 40 à 240 riels à l'hectare.
L'impôt est dû même si les terres imposables n'ont pas été cultivées. A l'ancien impôt, proportionnel au revenu brut de la terre, on a donc substitué une taxation basée sur la valeur du fonds et qui présente par là quelques rapports avec un impôt sur le capital.
L'impôt foncier de la propriété rurale ne s'applique pas aux terrains des agglomérati-

ons érigées en centres urbains ou ruraux soumis à un autre impôt appelé taxe foncière. Pour les terrains complantés en hévéas, la législation en vigueur a institué un impôt spécial, qui profite, comme nous l'avons vu, au budget de l'Etat.

L'IMPOT DES PADDYS

L'impôt des paddys représente la forme ancienne de l'impôt foncier dont sont frappées les rizières. Basé sur le produit de la récolte, il est calculé d'après le nombre de "Thang" (mesure de capacité évaluée à 40 décimètres cubes) récoltés.
A la suite de l'établissement du Cadastre, l'impôt foncier de la propriété rurale a remplacé progressivement l'impôt des paddys qui n'est plus appliqué que dans les communes non encore immatriculées ou soumises au régime des déclarations. L'impôt des paddys est donc appelé à disparaître et son étude ne présente plus qu'un intérêt rétrospectif.
Les cultivateurs doivent, chaque année, déclarer la superficie des rizières dont ils sont propriétaires ou occupants, qu'elles soient cultivées ou non. D'autre part, l'autorité administrative détermine un rendement moyen pour chaque commune. L'impôt dû par chaque exploitant se calcule à raison de 2 riels par Thang.
Les rizières non cultivées sont soumises au paiement d'une taxe annuelle de 6 riels par hectare destinée à établir en faveur du contribuable une présomption de possession en attendant l'établissement d'un régime foncier définitif.

IMPOT SUR LES TERRAINS DE CULTURE

L'impôt sur les terrains de culture, institué par l'Ordonnance Royale du 17 Octobre 1921, est assis sur les terrains défrichés et mis en valeur autres que ceux de rizières.

Cet impôt a suivi, lui aussi, le sort de l'impôt des paddys. Comme lui, il a été remplacé progressivement par l'impôt foncier de la propriété rurale et n'est plus appliqué que dans les communes non immatriculées et non soumises au régime des déclarations.
La législation prévoit quatre catégories de terrains. Le classement des terrains dans l'une de ces quatre catégories est fait d'après la nature des cultures qui y sont pratiquées. L'impôt s'établit d'après la superficie du terrain et suivant le tarif ci-dessous indiqué:
Terrain de 1ère catégorie 240 riels par hect.
Terrain de 2ème catégorie 160 riels par hect.
Terrain de 3ème catégorie 100 riels par hect.
Terrain de 4ème catégorie 60 riels par hect.

LA TAXE FONCIERE

Dans les centres urbains et les centres ruraux, l'impôt foncier de la propriété rurale fait place à la taxe foncière pour les propriétés bâties ou non bâties et à la taxe d'occupation temporaire pour les terrains domaniaux occupés en vertu d'un permis d'occupation temporaire, d'un bail ou d'un contrat.
D'une façon générale, l'imposition se fait suivant la catégorie et la superficie des immeubles.
La taxe foncière, instituée par la loi de Finances de 1947 pour les terrains de la municipalité de Phnom-Penh, et par celle de 1952 pour ceux des autres centres urbains, est due par les propriétaires fonciers, par les usufruitiers ou les emphythéotes.
Dans la ville de Phnom-Penh, la taxe se calcule d'après la valeur locative et la destination de l'immeuble (usage d'habitation, location ou usage mixte). Pour les terrains non bâtis, elle se détermine d'après leur surface et leur classement.
Dans les chefs-lieux des provinces, les terrains sont imposés d'après leur surface et leur classement. Il en est de même pour les autres centres.

DEUXIEME PARTIE

CAUSES DU DEVELOPPEMENT DE LA LEGISLATION FISCALE

Ainsi qu'on a pu constater dans l'aperçu sur la législation fiscale cambodgienne, le développement de cette dernière s'est situé dans les années d'après-guerre. On ne peut pas parler de développement réel si les lois nationales se bornent à se substituer à certains anciens textes datant de l'époque du protectorat français. Dans le cas du Cambodge le législateur est intervenu non seulement pour remplacer progressivement ces textes anciens dont le maintien en vigueur est jugé peu compatible avec la situation politique du pays de l'après-guerre, mais également pour créer de nouveaux impôts dont les règles d'assiette, de liquidation et de recouvrement sont comparables à celles en vigueur dans certains pays évolués. Certains textes anciens subsistent encore de nos jours; on peut citer ceux concernant les droits d'enregistrement, ceux de timbre, l'impôt sur les revenus des valeurs mobilières, ceux de régie. Les systèmes résultant de ces textes seraient profondément altérés sans les nouvelles lois nationales prises pour les rajeunir soit en changeant les règles d'assiette ou en étendant les champs d'application, soit en modifiant les tarifs en harmonie avec l'évolution des conjonctures. Les causes du développement de la législation fiscale cambodgienne peuvent se ramener à trois principales: politiques, financières et économiques.

CAUSES POLITIQUES

Il ne paraît pas sans intérêt historique de situer les dates de création ou de suppression des impôts par rapport aux différentes étapes politiques par lesquelles le Cambodge a passé.

a/– Jusqu'à la fin de la deuxième guerre mondiale, le pays était placé sous le protectorat français. En vertu de l'accord du 7 Janvier 1946 signé entre la France et le Cambodge, ce dernier jouissait d'une autonomie interne relative. Corrélativement à cette nouvelle situation politique, le pays se dotait d'un budget annuel appelé "Budget national" par opposition au "Budget fédéral" de l'Indochine dont la préparation et l'exécution étaient assurées par les autorités représentantes de la France. Pendant les premières années de son institution, le budget national du Cambodge disposait comme ressources fiscales de quelques impôts directs et indirects dont les principaux étaient la patente, les impôts sur les revenus, les impôts fonciers, la capitation, les droits de consommation et de circulation sur le sel, sur l'alcool et sur l'opium (le gouvernement fédéral détenant encore ses prérogatives sur les droits de régie sur le tabac et les allumettes), la taxe sur les tissus, la taxe de protection des forêts et des poissons.
Les premières lois fiscales qui apparaissaient à cette époque étaient celles instituant des impôts à portée générale en remplacement de ceux applicables seulement aux Cambodgiens. On peut retenir à titre d'exemples la contribution des patentes applicable à toutes les personnes, quelle que soit leur nationalité, résidentes ou domiciliées au Cambodge et y exerçant des professions lucratives (loi du 2 Décembre 1946), l'impôt foncier sur les propriétés rurales (loi du 30 Juin 1945). Certains impôts, comme la capitation, étaient sup-

primés comme ne répondant pas au critère de justice sociale.
Très vite, le Gouvernement Royal ressentait le besoin d'augmenter les impôts existants dont il avait la disposition: augmentation des impôts fonciers, de la contribution des patentes, élargissement du champ d'application de ce dernier impôt à certaines professions non prévues dans le texte initial. Quelques impôts indirects faisaient timidement leur apparition: c'étaient la taxe de protection des forêts, celle des poissons, la taxe sur les tissus. Sous la pression des besoins financiers, le Gouvernement Royal dut se résoudre à frapper toutes les transactions commerciales dans le Royaume. Malgré la réticence des autorités fédérales, la taxe sur la production de la glace et l'impôt général sur le chiffre d'affaires furent créés respectivement en 1948 et 1949. Vers la fin de 1949, le Gouvernement entreprit la réforme de la fiscalité sur les spectacles dans le sens de l'augmentation du rendement financier.

b/– Le traité d'indépendance de 1949 complété par la Convention de Pau de 1950 fut une seconde étape importante pour le développement de la fiscalité cambodgienne. Presque toutes les compétences en matière fiscale jusque là détenues par les autorités fédérales revinrent au Gouvernement Royal: droits d'enregistrement et de timbre, droits de régie sur le tabac et sur les allumettes. Etat indépendant, mais associé politiquement et économiquement aux deux autres pays de l'ex-Indochine française, le Vietnam et le Laos, le pays dut faire abstraction de ses frontières politiques, notamment en matière douanière. Les administrations douanières en place, en principe dirigées par les autorités locales de chaque Etat, ne continuaient pas moins de fonctionner au profit de l'"Union douanière" qui existait depuis avant la guerre et que la convention de Pau tentait de perpétuer après la reconnaissance de leur indépendance par la France. Les recettes perçues par les trois Etats de l'ancienne Indochine française constituaient un "fonds" qui devait être réparti à chacun d'eux suivant les pourcentages fixés par cette convention. Le Cambodge détenait 22% du total, le Laos 7% et le Vietnam 71%.
Au cours de cette seconde étape, le Gouvernement Royal prit quelques lois pour modifier les tarifs des droits d'enregistrement, du timbre, de la taxe sur le chiffre d'affaires, de l'impôt sur les revenus des valeurs mobilières, pour créer de nouveaux impôts (taxe de la Défense Nationale en 1951, taxe sur la transformation de paddy en 1953) et pour supprimer certains autres (taxe sur les tissus en 1952). Déjà, dès les premières années de l'émancipation politique du pays, la fiscalité khmère se proposait d'être interventionniste. Elle encourageait les entreprises à adopter les formes et les structures qui leur paraissaient les plus rentables. La loi du 18 Juillet 1951 exonérait de l'impôt sur les revenus des valeurs mobilières les distributions des réserves sous forme d'augmentation du capital social ainsi que les plus-values résultant de l'attribution gratuite d'actions, de parts bénéficiaires, de parts sociales ou d'obligation à la suite de fusion des sociétés anonymes, en commandite, par actions ou à responsabilité limitée entre le 1er Juillet 1950 et le 1er Janvier 1952. Elle s'offrait d'intervenir pour la réalisation des objectifs politiques gouvernementaux, notamment en matière d'urbanisme et de logement; la loi du 30 Août 1954 accordait l'exonération du droit d'enregistrement de 15% sur toute mutation à titre onéreux d'immeuble dont la construction et l'achèvement se réalisaient dans les trois ans à compter de la date de sa promulgation.

c/– La "Croisade Royale" entreprise par Sa Majesté Norodom Sihanouk, qui aboutit

à la reconnaissance de l'indépendance totale du Cambodge par la France et au traité de Paris de Décembre 1954, marqua une nouvelle étape pour la législation fiscale du pays. En rendant caduc le tripartisme consacré quatre ans plus tôt par la convention de Pau, le traité de Paris de 1954 mit fin également à l' "Union douanière" indochinoise. Les trois Etats de l'ex-Indochine française, devenus totalement maîtres de leur destin, durent aménager leur législation fiscale parallèlement à la nouvelle situation politique. En ce qui concerne le Cambodge, s'il reconduisait l'ancienne législation douanière pour un certain temps encore, il devait reviser en hâte la règlementation touchant le rayon douanier en fonction de ses frontières politiques. En effet, jusqu'au 1954, il n'existait pratiquement pas de barrières douanières entre le Cambodge, le Laos et le Vietnam, la législation française maintenue en vigueur par la convention de Pau assurant une libre circulation des marchandises à travers ces trois pays. Après 1954, il fallut pour le Cambodge étendre le rayon douanier institué à l'endroit de ses frontières avec la Thailande aux autres frontières avec le Laos et le Vietnam.

L'indépendance implique l'obligation d'avoir et de développer des relations économiques avec l'extérieur. La participation de fait du Cambodge à l'Accord Général sur les Tarifs douaniers et le Commerce (G.A.T.T.) a amené le pays à entreprendre une profonde réforme du tarif douanier. Devant s'interdire un tarif discriminatoire aboutissant à avantager indirectement tel ou tel pays, le pays a institué deux tarifs, l'un général applicable à tous les pays non membres du G.A.T.T. ou n'ayant pas conclu d'accord de commerce avec lui, l'autre minimum beaucoup plus favorable que le premier. Cette réforme a fait l'objet d'un tarif douanier promulgué en Août 1959.

En dehors de la question douanière, le Gouvernement a entrepris plusieurs réformes, notamment en ce qui touche les impôts sur les revenus (impôt sur les bénéfices, impôt sur les traitements et salaires, impôt général sur le revenu en 1954, impôt sur le revenu des valeurs mobilières en 1955). Le réformateur s'est attaché à résoudre, à défaut de conventions bilatérales ou multitatérales, le problème de répartition des impôts entre le pays générateur du revenu et les pays originaires du capital, à définir les établissements ou les personnes imposables. Par exemple, pour l'impôt sur les bénéfices, le champ d'application se limite en principe aux seuls bénéfices réalisés au Cambodge. Cependant, en cas de difficulté dans la détermination des bénéfices réalisés par les entreprises qui sont sous la dépendance ou qui possèdent le contrôle des entreprises situées hors du territoire, l'agent d'assiette doit les évaluer par comparaison avec les entreprises similaires exploitées normalement dans le pays. Plus compliqué est le problème de l'imposition des revenus distribués en dehors du Royaume. Le législateur de 1955 l'a tranché en fixant la quotité soumise à l'impôt cambodgien d'après la proportion entre la valeur vénale des biens situés au Cambodge et celle de son actif social, d'après celle entre le capital affecté par l'entreprise au fonctionnement de son établissement dans le pays et son capital-actions versé (banques, bureau d'achat), d'après celle de son chiffre d'affaires qui y sont réalisés par rapport au chiffre d'affaires global, ou d'après le montant des primes payables au Cambodge et le montant total des primes encaissées (entreprises d'assurance ou de réassurance).

IMPERATIF FINANCIER

Si, en raison des situations politiques où s'est trouvé le pays, le législateur a dû nationaliser les textes fiscaux existants, les modifier et en créer de nouveaux, il est peu vraisemblable que cette raison est la seule ou la plus préoccupante. En effet, dès les premières années de son autonomie politique, le Cambodge a eu à affronter un problème épineux, celui de l'équilibre de son budget. D'un côté, les dépenses publiques se sont accrues d'une manière très rapide. De l'autre, le pays ne disposait au début que de quelques impôts directs dont certains sont à rentabilité incertaine (impôts fonciers, capitation) et de quelques droits indirects à caractère spécifique facilement recouvrables mais indifférents au mouvement des prix. La pression des besoins financiers a été telle que le système fiscal a dû se modifier, et surtout dans le sens de la rentabilité. Bien entendu, les autres impératifs, tels que neutralité et justice sociale, n'ont pas été négligés, mais à chaque réforme entreprise le législateur a eu principalement en vue le côté financier.

Pour se faire une idée sur l'accroissement très rapide des dépenses publiques, on peut se référer aux chiffres indiqués ci-après représentant les prévisions annuelles des dépenses inscrites dans les budgets:

1946	38.750.000	riels
1947	88.830.800	,,
1948	147.335.000	,,
1949	375.194.000	,,
1950	443.809.800	,,
1951	838.090.300	,,
1952	1.174.625.000	,,
1953	1.141.500.000	,,
1954	1.670.000.000	,,
1955	1.742.000.000	,,
1956	2.601.669.000	,,
1957	2.788.000.000	,,
1958	3.410.500.000	,,
1959	3.908.050.000	riels
1960	4.420.000.000	,,
1961	4.887.000.000	,,
1962	5.300.000.000	,,
1963	5.600.000.000	,,
1964	6.245.000.000	,,
1965	6.100.000.000	,,
1966	7.000.000.000	,,
1967	6.686.000.000	,,

On peut dire que l'importance minime des budgets des premières années d'après-guerre est due au fait que la plupart des services importants relevaient à cette époque du Gouvernement fédéral et que leurs dépenses de fonctionnement incombaient à ce gouvernement. On est en droit d'imputer aussi cet accroissement nominal des dépenses publiques à la hausse des prix. Mais ce serait nier la réalité du rôle du jeune Etat que de vouloir expliquer le phénomène financier uniquement par la prise en charge des administrations appartenant jadis à la Fédération Indochinoise et par la hausse des prix. En effet, l'indépendance politique, si elle consacre la libre disposition de soi-même, implique en revanche pour l'état émancipé de nombreuses obligations: politique extérieure, défense nationale, éducation, santé publique, intervention dans l'économie. L'accomplissement de ces obligations politiques, économiques et sociales se traduisent évidemment par l'accroissement des charges de l'Etat. On pourra s'en rendre compte facilement en comparant les prévisions des dépenses depuis 1955, année ou toutes les compétences politiques et administratives ont été transférées au Gouvernement Royal, eu égard aux indices généraux des prix.

Années	Indice général des prix	Prévisions des dépenses de l'Etat (en millions de riels)
1955	193 (indice de base 100 en 1949)	1.742
1956	206	2.601
1957	209	2.788
1958	219	3.410
1959	236	3.908
1960	255	4.420
1961	275	4.887
1962	285	5.300
1963	303	5.600
1964	316	6.245
1965	326	6.100
1966	322	7.000

Les dépenses ont plus que quadruplé entre 1955 et 1966 alors que les prix ont augmenté de 65% seulement pendant la même période. Face à la montée rapide des dépenses, la fiscalité se doit de contribuer à l'équilibre budgétaire. Or le Cambodge est un pays à structure économique essentiellement agricole. Peuplé de 6,2 millions d'habitants dont 80% environ vivent de l'agriculture, le pays possède encore une économie soumise aux aléas climatiques malgré les efforts d'industrialisation et d'équipement en infrastructure entrepris depuis son accès à l'indépendance. La détérioration des termes de l'échange due à la stagnation ou même à la baisse des cours mondiaux des produits primaires exportés, la lente diffusion des techniques modernes dans le domaine de l'agriculture font que le monde rural dispose encore d'un revenu relativement faible. Partout dans le pays, l'artisanat prédomine encore et coexiste avec l'industrie naissante. Malgré les efforts de modernisation de l'outillage, la rentabilité de ce dernier secteur demeure chancelante.

Il est dès lors compréhensible que les finances de l'Etat ne peuvent et ne pourront pas compter avant longtemps encore sur la fiscalité directe frappant les domaines, les revenus de la population rurale, ceux des artisans et même ceux des entreprises à grande rentabilité qui sont encore en nombre limité. L'administration fiscale a mis au point quelques mesures et quelques réformes au sujet des impôts directs: augmentation des tarifs des impôts fonciers, de la patente, de l'impôt sur les bénéfices des sociétés, de l'impôt sur les engins de transport, de l'impôt sur les revenus des valeurs mobilières, création de la taxe exceptionnelle frappant les bénéfices transférés par les sociétés et les firmes étrangères, modification des règles d'assiette par la mise en vigueur progressive de la méthode de taxation à la source etc... Elles ont permis d'améliorer dans une certaine mesure leur rendement, mais ce ne sont pas là les plus rentables.

Sans abandonner les secteurs traditionnels, l'effort de réforme a été axé vers les impôts les plus économiquement élastiques, c'est-à-dire vers ceux qui suivent fidèlement les oscillations de la conjoncture et dont le rendement est fonction des volumes de transactions (droits spécifiques de consommation) ou à la fois des prix et des volumes de transaction (droits d'importation, taxe sur le chiffre d'affaires). Ces impôts, tous indirects, frappent les transactions du commerce extérieur, les transactions internes, les produits de grande consommation tels que les produits pétroliers, les alcools de bouche, le tabac, les allumettes, le sel etc... D'un rendement certain assorti d'une qualité anesthésiante incontestable, ces impôts ont marqué de leur empreinte le système fiscal cambodgien. Depuis longtemps, en effet, ce dernier s'est caractérisé par la prédominance des impôts indirects sur les impôts directs:

Année	Montant des impôts indirects (prévisions)	% par rapport au prélèvement fiscal total
1956	1.194,3	82,5%
1959	1.663,9	
1962	2.224,5	76,2%
1963	2.402,5	72,5%
1964	2.412,2	74,7%
1966	3.158	79 %

On peut retenir comme principales dates de réformes fiscales à but financier les années 1949, 1958-59, 1964.

Comme il est dit plus haut, jusqu'en 1949, le budget national du Cambodge disposait de quelques impôts indirects dont le rendement ne lui permettait pas de faire face à l'accroissement des charges publiques. Le gouvernement dut résoudre le problème de l'équilibre budgétaire par la suppression des impôts indirects sur quelques produits particuliers et leur remplacement par la taxe générale sur le chiffre d'affaires. Assis sur les produits vendus à tous les stades de transactions, le nouvel impôt devait procurer au budget une recette substantielle d'environ 100 millions de riels (en 1950). Cependant, le système d'imposition en cascade présentait entre autres l'inconvénient d'être vulnérable à la fraude. Elle exigeait un contrôle rigoureux des entreprises et maisons de commerce qui étaient nombreuses. Ce système dut être lui-même réformé par la loi de finances de 1958 qui lui substitua le système de taxation unique à la première vente. D'un champ d'application plus réduit – puisque l'impôt ne frappe plus que les premières ventes des produits – mais d'un tarif plus élevé, la taxe sur le chiffre d'affaires réformée fournit un rendement très satisfaisant presque comparable à celui des droits de douane sur les importations (près d'un milliard de riels en 1967). Depuis 1958, quelques remaniements de tarif sont intervenus dans le sens de l'augmentation, notamment pour les produits dits de consommation somptuaire: boissons alcoolisées, fruits exotiques, produits de conserve importés etc...

Pour les droits de douane, le tarif actuellement en vigueur a été promulgué par la loi du 13 Août 1959 qui remplace celui de 1949. Le législateur de 1959 a profité de la nationalisation de la législation douanière pour rénover le tarif institué depuis l'époque de l'Union douanière indochinoise, sauf en ce qui concerne les droits consolidés par le G.A.T.T. pour certains produits (lait, huiles minérales, voitures de transport de personnes etc...) et ceux relevant du régime préférentiel pour certains produits en provenance de la France (huiles végétales, produits de conserves, chocolat, machines et appareils divers etc...). Cette réforme, qui a le mérite de respecter dans ses grandes lignes l'esprit du G.A.T.T., a cependant apporté une certaine amélioration du rendement:

(Prévisions en millions de riels)

1958	1959	1960	1963	1966
726,8	789,5	908,5	946	1.100

Mais c'est surtout en matière de droits de consommation qu'on a enregistré une amélioration la plus sensible. La modification du tarif décidée au début de 1964 à la suite de l'abandon de l'aide américaine a provoqué un grand bond au point de vue de rendement de ces impôts:

(Prévisions en millions de riels)

1961	1963	1964	1966	1967
404,5	484	646	900	1.057,5

IMPERATIF ECONOMIQUE

L'étude rétrospective de la fiscalité cambodgienne a permis de révéler que malgré le souci de l'équilibre budgétaire elle n'a pas perdu de vue les objectifs d'ordre économique. Elle s'est efforcé d'être relativement neutre et stimulante du développement économique.

a/– Neutralité des impôts cambodgiens.– La neutralité fiscale implique à priori l'idée d'abstention de toute initiative en matière d'impôt jugée néfaste au développement économique. Dans les pays modernes on ne peut parler de la neutralité absolue, car chaque gouvernement, en créant des impôts ou en entreprenant une réforme fiscale a en vue d'autres objectifs que celui de la neutralité: justice, rendement financier, simplification des règles d'assiette. Or, ces objectifs se concilient parfois très difficilement avec celui de la neutralité.

Elle implique également l'idée que le système fiscal doit être revisé de temps à autre afin de neutraliser les effets de la conjoncture, notamment ceux de la hausse des prix. Nous donnons ci-après quelques exemples de la neutralité des impôts cambodgiens.

A l'égard des biens de production, la fiscalité cambodgienne n'était pas neutre au début. En effet, l'importation de ces biens était soumise aux droits d'importation, et la transaction intérieure portant sur ces biens donne lieu à la perception supplémentaire de la taxe sur le chiffre d'affaires. Cette surtaxation devait normalement produire un effet discriminatoire contre toute initiative visant à moderniser l'équipement de l'entreprise, puisque un chef d'entreprise avisé aurait préféré embaucher à la place une main-d'oeuvre supplémentaire moins coûteuse. Progressivement le législateur a atténué cette discrimination entre facteurs de production. Il a commencé par exonérer des droits d'importation sur les biens d'équipement les entreprises étrangères jugées économiquement utiles pour le Royaume. La loi de Finances de 1961 a étendu cette faveur fiscale – car ce n'est pas encore une mesure d'ordre général – aux entreprises nationales et mixtes. Pour ce qui est de la taxe sur le chiffre d'affaires, la loi du 9 Octobre 1959 autorise le Ministre des Finances à réduire dans la proportion de 50% au maximum la taxe frappant les transactions sur les biens d'équipement importés. Bien qu'en droit le régime de droit commun soit encore la taxation partielle des biens d'équipement, il importe de souligner qu'en fait les chefs d'entreprise peuvent éviter cette taxation en demandant aux services économiques l'attribution des devises nécessaires pour l'importation directe de ces biens. Comme la taxe ne s'applique que lorsqu'il y a importation pour la revente, toute importation directe par le chef d'entreprise ne doit donner lieu à aucune imposition. Ainsi, plus ou moins consciemment, le systéme fiscal cambodgien en arrive à une forte détaxation des biens de production, réalisant de ce fait une neutralité relative vis-à-vis d'eux.

Pour ce qui est de la formation de l'épargne et du mouvement des capitaux, il est admis que les investissements librement décidés par l'intermédiaire du marché financier sont généralement plus rentables que ceux opérés par les sociétés, lesquelles doivent respecter l'objet des statuts. Taxer les revenus individuels des personnes physiques plus lourdement que les revenus des sociétés affectés au réinvestissement, ce serait favoriser ce genre d'investissements qui ne sont pas forcément les plus rentables. La neutralité fiscale suppose un poids d'impôts relativement identique au stade de l'emploi des revenus, que ceux-ci appartiennent aux personnes physiques ou aux sociétés.

Sur ce point, le système cambodgien présente quelques caractéristiques de neutralité. En effet, jusqu'au stade de l'emploi des revenus, le poids fiscal sur les revenus individuels et celui sur les revenus des sociétés sont à peu près égaux. Les bénéfices des sociétés, bien qu'ils soient soumis au taux proportionnel modéré de 25%, supportent un autre impôt de 15 à 20%, l'impôt sur le revenu des valeurs mobilières, pour la partie affectée à l'augmentation du capital social nécessitée par les investissements. Quant aux bénéfices des entreprises individuelles, l'entrepreneur peut en disposer après paiement de l'impôt sur les bénéfices de 13% à 62%, progressif mais unique.

Le raisonnement qui vient d'être fait à propos de la formation de l'épargne fait abstraction des effets de la hausse des prix. En période d'inflation, la neutralité fiscale réalisée subit nécessairement une altération. En effet, l'inflation a pour effet d'augmenter le montant nominal des revenus. Elle fait passer dans le champ d'imposition de l'impôt progressif une partie de la tranche de revenu qui aurait pu échapper à la taxation par le jeu des abattements. De même, l'augmentation nominale des revenus entraîne l'application des taux progressifs plus lourds. Les personnes physiques titulaires des revenus verront leur pouvoir d'achat réel diminuer d'une partie correspondant au prélèvement fiscal supplémentaire ainsi opéré. Par contre, les revenus des sociétés soumis aux droits proportionnels ne subissent pas une détérioration comme ceux des personnes physiques. Pour neutraliser les effets perturbateurs de la hausse des prix, la revision de tarif des impôts progressifs s'impose. C'est précisément dans ce but que les lois de finances de 1961 et 1966 ont modifié les tarifs progressifs de l'impôt sur les bénéfices et de l'impôt général sur le revenu des personnes physiques dans le sens de la modération.

Vis-à-vis des structures des entreprises, le système de la taxe sur le chiffre d'affaires d'avant la réforme de 1958 n'était pas neutre. En effet, avant cette date, cet impôt était en cascade, donc cumulatif. Il frappait les transactions à tous les stades, et les produits intermédiaires de fabrication supportaient autant de fois cet impôt qu'il y avait de cessions de produits d'une entreprise à l'autre. Il en résultait une pénalisation des entreprises isolées se livrant chacune à la fabrication des produits intermédiaires déterminés, car les impôts payés à l'occasion des cessions de produits d'une entreprise à l'autre s'ajoutent les uns aux autres et le total pesait lourdement sur les prix des produits finis au bout du cycle. Par contre, les entreprises intégrées jouissaient d'un avantage fiscal d'autant plus important que le produit exigeait un cycle de fabrication plus long.

En remplaçant le système d'imposition à cascade par celui de taxation unique à la première vente et en autorisant chaque entreprise à déduire du chiffre d'affaires imposable la valeur des biens intermédiaires déjà taxés à la première vente, la réforme de 1958 a atténué notablement l'inconvénient d'ordre économique de la taxation discriminatoire des entreprises.

b/– Mesures fiscales considérées comme stimulantes des activités économiques. – L'Etat cambodgien, comme tout autre Etat nouvellement indépendant, a le devoir de veiller sur son économie et de lui assurer une croissance régulière. Comme les finances de l'Etat ne peuvent pas encore dégager une épargne importante nécessaire aux investissements publics et que le recours exclusif à la méthode du financement par le déficit n'est pas sans conséquences néfastes sur les prix et sur l'économie en général, le pays a dû accorder une place aux capitaux étrangers et aux capitaux privés intérieurs. Parmi les mesures prises par le gou-

vernement pour inciter les détenteurs de capitaux à investir, quelques-unes sont d'ordre fiscal. A défaut d'un code d'investissement approprié, les mesures fiscales stimulantes font l'objet des lois isolées dont les principales sont celles promulguées en 1957, en 1960, en 1961 et en 1965.

La loi de 1957 traite des avantages fiscaux réservés aux capitaux étrangers investis dans le pays. En faveur des entreprises étrangères présentant un intérêt exceptionnel pour le Royaume, des exonérations fiscales peuvent être accordées par le Ministère des Finances pour les bénéfices réinvestis, pour les biens d'équipement ou les matières premières importés pendant les premières années d'exploitation. La loi du 6 Mars 1961 a étendu l'exonération des droits d'importation sur les biens d'équipement aux entreprises locales. La loi de finances de 1965 a implicitement mis fin à la distinction entre les capitaux étrangers et les capitaux nationaux au point de vue d'avantages fiscaux. Désormais, les investissements des capitaux réalisés dans les entreprises agréées par le Gouvernement Royal peuvent bénéficier des avantages énumérés ci-après pendant les premières années d'exploitation:

- exonération des droits d'enregistrement et de timbre sur les actes constitutifs des sociétés ainsi que pour les augmentations de capital social;
- exonération des droits d'importation des biens d'équipement et des produits de base nécessaires au fonctionnement de l'entreprise;
- exonération des impôts fonciers (pour les exploitations agricoles);
- exonération de l'impôt sur les bénéfices;
- exonération de l'impôt sur les revenus des valeurs mobilières, pour les revenus distribués et en cas d'augmentation de capital par incorporation des réserves.

Les entreprises agréées peuvent, sur autorisation ministérielle, opérer des amortissements accélérés sur les immeubles et sur les biens d'équipement. En autorisant ce genre d'amortissements, l'Etat entend différer l'imposition des bénéfices pour un laps de temps déterminé, surtout pendant les premières années de démarrage où l'exploitation n'est pas forcément ou tellement rentable. Il ne l'abandonne pas définitivement.

Les entreprises bénéficiaires sont surtout celles qui contribuent au progrès de l'agriculture (engrais chimiques) ou qui constituent ses débouchés immédiats (industries alimentaires), celles se livrant à la fabrication des produits de grande consommation (produits pétroliers) ou qui sont susceptibles de faire gagner au pays des devises importantes (industries hôtelières de classe internationale).

Dans le domaine de l'agriculture, le législateur entend favoriser des cultures produisant pour l'exportation (hévéas, maïs) ou pour la consommation intérieure en remplacement des produits étrangers (thé, café, plantations de cocotiers à huile).

Malgré ce développement de la législation fiscale, beaucoup de problèmes restent en suspens. Par exemple, elle n'a pas encore mis au point la définition de l'établissement stable pour l'imposition des revenus. Elle n'a pas non plus prévu un régime de faveur pour les redevances d'exploitation des brevets d'invention, des licences et marques de fabrique étrangères, ni instauré un système destiné à éviter les doubles impositions des revenus des capitaux et des techniciens étrangers. Or le pays a besoin, du moins pendant cette phase initiale de l'industrialisation, d'apports d'experts, de connaissances et de techniques étrangers.

Cette situation ne saurait durer sans créer de sérieuses entraves aux facteurs essentiels de progrès. Sans doute, il existe des arrangements

pour des cas particuliers soulevés par exemple par la présence des techniciens étrangers. Mais ces actes n'ont pas la portée des lois à caractére général. Des conventions ou des accords fiscaux viendront peut-être un jour régler ces problèmes délicats.

AVANTAGES FISCAUX POUR LES INVESTISSEMENTS DANS UNE REGION DU BRESIL

Les mesures prises par le Gouvernement brésilien tendant à favoriser les investissements étrangers dans la région "légale" d'Amazonie ont été modifiées et étendues par les lois n°s 5173 et 5174 du 27 Octobre 1966 et publiées au Journal Officiel le 31 Octobre 1966. Ces lois réglementent les investissements de la zone brésilienne des Etats d'Acre, Para, Amazonas, une partie de Mato Grosso, une partie de Goias et de Maranhao ainsi que tous les territoires de Amapa, Roraima et Rondonia. Le tout représentant une très importante superficie.

Nous allons brièvement analyser ces deux lois qui présentent dans leurs lignes générales, des principes identiques à ceux de SUDENE (organisme créé en vue d'aider le développement des régions situées au nord et à l'est du Brésil) et ont créé SUDAM (Superintendance de Développement de l'Amazonie) et ont supprimé SPVEA (Superintendance du Plan de Mise en Valeur de l'Amazonie).

1° Sudam examinera les établissements qui sont déjà installés en Amazonie ou qui doivent s'y installer. Les établissements qui auront été approuvés bénéficieront jusqu'à l'exercice 1982 inclus, de l'exonération de l'impôt sur les bénéfices et n'importe quel autre impôt additionnel sur les résultats financiers, dans les conditions suivantes:

a) 50% pour les établissements qui se trouvent effectivement installés à la date de la publication des lois mentionnées plus haut;

b) 100% pour les établissements qui s'installeront légalement avant la fin de l'exercice financier de 1971, ou qui seront installés mais n'auraient pas encore commencé leurs opérations ou qui agrandiraient, moderniseraient ou augmenteraient leur potentiel industriel par la mise en service de nouveaux équipements avant la fin de l'exercice financier de 1971.

2° Le montant de l'exemption devra être incorporé au capital de la personne juridique bénéficiaire, avant la fin de l'exercice financier suivant celui durant lequel la dispense de paiement de tout impôt ou taxe fédéral aura été accordée. L'octroi des actions ou parts de capital découlant de cette capitalisation ne sera pas soumise à impôts.

3° Les personnes juridiques qui ont une activité industrielle ou agricole établies dans la région protégée par SUDAM, bénéficieront de l'exemption des impôts et taxes fédéraux. L'augmentation correspondante de capital fait avec des fonds provenant de réserves ou de bénéfices non distribués ne sera pas soumise à l'impôt dans la mesure ou l'augmentation a été faite dans l'année suivant la date de publication du règlement de la fin n° 5.174. L'octroi d'actions ou parts de capital provenant de ces capitalisations ne seront pas soumises non plus à l'impôt sur les revenus.

4° L'importation de machines et équipements destinés à l'Amazonie pour le fonctionnement d'entreprises déclarées prioritaires par la SUDAM pour le développement de la région sera exempte de tout impôt même indirect. Dans les mêmes conditions on pourra importer des moteurs maritimes.

5° Toutes les personnes juridiques enregistrées dans le pays pourront déduire de l'im-

pôt sur le revenu et additionnels:
a) Jusqu'à 75% de la valeur des "Obligations d'Amazonie" émises par la Banque d'Amazonie S.A. dans le but spécifique d'augmenter les ressources de FIDAM (expliqué plus bas). Ces obligations seront nominatives, intransmissibles et rachetables dans un délai de 10 ans dans les conditions et avantages établis par le Conseil Monétaire National;
b) Jusqu'à 50% de la valeur de l'impôt dû, pour des investissements dans des projets agricoles, industriels ou de services essentiels déclarés d'intérêt pour le développement de l'Amazonie. Les services essentiels sont ceux relatifs à l'énergie, au transport, aux communications, au tourisme, à l'éducation et à la santé publique conformément au règlement établi par la SUDAM.

6° Pour obtenir l'avantage mentionné à l'article 5 b), il est nécessaire que le contribuable ou l'entreprise bénéficiaire de cette disposition, participe effectivement au financement des investissements du pays avec des fonds propres jamais inférieur à 1/3.
Les projets des investissements en Amazonie pourraient être classés d'après un barème de priorité et c'est ainsi qu'un projet pourrait être qualifié de première priorité selon l'intensité de l'utilisation des matières premières et de main d'oeuvre originaire de l'Amazonie.
Les réductions mentionnées dans le Point 5°) a) et b) ne pourront pas surpasser, séparés ou conjointement, dans chaque année fiscale 50% de la totalité de l'impôt sur le revenu auquel est assujettie la personne morale en question.

7° Pour bénéficier des avantages mentionnés dans le point 5°) b), la Société qui a commencé ses activités en Amazonie devra déposer sa déclaration annuelle d'impôts sur le revenu à la Banque d'Amazonie S.A. ainsi que le montant des impôts que cette société aurait dû payer avant l'institution de SUDAM. Cette Banque bloquera les fonds jusqu'au moment de la reconnaissance de cette société par SUDAM comme rentrant dans le cadre de la protection.
Une société qui a obtenu la reconnaissance de SUDAM doit continuer à déposer sa déclaration d'impôts et les fonds correspondants pendant une période relativement longue, de façon à bénéficier de ce qui est prévu dans le système de SUDAM pour les réinvestissements.

8° Pour bénéficier également de ce qui a été exposé dans le point 5 b) les actions et parts de capital devront être nominatives et ne pourront pas être transférées pendant une période minimum de 5 ans.
Dans le cas d'investissement dans des sociétés anonymes, un minimum de 50% des actions du total de l'investissement devra être composé d'actions préférentielles sans droit de vote dans les Assemblées s'il s'agit de modifier le montant de capital de ladite société. La situation des titulaires d'actions ordinaires est protégée par la loi dans la mesure où ces actionnaires représentent un minimum de 25% du capital, en lui donnant droit à un représentant au Conseil d'Administration.

9° Le régime légal que nous sommes en train d'analyser a créé aussi un "Fonds pour les investissements privés dans le développement de l'Amazonie" (FIDAM). Avec ce Fonds, des obligations d' "Obligations d'Amazonie" seront émises par la Banque d'Amazonie S.A.
Les capitaux de FIDAM sont utilisés pour aider l'initiative privée dans les projets d'établissement des activités privées qui aident le développement de cette région spécifique, particulièrement dans les cas des activités industrielles qui utiliseraient les ressources naturelles et agricoles de la région.

10° Aucune distinction n'existe, bien sûr, entre les investissements faits avec des capitaux étrangers ou locaux.

Dans le cas où une même compagnie a fait des investissements à la fois dans le cadre de SUDAM (que nous venons d'étudier) et celui de SUDENE (structure similaire qui vise les activités dans le nordest du Brésil) les déductions d'impôts sur le revenu ne pourront au total dépasser 50%.

FRANK K. HASZARD*:

THE TAX LIABILITY OF FOREIGNERS ON BUSINESS TRANSACTIONS IN PUERTO RICO

Puerto Rico is today one of the most rapidly developing areas in the world. Per-capita income has risen from $ 118 in fiscal year 1940 to $ 1,037 in fiscal 1967. During the last five years national income has increased at the rate of approximately 10 per cent a year.

Such a dramatic growth rate can be attributed largely to the development of an industrial complex with tremendous potentialities. To take but one example, the petro-chemical industry has advanced with enormous strides in the last few years. As a result, it is anticipated that in the not too distant future Puerto Rico may well become one of the world's leading producers in that important field.

This success story is based on imaginative leadership—a leadership that realistically evaluated the Island's liabilities and assets. It chose not to be overwhelmed by the liabilities, such as a super-abundant population and a dearth of natural resources. Instead, primary stress was laid on the asset side of the picture—fiscal autonomy, combined with free access to the United States market.

We used our fiscal autonomy by granting industrial tax exemption, which we have found to be a powerful stimulus to the establishment of manufacturing operations on the Island. In essence, anyone who operates a hotel or who produces or seeks to produce on a commercial scale in Puerto Rico any manufactured product which was not produced on such a scale prior to 1947 is eligible for industrial tax exemption. Under this program income and property taxes (as well as certain other minor taxes) are forgiven for a period of from 10 to 17 years, depending upon the location of the establishment. Or, if it chooses, a firm may take exemption from half of its tax burden for twice the number of years.

The industrial tax incentives program has been highly effective in attracting new firms from the United States. Our success in attracting foreign-based enterprises has been less spectacular. In the first place, although we have a plentiful supply of skilled and semi-skilled labor, its costs are generally somewhat higher than in most foreign countries. In the second place, for purpose of customs duties, Puerto Rico is considered a part of the United States tariff area. That is, United States Customs are fully applicable on the importation of merchandise from foreign countries. However, there is one exception to this second point. Near the port of Mayaguez there is located a Foreign Trade Zone into which foreign goods may be imported, for manufacturing or processing, without payment of U.S. duties. Those goods which are shipped out of the Trade Zone to foreign destinations are exempt, while those which are introduced from the Trade Zone into Puerto Rico or the United States are subject to the regular tariff rates.

In any event, the rapid development of the Island has naturally led to an increase in trade of alle classes, including that with foreign countries. For example, in 1940 Puerto Rico's foreign trade consisted of only $ 6.5 million in imports and $ 1.4 million in exports. On the other hand, in fiscal 1967 our imports from foreign countries had risen to $ 326.5 million, that is, more than 18 per cent of our

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total imports. Foreign exports were $62.0 million, or about 5 per cent of total exports. The wide disparity between foreign imports and foreign exports is largely attributable to our tremendous importations of foreign petroleum and petroleum products, originating mainly in Venezuela and the Netherlands Antilles. In turn, the petro-chemicals produced from these importations are destined primarily to United States markets.

Of course, the expansion of foreign trade inevitably means that more and more foreigners are becoming involved in business dealings with Puerto Rico. The individuals or corporations concerned may not always be perfectly aware of the tax implications inherent in such dealings. It is hoped that the following paragraphs will help to clear up some of the doubts that may exist with respect to the taxability of those transactions.

First of all, it has already been mentioned that Puerto Rico enjoys fiscal autonomy. This means that, as a general rule, Federal taxes are not locally applicable. The main exceptions are Federal customs duties and the Federal social security tax, which are collected in Puerto Rico as they are in the United States. In addition, individuals, including resident aliens, who move from the United States to Puerto Rico are subject to the Federal income tax on all income until residency in Puerto Rico has been established. (It may be mentioned that a resident alien of Puerto Rico is considered, for Federal tax purposes, a nonresident alien). Therefore, when we speak of the taxation of foreign business transactions in Puerto Rico, we are necessarily referring to the Commonwealth taxes that may be applicable. Of these, the Commonwealth income tax is by far the most important, and on this tax we shall concentrate our attention.

The Commonwealth of Puerto Rico imposes a tax on the income of individuals and corporations under provisions of the Income Tax Act of 1954, as amended. The Law defines a "taxpayer" as any person subject to income tax[1]. The term "person" includes an individual, a trust or estate, a corporation, or a partnership[2]. Since estates and trusts are generally taxed in the same manner as individuals[3], and partnerships are subject to the same provisions as corporations[4], the several classes of taxpayers may be broadly classified into two groups—individuals and corporations.

It should be cautioned that the term "corporation" is not used in a limited sense of an artificial person. It includes a general or limited partnership, a joint stock company, and, in general, any organization or association "which, in like manner as corporations, may continue to exist regardless of the changes in the membership thereof[5]..."

A corporation, created or organized in Puerto Rico under Commonwealth legislation is called a "domestic corporation". A "foreign corporation" is one not created or organized in Puerto Rico or under the laws of Puerto Rico[6]. A domestic corporation is a "resident corporation", whether or not it is engaged in trade or business in Puerto Rico. A foreign corporation is considered a "resident corporation" if it is engaged in trade or business within Puerto Rico. If not, it is considered a nonresident foreign corporation[7].

On the other hand, alien individuals may either be residents or not residents. In turn, these individuals may be engaged in trade or business in Puerto Rico, or not.

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1 Section 411(a) (12). All statutory provisions henceforth cited refer to section numbers of the Income Tax Act of 1954, as amended.
2 Section 411(a) (1).
3 Section 161(a).
4 Regulations, Article 411-4.
5 Section 411(a) (2).
6 Section 411(a) (4) and (5)
7 Regulations, Article 411-8.

THE FOREIGN CORPORATION. The tax applicable to a foreign corporation or partnership depends upon whether or not it is engaged in trade or business in Puerto Rico. If the foreign corporation is engaged in trade or business in Puerto Rico it is taxed on its income from sources within Puerto Rico on the same basis as domestic corporations. This tax is graduated with rates ranging from a minimum of 21 per cent to net incomes of less than $ 33,333.33 to a maximum of 36.75 per cent applicable to the amount of any net income in excess of $ 133,333.33[8].

The foreign corporation or partnership not engaged in trade or business within Puerto Rico is taxed at a flat rate of 29 per cent of income derived from sources within Puerto Rico. However, dividends or partnership profits received from corporations or partnerships engaged in the operation of hotels or a manufacturing business within Puerto Rico are taxed at 15 per cent[9]. It should be noted that the applicable tax in either of these cases is withheld at source, before any payment is made to the foreign corporation or partnership[10].

INDIVIDUALS. Like a corporation, an alien individual may be a resident of Puerto Rico, in which case he is taxable on all income from sources within and without Puerto Rico at progressive rates, ranging from a minimum of 12.6 percent on taxable incomes of less than $ 2,000 to a maximum of 82.95 per cent on that portion of taxable income in excess of $ 200,000[11]. In addition, the alien resident is permitted all the applicable credits and deductions provided for by Sections 23 and 25 of the Law.

The treatment of a nonresident alien individual depends upon whether such individual is engaged in trade or business in Puerto Rico or not. Under Section 211 (b) of the Law, a nonresident alien individual is considered to be engaged in trade or business in Puerto Rico if he performs a personal service within Puerto Rico at any time during the taxable year unless (1) he was not in Puerto Rico for more than 90 days, (2) he did not earn more than $ 3,000 or, (3) he worked for a foreign enterprise not engaged in trade or business within Puerto Rico. If any one of these conditions is met by a nonresident alien individual he is not considered to be engaged in trade or business within Puerto Rico.

The distinction is important. The nonresident individuals engaged in trade or business within Puerto Rico are subject to the same rates of tax as the resident individuals. They are taxable at the full rates not only on their recurrent or periodical income but also on capital gains, as well. Furthermore, they are allowed as deductions only certain losses, provided by Section 23 (a) (2) and (3), and charitable contributions under Section (23 (o). Other deductions, such as the standard deduction provided in Section 22 (aa), are not allowed. Finally, the personal exemption and credits for dependents provided under Section 25 are not allowed[12].

On the other hand, nonresident alien individuals not engaged in trade or business in Puerto Rico are subject to a flat rate, withheld at source[13], of 30.45 per cent, on the sum of recurrent or periodic gross income from sources within Puerto Rico and includable capital gains[14], provided that the total is less than $ 22,222.22. On incomes higher than this amount, rates and tax treatment are similar to those applied to nonresidents engaged in trade or business in Puerto Rico. No exemptions or credits are allowed.

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8 Sections 13(b), 26(b), and 406(a).
9 Section 231(a).
10 Section 144.
11 Sections 12 and 406(a).
12 Section 214.
13 Section 143.
14 Sections 211(a) (1) and 406(a).

It should be pointed out that the tax withheld at source, both for corporations and individuals, is completely unrelated to the fact that the income may or may not be derived from the distribution of profits of tax-exempt enterprises. That is, the exempt status of the income of a particular firm is applicable as long as its profits are not transferred out of Puerto Rico. In other words, if these profits are maintained in the business or distributed to residents of Puerto Rico they are exempt. But if they are transferred to nonresidents, the corresponding withholding tax applies. There is one notable exception to the withholding tax, in the case of both corporations and individuals. That is, the provisions for withholding of the tax (29 per cent in the case of foreign corporations and 30.45 per cent in the case of alien individuals) do not apply to interest on deposits with persons engaged in the banking business in Puerto Rico, neither to tax exempt interest under the provisions of Section 22 (b) (4) of the Law, nor to remuneration as pensions for services rendered. In effect, these forms of income are exempt from taxation if received by nonresident aliens.

The foregoing has been a brief summary of the income tax treatment of foreigners deriving income from sources within Puerto Rico. Whether or not income is derived from sources within Puerto Rico is another question. However, in general, a foreign firm that merely sells merchandise to firms or individuals in Puerto Rico receives no income from sources within Puerto Rico unless it maintains an office or place of business on the Island. Of course, the transferance of any other form of income, such as the distribution of corporate profits, is subject to the applicable provisions of our income tax law. In closing, it may be pointed out that certain other taxes, such as excises and municipal gross receipts taxes, are not applicable to any transaction involving the export of goods produced in Puerto Rico.

R.G. HOLLOWAY*:

U.K.: THE CASE FOR A GENERAL PAYROLL TAX

Economic development is impeded by a number of economic frictions. Undoubtedly the most important frictions currently affecting the British economy are those which misallocate capital resources and those which impede the most efficient use of labour. The actual increase in capital per worker in this country since 1938 compares favourably with increases in the United States and Germany. But much of this investment has been of the wrong type. There has, in other words, been a deficiency in the quality rather than the quantity of investment. The greater part of this deficiency is due to the fact that investment has not been sufficiently labour-saving in direction. Too much has been spent on the mere extension of plant, in excess of the labour available for working it. The result has been chronic surplus capacity in many industries despite adequate demand; and this surplus capacity cannot be brought into operation by the normal methods of economic stimulation. Among British enterprises generally, crude methods of investment appraisal appear to be delaying the introduction of more capital intensive methods of production well beyond the point at which they can be shown to have become economically attractive. At the same time, inadequate cost accounting combined with vague and sluggish forecasting appears to result in a normal tendency to hoard sub-marginally productive workers which substantially contributes to the serious aggregate shortage of labour which emerges in the absence of strong deflationary measures. It is part of the case for a general payroll tax that it would work against these economic frictions.

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INCREASED PRODUCTIVITY

To achieve the rate of growth which past consultation in the National Economic Development Council has indicated is possible, there is a strong underlying need to increase labour productivity. Greater investment is needed; so is an improvement in the attitude of both management and labour towards new methods of working. The primary and most urgent requirement, however, is a redeployment of labour away from low-productivity enterprises to those where the prospects for higher productivity can be immediately identified; away from such declining industries as shipbuilding, coal and cotton textiles to the growth industries of vehicles, electronics, plastics and petrochemicals.

It may be anticipated that a general payroll tax could, by increasing the cost of labour, be expected to lead quickly to greater efficiency in its deployment and accelerate the introduction of more efficient (frequently but not necessarily more capital-intensive) techniques. These advantages depend, of course, on the tax imposing a pressure of profit margins. Unfortunately, it is not at all obvious that such a pressure would result. There is ample recent evidence of wage increases being passed on in higher prices and this evidence suggests that a general payroll tax would also be passed on.

The possible effects of a general payroll tax can be examined with the help of a small number of highly simplified examples. Suppose, therefore, that there are two firms working at full capacity and making an identical product for sale in the same market. They have to charge the same price and their

sales receipts are therefore the same. Both firms employ the same amount of capital. Both have to pay the same wage rates but one firm employs more workers and its wage bill is therefore higher. With depreciation and other costs assumed to be nil, the situation might be as follows:—

	A	B
	£000	£000
Sales	1,000	1,000
Wages	700	900
Profits	300	100
40% corporation tax	120	40
Profits after tax	180	60

Here the efficient firm A is making trhee times as much profit as the labour-wasting firm B (the tax making no difference to this ratio). B's shareholders, if they are able to compare their profits with those of firm A, are likely to press for greater efficiency. But the knowledge of B's shareholders may be limited. In the actual world such pressures undoubtedly exist, but they are often too weak to be sufficient. It may therefore be concluded that a reinforcing pressure should be applied through tax discrimination against the less efficient. A payroll tax could be imposed with the intention of providing this discrimination.

AS ADDITION TO TAX BURDEN

The first case to consider is where a payroll tax is imposed without a reduction in other business taxes (a possibility which follows strongly from the current rate of growth in government expenditure). If this happened, firms able to administer prices would be tempted to raise them to maintain a constant rate of aftertax return on capital employed. If all prices rose equally, the value of stocks and of buildings, plant and machinery would also rise equally. This would raise the value of capital employed. To maintain the rate of return on capital employed, therefore, the amount of the price rise would have to exceed the amount of the tax. If, for instance, a 5 per cent tax is imposed on the wages of firms A and B, the result might be:

	A		B	
		£000		£000
Sales		1,050		1,050
Wages	700		900	
5% payroll tax	35		45	
		735		945
		315		105
40% corporation tax		126		42
Profits after tax		189		63

Here prices have risen by £100,000 while tax revenue has increased by only £88,000. But, as there has been no change in the ratio of after-tax profit to capital employed by either A or B, there has been no spur to greater efficiency through releasing hoarded labour or by investing in new machinery or in any other way.

It may also be noted that the rise in prices due to the tax has reduced the purchasing power of the tax revenue. If the Government has failed to anticipate this, an increase in the rate of tax can be expected. But whether this increase is in the rate of payroll tax or in the rate of corporation tax the only logical result is further inflation without any gain to efficiency. The purchasing power of wages has also fallen. This means that the tax has a regressive effect which has diminished social welfare. On the other hand, it has transfered resources from wage-earners (who would probably have spent the greater part on consumption) to Government (which would probably spend the greater part on investment) so that faster economic growth should result. Even so, the fall in the purchasing power of labour

is likely to lead to demands for increased wages, so completing the first circuit of an inflationary spiral at the cost of weakening the international payments position and pressing hard on those with fixed incomes while possibly also involving a loss of production through strikes.

There are, however, a number of improbabilities in this situation. Firstly, in itself, the tax does nothing to increase the monetary supply. If there is no increase in the monetary supply, the same volume of production cannot be sold at higher prices and—in the short run at least—firms are more likely to try to maximise sales than to try to maximise prices. The position is therefore quite different from the situation resulting from a general rise in wages (where the increased monetary supply permits price increases).* This limitation is most evident for exports. If export prices rise, less is likely to be sold because the income available in the foreign market remains unchanged.

Besides this monetary limitation to price increases, there is the limitation arising from the availability of foreign substitutes.

Foreign competition would also have the effect of tending to keep the value of stocks unchanged. This would, in turn, restrict an upward revaluation of capital employed. The availability of foreign plant and machinery would also restrict revaluation. It is, of course, possible that individual foreign exporters would grasp an opportunity to increase their prices in the UK market and in other markets where they compete with UK exporters and this action would tend to support revaluation. But this is not likely to be the general case. Higher distribution costs in the UK would marginally increase the cost of new capital equipment but would not affect the (historic cost or market sale price) value of existing investment.

Additionally, other costs not taken into consideration in our highly simplified example may remain unchanged, particularly where their prices have been fixed by contract (as in the case of leasehold rents and debentures). Even newly negotiated rents should rise less than the general level of prices since that element of the rental payment which represents the scarcity value of unimproved land will remain unchanged (the supply being fixed with no costs involved since unimproved land is the gift of nature while the demand price would remain unchanged because there are no additional competing uses and no increase in the general monetary supply). All these factors favour the capital-intensive producer.

A further factor is the existence of price stabilization machinery in the form of the Prices and Income Board. This factor could be of importance if it can be shown that the tax should have beneficial effects if prices are not raised.

It is impossible to quantify the effects of these factors. Despite this, it can reasonably be assumed that the tax would not be fully passed on and that some costs of production would not be affected (at least in the short run). If, for instance, a 5 per cent payroll tax is accompanied by a 2½ per cent rise in prices, the result for firms A and B might be:—

	A		B	
	£000		£000	
Sales		1,025		1,025
Wages	700		900	
5% payroll tax	35		45	
		735		945
		290		80
40% corporation tax		116		32
Profits after tax		174		48

* Professor D.J. Robertson, "The Inadequacy of Recent Wage Policies in Britain", Scottish Journal of Political Economy, June 1958, pp. 106-107.

Here the after-tax profits of the inefficient firm compare less favourably with those of the efficient than before. There has, therefore, been a spur to efficiency at the cost of some inflation. In the long run this would probably be chiefly through investment in more and better plant and machinery. In the short run it might well be through releasing hoarded labour.

AS A SUBSTITUTE

Inflation might also have occurred if increased Government commitments had been met by increasing existing business taxes. In this case, there might not have been any beneficial effect. The imposition of a payroll tax to raise additional tax revenue is therefore better regarded as a substitution for increases in other business taxes. For simplicity of analysis, it therefore seems best to assume that the introduction of the payroll tax is accompanied by a reduction in corporation tax so that the total tax yield is unaffected. Provided there are no price changes, it would appear that a 10 per cent payroll tax applied to the corporate sector would yield enough revenue to offset the abolition of corporation tax. (Equity would demand that a payroll tax should also be applied to the non-corporate sector and also offset by the reduction of business taxes in that sector but this is a detail which need not detain us). Applying this rate to firms A and B gives the following result:—

	A	B
	£000	£000
Sales	1,000	1,000
Wages	700	900
Pre-tax profits	300	100
10% payroll tax	70	90
Profits after tax	230	10

Here the after-tax profits of the efficient firm have been increased while those of the inefficient firm have fallen. This result may be compared with a value-added tax situation.

VAT COMPARED

A comparison of value-added tax and payroll tax involves four main considerations. These are:—
the effect on economic efficiency and growth;
the effect on prices;
the effect on the balance of payments;
the ease and economy of collection.
Ultimately, the first three considerations are inter-dependent but, for the sake of simplicity, analysis is restricted to the first-stage effects.

EFFICIENCY AND GROWTH:

The example below illustrates the situation with VAT imposed to yield the same revenue as a 10 per cent payroll tax:—

	FIRM A	FIRM B
	£000	£000
Sales= value added	1,000	1,000
Wages	700	900
Pre-tax profits	300	100
8% VAT	80	80
Profits after tax	220	20

By comparing this example and the earlier example with a 10 per cent payroll tax, it can be seen that a payroll tax is more favourable to efficiency (and, therefore, growth) than a VAT. This is because the VAT includes profits in its tax base whereas the payroll tax does not.

PRICES: Since a firm of above-average efficiency would expect to have larger after-tax

profits with a payroll tax than it would have with VAT, it would be better able to absorb increases in costs due to factors unconnected with the tax (such as improvements in quality). In a competitive situation, the result should include reduced prices.

Some British industries, however, set prices to maintain a satisfactory rate of profit for their least efficient members. This would imply that a payroll tax would lead, in these instances, to higher prices than those which would follow from a VAT. But, in view of the compensating reduction or abolition of other taxes, this results depends on there being no action by the Restrictive Practices Court or the Prices and Incomes Board. It also depends on there being no monetary limitations on total demand, on the non-availability of competitive imports, and on there being no switch in demand to the products of other industries.

In the long run, any increases in the prices of labour-intensive products should be more than offset by the lower level of other prices as the result of more capital-intensive production.

BALANCE OF PAYMENTS: It is generally accepted that a VAT may be rebated on exports without contravening international treaty obligations and that a payroll tax may not. However, neither GATT nor EFTA mention payroll tax and it would appear that the belief that a payroll tax would contravene these treaties results from the equation of payroll tax with social welfare charges (which are listed among the taxes which may not be rebated). Most payroll taxes are social welfare charges. One exception is the selective employment tax. Another is the Australian payroll tax and this tax is rebated on exports without challenge. It must be pointed out, however, that Australia is not a signatory to the relevant provisions of GATT and is not an important exporter of those classes of goods which attract the prohibitions.

COLLECTION: The existence of a monthly invoice-based VAT in France and the EEC reports on tax harmonisation are evidence of the practicability of VAT. However, a payroll tax would be simpler and cheaper to collect.

A possible objection against both payroll and value-added taxes is that they discriminate against the labour-intensive firm even when it is equally efficient. While this situation seems likely to be rare, a bias in favour of capital-intensive methods seems desirable to eliminate the uneconomic lapse in technological adaptation which appears to arise with non-discriminatory treatment.

REDEPLOYMENT

The case for a payroll tax is much stronger if it can be shown that its introduction is likely to redeploy the labour force, moving workers from low-productivity employment to highly productive utilisation of plant which had previously been idle through an inability to recruit workers for it (and, by extension, to the utilisation of plant which had not been bought because of the anticipated problem of recruiting labour for it).

The first difficulty to consider is why this move may not have already taken place since the more highly productive work can be expected to be better paid. Generally, it undoubtedly is. But often the wage premium may be insufficient to induce the employee to change his work. National wage agreements and gentlemen's agreements between managements may be important factors restricting the wage premium for more productive work. A further factor impeding labour mobility is undoubtedly the code of management ethics which led the managing

director of an important company to state: "The machine tool people say we have pinched their skilled workers. If they can show me anyone we have taken from them, I will be quite happy to sack him". Another major factor may well be that the more productive work utilises newer plant for which a higher return on capital is required. This increase in the rate of profit demanded necessarily reduces the amount of wage premium which the new firm is prepared to offer to attract labour. From the national point of view, this differential in the required rate of return on capital employed may often be too high. The evidence which exists suggests that this is so and the National Economic Development Council has already taken steps to publicise better methods of investment appraisal. A payroll tax would add a spur to better methods.

To illustrate the effect of a payroll tax with redeployment of labour to more productive work, let us suppose that firm B is an old firm with an old product and that it has been working below capacity as a result of a decline in demand which it thinks may be temporary but which is, in fact, permanent. It has therefore retained its full capacity labour force. By doing so, it has left A, a new firm with a new product, short of workers. Suppose, too, that the average annual workers payment is £1,000 in both firms. This would mean that A has 700 workers and B has 900. Suppose that the cut in after-tax profits resulting from a 5 per cent payroll tax persuades B to release 100 workers without having to reduce its production and that these 100 workers are used by A to increase production by 30 per cent. If prices remained unchanged as the result of A's increased output, the result might be:—

	A		B	
	£000		£000	
Sales	1,300		1,000	
Wages	800		800	
	500		200	
5% payroll tax	40		40	
20% corporation tax	100		40	
	140		80	
Profits after tax	360		120	

Here both firms are making twice as much after-tax profit as in the 40 per cent corporation tax situation. Tax revenue has also increased, enabling new socially desirable Government outlays to be undertaken. For the sake of simplicity of illustration, wage rates have been left unadjusted in the example but the improved productivity would undoubtedly enable them to be increased substantially. It is important to note that these gains are gains in real income terms, i.e. without inflation.

TAX NET

The form of the tax is important in relation to both equity and aggregate economic effect. If the tax is levied on the basis of monetary outlays it must, if it is not to result in widespread avoidance, include employers' outlays on wage and salary fringe benefits (which equal about 12 per cent of total payroll costs). The treatment of outlays on benefits such as subsidised canteen meals and company sports grounds might not involve difficulties of calculation but some adjustments would probably have to be made when taxing such items as employers' housing loans and superannuation contributions. A per capita tax involves the equitable need to make somewhat arbitrary adjustments for

part-time workers and juveniles (but not for women). But it has the advantage of bearing more heavily on the employment of the less skilled and can be expected to result in their upgrading after retraining, particularly if the tax is not levied on trainees. A flat rate tax of, say, 1/- per hour (roughly the cost of the payroll taxes in France and Germany) would avoid the difficulty of adjustment for part-time workers and also bear regressively on the employment of the less skilled. It would have a further advantage if it reduced overtime working without reducing production.

REVENUE USE

One use for the revenue of the tax which has been frequently suggested is the reduction or abolition of local rates on industrial and commercial enterprises, it being argued that not many direct services are provided to them. This argument seems to assume a cost-benefit relationship in taxation which does not conform either to modern taxation theory or to modern tax practice (which stresses rather the ability to pay). In any case, the benefit to industry of improved worker skill through better education and improved worker welfare through housing and the social services, although indirect, is not inconsiderable. Even if a cost-benefit approach were adopted, it would not be possible to measure this indirect benefit. More importantly, land and buildings are also scarce national resources and local rates help to ensure economies in their use.

The tax is, moreover, likely to generate its own expenditure. If it succeeds in its primary objective, a small part of the revenue will be needed to augment Government spending on the retraining and relocation of labour—itself to be desired. If its secondary objective is to be rapidly achieved, part of the remaining revenue ought to be used to provide additional investment grants. The balance not already committed could be used to reduce profits taxation and so reinforce the price reduction effect of the tax.

Additional uses of the tax could include the stimulation of regional development. Even if not rebated on exports, it should also stimulate them indirectly since, in bearing more heavily on the more labour-intensive service industries, it ought to release resources to the more export-orientated manufacturing sector which can also derive greater benefit from returns to scale. The rate of tax could also be periodically varied to permit the tax to be used as an economic stabiliser.

Is a payroll tax only desirable as a transitional measure? Certainly, its effect will be greatest at its introduction and will then decline. But it is unlikely that the position will be reached where it is no longer needed. Economic development is a matter of dynamics, not of comparative statics, and the abolition of the tax could be expected to renew the abrasive force of economic frictions.

CONCLUSION

To summarise: the case for a general payroll tax is that it could be expected to help maximise the efficient use of scarce resources. It should do this by overcoming two important economic frictions: the bias against labour-saving investment and the tendency of many firms to hoard labour which could be more productively used elsewhere. The burden of the tax should be borne by the producers who are making the least efficient use of their labour and capital resources. In the long run, real incomes can be expected to be increased all round.

A payroll tax would have better effects on economic efficiency, growth and prices than a value-added tax. It would also be simpler and cheaper to collect. Against these definite

advantages must be set the fact that there is no doubt that a VAT may be rebated on exports whereas there is some doubt about the rebateability of a payroll tax.

How far does the selective employment tax promise to fulfil the claims made for a general payroll tax? The SET, as the Chancellor's explanatory White Paper (Cmnd. 2986) stated, was expected to "provide a means of restraining consumer demand without again hitting severely those industries upon which indirect taxation is at present concentrated". Implicit in this statement is the assumption that the greater part of burden of the tax would be passed on to the consumer. This, however, is not an advantage claimed for a general payroll tax and it may be considered to be a serious long-term disadvantage. The selective tax has a secondary intention which is to give a spur to the movement of workers from services to the more export-orientated manufacturing sector. A general tax would also have this effect. But the choice of a selective tax ignores the fact that it is easier to move a worker from one factory to another than from, say, a hotel to a factory; and the gain is not necessarily less. There is, moreover the danger that the subsidisation of labour costs in manufacturing industry (where the scope for the replacement of labour by machinery is greatest) will result in its being used more carelessly. The conclusion must, therefore, be that a general payroll tax is to be preferred.

RESOLUTIONS DE LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE & D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE

HARMONISATION DES TAXES SUR LE CHIFFRE D'AFFAIRES DANS LES PAYS DE LA C.E.E. MESURES TRANSITOIRES RELATIVES AUX STOCKS ET AUX BIENS D'EQUIPEMENT

I LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE,

– Rappelant ses résolutions des 29 novembre 1962 et 14 novembre 1963 relatives à l'harmonisation des taxes sur le chiffre d'affaires dans les pays de la Communauté économique européenne;

– Se référant aux deux directives adoptées par le Conseil de la C.E.E. "en matière d'harmonisation des législations des Etats membres relatives aux taxes sur le chiffre d'affaires";

– Regrette que la deuxième directive du Conseil dont l'objet est de fixer les modalités d'application du système commun de taxe sur la valeur ajoutée se soit bornée, dans son article 17, à propos des mesures transitoires qui devront être prises en matière de stocks en vue de faciliter le passage des systèmes actuels de taxe à cascade au système commun de T.V.A., à n'évoquer que brièvement la faculté d'accorder une détaxation des stocks, sans même recommander que cette détaxation soit la plus large possible.

II LA CONFERENCE PERMANENTE

– Craint en effet qu'une détaxation insuffisante ou trop lente des stocks existant au moment de la mise en application de la T.V.A. ne présente de multiples inconvénients qui rendraient beaucoup plus délicat le passage au système commun de T.V.A.;

– Estime en particulier:

a) qu'elle entraînerait dans les mois précédant l'introduction de la T.V.A. une très forte rétention des commandes des entreprises en vue de réduire au maximum leurs stocks;

b) que par suite, elle perturberait gravement la vie économique, non seulement des Etats membres intéressés, mais encore de l'ensemble de la C.E.E. en accentuant vivement les tendances à la récession qui se manifestent dans l'évolution conjoncturelle;

c) qu'à ce titre, elle ne manquerait pas de susciter dans l'opinion publique et notamment dans les milieux industriels et commerciaux d'expresses réserves à l'encontre de l'adoption du système commun de T.V.A. si souhaitable par ailleurs;

d) qu'au surplus, dans l'hypothèse où ces stocks seraient – directement ou après transformation – exportés, cette rémanence d'impôt ne pourrait pas être compensée à la frontière et entraînerait des distorsions de concurrence entre les enterprises de la Communauté;

e) qu'enfin elle rendrait impossible dans l'immédiat le calcul, par les entreprises, du prix net des biens et des services que devrait pourtant permettre loqiquement l'adoption de la T.V.A.;

f) que, d'une manière générale, elle s'opposerait aussi bien sur les marchés nationaux que dans les échanges intra-communautaires à cette neutralité de l'imposition que vise pour-

tant l'institution d'un système commun de T.V.A.
– Attire l'attention sur le fait que toutes ces difficultés seront d'autant plus graves qu'elles se renouvelleront régulièrement au fur et à mesure de l'adoption du système commun de T.V.A. par chacun des Etats membres inréressés.

III LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE attire également l'attention sur les difficultés qui peuvent se présenter en matière de biens d'équipement.
La logique du système postule une neutralisation intégrale de l'impôt grevant ces biens. Les régimes transitoires à prévoir selon les dispositions de l'article 17 de la deuxième directive du Conseil devraient empêcher la réduction de la demande de biens d'équipement pendant la période précédant l'introduction de la T.V.A.

IV LA CONFERENCE PERMANENTE affirme qu'on ne saurait justifier l'insuffisance ou la lenteur de la détaxation par des considérations d'ordre budgétaire. En effet, les inconvénients conjoncturels et psychologiques qui en résulteraient seraient en dernière analyse beaucoup plus préjudiciables pour le Trésor.

le 1er décembre 1967

L'HARMONISATION DES DROITS D'ACCISE DANS LA COMMUNAUTE ECONOMIQUE EUROPEENNE

LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE,

Consciente de la nécessité d'une harmonisation, allant même jusqu'à l'unification des droits d'accise (c'est-à-dire des droits de consommation spécifiques frappant dans les six pays de la Communauté économique eupéenne différents produits à des stades variables de leur production ou de leur distribution), afin d'obtenir la suppression de toutes frontières fiscales et la réalisation d'un véritable marché commun;
Rappelant que l'article 99 du traité de Rome oblige la Commission européenne à examiner ce probleme et à soumettre des propositions au Conseil pour le résoudre et prévoit même l'utilisation de la procédure des articles 100 et 101 sur le rapprochement des législations pour obtenir les modifications législatives souhaitables;

Après avoir étudié les différents régimes d'accises en vigueur dans les six pays de la Communauté économique européenne;

AFFIRME:

1° qu'il est indispensable de maintenir dans tous les Etats de la Communauté un nombre suffisant d'impôts indirects, afin d'éviter un transfert brutal des impôts sur la consommation aux impôts sur les revenus ou sur la fortune, et même, si dans certains cas l'harmonisation des accises permettait de dégager des recettes supplémentaires, qu'il est souhaitable d'obtenir en compensation une réduction des charges directes;
2° que le mécanisme de l'impôt sur la consommation, s'il est convenablement conçu et n'est appliqué qu'à des produits facilement taxables et contrôlables, soit lors de leur production, soit au cours de leur distribution, doit permettre de déceler aisément et de réprimer efficacement toute fraude de nature à

troubler les conditions de concurrence;

3° que le régime des accises doit rester indépendant de celui de la taxation sur la valeur ajoutée, aucune confusion ne devant être possible entre les deux systèmes de taxation, c'est-à-dire les accises ne devant jamais être considérées comme des taux majorés de la taxe sur la valeur ajoutée;

4° que, dans l'ensemble des accises, il convient de distinguer celles qui frappent des produits sans concurrence possible dans le marché commun ou de consommation purement locale et celles qui, au contraire, frappent des produits dont la consommation peut être effectuée indifféremment et dans des conditions à peu près identiques dans chacun des six pays de la Communauté;

5° que, pour les produits de la première catégorie, toute liberté d'imposition doit être laissée aux gouvernements, les divergences d'imposition étant alors sans incidence sur la répartition des activités dans la Communauté puisqu'il n'y a pas de concurrence possible entre les marchés;

6° qu'en revanche, pour les produits de la seconde catégorie, dont les achats en vue de la consommation peuvent se faire indifféremment sur l'un ou l'autre des six marchés, les discriminations doivent être évitées et que les différents problèmes posés par l'application de ce principe doivent être traités selon la nature des droits en cause et leur objet, sans être isolées des exigences des politiques communes et des interventions particulières des pouvoirs publics – notamment dans le domaine de l'énergie et des transports:

7° que les monopoles de production et de distribution de certains produits soumis à accises doivent être adaptés aux conditions de la libre concurrence dans le marché commun, la Conférence Permanente se réservant de se prononcer à bref délai à cet égard, après un examen plus approfondi des conditions d'exercice des différents monopoles.

le 1er, décembre 1967

FOREIGN INVESTORS TAX ACT

UNITED STATES INTERNAL REVENUE CODE PROPOSED REGULATIONS

The Foreign Investors Tax Act 1966 wrought substantial changes in the taxation of income earned by aliens from United States sources. Consequently the Commissioner of Internal Revenue has issued proposed regulations defining and implementing these changes. The proposed regulations are reproduced below.

§ 1.864-1. Meaning of sale, etc.—For purposes of §§ 1.861 through 1.864-7, the word "sale" includes "exchange"; the word "sold" includes "exchanged"; the word "produced" includes "created", "fabricated," "manufactured," "extracted," "processed", "cured," or "aged."

§ 1.864-2. Trade or business with the United States.—(a) In general. As used in part I (section 861 and following) and part II (section 871 and following), subchapter N, chapter 1 of the Code, and chapter 3 (section 1441 and following) of the Code, and the regulations thereunder, the term "engaged in trade or business within the United States" does not include the activities described in paragraphs (c) and (d) of this section, but includes the performance of personal services within the United States at any time within the taxable year except to the extent provided in paragraph (b) of this section.

(b) PERFORMANCE OF PERSONAL SERVICES FOR FOREIGN EMPLOYER. For purposes of paragraph (a) of this section, the term "engaged in trade or business within the United States" does not include the performance of personal services—

(1) For a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States at any time during the taxable year, or

(2) For an office or place of business maintained in a foreign country or in a possession of the United States by an individual who is a citizen or resident of the United States or by a domestic partnership or a domestic corporation,

by a nonresident alien individual who is temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate a gross amount of $3,000. The term "day," as used in this paragraph, means a calendar day during any portion of which the nonresident alien individual is physically present in the United States. Solely for purposes of applying subparagraph (1) of this paragraph, the nonresident alien individual, foreign partnership, or foreign corporation for which the nonresident alien individual is performing personal services in the United States, shall not be considered to be engaged in trade or business in the United States by reason of the performance of such services by such individual. In applying subparagraph (1) or (2) of this paragraph it is immaterial whether the services performed by the nonresident alien individual are performed as an employee for his employer or under any form of contract with the person for whom the services are performed. See section 7701 (a) (5) and § 301.7701-5 of this chapter (Procedure and Administration Regulations) for the meaning of "foreign" when applied to a corporation or partnership. As to the source of compensation for personal services, see §§ 1.861-4 and 1.862-1. The application of this paragraph may be illustrated by the following examples:

Example *(1)*. During 1967, A, a nonresident alien individual, is employed by the London office of a domestic partnership. A, who uses the calendar year as his taxable year, is temporarily present in the United States during 1967 for 60 days performing personal service in the United States for the London office of the partnership and is paid by that office a total gross salary of $2,600 for such services. During 1967, A is not engaged in trade or business in the United States solely by reason of his performing such personal services for the London office of the domestic partnership.

Example *(2)*. The facts are the same as in example (1), except that A's total gross salary for the services performed in the United States during 1967 amounts to $3,500, of which $2,625 is received in 1967 and $875 is received in 1968. During 1967, A is engaged in trade or business in the United States by reason of his performance of personal services in the United States.

(c) TRADING IN STOCKS OR SECURITIES. For purposes of paragraph (a) of this section—

(1) In general. The term "engaged in trade or business within the United States" does not include the effecting of transactions in the United States in stocks or securities through a resident broker, commission agent, custodian, or other independent agent. This subparagraph shall apply to any taxpayer, including a broker or dealer in stocks or securities, except that it shall not apply if at any time during the taxable year the taxpayer has an office or other fixed place of business in the United States through which, or by the direction of which, the transactions in stocks or securities are effected. The volume of stock or security transactions effected during the taxable year shall not be taken into account in determining under this subparagraph whether the taxpayer is engaged in trade or business within the United States.

(2) TRADING FOR TAXPAYER'S OWN ACCOUNT.—(i) In general. The term "engaged in trade or business within the United States" does not include the effecting of transactions in the United States in stocks or securities for the taxpayer's own account, irrespective of whether such transactions are effected by or through—

(a) The taxpayer himself while present in the United States,

(b) Employees of the taxpayer, whether or not such employees are present in the United States while effecting the transactions, or

(c) A broker, commission agent, custodian, or other agent of the taxpayer, whether or not such agent while effecting the transactions is(*1*) dependent or independent, or (*2*) resident, nonresident, or present, in the United States,

and irrespective of whether any such employee or agent has discretionary authority to make decisions in effecting such transactions. For purposes of this subparagraph, the effecting of transactions in stocks or securities includes buying, selling (whether or not by entering into short sales), or trading in stocks, securities, or contracts or options to buy or sell stocks or securities, on margin or otherwise, for the account and risk of the taxpayer, and any other activity closely related thereto (such as obtaining credit for the purpose of effectuating such buying, selling, or trading). The volume of stock or security transactions effected during the taxable year shall not be taken into account in determining under this subparagraph whether the taxpayer is engaged in trade or business within the United States. The application of this subdivision may be illustrated by the following example:

Example: A, a nonresident alien individual who is not a dealer in stocks or securities, authorizes B. and individual resident of the United States, as his agent to effect transactions in the United States in stocks and securities for the account of A. B is empowered with complete authority to trade in stocks and securities for the account of A and to use his own discretion as to when to buy or sell for A's account. This grant of discretionary authority from A to B is also communicated in writing by A to various domestic brokerage firms through which A ordinarily effects transactions in the United States in stocks or securities. Under the agency arrangement B has the authority to place orders with the brokers, and all confirmations are to be made by the brokers to B, subject to his approval. The brokers are authorized by A to make payments to B and to charge such payments to the account of A. In addition, B is authorized to obtain and advance the necessary funds, if any, to maintain credits with the brokerage firms.

Pursuant to his authority B carries on extensive trading transactions in the United States during the taxable year through the various brokerage firms for the account of A. During the taxable year A makes several brief visits to the United States in order to discuss with B various aspects of his trading activities and to make necessary changes in his trading policy. A is not engaged in trade or business within the United States during the taxable year solely because of the effecting by B of transactions in the United States in stocks or securities during such year for the account of A.

(ii) PARTNERSHIPS. A nonresident alien individual or foreign corporation shall not be considered to be engaged in trade or business within the United States solely because such person is a member of a partnership (whether domestic or foreign) which, pursuant to discretionary authority granted to such partnership by such person, effects transactions in the United States in stocks or securities for the account of such person or

solely because an employee of such partnership, or a broker, commission agent, custodian, or other agent, pursuant to discretionary authority granted by such partnership, effects transactions in the United States in stocks or securities for the account of such partnership. This subdivision shall not apply, however, to any member of (*a*) a partnership which is a dealer in stocks or securities or (*b*) a partnership (other than a partnership in which, at any time during the last half of its taxable year, more than 50 percent of either the capital interest or the profits interest is owned, directly or indirectly, by five or fewer partners who are individuals) the principal business of which is trading in stocks or securities for its own account, if the principal office of such partnership is in the United States at any time during the taxable year. The principles of subdivision (iii) of this subparagraph for determining whether a foreign corporation has its principal office in the United States shall apply in determining under this subdivision whether a partnership has its principal office in the United States. See section 707(b)(3) and paragraph (b)(3) of § 1.707-1 for rules for determining the extent of the ownership by a partner of a capital interest or profits interest in a partnership. The application of this subdivision may be illustrated by the following examples:

Example *(1)*. B, a nonresident alien individual, is a member of partnership X, the members of which are U.S. citizens, nonresident alien individuals, and foreign corporations. The principal business of partnership X is trading in stocks or securities for its own account. Pursuant to discretionary authority granted by B, partnership X effects transactions in the United States in stocks or securities for the account of B. Partnership X is not a dealer in stocks or securities, and more than 50 percent of either the capital interest or the profits interest in partnership X is owned throughout its taxable year by five or fewer partners who are individuals. B is not engaged in trade or business within the United States solely by reason of such effecting of transactions in the United States in stocks or securities by partnership X for the account of B.

Example *(2)*. The facts are the same as in example (1), except that not more than 50 percent of either the capital interest or the profits interest in partnership X is owned throughout the taxable year by five or fewer partners who are individuals. However, partnership X does not maintain its principal office in the United States at any time during the taxable year. B is not engaged in trade or business within the United States solely by reason of the trading in stocks or securities by partnership X for the account of B.

Example *(3)*. The facts are the same as in example (1), except that, pursuant to discretionary authority granted by partnership X, domestic broker D effects transactions in the United States in stocks or securities for the account of partnership X. B is not engaged in trade or business in the United States solely by reason of such trading in stocks or securities for the account of partnership X.

(iii) DEALERS IN STOCKS OR SECURITIES AND CERTAIN FOREIGN CORPORATIONS. This subparagraph shall not apply to the effecting of transactions in the United States for the account of (*a*) a dealer in stocks or securities or (*b*) a foreign corporation (other than a corporation which is, or but for section 542(c)(7) or 543(b)(1)(C) would be, a personal holding company) the principal business of which is trading in stocks or securities for its own account, if the principal office of such corporation is in the United States at any time during the taxable year. Whether a foreign corporation's principal office is in the United States for this purpose is to be determined by comparing the activities (other than trading in stocks or securities) which the corporation conducts from its office or other fixed place of business located in the United States with the activities it conducts from its offices or other fixed places of business located outside the United States. For purposes of this subsivision, a foreign corporation is considered to have only one principal office, and an office of such corporation will not be considered to be its principal office merely because it is a statutory office of such corporation. For example, a foreign corporation which carries on most or all of its stock or security transactions in the United States but maintains a general business office outside the United States in which its management is located and from which it carries on all of its functions of communicating with its shareholders and the general public, soliciting sales of its own stock, and maintaining its corporate records and books of account, is not considered as having its principal office in the United States. The application of this subdivision may be illustrated by the following example:

Example. (a) Foreign corporation X (not a corporation which is, or but for section 542(c)(7)

or 543(b)(1)(C) would be, a personal holding company) was organized by foreign commercial banks and foreign brokerage houses to sell its shares to nonresident alien individuals and foreign corporations and to invest the proceeds from the sale of such shares in stocks or securities in the United States. Foreign corporation X is engaged primarily in the business of investing, reinvesting, and trading in stocks or securities for its own account.

(b) For a period of three yeaas, foreign corporation X irrevocably authorizes domestic corporation Y to exercise its discretion in effecting transactions in the United States in stocks or securities for the account and risk of foreign corporation X. Foreign corporation X issues a prospectus in which it is stated that its funds will be invested pursuant to an investment advisory contract with domestic corporation Y and otherwise advertises its services. The only functions performed for foreign corporation X by domestic corporation Y is the rendering of investment advice and the effecting of transactions in the United States in stocks or securities for the account of foreign corporation X; domestic corporation Y does not participate in the marketing of the shares issued by foreign corporation X or in the day-to-day conduct of other business activities of foreign corporation X.

(c) Foreign corporation X maintains a general business office outside the United States in which its management is permanently located and from which it communicates with its shareholders and the general public, solicits sales and makes redemptions of its own stock, and maintains its books and records. The management of foreign corporation X at all times retains the independent power to cancel the investment advisory contract with domestic corporation Y subject to the contractual limitations contained therein and is in all other respects independent of the management of domestic corporation Y. The managing personnel of foreign corporation X make occasional visits to the United States at which time they visit the offices of domestic corporation Y in connection with the business activities of foreign corporation X.

(d) The principal office of foreign corporation X will not be considered to be in the United States; and, therefore, foreign corporation X is not engaged in trade or business within the United States solely by reason of its relationship with domestic corporation Y.

(iv) DEFINITION OF DEALER IN STOCKS OR SECURITIES—*(a)* In general. For purposes of this subparagraph, a dealer in stocks or securities is a merchant of stocks or securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged as a merchant in purchasing stocks or securities and selling them to customers with a view to the gains and profits that may be derived therefrom. Persons who buy and sell, or hold, stocks or securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade of business, and officers of corporations and members of partnerships who in their individual capacities buy and sell, or hold, stocks or securities for investment or speculation are not dealers in stocks or securities within the meaning of this subparagraph. In determining under this subdivision whether a person is a dealer in stocks or securities such person's transactions in stocks or securities effected both in and outside the United States shall be taken into account.

(b) UNDERWRITING SYNDICATES AND DEALERS TRADING FOR OTHERS. A foreign person who otherwise may be considered a dealer in stocks or securities for purposes of this subparagraph shall not be considered a dealer in stocks or securities for such purposes—

(1) Solely because he acts as an underwriter or as a selling group member for the purpose of making a distribution of stocks or securities of a domestic issuer to foreign purchasers of such stocks or securities, or

(2) If he can demonstrate to the satisfaction of the Commissioner, in respect of transactions effected in the United States in stocks or securities pursuant to his grant of discretionary authority to make decisions in effecting such transactions, that the broker, commission agent, custodian, or other agent through whom such transactions were effected acted pursuant to his written representation that the funds in respect of which such discretion was granted were the funds of a customer who is neither a dealer in stocks or securities, a partnership described in subdivision (ii) *(b)* of this subparagraph, or a foreign corporation described in subdivision (iii) *(b)* of this subparagraph.

For purposes of this subdivision *(b)*, a foreign person includes a nonresident alien individual, a foreign corporation, or a partnership any member of which is a nonresident alien individual or a foreign corporation. This subdivision *(b)* shall apply only if the foreign person at no time during

the taxable year has an office or other fixed place of business in the United States through which, or by the direction of which, the transactions in stocks or securities are effected.

(*c*) ILLUSTRATIONS. The application of this subdivision may be illustrated by the following examples:

Example (1). Foreign corporation X is a member of an underwriting syndicate organized to distribute stock issued by domestic corporation Y to purchasers who are nonresident alien individuals and foreign corporations. Domestic corporation M is syndicate manager of the underwriting syndicate and, pursuant to the terms of the underwriting agreement, reserves the right to sell certain quantities of the underwritten stock on behalf of all the members of the syndicate so as to engage in stabilizing transactions and to take certain other actions which may result in the realization of profit by all members of the underwriting syndicate. Foreign corporation X is not engaged in trade or business within the United States solely by reason of its participation as a member of such underwriting syndicate or by reason of the exercise by M corporation of its discretionary authority as manager of such syndicate.

Example (2). Foreign corporation Y, a calendar year taxpayer, is a bank which trades in stocks or securities both for its own account and for the account of others. During 1967 foreign corporation Y authorizes domestic corporation M, a broker, to exercise its discretion in effecting transactions in the United States in stocks or securities for the account of B, a nonresident alien individual who has a trading account with foreign corporation Y. Foreign corporation Y furnishes a written representation to domestic corporation M to the effect that the funds in respect of which foreign corporation Y has authorized domestic corporation M to use its discretion in trading in the United States in stocks or securities are not funds in respect of which foreign corporation Y is trading for its own account but are the funds of one of its customers who is neither a dealer in stocks or securities, a partnership described in subdivision (ii) (*b*) of this subparagraph, or a foreign corporation described in subdivision (iii) (*b*) of this subparagraph. Pursuant to the discretionary authority so granted, domestic corporation M effects transactions in the United States during 1967 in stocks or securities for the account of the customer of foreign corporation Y. At no time during 1967 does foreign corporation Y have an office or other fixed place of business in the United States through which, or by the direction of which, such transactions in stocks or securities are effected by domestic corporation M. During 1967 foreign corporation Y is not engaged in trade or business within the United States solely by reason of such trading in stocks or securities during such year by domestic corporation M for the account of the customer of foreign corporation Y. Copies of the written representations furnished to domestic corporation M should be retained by foreign corporation Y for inspection by the Commissioner, if inspection is requested.

(d) TRADING IN COMMODITIES. For purposes of paragraph (a) of this section—

(1) In general. The term "engaged in trade or business within the United States" does not include the effecting of transactions in the United States in commodities through a resident broker, commission agent, custodian, or other independent agent if (i) the commodities are of a kind customarily dealt in on an organized commodity exchange, such as a grain futures or a cotton futures market, (ii) the transaction is of a kind customarily consummated at such place, and (iii) the taxpayer at no time during the taxable year has an office or other fixed place of business in the United States through which, or by the direction of which, the transactions in commodities are effected. This subparagraph shall not apply to the effecting of transactions in commodities for the taxpayer's own account.

(2) TRADING FOR TAXPAYER'S OWN ACCOUNT. The term "engaged in trade or business within the United States" does not include the effecting of transactions in the United States in commodities for the taxpayer's own acount if the commodities are of a kind customarily dealt in on an organized commodity exchange and if the transaction is of a kind customarily consummated at such place. This rule shall apply irrespective of whether such transactions are effected by or through—

(i) The taxpayer himself while present in the United States,

(ii) Employees of the taxpayer, whether or not such employees are present in the United States while effecting the transactions, or

(iii) A broker, commission agent, custodian, or other agent of the taxpayer, whether or not such agent while effecting the transactions is (*a*) dependent or independent, or (*b*) resident, nonresident,

or present, in the United States.
and irrespective of whether any such employee or agent has discretionary authority to make decisions in effecting such transactions. The application of this subparagraph may be illustrated by the following example:

Example. Foreign corporation X, a calendar year taxpayer, is engaged as a merchant in the business of purchasing grain in South America and selling such cash grain outside the United States under long-term contracts for delivery in foreign countries. Foreign corporation X consummates a sale of 100,000 bushels of cash grain in February 1967 for July delivery to Sweden. Because foreign corporation X does not actually own such grain at the time of the sales transaction, such corporation buys as a hedge a July "futures contract" for delivery of 100,000 bushels of grain, in order to protect itself from loss by reason of a possible rise in the price of grain between February and July. The "futures contract" is ordered through domestic corporation Y, a futures commission merchant registered under the Commodity Exchange Act. Foreign corporation X is not engaged in trade or business within the United States during 1967 solely by reason of its effecting of such futures contract for its own account through domestic corporation Y.

(3) DEFINITION OF COMMODITY. For purposes of section 864(b)(2)(B) and this paragraph the term "commodities" does not include goods or merchandise in the ordinary channels of commerce. Thus, this paragraph and such section apply solely to the purchase or sale of commodities for future delivery, including such a purchase or sale which is entered into as part of a hedging transaction. The purchase or sale of a commodity for future delivery does not include a purchase or sale of a cash commodity for deferred shipment or delivery.

(e) Other rules. The fact that an individual, partnership, or corporation is not determined by reason of this section to be not engaged in trade or business within the United States is not to be considered a determination that such person is engaged in trade or business within the United States. Whether or not such person is engaged in trade or business within the United States shall be determined on the basis of the facts and circumstances in each case. For other rules relating to the determination of whether a taxpayer is engaged in trade or business in the United States see section 875 and the regulations thereunder.

(f) Effective date. The provisions of this section shall apply only in the case of taxable years beginning after December 31, 1966.

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EDITORIAL:

TURNOVER TAXES AND TAX TREATIES

The problem of fiscal factors unintentionally influencing the international movement of persons and investment capital is being dealt with continually utilizing a mainstay of the international tax scene, the tax treaty. Two articles in the present issue of the Bulletin consider aspects of tax treaties and together serve to indicate their scope and flexibility as a technique for bringing order into fiscal relationships.

The flow of goods in international commerce, however, has thus far remained outside the scope of tax treaties. Surely it cannot be said that this exclusion is due to the absence of fiscal factors unintentionally influencing the international movement of goods. One need only note that a rationale of the turnover (value added) tax refunds at export and imposition at import is that the State of destination or origin respectively utilizes a similar system of taxation. The largest trading nation in the world, the United States, has no system even remotely resembling the turnover (value added) tax and other countries rely to varying degrees on it. This results in, assuming the honesty of the high turnover (value added) tax States, the development of an unintended system of pseudo tariffs.

While the tariff attribute would seem to indicate multilateral handling of the problem within the framework of the GATT, which indeed includes some recognition of the situation, it may be useful to explore the application of the tried and true bilateral tax treaty techniques.

Agreements between nations could take account of differences in the systems of goods taxation which exist, thereby eliminating those unintended fiscal factors affecting the movement of goods between them. Thus in recognition of a country's reliance on direct rather than indirect taxation, a state relying on the latter might reduce its equalization rate on import. Whatever the arrangements agreed upon the important thing is that the problems will be considered without waiting for a multunational concensus. Perhaps the results will point the way toward a general solution.

HARRY N. CHAMBIDES

* * * * ARTICLES * * * *

J.E. MONTEIRO DE BARROS*:

INCOME TAX TREATY BETWEEN BRAZIL AND THE UNITED STATES OF AMERICA

1. INTRODUCTION

The governments of Brazil and the United States of America have concluded a convention, as yet unratified by either country, for the avoidance of double taxation in respect of taxes on income. The original draft, besides observing on general lines the recommendations of the Fiscal Committee of the Organization for Economic Cooperation and Development, (1) closely followed the United States-Israel treaty then pending ratification by the United States Congress. That draft was discussed for a considerable period of time in Washington and Rio de Janeiro by two committees of American and Brazilian government tax experts, which also consulted independent tax specialists in their respective countries.

In 1964, however, negotiations were suspended at the initiative of the United States government, following the withdrawal of the United States-Israel treaty due to objections expressed by certain United States Senators regarding the "tax sparing" clause of that treaty. All preliminary discussions then being carried on by the United States with other countries were similarly suspended, but were resumed following ratification by the United States Congress of the revised United States-Israel treaty on June 29, 1965 (2)

Negotiations with Brazil were concluded in February, 1967 and on March 13, 1967 a protocol was signed by the representatives of the two governments. That protocol was submitted to Congress by the President of the United States on April 21, 1967 and its text was subsequently published officially and by private sources in that country and abroad. (3) The government of Brazil, on the other hand, has as yet not submitted the pro-

* Attorney-at-law and tax specialist, Pinheiro Neto & Gomes de Sousa, São Paulo, Brazil.
This paper could not have been written without the advice and collaboration of Rubens Gomes de Sousa, former Professor of Taxation in the University of São Paulo, Brazil, and member of the same law firm.

1 OECD: Draft Double Taxation Convention on Income and Capital, 1963.
2 CCH: Tax Treaties, p. 4203.
3 US Government Printing Office, Washington 1967; CCH: Tax Treaties, Report 183, pp. 807-829; Bulletin for International Fiscal Documentation, Supplement "E", vol. XXI no 10, October 1967.

EDITORS NOTE

The text of the income tax treaty between Brazil and the United States of America was published in Supplement E, 1967, Supplement to Bulletin for International Fiscal Documentation 1967, No 10 (October 1967).

tocol to Congress, or even made any official public statement recognizing its existence. All information contained in this paper is therefore derived from the non-Brazilian sources previously cited. For the same reason, it is not possible thus far to assess the eventual reaction in Brazil to the terms of the convention, either from Congress, tax scholars, or the public at large.

Conversely however, the "official" American ideas concerning double-taxation conventions with developing countries have been expounded by Mr. Stanley S. Surrey, Under-Secretary of the United States Treasury and former Professor of Taxation at Harvard University, in two lectures delivered respectively on September 21, 1964 to the Tax Executive Institute, Montreal, Canada, and on December 2, 1965 to the Tax Institute of America, New York. (4)

2. TAXES COVERED

In addition to notes defining and clarifying the various terms used in the text, the protocol includes a definition of the scope of the treaty. Thus, in the case of Brazil, which is the subject of this paper, the treaty will apply, with the exceptions noted below, to all taxes on income imposed under the Regulations currently in force, as approved by Decree No 58,400 of May 10, 1966 consolidating and implementing all Acts of Congress effective on that date, as well as under all Acts of Congress subsequently passed.

The income tax in Brazil is a Federal tax. In spite of frequent amendments since its original inception in 1924, the tax takes two forms: (a) the assessed tax, imposed on the basis of annual returns submitted by the taxpayer, and (b) the withholding tax, retained on behalf of the Treasury by the source of the income. The Regulation rules relating to the assessed tax vary as the taxpayer is either an individual or a legal entity, while the rules relating to the withholding tax are, with certain exceptions, common to both individuals and legal entities.

a) The assessed tax:

As a general rule, the assessed tax applies to nominative income, that is to say, to those situations where the identity of the recipient of the income is known or may be ascertained.

If the recipient of the income is an individual, the tax is assessed in two steps. As a first step, all his gross receipts are classified into eight schedules according to the nature of the source from which they are derived: interest, salary, professional fees, rent, dividends, etcetera. Schedular taxes were at one time be imposed at flat percentage rates different for each schedule. They were abolished in 1964, but the preliminary classification of gross income by schedules is retained for the purpose of allocating to each schedule varying deductions in accordance with the nature of the income. In the second step the net incomes from all schedules are added together and further deductions are applied, relating to personal circumstances of the taxpayer: family charges, interest on personal debts, insurance, and so on. The tax is then computed at graduated rates from 3 percent to 50 percent, depending on the amount of the total net income in excess of a basic personal exemption.

If the recipient of the income is a legal entity, the tax is assessed at the flat rate of 30 percent on the profits of each business year, as demonstrated by the balance-sheet and profit-and-loss account, after certain plus or

4. Bulletin for International Fiscal Documentation, vol. XVIII, p. 441 (1964) and vol. XX, p. 45 (1966)

minus adjustments for tax purposes. This is a tax on income produced since its incidence occurs prior to, and irrespective of, any distribution or reinvestment of the taxable profits. Legal entities for this purpose include all incorporated or non-incorporated juridical persons (as distinct from their partners or shareholders) as well as certain individuals engaged in trade or industry who are required to keep books of account for tax purposes. Two alternative methods are provided for the determination of taxable profits, namely: (a) "presumed profits". a beneficiary method for certain smaller concerns, and (b) "arbitrated profits", a penalty method for legal entities which fail to keep accounts in the prescribed manner. Lower tax rates are also provided in the case of professional firms (lawyers, doctors, etc.), public utilities companies, and certain others.

b) The withholding tax:

As a general rule, this method of collection applies to income, where the identity of the recipient is unknown, as in the case of dividends paid with regard to bearer shares, or to shareholders located outside the jurisdiction of the Brazilian tax authorities, as in the case of income of whatever nature paid to non-residents. In other words, the withholding tax is basically a tax on "anonymous" income.

In recent years, however, in the interest of simplifying the tax bureaucracy, or of accelerating collections, the withholding tax is being increasingly applied in cases where the recipient of the income is identifiable. Thus, the tax on salaries (up to a certain level) is deducted from each salary payment. Also, the tax rate on bearer dividends or other corporate distributions is greatly reduced if the recipient elects to identify himself for tax purposes. In all such cases, the withholding tax is regarded as an advance payment: in other words, the recipient of the income is required to include the gross amount thereof in his annual return, but is permitted to take the withholding tax as a credit against the tax due on the return.

c) Capital gains and property taxes:

To complete this brief resumé of Brazilian income taxes, it should be noted that the Regulations make no systematic distinction between income and capital gains (or losses). Thus, theoretically at least, capital gains would be treated as ordinary income. In practice, however, administrative and judicial rulings hold that capital gains (i.e., gains derived from a sale or other disposal of capital assets) are taxable only when specifically provided for by statute.

Consequently, very few cases of capital gains are taxable when realized by individuals: for instance, an income tax on gains from the sale of real property, instituted in 1946, was abolished in 1947, and there is no tax on gains from the sale of personal (or movable) property, except if it is undertaken professionally as a trade. The same is not true, however, in the case of legal entities: since these are assessed on profits as demonstrated by the balancesheet and profit-and-loss account, their capital gains (or losses) are treated in the same manner as their operational profits (or losses).

On the other hand, property taxes, defined as taxes on the ownership of property (as distinct from taxes on the income therefrom), are limited by the Constitution of Brazil to real property alone, and are collected by the States (in the case of rural real estate) or by the cities (in the case of urban land or buildings). These taxes are, therefore, outside the scope of the proposed Brazil-United States treaty, which is specifically restricted to taxes on income, as defined by the legislation of the parties to that agreement.

3. EXCEPTIONS

As stated above, the proposed treaty applies to all taxes on income in whatever form. However, through express reservations, the treaty shall not apply to two specific types of income taxes imposed by Brazil, namely: (a) the 20 percent surcharge on foreign income, (b) the "supplementary" tax on foreign remittances.

a) The 20 percent surchage:
Income of whatever nature, realized in Brazil by a non-resident individual or legal entity, is subject to withholding income tax at the flat rate of 25 percent. This tax becomes due whenever income is paid, delivered, remitted or credited in Brazil to a non-resident individual or legal entity, or reinvested in Brazil on behalf of such individual or legal entity; its incidence is, therefore, independent of actual remittance of the income outside of Brazil.
However, when the non-resident income results from activities regarded as of lesser interest to the Brazilian economy, the 25 percent withholding tax is increased by a surchage of 20 percent computed on the tax due. The definition of the activities liable to this surchage is made, and revised from time to time, by Executive Order.
As is obvious from the foregoing, this is an additional tax designed to discourage foreign investment in areas not regarded as being of major interest to the development of the national economy. Nevertheless, an express reservation in the protocol excludes this additional tax from the scope of the proposed treaty, in recognition of the fact that the definition of such areas of economic investment is a privilege of the party most directly concerned. For the purposes of this paper, therefore, it will be sufficient to note that this matter will be outside the scope of the proposed treaty.

b) The "supplementary" tax:
Brazilian law specifically regulates the investment of foreign capital, and consequently its repatriation and the remittance abroad of income derived therefrom. Foreign investors must comply with certain formalities which need not be detailed in this paper, it being sufficient to indicate that foreign capital, in order to be recognized as such, must be registered with the Central Bank of Brazil. Income from such capital, when reinvested in Brazil, increases the amount of the registration.
There is no annual or other periodic limit on the amount of the income which may be remitted abroad, either in absolute figures or as a percentage of the registered foreign capital. A "supplementary" tax, however, is imposed on remittances which, on any 3-year period beginning in 1963, exceed on the average 12 percent per year of the total registered capital (original investment plus reinvestments). This tax, in addition to the 25 percent withholding tax described above, is assessed at the following graduated rates on the amount of the excess:

Between 12% and 15%.....40%
Between 15% and 25%.....50%
Over 25%.....60%

As indicated above, this "supplementary" tax is also excluded from the scope of the proposed treaty; here again, the parties to the protocol agreed that measures of this kind, obviously aimed at discouraging a decapitalization of the country of investment, are a privilage of the party most directly concerned.

4. ELIMINATION OF DOUBLE TAXATION

The protocol emphasizes the territorial nature of the power of taxation over income. Individuals and legal entities of the United States may be taxed by Brazil only on income derived from Brazilian sources, and vice-versa. The definition of Brazilian (or United States) sources of income will be discussed at 5 below. Notwithstanding this, it is provided that all exemptions, exclusions, deductions, credits, and similar tax benefits, whether existing or created in the future, shall be equally recognized to citizens or legal entities of both contracting parties.

Specifically, the protocol provides that each country shall grant to citizens or legal entities of the other a tax credit against its own income tax, in an amount equivalent to that of the income tax paid by that citizen or legal entity to its home country. However, in view of the difference in income tax rates between the United States and Brazil, it is provided that the relation between the amount of the credit granted by one State and the total tax due will in no case exceed the relation between the taxpayer's total taxable income and the portion of that income derived from sources within the other State

In the case of an American legal entity holding 10 percent or more of the voting stock of a Brazilian entity, the United States will grant to the American entity a credit against United States income tax, equal to the amount of income tax paid to Brazil by the Brazilian entity on the profits from which dividends or other distributions were paid to the American entity; and Brazil will do likewise in respect of a Brazilian entity in the same circumstances.

5. DEFINITION OF SOURCE OF INCOME

The protocol includes specific rules for the determination of the source of varying types of income. A general provision stipulates further that in all cases omitted, both contracting States obligate themselves to enact identical legislation.

a) Dividends:

Dividends paid by Brazilian companies to American shareholders, or vice-versa, shall be regarded as arising from sources located within the payor State. Dividends paid by any non-American or non-Brazilian company to Brazilian or American shareholders shall be regarded as arising from sources outside either of the contracting States.

However, dividends paid by a non-American or non-Brazilian company may be regarded as arising from sources within one of the contracting States if that company (a) maintains a permanent establishment within that State, and (b) derived more than 85 percent of its gross income, in a period of three years terminating simultaneously with the financial year in which the dividend was declared, from sources within that State. Though the protocol is not quite clear, it would seem that these two requirements are cumulative rather than alternative.

Dividends paid by a Brazilian company to an American shareholder (individual or legal entity) may be taxed by both countries. However, the Brazilian withholding tax on bearer dividends or other corporate distributions shall not exceed 20 percent when (a) 10 percent or more of the voting stock of the payor company is held by the shareholder company and (b) not more than 25 percent of the gross income of the payor company in its business year preceding the payment of the dividend, derives from divi-

dends and interest received (except if the payor company is a bank).
The same 20 percent limitation shall apply to Brazilian income tax on profits realized in Brazil by branches of American legal entities authorized to operate in Brazil. But it should be noted that that percentage limitation is tentative and the protocol provides for its increase by mutual agreement of the contracting States.

b) Interest:
The same rules described in respect of dividends shall also apply to the determination of the source of income in the case of interest. In addition, interest shall be regarded as arising from sources within that contracting State where an individual or legal entity of the other contracting State maintains a permanent establishment, provided such interest (a) is paid directly with the resources of that permanent establishment, (b) relates to debts contracted by that permanent establishment (c) derives from bank deposits kept by that permanent establishment.
Interest may be taxed by both countries, but interest received by the government, or by an official entity of the government of either contracting State is exempt. Brazilian withholding tax on interest shall not exceed 15 percent whenever the recipient is an American bank or financial institution. However, if the recipient maintains a permanent establishment in Brazil this limitation shall not apply. In this case, the interest will be treated as commercial or industrial operating income under the same provisions described at 8 below.
For the purposes of the protocol, "interest" includes income from government bonds, income from private credit transactions of whatever nature, and all payments capable of being assimilated to the remuneration of a monetary loan.

c) Royalties:
Royalties will be regarded as arising from sources within the contracting State in which the rights to which they refer are exploited or used, or, in the case of exploitation of mines and other mineral resources, the contracting State in which the property is located.
It should be noted that Brazilian tax law distinguishes between "royalties" and "technical assistance fees", the former relating to the use and exploitation of patents and trademarks, the latter to the rendering of technical services and the communication of "know-how". The provisions of the proposed treaty may apply only to "royalties" as defined above.
Brazilian withholding tax may not exceed 15 percent of the gross amount of the royalties. This limitation shall not apply when the recipient of the royalties maintains a permanent establishment in Brazil, in which case royalties are to be treated as industrial or commercial operating income.

d) Personal services:
These will be regarded as income from sources within the contracting State where the services are rendered, whether by a salaried individual or an independent professional. In the case of services rendered partially within and partially without a contracting State, the income therefrom shall be treated accordingly by that State. In this writer's opinion, these rules may apply to the determination of the sources of income in the case of technical assistance services (see (c) above), whether rendered by an individual or a legal entity.
Income from personal services, when earned in Brazil by an American individual, shall be exempt from Brazilian income tax if (a) the individual maintains a permanent residence in Brazil for not more than 6 months in any given financial year, (b) the individual is an

employee of the permanent establishment in Brazil of a legal entity not domiciled in Brazil, provided that the payment for the individual's services is not deductible by that permanent establishment, or the total amount of the income does not exceed US$ 4,000 or its equivalent in Brazilian currency.

6. NON-DISCRIMINATION

The protocol provides that each contracting State shall make no tax discrimination between its own residents who are citizens of itself or of the other contracting State. The same applies to legal entities established in one contracting State but owned or controlled by individuals residing, or legal entities established, in the other contracting State. The object of these provisions obviously is to avoid nationals of one contracting State residing or established in the other being more heavily taxed by the latter than they would were they citizens of the latter State. However, the protocol clarifies that this provision shall not be construed as obligating either of the contracting States to extend to nonresident nationals of the other contracting State any deductions, exemptions or other tax benefits specifically provided only for its own residents.

7. INVESTMENT CREDIT

The protocol provides for the granting by each contracting State of a credit against its own income tax, in relation to the value of the investment held by the taxpayer (individual or) legal entity in the other contracting State.

Thus, the United States shall grant to an American (individual or) legal entity holding at least 25 percent of the voting stock of a Brazilian legal entity, a credit against United States income tax, equal to 7 percent of the value of the property held by that (individual or) legal entity during any fiscal or business year, for exclusive use in Brazil; and Brazil will do likewise in the reverse situation. The protocol includes rules for the granting of this credit and provides exclusions and limitations based, among others, on the nature of the transaction or business capable of giving rise to the credit.

8. PERMANENT ESTABLISHMENT

The protocol defines as a "permanent establishment" any fixed place of business through which an individual or legal entity of one contracting State carries on activities in the other. The term "fixed place of business" includes (but not exclusively) an office, a shop, a selling place, a workshop, a factory, a warehouse, a mine or mineral reserve or other place for the extraction of mineral resources, a building or other construction or other place of assembly.

However, the protocol includes exceptions in which a fixed place of business shall not be regarded as a permanent establishment. This includes the case, among others, of a place used for the simple collecting of information, for advertising, for the exhibition of goods or merchandise, for scientific research, or for construction projects, if such places are used for less than 6 consecutive months.

On the other hand, an individual or legal entity without a fixed place of business and operating through an agent shall be deemed to have a permanent establishment if the agent (a) has powers to complete transactions except purchases and sales of merchandise, in the name of his principal, (b) maintains a

stock of goods or merchandise belonging to his principal.
The controlling ownership of stock is not a factor to determine the existence of a permanent establishment in the State where the controlled entity is established. Similarly, the use of a broker, of a non-exclusive representative, depository, or other independent agent, is not to be construed as an acknowledgment of the existence of a permanent establishment.
Commercial or industrial operating profits of a permanent establishment shall be treated as income from sources within the State of its location.

9. OPERATIONAL PROFITS

An American resident individual or legal entity having no permanent establishment (as defined above) in Brazil shall be exempt from Brazilian income tax in respect of its operational profits.
If such American individual or legal entity has a permanent establishment in Brazil, the latter may tax all operational profits (a) pertaining to such permanent establishment, as if it were an independent legal entity, or (b) deriving from Brazilian sources. The corresponding operating expenses may be deducted in either case.
Operational profits for this purpose means all income derived from the regular conduct of a trade or business and includes dividends, interest, royalties, real-estate income and other income received, with the sole exception of income from personal services.

10. MISCELLANEOUS PROVISONS

Holdings:

The reduced Brazilian income tax rates on dividends, interest, and royalties shall not apply to a legal entity which enjoys substantial tax benefits and the capital of which is at least 25 percent held by American Citizens, whether resident in Brazil or otherwise.

Real-estate income or gains:

Income from real-estate property, including gains from its purchase and resale, except interest on mortgages or other debts secured by such property, shall be treated as derived from a source within the contracting State where the property is located. It should be recalled that, as noted above, the specific capital gains tax on the sale of real-estate property by individuals has been abolished. Therefore, such gains are not subject to Brazilian income tax, even if the recipient is a non-resident individual. In the case of legal entities, as also noted before, such gains are taxable as operational profits.

Rental:

The same rule noted above applies to income from the rental of movable or personal property, i e., such income is treated as derived from a source within the contracting State where the rented property is situated and used.

Sales:

Gains from the sale of movable or personal property are treated as income derived from a source within the contracting State where such property is sold. If such property is located in one of the contracting States and sold in the other, the total amount of the gain shall be apportioned between the two States. In practical operation, this rule indicates that the portion of the sales price corresponding to the cost of production shall be treated as income from a source within the producing State, while the portion corres-

ponding to the merchandizing of the finished product shall be treated as income from a source within the State where the sale took place.

In this respect, two specific points should be emphasized. First, the Brazilian courts hold that export sales of Brazilian products are not taxable, since the profit is realized outside of the country; the same applies to the interest portion of the price of term sales. The second point concerns a Brazilian statutory provision aimed at taxing profits from sales made in Brazil by foreign entities through agents or representatives. In such cases, the agent is taxed on the commission as his own income, and is further required to show the profit realized by his principal: this is arbitrated at 20 percent of the gross sales price if the agent fails to demonstrate the actual profit. This provision, though dating from 1958, has never been rigidly enforced and still is the subject of much debate, since it seems difficult to make the agent personally responsible for a tax (other than a withholding tax) due from his foreign principal.

Exchange of information:

The protocol provides for direct understandings between the tax authorities of the two contracting States, with the purpose of exchanging information conducive to the avoidance or repression of evasion and fraud. The divulging of such information is prohibited.

NORMAN D. NOWAK:

TAXATION IN SOUTH AMERICA

—some thoughts—

In the last decade taxation in South America in terms of tax intake by the various countries, political interest, intellectual ferment, legal and accounting specialization and management and administrative improvement has had a tremendous growth. Tax intake, in dollar terms, in the major countries has increased during this period from 100 to 200% in countries with little inflation, and from a minus quantity to plus 60% in countries with large inflation, an average of approximately 25% in total Latin America. A decade or more ago, the political leaders, including the Ministers of Hacienda, Economics and Finance, were mainly lawyers. Today, a good proportion of them are economists or graduates in the social sciences.

To attempt to measure this development in terms of statistics or even in what is called "fact" would be to miss, we believe, the basic reasons behind this development. Of necessity, therefore, this article is opinionate but rather than being the opinion only of the author, it is a synthesis of opinions of many people, particularly many South Americans, from various countries whose positions bring them in close contact with the subject.

It is a general consensus that there is no one reason for the change, but rather a combination of many things happening at the same time, each in its own way sparking and assisting each other. A primary and underlying cause was the awakening of the lower classes in all countries of South America, the winds of revolution so to speak, the demand for a better life. Inflation and lack of confidence in the future has sent outside South America to safe harbors approximately the same amount of money that outside sources have given or lent the various countries, thereby draining the financial sources needed for the change. Having neither the money, the training or the experience in productivity within any country to get this better life through individual dynamics, all countries to a greater or lesser degree have turned to their governments to lead them. Most countries now, in addition to owning or controlling all utilities, own or control heavy industry and then the various Government "development corporations" have a large interest in other manufacturing corporations.

Pushing and swelling this force is a tremendous population explosion. South America has had one of the greatest population increases in the last 20 years of any part of the world. The total population of South America 20 years ago was about 100 million. Today it is 174 million. By the year 2.000, only some 33 years from now, it is expected to go about 400 million.

With the increase in population the surplus agricultural workers, the major product of the farm, migrated to the cities where industry generally could not absorb all of them. The social changes this caused and the tremendous costs to Governments for the amelioration of the miserable social conditions in which they lived, made the need for additional tax intake imperative. The growing industrialization at the same time caused a shift of the type of taxation from a simple agricultural pattern to the much more complex tax and collection processes of an urban environment.

The high rate of unemployment and partial

employment of the city dwellers, who found that economically it was much more difficult to survive in the city than in the country, again forced a change of old patterns. To ameliorate these conditions, Governments started to hire extra employees both in the Government itself and in the Government controlled or owned enterprises. To hire these employees and pay their salaries, low though they may be, required more tax intake. Added to this was the money required to make up the deficit of these enterprises. For example: in one country, the railroads which in 1942 were run very effectively with 120.000 employees, today employ about 170.000 employees. To pay for this takes approximately 15% of the national budget. The general percentage of Government or semi-government employees to total employed in the main countries of South America ranges from 20 to 35%. This in an area where agriculture is roughly 40-50% of the total work force.

One of the amusing, but I believe, one of the more important reasons why taxes have become such an important factor in the life of South America is that now they have become part of the vocabulary of the common man. With Government employees such a large part of the total work force the news of tax increases is followed avidly because it may mean pay increases. As the income tax, due to evasion caused by poor administration, rises slowly, excise and sales taxes still make up the major difference. This becomes an everyday reminder of taxes both to housewives and businessmen. As inflation grows and the rate of inflation is signaled by the change in the ratio of the national currency to the dollar, even the laborer is interested in the financial pages of the newspaper.

The pressure generated by the factors noted above plus lack of political stability have not permitted in most cases a balanced tax system that would assist the country in its march toward economic development. The tax problem, for political and social reasons, became one of securing revenue. As evasion and moratoriums eroded the tax structure, the tax rates were increased to compensate. In many countries collection of a full 100% of taxes required by law would bankrupt the private sector. Due to insufficient skills on the part of both industry and labor and inadequate capitalization, most local manufactured products are unsalable outside the national boundaries. To protect them inside the national boundaries very high customs duties were imposed which in turn unbalanced the social-financial situation even more. Export taxes in many countries further confused the balancing of the national tax structure. Add to this in a generally two class society, a not too effective tax administration in most countries which by their very ineffectiveness made difficult the shift from the more direct type of tax, such as a progressive income tax, to the somewhat simpler excise and sales taxes which burdened those least able to pay.

The catalyst that set the machinery of tax reform, both administrative and substantive, into motion was the meeting in Punta del Este in August 1961 participated in by all the nations of Latin America plus Mexico and the United States, and the Charter of Punta del Este that derived from this meeting. This Charter pledged the nations of Latin America "to reform tax laws, demanding more from those who have most, to punish tax evasion severely, and to redistribute the national income in order to benefit those who are most in need, while, at the same time, promoting savings and investment and reinvestment of capital", and also pledged the United States to assist in the emplementation of this Charter. This declaration was a commitment not only for tax reform but for social and

economic reform. Self help in this context was basic to any assistance from the United States and the International Lending Agencies.

On the part of the United States, a Foreign Tax Assistance Staff was created within the Internal Revenue Service in 1962 and in the course of 5 years some 17 teams were working with signatory countries to assist them in reforming their tax administration. The Organization of American States and various universities, Harvard especially, sent teams to assist in the studies for revision of substantive legislation. The international lending agencies, the World Bank, the International Monetary Fund, the Inter American Development Bank, etc., as part of their lending consideration to the various countries to enhance and improve basic industry and assist in financial growth viewed the efforts made by each country in the area of tax reform as one of the basic factors necessary for the securing of a loan.

In May 1968, the Inter American Center of Tax Administrators (CIAT) will have its second meeting in Buenos Aires to discuss mutual problems of tax administration. All over South America schools of tax law, tax management and tax administration are springing up backed by international agencies, foundations or by progressive governments. To mention a few: the Internal Tax Service of Chile is running international courses in tax administration for all Latin America, the first school specifically for tax administration; the Organization of American States in Buenos Aires for tax legislation and general management; the Organization of American States-Interamerican Development Bank has prepared a model tax code. Little by little the forces who have been fighting against tax improvements are being pushed back.

Whether the left wing, when and if they gain power, will use taxation to other extreme is yet to be seen.

In my opinion, and in the opinion of many people who should know, the increase in interest and, more important, the increase in action in the area of taxation is South America, has put Latin America on the road to progress. The speed of the progress will depend on their ability to control inflation, change taxpayer attitude and, most important, increase the administrative efficiency of their tax agencies; their success in the total economic picture, of which taxation is an integral part, depends also on improved agricultural and industrial techniques within a changed social and economic infrastructure. Failure to progress in these areas may well cancel out progress in tax reform.

PATRICK DURAND AND JACQUES LATSCHA*

THE TAXATION OF BRITISH INDIVIDUALS LIVING IN FRANCE

British and French tax systems are so different, that it is in most cases a complicated venture for a British taxpayer to ascertain and digest the taxation which he will undergo when moving from the United Kingdom to France.

The purpose of this study is not a theoretical analysis of the merits of French taxes. It is meant solely to be a practical guide giving a general idea of the basic principles governing the taxation of aliens in France, in the light of the Tax Treaty existing between the United Kingdom and France.

I-DOMICILE AND RESIDENCE UNDER FRENCH LAW

As anyone knows, domicile has quite different definitions in English and French law. Only the French legal approach will therefore be considered.

A) CIVIL LAW

a) Domicile

Article 102 of the French Civil Code is very clear: "The domicile of any French citizen, for the exercise of his civil rights, is where he has his principal place of interest (in French: principal établissement)."

Since this definition applies only to French citizens, it cannot be used with reference to aliens.

b) Residence

There is no definition of a "résidence" in French law, although a number of Court decisions have dealt with the problem.

B) TAX LAW

Domicile and residence are, for tax purposes, two ideas which are intimately mixed. However, since the reform of the taxation of individuals introduced in 1959, a differentiation has been made between "principal residence" and "auxiliary residence", the latter term being used with reference to taxpayers having their principal residence outside France, and one or more auxiliary residences within France.

According to article 4-1 of the French Tax Code, a taxpayer is considered as having a "tax domicile" in France when the center of his activities and interests is in France, irrespective of his nationality.

A British subject, employed by a French firm and living with his family in Bordeaux, is, therefore, domiciled in France for tax purposes.

On the other hand, the same individual, living in Holland and working there for the subsidiary of a French firm, is not domiciled in France even if he has a villa on the Riviera where he spends one or two months a year during the holiday season. This situation, however, has a certain impact on his income originating from France, as will appear below.

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II - GENERAL PRINCIPLES OF FRENCH TAXATION

A) BASIC SYSTEM

a) Individual income tax

Every individual domiciled in France for tax purposes is liable to taxation on his total income without exception. This tax is known as "Impôt sur le revenu des personnes physiques" and will be referred to, from now on, as I.R.P.P.

The rate of tax is progressive according to the following rate schedule:

5% on the slice of income for each "part" not higher than 2,500 Frs
15% on the slice between 2,500 Frs and 4,500 Frs
20% on the slice between 4,500 Frs and 7,600 Frs
25% on the slice between 7,600 Frs and 11,250 Frs
35% on the slice between 11,250 Frs and 18,000 Frs
45% on the slice between 18,000 Frs and 36,000 Frs
55% on the slice between 36,000 Frs and 72,000 Frs
65% on the slice above 72,000 Frs

Deductions are allowed for families. High incomes are subject to a 5% surcharge.

It is not possible, in this short analysis, to give the detailed computation table applicable to a large scale of incomes. However, the following schedule may be useful to give a rough idea of the system.

The family allowance is calculated by a number of "parts" as follows:—

Single, divorced, widower or widow without dependent children 1 part
married without dependent children 2 parts
married with one dependent child 2.5 parts
and for each dependent child in excess, per child 0.5 part

Therefore, a married couple with 4 dependent children will represent 4 "parts".

If the total income is R and the number of "parts" is N the tax is calculated as follows:

$\frac{R}{N}$ (result of the division of the income by the number of parts)	Calculation of tax T
under 1,600 Frs	nil
between:	
1,600 and 2,500	$R \times 0.05$
2,510 and 4,500	$R \times 0.15 - 250 \times N$
4,510 and 7,600	$R \times 0.20 - 475 \times N$
7,610 and 11,250	$R \times 0.25 - 855 \times N$
11,260 and 18,000	$R \times 0.35 - 1980 \times N$
18,010 and 36,000	$R \times 0.45 - 3780 \times N$
36,010 and 72,000	$R \times 0.55 - 7380 \times N$
over 72,000 Frs	$R \times 0.65 - 14580 \times N$

The married couple with 4 dependent children which we quoted here-above, will be therefore taxable as follows, on the basis of a total taxable income of 40,000 Frs:—

$R = 40{,}000$ Frs
$N = 4$
$\frac{R}{N} = 10{,}000$ Frs
$N = 4$

therefore the tax is computed:
$(40{,}000 \times 0.25) - (855 \times 4) = 6{,}580$ Frs.

It is of course assumed that, for the calculation of the taxable income, all necessary deductions, or allowances have been deducted. previously. The vast number of these factors is such that it is really impossible to give a complete list.

Suffice it to say that salaries are subject to very favourable tax treatment: the salaried taxpayer is entitled to a double allowance on

his gross salary income, calculated as follows:—

Gross salary (social security deducted)	40,000 Frs f.i.
allowance for expenses 10%	4,000
	36,000
special allowance 20%	7,200
	28,800 Frs

Therefore, the salary in France is only taxable on 72% of its gross amount.

These rules are applicable to all salaries, irrespective of their origin, i.e. salaries paid to a French tax-payer by a British firm can benefit from this deduction, subject to the application of the tax treaty.

b) Special complementary tax

This tax (in French: taxe complémentaire) is levied on a certain group of sources of income, and is added to the general income tax or I.R.P.P.

The main taxable items are:

—real property income
—professional income (Accountants, lawyers, etc.)
—agricultural profits

The rate is 6%

B) TAXATION OF NON-RESIDENTS

A "non-resident" for tax purposes is an individual who does not fall under the provisions of article 4-1 of the French tax code; his activities and center of interest are located outside France. Such an individual may however have a "résidence secondaire" or auxiliary residence, in France, and consequently be liable to French taxation.

a) Having a "résidence secondaire"

Generally speaking, the fact that a non-resident is the owner of a villa, building or other real estate in France forms the basis for the right for the French tax authorities to tax all his income deriving from French sources according to article 164-2 of the French tax code.

If he also possesses a "résidence secondaire", he is taxable on all his French income, unless the estimated rental value of his "résidence secondaire" multiplied by five, results in a greater figure, in which case the latter amount will be considered to be taxable income.

If for example a non-resident, having however a "résidence secondaire" in France, has income of French origin as follows:—

dividends	15,000 Frs
rent of property	5,000
copyrights	10,000
	30,000 Frs

and if, on the other hand, the estimated rental value of his "résidence secondaire" is 3,000 Frs per annum, his taxable income will amount to 30,000 Frs, as 3,000 Frs × 5 = 15,000 Frs is not in excess of 30,000 Frs.

But if all the estimated rental value is 10,000 Frs p.a., his taxable income will be:

10,000 × 5 = 50,000 Frs.

b) Having no residence

In such case, non-residents are only liable in France to taxation on their income originating from France, subject to the special conditions agreed upon in the tax treaty concluded between France and the country of residence.

C) TAXATION OF RESIDENT ALIENS

Resident aliens are subject to French tax at the standard rate on all their income. If income derived outside of France is subject, in the country of origin, to taxation similar to the French system, then such income is exempted from tax in France.

It must be noted here that, according to

article 164-1 of the French tax code, an alien is considered as resident and domiciled in France for tax purposes:

—if he has the center of his interests in France

—or if he is resident in France since at least five years.

A considerable number of cases have been decided by the French "Conseil d'Etat" in this matter, and it might be of interest to pick up a few typical cases in order to show how the Supreme Tax Court has solved some critical questions, mainly regarding the definition of what is called a "center of interests". The Court judged that the following individuals actually had the center of their interests in France:—

—a Swiss citizen having his permanent home in France, and dealing continuously with French customers, although Swiss law required him to be resident in Switzerland owing to the special nature of his business (decision of 20th December, 1937)

—a British citizen, permanently living in France as manager of a British insurance company (decision of 10th July, 1937).

Opposite results have also been reached by the Conseil d'Etat, which decided, in the following instances, that the individuals concerned did not have the center of their interests in France:—

—an alien, living permanently in France for more than five years, but whose income was derived from real property outside France (decision of 25 July, 1936)

—an alien, having no business activity in France, having established a residence since less than five years, and whose income was exclusively derived from a portfolio of securities deposited and managed outside France (decision of 8 February, 1960)

These various decisions can be summarized as follows:—

An alien establishing his permanent residence in France is liable to French taxation on all his income if he transfers at the same time the center of his interests in France.

If such a transfer does not occur, he will be, during the first five years, liable to taxation on his French income only, as per the system defined above under II-B-a). At the end of the fifth year, if he maintains his permanent residence in France, he will be liable to taxation on all his income derived from all countries including France, subject to existing tax treaties; furthermore, if any part of his income is subject in the country of origin to a progressive income tax similar to the country of origin to a progressive income tax similar to the French I.R.P.P., the corresponding slice of income will be exempted from taxation in France.

III - THE TAX TREATY BETWEEN THE UNITED KINGDOM AND FRANCE

On 14th December, 1950, a tax treaty was agreed between the United Kingdom and France. Tax domicile, tax exemption and other significant items are defined therein.

It would seem useless to comment in detail on all articles of the convention. Our investigation will therefore be limited to the two main following aspects:—

a) taxation of individuals receiving income from the United Kingdom and considered as domiciled in France according to the tax treaty

b) taxation of individuals receiving income from the United Kingdom, having a "résidence secondaire" in France, but not domiciled in France according to the tax treaty.

Prior to actual analysis, it must be noted that the tax domicile is the subject matter of article II-1-g) of the treaty. A resident in France is said to be any person whose fiscal domicile for the purpose of French tax is in France and who is not resident in the United Kingdom for the purposes of United Kingdom tax.
Under these definitions, a Britisch citizen who has not transferred his center of interests from the United Kingdom to France and has had a residence in France for less than five years is not considered as a French resident since his tax domicile is not yet established in France according to the French tax code.
On the other hand, a British citizen who has moved with his family from the United Kingdom to France and is employed by a French firm under a service agreement will be considered as domiciled in France for tax purposes since he has obviously transferred his center of interests to France.

a) Taxation of individuals fiscally domiciled in France

According to the tax treaty, the following sources of United Kingdom income are exempt from French taxation, provided they have borne United Kingdom. Income Tax at the standard rate:
—dividends (tax treaty article XX-3-b)
—interests(tax treaty article XX-3-b)
—director's fees (tax treaty article XX-3-a).
Moreover, pensions served by the British Government (woundspensions, retired pay of disabled officers, disability pensions of various sources) which are exempted from United Kingdom income tax are also exempted from French taxation when paid to a resident of France (article XIII-3-a to e) of tax treaty).
However, it is stated in the treaty that income deriving from sources mentioned in article XX (dividends, interests, directors fees), although exempted from French tax when subject to United Kingdom income tax, may be taken into account when determining the effective rate of French I.R.P.P. chargeable on the income other than the types referred to above.
The actual impact of these provisions will be analyzing later on in a practical example. As fas as real property is concerned, the income therefrom is always taxable in the country where the property is located.

b) Taxation of individuals having a "résidence secondaire" in France but not domiciled in France according to French tax law

It is very surprising to note that, if the tax treaty has clearly provided a number of advantageous clauses avoiding double taxation for the individuals who are domiciled taxwise in the United Kingdom or in France, nothing is said about those who have a residence in both countries. Apparently, the treaty does not apply to these taxpayers who are liable to tax in both countries.
As far as France is concerned, tax will be levied only upon all French-source income, according to the system which we described under II-B-a) above.
This solution is practically confirmed by article XVI of the tax treaty, which states that nothing in the treaty will affect the provisions of the French tax code regarding the tax payable by individuals who are not fiscally domiciled in France, but have nevertheless a residence in the country.
Last but not least, British citizens fiscally domiciled in France can benefit of the same tax allowances for family dependents, etc., as granted to French nationals, according to article XIX-2 of the tax treaty.

IV-SOME PRACTICAL EXAMPLES

The calculations will be made on the basis of a single unmarried individual of British nationality living in the South of France in a villa, and having no dependent children.

His number of "parts", according to the French tax system (see II-A-a) is therefore: one.

He has established his residence in France since less than five years, but has retired from active business and can therefore be considered as having transferred to France the center of his interests at the time of establishment of his residence.

His income is represented by the following items:

1.	disabled officer pension served by H.M.'s Government	14,000 Frs
2.	income from U.K. property	16,000 Frs
3.	dividends from U.K. companies (income tax deducted)	10,000 Frs
4.	director's fees from Switzerland	10,000 Frs
5.	director's fees from a Panama Trust	10,000 Frs
6.	income from French property	15,000 Frs
	total	75,000 Frs

Item 1 is free of any French tax (tax treaty article XIII).

Item 2 is only taxable in the United Kingdom (tax treaty article XII).

Item 3 is exempted from French tax (article XX-3) but can be taken into account when computing the effective tax rate applicable.

Item 4 is taxable only in Switzerland according to the tax treaty between France and Switzerland.

Item 5 is fully taxable in France; there is no tax treaty between France and Panama.

Item 6 is also fully taxable in France.

The total taxable income in France will therefore amount to:

(5) 10,000 Frs + (6) 15,000 Frs= 25,000 Frs

However, for the computation of the effective tax rate, item 3 will be added to the above total, showing a grand total of 35,000 Frs.

The initial slice of 10,000 Frs corresponding to item 3 will not be taxed, but the other sources of income will be charged with the progressive tax rate applicable to such amount, as follows:—

from 10,000 to 11,250 : 25% on 1,250 Frs=	312 Frs
from 11,250 to 18,000 : 35% on 6,750 Frs=	2,362 Frs
from 18,000 to 35,000 : 45% on 17,000 Frs=	7,650 Frs
total tax:	10,324 Frs

This quite rapid survey of the principles governing the taxation of aliens in France cannot be considered as exhaustive of all questions deriving from the problem.

As a matter of fact, a number of practical situations can arise from the origin of the income derived, owing to the particular details of the tax treaty which France may have concluded with the relevant country.

A new tax treaty is currently being negotiated between the United Kingdom and France. It is expected that the same conditions will prevail as in the present one. It should be noted however that the matter of taxation related to a "résidence secondaire' in France has been recently solved in the new tax treaty between France and Switzerland, which states that the residents of France and Switzerland who have at their disposal another residence in Switzerland or France cannot be taxed in the latter state on an assumed income

based upon the theoretical rental value of their residence.

This favourable disposition, will hopefully be reproduced in the other tax treaties which France is now re-negotiating with many countries, as the principle is clearly expressed in article 4-2-a) of the O.E.C.D. draft convention.

THE SWEDISH PROPOSALS OF 1968 FOR AN ADDED VALUE TAX SYSTEM*)

In the Budget Bill of January 1968 the Swedish Minister of Finance has announced that a bill on the introduction of an added value tax system as from 1st January 1969 instead of the present general turnover tax system is to be presented by the Government to Parliament at its spring session.

The Government proposal will be based upon a report delivered in October 1967 by a special committee. As the bill has not yet been prepared a summary of the proposals made by the committee will be given here under "Part I". Under "Part II" will be mentioned some modifications of these proposals which have been hinted at and some other statements made in the Budget Bill.

PART I

The main points of the proposals made by the committee—which has studied the problems only from a technical point of view—are as follows:

The scope of tax liability for the proposed added value tax system includes trading with goods and rendering of services within the country.

The tax liability also includes importation of goods. Goods which are imported in order to be used in a professional activity are, however, not taxable if the tax on the purchase of the same goods within the country would have been deductible for the buyer. Exportation of goods is exempted from tax. But the exporter himself is theoretically considered as if he were liable to tax which makes it possible for him to get the taxes paid on his purchases refunded.

Taxable are all commercial goods and merchandise, including electric power and certain fuels, and buildings sold by building enterprises.

Exempted are i.a. fishing ships and other ships of more than 20 registered tons; certain war material; certain medicines; plant and machinery and stock of goods when sold in connection with the whole business or part of it; pictures and sculptures when sold by the artist himself; certain papers for members and employees, catalogues (ordinary newspapers, weeklys etc., however, are taxable).

Taxable are also in principle all services rendered on taxable goods, buildings, grounds, growing trees and other vegetable growths; also consultory services in the same connections as architect drawings etc. are included. Taxable are further more travels and transports, the letting of hotelrooms etc., bookkeeping, advertising etc. Other taxable services are beauty treatment, hair cutting and similar services.

Exempted are other personal services and services rendered by banks, insurance companies etc. Excluded from tax liability are also postal transports of letters (but not parcels), international travels and transports. International travelling by bus or train in regular traffic will be taxed for the part falling within the country.

The tax rate to be applied is not mentioned in the report. But it is pointed out that if the added value tax proposed is supposed to give

* prepared by the Swedish Ministry of Finance.

the same tax receipts as the existant general turnover tax the tax rate would have to be 12,8% on the sales price without tax. The rate for the existant tax is 10% on the price including the tax, i.e. 11.11% on the price without tax.

As taxable value is to be considered the sales price without tax. If taxable goods are withdrawn from the business the tax has to be calculated on the sales value without tax. The tax on imported goods is to be based upon the customs duty value without tax.

A reduced value is to be used in certain cases as tax base. Such is the case for:

1) buildings and prefabricated houses and services connected therewith; the tax base should be 60% of the price without tax;

2) contracts for roads, streets, bridges, airfields, harbors, canals etc. are taxable to 20%;

3) agriculture products (other than forestry products) are taxable to 60% when sold by a farmer;

4) forestry products are taxable to 20%, when sold by a farmer or other owner of forest property.

As to agriculture and forestry a special rule is applicable in order to reduce in fact the tax liability in cases where the total turnover does not exceed 40.000 Sw. crowns a year. In such cases the farmer or the owner of a forest property is not obliged to render any account for tax received when selling. On the contrary he is entitled to keep the tax on the reduced value which he has received. He is thus compensated for the tax paid by himself when buying. If the business volume amounts to more than 40.000 crowns the farmer is obliged to account for taxes received. These taxes are calculated on the reduced value. The effect is a lower tax on agriculture and forestry products in the first turnover-stage.

Those who are buying such products for reselling or processing get a lower input*). But when reselling they have to deliver the taxes collected on an unreduced tax value. Consequently the reduced tax base applicable for farmers will not affect the taxes which are to be paid by the final consumers.

About two thirds of the farmers are estimated to be exempted from tax liability by the business volume limit of 40.000 crowns mentioned before.

A general exemption from the liability to account for added value tax is prescribed for others than farmers with a turnover less than 6.000 crowns a year. Of totally 400.000 who are supposed to be liable to the tax only 280.000 are estimated to have to account for such a tax.

The liability to the tax occurs at cash payment or when debt is arising. This means that tax has to be accounted for according to book-keeping practice. All transactions between persons liable to the tax have to be invoiced in order to show the tax value and the amount of the tax. The invoice obligation is not applicable on the delivering of gas, water, heat, electric power and on travelling or transport services for which tickets and other acknowledgments are given as receipts.

Access to the input tax deduction is to be given as soon as the purchase invoice has been booked in the accounts which mostly is done before the payment. In this way all the input tax may be deducted when accounting for the taxpayers own tax due to the selling. In case the tax to be paid does not amount to the tax deductible the excess is to be refunded provided that it surpasses 1.000 crowns.

Car dealers are entitled to a special deduction when acquiring used passenger cars not

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* Deductible value added tax paid on purchases — Ed.

submitted to tax when transferred to the car dealers as part of the payment for cars sold by them. The deduction to be operated corresponds to the tax amount which would have been paid if the estimated value of the car acquired had been paid in cash. The deduction is motivated by the general interest of not promoting the uncontroled market of used cars. Tax deduction is not allowed for passenger cars which are not bought for use in professional traffic.

Nor is tax deduction allowed for goods, buildings and services not to be used in a taxable profession.

Registration etc. Those who are due to account for added value tax have to be registered by the county authorities. They have to give account for the tax for every two months if special permission for longer periods is not granted. The tax is to be regarded as definitely imposed when accounted for, which means that no special assessment procedure is prescribed. But of course the taxpayer and the tax authorities are entitled to claim for adjustments. The accounts must be given within 35 days from the end of every tax period.

Advanced rulings can be given by the National Board of Taxation on questions about the tax liability etc.

The effect of a change from the existing general turnover taxes to the proposed added value tax would be i.a. an increased taxing of private consumption and a corresponding diminution of the tax to be paid by the industry and commerce sector. This diminution is caused by the deduction for investments in machinery and other costs. Investment goods as well as fuels and electric power for commercial use are namely taxed in the now existing tax system. The present receipts from the turnover tax is about 6.790 million crowns. To reach the same amount with the proposed added value tax the tax rate for such a tax would have to be 12,8% on the sales price without tax.

PART II

Here follows a summary of the tax program announced in the Budget Bill.

In the Budget Bill the Minister of Finance acknowledged that the authorities and private organisations concerned have declared themselves principally in favour of the committee proposals. Certain objections, however, were raised. Opinions differ for instance on the special rules suggested by the committee for the minor agriculture and forestry. According to the Minister of Finance it should, however, be possible to find some acceptable solution on the basis of the committee proposal.

The Minister of Finance also stressed upon that a main condition for changing to an added value tax is that the tax reform must not end in a considerable shifting of the tax burden from the business enterprises to the private consumers. He presupposed that the tax rate to be applied for the new added value tax will be the same as the rate for the existant turnover tax, i.e. 10% on the price including the tax. According to the Minister of Finance this will lead to the necessity of compensating the diminution of the tax burden on the industry and commerce sector caused by the deduction for investments in machinery and other costs which will be allowed in the added value tax system. In the opinion of the Minister of Finance the compensation has to be achieved by a special employers charge. This charge will be levied upon the total of the salaries and wages paid by the enterprises as well as the profits earned by persons carrying on their own

businesses. Salaries and wages in public and other similar activities will also be submitted to the charge. The rate will be 1%.

With regard to the scope of the tax liability for the added value tax the Minister of Finance expressed the opinion that it should be somewhat lessened in comparision with the committee proposal. He agreed with the committee that the trading with used cars now exempted from turnover tax should be submitted to added value tax. In accordance with the committee he also considered the hotel services to be included in the new system. In his opinion, however, these services are to be treated in the same way as restaurant services are treated at present. This means that only 60% of the turnover will be submitted to tax. The treatment of the daily newspapers is to be reconsidered in connection with the proposals on State subventions to the press which are prepared by a special press committee.

Apart from this the Minister of Finance declared that he disagrees with the committees proposals to include in the scope of tax liability for the added value tax persona. transports and such electric power and fuels which now are subject to the present tax on energy consumption.

According to the Minister of Finance an added value tax on personal transports would mean a disadvantage for public transports in respects of costs and competition compared with private transports which is not desirable. In his opinion personal transports must be exempted from the added value tax.

The Minister of Finance reminded that although the electric power and oil enterprises still would be liable to pay tax on energy they should be entitled to deduct the added value tax paid on their investments and other costs in order to be equalled to industrial enterprises in general.

As to the economic effects of the shifting from a turnover tax to an added value tax the Minister of Finance pointed out i.a. that the turnover tax the exporting and certain other enterprises now have to pay on their investments is estimated to reach an amount of more than twice as much as the total of the employers charge imposed upon them. As expected to be especially favoured the Minister of Finance mentioned the iron and steel industry and the forest industry. As such sectors for which the employers charges could be expected to exceed the present tax on investments he mentioned the service and building enterprises. In both cases the reason is to be found in the low volume of investments in relation to the wages. The public administration will also bear a considerable part of the employers charge.

In order to ensure a smooth transition to the new system the Minister of Finance suggested the introduction of the added value tax and the employers charge to take place on January 1st, 1969. This means that the present turnover tax on the investments is to be maintained during 1968. It can therefore be feared that the enterprises postpone their orders for certain investment goods, particularly machinery, on purpose to get delivery the next year and thus benefit from tax exemption according to the new system. In order to avoid such consequences and to promote a more steady development of the investments in machinery during 1968 and 1969 the Minister of Finance announced his intention to propose the right of an extra deduction of 10% at the State income tax assessment for machinery acquired during 1968. The tax relief by such a measure could be estimated to some 5% of the acquirement costs, whereas the present turnover tax costs after income tax could be calculated to 3%. The proposed investment deduction thus would ensure an extra stimulus to investments in machinery during 1968.

AGREEMENT CONCLUDED BETWEEN FRANCE AND U.S.S.R. CONCERNING TAXATION OF PATENT ROYALTIES

ACCORD CONCLU PAR ECHANGE DE LETTRES ENTRE LE GOUVERNEMENT DE LA REPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'UNION DES REPUBLIQUES SOCIALISTES SOVIETIQUES, RELATIF AU REGIME FISCAL DES BREVETS

An agreement concluded by an exchange of letters between France and U.S.S.R. and signed in Paris on March 14, 1967, concerning taxation of patent royalties was adopted by the French National Assembly on December 19, 1967.

This agreement provided a mutual exemption from income taxes and turnover taxes on royalties from the U.S.S.R. paid by the Soviet foreign trade organizations to an individual or entity, resident in France and on royalties from France paid by an individual or entity, resident in France to the Soviet foreign trade organization.

We are now publishing the text of this agreement and the motives as submitted to the National Assembly.

ANNEXES

I

AMBASSADE DE L'UNION
DES RÉPUBLIQUES
SOCIALISTES SOVIÉTIQUES
A PARIS

Paris, le 14 mars 1967.

Monsieur Hervé Alphand, Ambassadeur de France, Secrétaire général du Ministère des Affaires étrangères, Paris.

Monsieur l'Ambassadeur,

Désireux de développer la coopération entre l'Union des Républiques socialistes soviétiques et la République française dans le domaine de la propriété industrielle, j'ai l'honneur de vous proposer d'exonérer, à partir du 1er janvier 1966, des impôts sur le revenu et des taxes sur le chiffre d'affaires actuellement perçus ainsi que des impôts de même nature qui s'y ajouteraient ou qui les remplaceraient, les redevances payées en rémunération de la vente ou de la concession de licences d'exploitation portant sur des brevets d'invention, des marques de fabrique, de commerce ou de service, des dessins et modèles. Cette exonération concerne notamment les redevances versées pour l'utilisation de procédés et de méthodes de fabrication

et pour l'usage d'équipements industriels et scientifiques ainsi que les redevances versées en rémunération de l'assistance technique afférente à cette vente ou concession.
L'exonération ainsi accordée s'appliquera — que le paiement ait lieu en une ou plusieurs fois:
— en U.R.S.S., à toute somme payée par les organismes soviétiques du commerce extérieur à des personnes physiques ou morales ayant leur domicile ou leur siège social en France, et
— en France, à toute somme payée aux organismes soviétiques du commerce extérieur par des personnes physiques ou morales ayant leur domicile ou leur siège social en France.
Je vous serais reconnaissant de me faire savoir si cette proposition rencontre l'agrément du Gouvernement français. Dans l'affirmative, je suggèrerais que la présente lettre et la réponse de Votre Excellence soient considérées comme consacrant l'accord intervenu sur cette question entre le Gouvernement de l'Union des Républiques socialistes soviétiques et le Gouvernement de la République française. Cet accord pourrait entrer en vigueur le premier jour du mois suivant l'échange des notifications constatant que les procédures constitutionnelles requises à cette fin ont été accomplies dans les deux Etats.

Veuillez agréer, Monsieur l'Ambassadeur, l'assurance de ma très haute considération.

Signé: V. ZORINE

II

MINISTÈRE DES AFFAIRES ÉTRANGÈRES

LIBERTÉ-ÉGALITÉ-FRATERNITÉ
RÉPUBLIQUE FRANÇAISE

Paris, le 14 mars 1967.

Son Excellence Monsieur Valerian Zorine,
Ambassadeur de l'Union des Républiques socialistes soviétiques
à Paris.

Monsieur l'Ambassadeur,
Par lettre en date de ce jour, vous avez bien voulu me faire savoir ce qui suit:
«Désireux de développer la coopération entre l'Union des Républiques socialistes soviétiques et la République française dans le domaine de la propriété industrielle, j'ai l'honneur de vous proposer d'exonérer, à partir du 1er janvier 1966, des impôts sur le revenu et des taxes sur le chiffre d'affaires actuellement perçus ainsi que des impôts de même nature qui s'y ajouteraient ou qui les remplaceraient, les redevances payées en rémunération de la vente ou de la concession de licences d'exploitation portant sur des brevets d'invention, des marques de fabrique, de commerce ou de service, des dessins et modèles. Cette exonération concerne notamment les redevances versées pour l'utilisation de procédés et de méthodes de fabrication et pour l'usage d'équipements industriels et scientifiques ainsi que les redevances versées en rémunération de l'assistance technique afférente à cette vente ou concession.
L'exonération ainsi accordée s'appliquera que le paiement ait lieu en une ou plusieurs fois:

— en U.R.S.S., à toute somme payée par les organismes soviétiques du commerce extérieur à des personnes physiques ou morales ayant leur domicile ou leur siège social en France, et
— en France, à toute somme payée aux organismes soviétiques du commerce extérieur par des personnes physiques ou morales ayant leur domicile ou leur siège social en France.
Je vous serais reconnaissant de me faire savoir si cette proposition rencontre l'agrément du Gouvernement français. Dans l'affirmative, je suggérerais que la présente lettre et la réponse de Votre Excellence soient considérées comme consacrant l'accord intervenu sur cette question entre le Gouvernement de l'Union des Républiques socialistes soviétiques et le Gouvernement de la République française. Cet accord pourrait entrer en vigueur le premier jour du mois suivant l'échange des notifications constatant que les procédures constitutionnelles requises à cette fin ont été accomplies dans les deux Etats.»
J'ai l'honneur de faire part à Votre Excellence de l'accord de mon Gouvernement sur ce qui précède.
Veuillez agréer, Monsieur l'Ambassadeur, les assurances de ma très haute considération.

Signé: HERVÉ ALPHAND

EXPOSÉ DES MOTIFS

MESDAMES, MESSIEURS,
Les achats de procédés de fabrication soviétiques par des industriels français se sont développés au cours de ces dernières années.
Or, la taxation en France des redevances versées par les personnes physiques ou morales françaises aux donneurs soviétiques de licences d'exploitation de brevets présente de sérieux inconvénients sur le plan économique.
En effet, d'une part, les donneurs étrangers de licences n'ayant pas d'installation professionnelle en France sont, en vertu des dispositions des articles 4 *bis*-1° et 182 du Code général des impôts, passibles de l'impôt sur le revenu des personnes physiques perçu par voie de retenue à la source au taux de 24% sur le montant net des redevances qui leur sont versées, montant forfaitairement égal à 80% de ces sommes, observation étant faite, toutefois, que par l'effet des conventions conclues par la France en vue d'éviter la double imposition en matière d'impôts sur le revenu, cette retenue est très fréquemment supprimée ou réduite à un taux très modéré (5%).
D'autre part, au regard des taxes sur le chiffre d'affaires, les cessions de brevets et la concession de licences d'exploitation de brevets, marques de fabrique, procédés ou formules de fabrication, par une firme étrangère à un utilisateur français constituent des affaires faites en France, et sont donc passibles, en principe, de la taxe sur les prestations de services dont le taux est égal à 8,50%. Toutefois, si lesdites opérations peuvent être regardées comme réalisées par une personne pouvant se prévaloir de la qualité d'inventeur, elles sont, conformément à l'article 92 du Code général des impôts, considérées comme relevant de l'exercice d'une profession non commerciale et échappent ainsi à l'imposition aux taxes sur le chiffre d'affaires. Mais les inventeurs étrangers se trouvant dans l'impossibilité pratique d'établir qu'ils ont effectivement cette qualité, l'Administration française a déjà été amenée à conclure avec certaines autorités étrangères des accords destinés à régler ce point. Il en a été ainsi notamment avec la Suisse, les Etats-Unis

d'Amérique, la Hollande, l'Allemagne, la Belgique, la Norvège, la Grande-Bretagne, l'Autriche, le Danemark et l'Italie.

Ainsi, avec la plupart des pays donneurs de licences, les inconvénients économiques du régime fiscal décrit ci-dessus ont été supprimés ou limités par la conclusion de conventions destinées à éviter les doubles impositions en matière d'impôts sur les revenus et d'accords de réciprocité de nature à écarter l'application des taxes sur le chiffre d'affaires chaque fois, du moins, que selon les normes convenues sur une base de réciprocité, le bénéficiaire des produits peut se prévaloir de la qualité d'inventeur.

Or, en l'absence d'accord de cette nature liant la France et l'Union soviétique, le poids de la fiscalité se répercutait nécessairement sur les prix de revient des fabrications des entreprises françaises utilisant des brevets soviétiques. Ces prix de revient se trouvaient donc grevés d'une lourde charge supplémentaire constituant un désavantage certain pour ces entreprises face à la concurrence internationale.

Pour remédier à une telle situation, de nature à freiner les échanges de techniques entre la France et l'U.R.S.S. à un moment où l'on envisage au contraire de les intensifier, un accord relatif au régime fiscal des brevets, négocié sous forme d'échange de lettres entre les deux pays, a été signé le 14 mars 1967.

Cet accord prévoit l'exonération réciproque des impôts sur le revenu et des taxes sur le chiffre d'affaires actuellement perçus ainsi que des impôts de même nature qui s'y ajouteraient ou qui les remplaceraient, des redevances payées en rémunération de la vente ou de la concession de licences d'exploitation de brevets d'invention, des marques de fabrique, de commerce ou de service, des dessins et modèles, s'appliquant:

— en U.R.S.S., à toute somme payée par les organismes soviétiques du commerce extérieur à des personnes physiques ou morales ayant leur domicile ou leur siège social en France,

— et en France, à toute somme payée par des personnes physiques ou morales ayant leur domicile ou leur siège social dans ce pays aux organismes soviétiques du commerce extérieur.

Cette exonération s'étendra aux redevances rémunérant, non seulement la cession du droit d'utilisation des inventions proprement dites (brevets, marques de fabrique, de commerce ou de service, dessins et modèles) mais aussi à l'ensemble des dispositions nécessaires à l'utilisation pratique de l'invention (tour de mains, savoir faire («Know how»), procédés et méthodes de fabrication, usage d'équipements industriels et scientifiques) et à l'assistance indispensable à l'exploitation de l'invention (mise à la disposition de l'utilisateur de la licence, de techniciens du pays donneur de la licence pour la mise en train de l'invention, contrôle du montage des installations nécessaires pour la mise en oeuvre de ladite invention et l'utilisation des plans, instruction de l'utilisateur de la licence, contrôle des premiers résultats de la fabrication).

En revanche, cette exonération ne s'appliquera pas aux redevances se rapportant à des opérations accessoires, telles que louage de main-d'oeuvre, fournitures d'objets (à l'exception de l'usage d'équipements industriels et scientifiques), publicité, exécutées sur le territoire de l'utilisateur de la licence.

L'Accord du 14 mars 1967 qui contribuera, dans une large mesure, au développement de la coopération entre notre pays et l'Union des Républiques socialistes soviétiques dans le domaine de la propriété industrielle doit entrer en vigueur le premier jour du mois qui suivra l'échange des notifications d'approbation et restera en vigueur sans limitation de

durée. Sa date d'effet a été fixée au 1er janvier 1966.
Telles sont les principales dispositions de l'Accord relatif au régime fiscal des brevets qui vous est aujourd'hui soumis en vertu de l'article 53 de la Constitution.

PROJET DE LOI

Le Premier Ministre,
Sur le rapport du Ministre des Affaires étrangères et du Ministre de l'Economie et des Finances.
Vu l'article 39 de la Constitution.

Décrète:
Le présent projet de loi, délibéré en Conseil des Ministres, après avis du Conseil d'Etat, sera présenté à l'Assemblée Nationale par le Ministre des Affaires étrangères qui est chargé d'en exposer les motifs et d'en soutenir la discussion.

Article unique.
Est autorisée l'approbation de l'Accord conclu par échange de lettres entre le Gouvernement de la République française et le Gouvernement de l'Union des Républiques socialistes soviétiques, relatif au régime fiscal des brevets signé à Paris le 14 mars 1967 et dont le texte est annexé à la présente loi.

Fait à Paris, le 25 novembre 1967.

Signé: GEORGES POMPIDOU.

Par le Premier Ministre,
Le Ministre des Affaires étrangères,

Signé: MAURICE COUVE DE MURVILLE.

Le Ministre de l'Economie
et des Finances,

Signé: MICHEL DEBRÉ.

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SUPPLEMENT to this issue (Supplement B 1968)
Convention between Japan and the United States of Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income

EDITORIAL:

TAXATION AND BASIC ECONOMIC PRINCIPLES

This issue contains a decision of the Federal Fiscal Court in Germany, the highest court in tax matters, regarding the account to be taken of inflation in the determination of income for tax purposes. The result reached by the Court is that no account of inflation may at present be judicially taken for purposes of the income tax laws.

The decision, however, contains a long exposition of the Court's views on the distortions induced by inflation and provisions which legislatively might be included in the tax laws to correct for them. It also contains the submissions of interested organizations on the questions of inflation and taxation generally and judicial intervention in this problem in particular.

It is very hard for people educated in a Keynesian manner to understand why such a case reached the Federal Fiscal Court. For them a policy of slow inflation is viewed as one which the government may, and even should pursue if it is necessary for the achievement of full employment.

Basic principles differ amongst nations however, and in Germany it appears that there is still some substantial dispute about the propriety and indeed even the legality of inflation as a governmental policy.

It is of particular importance that such differences in basic principles be borne in mind when working with the tax laws of a foreign State. Failure to do so may result in totally inaccurate conclusions.

HARRY N. CHAMEIDES

KARIM G. KHOURI:

TAX ADVANTAGES FOR INVESTMENT IN LEBANON

Lebanon is a small country at the eastern side of the Mediterranean Sea, having an area of 10,400 square kilometers and with a population of about 2,500,000. It enjoys a laissez faire economic policy with a free money market.

Taxes on income in Lebanon are of three categories, viz:

A – Tax on income from business and the professions. This tax is a progressive tax, divided into two classes, income from business and income from the professions. Business income is taxed at rates ranging from 5% on incomes not exceeding 5,000 Lebanese pounds to 42% on incomes exceeding 750,000 Lebanese pounds.

Income from the professions is taxed at rates ranging from 4% on incomes not exceeding 5,000 Lebanese pounds to 37% on incomes exceeding 750,000 Lebanese pounds.

B – Tax on income from employment. This is also a progressive tax. It starts at the rate of 2% for incomes not exceeding 4,800 Lebanese pounds and rises to a maximum rate of 10% for incomes exceeding 48,000 Lebanese pounds. It is to be observed that this tax is not as burdensome as the tax on incomes from business and the professions.

C – Tax on income from investments in movable property. This tax is levied on income such as interest, capital gains, bonus shares and the like. The tax is levied at a flat rate of 10% on such income.

Interest received from banks on savings deposits is exempt from this or any other tax, irrespective of the amount involved.

The income tax is only charged on income earned in Lebanon or earned by residents of Lebanon from trade and business abroad. Income earned by resident firms or corporations, abroad through branches or general agencies is not subject to tax in Lebanon, irrespective of whether the income is brought to Lebanon or not. Hence tax is charged on income arising from Lebanon only.

Moreover, income received in Lebanon by persons or companies who do not have a place for conducting their business in Lebanon are taxed on income arising from Lebanon in the following manner:

Net income subject to tax is calculated at the rate of 10% of the gross income in the case of income from business on trade. In the case of income from personal services rendered in Lebanon, net income subject to tax is calculated at the rate of 50% of the gross income. Tax, in both cases, is levied at a flat 10% rate. The purpose of these provisions is to tax income arising from Lebanon to management consultants, engineering consultants and from other services rendered by persons and companies not domiciled in Lebanon.

Airlines and steamship companies are exempt from tax in Lebanon, whether such companies are Lebanese or foreign.

It will be observed that the intent of the aforementioned tax laws and regulations

insofar as bank deposits are concerned, is to encourage deposits in savings accounts where interest thereon is tax free, while other forms of interest income are charged at the flat 10% rate.

Aside from the aforementioned advantages, the Lebanese Government has, passed various laws during the past two years granting tax advantages to certain types of banks and to new industries.

Law No. 38/67 is designed to promote industrial development in the country. Any industry which is established to produce products not already produced in Lebanon is entitled to benefit from this law, provided it meets with certain conditions detailed therein. This law covers industries that produce semi-finished goods, produce goods from semi-finished goods imported into the country, or assemble products.

The major requirements provided for in this law are that the fixed assets of the enterprise amount to at least one million Lebanese pounds and that the total annual payroll amount to at least 150,000 Lebanese pounds. These two amounts are reduced by half should the new industry be established in an area which the Government desires to develop.

Such industries shall be exempt from taxes on income for a period of six years from the date they commence their business activity. This period of tax free income shall be increased to ten years, should the industrial project be established in an area which the Government desires to develop.

This law embraces new establishments as well as existing establishments which diversify to produce new products. Existing establishments, of whatever industrial nature are also entitled to a tax benefit, should they meet with the requirements of the law. They shall be exempt from tax on 50% of their net income, and on 75% of their income should they be in districts which the Government desires to develop, if an equivalent amount is set aside from their profits to be reinvested for the purpose of increasing the capacity or quality of production and/or for labour housing schemes and labour cultural and health development. This partial exemption shall be for a four year period. It is presumed that new establishments or existing establishments that benefit from total exemption, shall be entitled to this partial exemption after the expiry of the period for total exemption. It is to be mentioned that the validity of this law extends to the end of the year 1970.

The introduction of this law has in fact encouraged some foreign capital to be invested in certain industries, particularly in the field of assembly plants.

Insofar as banks are concerned, Law No. 22/67 aims at encouraging the establishment of banks for medium and long term loans. Such banks are becoming a necessity in view of the envisaged industrial development and the increase in housing demand.

Under this law, banks that are established for these purposes are exempt from tax on income for a seven year period. From the eighth year onward, they are exempt from tax to the extent of 4% on their capital. Moreover, they shall enjoy tax free mortgages on real estate and also exemptions from certain stamp duties, which are normally high. The tax on a mortgage is normally 4% and stamp duties are ad valorem on the transactions envisaged by the law, at the rate of about 0.2%.

Moreover, in order to encourage the amalgamation of the smaller banks in Lebanon, Government has promulgated a decree No. 8284 for the purpose. The validity of this decree expires on October 9, 1969.

By this decree, banks that amalgamate or merge, shall be exempt from tax for two years, if the capital of each of the two banks

does not exceed 3,000,000 Lebanese pounds, and for one year should the capital of one of them exceed this amount in capital. Another year of exemption is granted however, should the merger involve more than two banks.

The benefits mentioned above apply to residents and non-residents alike, and likewise to local capital as well as foreign capital. There are no laws that grant tax benefits solely for foreign capital invested in Lebanon.

TERENCE J. GROVE:

TAXATION IN IRAN
THE 1345 TAX ACT

(Part 2)

The January 1968 issue of the Bulletin contained Part 1 of this article. Part 2 is intended to supplement the text of the article as well as the text of Appendix "B".

OTHER PROVISIONS

16*. Amongst other provisions which are of interest are those relating to taxes due under the old law, tax ratios and factors, and fines and penalty interest. The provisions of Chapter II will be dealt with in a later article.

17. The fourth chapter of the law contains provisions as to the settlement of taxes relating to income which was received prior to 1346 for the settlement of these taxes was not restricted as to time and the tax figure had not been finalised. There are specific provisions dealing with (amongst other matters):-

(a) dividends paid from profits undistributed as of 29th Esfand 1345 (see Appendix B-D-4)

(b) income of contractors arising from contracts either finalised prior to 1346 or in respect of which a written proposal had been made prior to 1346. (Unless the employee is the government or government associated bodies it will be necessary to produce satisfactory documentary evidence). Tax will be payable on income from such contracts at rates set out in Section 11 of the 1335 Tax Act (See Part 1).

(c) establishment of tax dispute commissions to settle all outstanding taxes other than those of artisans, traders and selfemployed persons.

18. Part V of Chapter I contains the provisions as to the basis and method of assessment of taxes whenever the provisions of Article 61 apply. Briefly this article (which applies to merchants, contractors and legal persons) states that under specific circumstances taxes are to be directly assessed in accordance with Part V. The more important cases mentioned are as follows:-.

(a) failure to submit accounts on time (normally within 4 months of the year end)

(b) when accounting records are not made available to tax officials.

(c) when the accounting records are determined to be incapable of review for purposes of assessing income, or are not accepted as reliable and reflecting proper results (it should be noted that a taxpayer even in such case has the right to produce a certificate of an official accountant as to the correctness of

* The paragraphs of the Part I should have been numbered through to 15. Consequently Part II begins with No. 16.

his records and if this is done his report will form an acceptable basis for calculation of tax payable—Note to Article 279).

19. The ratios and factors which will be used whenever a direct assessment is to be made will apply in the following manner. Rates schedules will be established by a special commission and unless amended by local commissions to take account of the special circumstances of various parts of the country will be applied to certain bases defined in Article 128. (These bases are similar to those contained in the old law and include capital, purchases, sales, vehicle capacity, etc.)

20. The provisions of Section 61 apart from those noted above also extend to fines and penalty interest as follows:-

18 (a) above will give rise to:
a fine of 10% of tax assessed or
a fine of 2% of tax assessed (maximum Rls 10,000) if tax computed as due was paid within the 4 month period (with certain exceptions of minor nature)
if proper books of account have not been maintained, a fine equal to 20% of tax assessed (such a circumstance may also give rise to a prison sentence of from three months to two years)

18 (b) the above will give rise to a fine of 20% of tax assessed if proper books of account have not been maintained.

18 (c) the above will given rise to a fine of 10% of the difference between tax finally assessed and the taxpayer's declaration of tax payable.

21. Other fines which should be noted are:
(a) making false declaration—15% of difference between tax finally assessed and taxpayer's declaration.
(b) failure to provide lists or particulars required by the law as, for example, salaries lists, failure to send particulars of a contract in excess of Rls 10,000,000 to the Ministry of of Finance—5% of the income figure involved.
(c) failure to give particulars of income from which tax is deductable in accordance with the law (e.g. details of rental paid)—2% of the tax involved or Rls 5,000 whichever is lowei.
(d) failure to remit tax deductible on the due date—20% of the tax due.

CONCLUSIONS

22. Whilst the new law contains a number of regulations which are unclear in their application the mere fact that all past conflicting legislation has been disposed of is an improvement. The manner in which the Ministry officials are tackling the difficulties of implementing the new law gives rise to hopes that the law will be fairly applied. What remains to be seen however is the manner in which private individuals will be obliged to make a full declaration of income and pay over their fair share of tax.

APPENDIX "B" (CONTINUED)

D TAX ON THE INCOME OF LEGAL PERSONS

1. The wording of the article of the law defining the manner in which this class of income is to be taxed is such as to lead one to the assumption that income of all companies[1], and only that part of the income of other legal persons which arises from activities undertaken with a view to the earning of a profit, will be subjected to tax. This assumption whilst apparantly confirmed specifically in the law[2], is yet to be determined by practice as correct or otherwise. It is useful to note that the law only specifically excludes certain religious organisations and societies, certain public endowments (such as the Pahlavi Foundation Social Services organisation) and registered public charities from tax and then, in each case, subject to certain provisions regarding the earning and disposal of income.

2. The rates at which taxable income of legal bodies is to be taxed fall into two groups: tax is either imposed at rates given in Appendix "C"[3] or at flat rates. Complete exemption is allowed however to income of foreign insurance companies whenever the country in which they are resident extends similar relief as regards income of Iranian insurance companies.

3. Tax will be imposed at rates given in Appendix "C"[4] in the following cases:-
(a) income of government or municipality partly or wholly owned companies (to be distinguished from other legal bodies). Such companies cannot benefit from specific exemptions from tax stated in Part III of the law in the calculation of taxable income.
(b) income from profitable activities of legal bodies which are not established for the purpose of distributing profits to stockholders.
(c) income of foreign legal bodies and other legal bodies established outside Iran, apart from shipping and airline companies, received from investment in Iran, derived from direct activities or activities of agents or representatives or via branches and the like, or income derived from the granting of patent rights or concessions or from technical service or training agreements. In this connection note should be made of the existence of an exemption for technical service and training agreement income for a period of one year following the establishment of the beneficiary industrial unit.
(d) income distributable to stockholders in excess of 10% of the taxable income (except in the case of joint-stock or joint-stock partnership companies)
(e) income of co-operative societies[5].
(f) dividends payable to foreign investors or persons resident outside Iran who are holders of registered shares of joint-stock or joint-stock partnership companies.
(g) In cases discussed in paragraphs 8 and 9 below.

4. Tax will be imposed at flat rates as follows:-
(a) 10% of the income of all legal persons other than those noted in 3 (a) (b) (c) and (e) will be payable as tax.
(b) in the case of joint-stock or joint stock partnership companies the balance of taxable

1 See Part 1 for a summary of the types of companies possible under Iranian law.
2 See below.
3 See Part 1.
4 Ibid.
5 See paragraph 10-c-9 for exceptions.

profits after deduction of the 10% tax payment noted above is taxable as follows:

(1) in respect of profits which, in accordance with a decision of the responsible organ, are distributable amongst shareholders who hold registered shares or those "guarantor partners" in the joint stock partnership company, at 15% of the amount distributed.

(2) in respect of the balance of profits and in respect of profits distributable to shareholders of bearer shares, at 25% except that whenever profits distributed including profits distributable to shareholders of bearer shares exceed Rls 100,000,000 the balance of profits is taxable at 50% of the balance of profits or the distribution as the case may be.

Note: 1. Whenever registered shares are held by a foreign investor or whenever these are held by a person not resident in Iran, tax will be payable in respect of profits distributed to such shareholders at rates set out in Schedule "C" (Section 80-D-1).

Note: 2. In accordance with Section 307 (included in the regulations relating to outstanding taxes) any distribution out of profits which have arisen in financial periods prior to the year 1346 (year ended 20th March 1968) will be taxed not on the basis noted above but will be taxed in accordance with tax laws and regulations on the basis of which company profits are taxed. This will be almost without exception at a basic 6% rate plus surtaxes of 15% municipality dues and 15% chambers of commerce and industries and mines dues based on the tax payable (i.e. an effective rate of 6.99%).

5. The following example is given to illustrate the effect of the provisions noted in no. 4:

Joint Stock Company A has 25% foreign shareholding in registered shares and in addition bearer shares have been issued which are held by Iranian investors. Taxable profits and net profits for 1346 were Rls 35,000,000 and distribution was a follows:

	Rials
Registered shareholders dividend	10,000,000
Bearer shareholders dividend	10,000,000
Retained	15,000,000
Rls	35,000,000

It is assumed here that the company does not receive any exemptions from tax in respect of taxable profits other than those relating to allowable expenses.

Tax payable by the company will be as follows:

	Rials
10% of profits (Article 80-D)	2,500,000[6]
15% of distribution to holders of registered shares	1,500,000
25% of distribution to holders of bearer shares	2,500,000
25% of balance of profits (Rls 15,000,000 less Rls 2,500,000)	3,125,000
Basic taxation	9,625,000
3% per section 166 for benefit of Municipality	288,750
0.3% per section 167 for benefit of Chambers of Commerce and Industries and Mines and Guilds)	28,880
Rls	9,942,630

(28,4% of net profits as above)

6. Had the share capital of the company noted in 5 above consisted solely of registered

6 Editor's note - This amount should apparently be 3,500,000 but the difference has no significant effect on the comparison made by the author.

shares the tax payable would be reduced as follows:

	Rials
Basic taxation on profits	9,625,000
Less:	
10% of distribution to holders of bearer shares	1,000,000
	8,625,000
3% Municipality	258,750
0.3% chamber of commerce & guilds	25,880
Rls	8,909,630
	(25,4% of profits)

The main objective behind the distinction made in the law between registered and bearer shares is to encourage investors to utilize registered shares as this will facilitate the checking of individuals' tax declarations by ministry officials.

7. Assessment of taxable profits of legal bodies will in general be based on profits as shown by the legal books. The following exceptions should be noted:-

(a) special arrangements concerning insurance companies exist which will necessitate some form of prior agreement between the Iranian Insurance Companies Syndicate and the Ministry of Finance. Further, in the case of representatives or branches of foreign companies permitted to operate in Iran, results of reinsurance effected by the foreign company will not be brought into the calculation of taxable profits and if reinsurance is effected with a foreign insurance company which has not established a branch or representative in Iran or if such company receives similar income (direct insurance income) 12% of this is to be deemed taxable profits. Although the law does not indicate clearly the rate applicable it can be fairly assumed that rates noted in Appendix "C" will apply. It is of interest to note that, as yet, no provisions requiring withholding of such tax at the source have been formulated.

(b) a special provision allows co-operative societies to include as an expense any legal reserve which is established provided that the amount claimed agrees with accounting records.

(c) foreign shipping and airline companies will be taxed at a fixed rate of 5% of receipts. This is to be withheld at the source by branches of the foreign company and to be paid to the Ministry on a monthly basis. In calculating receipts, all income due in respect of sales of tickets or in respect of freight and the like "from Iran" is to be brought into account whether received in Iran or overseas. The 3% municipality tax will be payable on this income and total tax will therefore amount to 5.015% of receipts.

(d) if: a legal body fails to submit its balance sheet and profit and loss account within 4 months of the year-end or;

the taxpayer refuses without good reason to produce accounting records and vouchers or;

it is determined that the taxpayer's records do not form a reliable basis for the assessment of taxable profits or;

it is determined that results reflected in the taxpayer's accounting records are not in agreement with results of similar undertakings (taking into account economic and other special conditions)

a lump-sum assessment will be made.

(e) the taxable profits of the last accounting period of dissolved companies will consist of the value of assets less liabilities paid up capital and recorded reserves on which tax has been paid. It should be noted that since as a result of exemptions which may be obtained, companies could build-up substantial untaxed reserves and that therefore a final distribution amongst shareholders will not be permitted until either the tax due has been paid or a bond in lieu thereof has been given,

there might be considerable delay in the final dissolution of a company.
(f) certain expenses may not be allowed as deductions and certain exemptions may be claimed by the taxpayer in accordance with Part III of the law.

8 Section 89 deals with the tax treatment of earnings of a manager who is not a shareholder of a company or other legal entity and in the management of which the shareholders or owners do not directly participate. It can be presumed that direct participation will refer to direct supervision or control of daily transactions as they occur.

9 The article referred to in 8 above makes two points. The first is that the income of the manager so far as it falls within the definition of wage or salary income will be taxed in accordance with the relevant provisions (see A above); in so far as the income is derived from a share of profits, this is to be taxed "in accordance with the relevant provisions". Although the wording is vague it can be presumed that tax will be payable on the income shown as this type of income in the tax declaration which the manager will be obliged to render in accordance with Section 131 (See paragraph 14 of the article). A credit will be given for the tax withheld by the company (see 4 above). The second point made by article 89 concerns the tax on the profits of companies or legal entities which are to be taxed at rates noted in Appendix "C" to the article. The interrelationship of this provision with the other provisions noted in 3 & 4 above is not clear.

10. Exemptions from taxation of the income of corporate bodies are dealt with in approximately 20 articles of the law and are far reaching in their effect. The exemptions can be classified as follows:-

(a) exemptions granted to industrial and mining establishments. The exemption will either be a continuation of the exemption of 50% of taxable income in accordance with the law of 1337 or an exemption for either 5 or 10 years of between 20%-100% of taxable income. The latter exemption applies to companies which receive a licence to set up a qualifying establishment from the Ministry of Economy on or after the 28th Esfand 1345 whilst the former will be a continuation of the exemption granted for a period of 5 years from the date as of which operation officially commenced, applicable to establishments receiving a licence prior to the 28th Esfand 1345. In effect, the provisions will not become effective immediately in all cases, since, in general, a considerable amount of time may elapse between the receipt of a licence and the commencement of operations. The law provides in this respect for a maximum delay of two years. However the law provides that certain establishments which were not exempt under the 1337 law may be granted an exemption under the new law. In such cases exemptions will run for 5 years from start of operations. The exemptions granted by the new law have been set out in a schedule (which is to be revised every three years and applies to licences granted in each three year period specified in the schedule) and it is of interest to note that factories which qualified for exemption under the 1337 Tax Act and which do not commence production until a period within 2 years of the date of the new law can elect to take advantage of exemptions provided for by the new law instead of those provided for by the old.
(b) In addition to the exemption which is noted in (a) above there are two more generally applicable exemptions worthy of note as follows:

(1) reserves set aside and utilised within a maximum period of three years to meet the capital cost of a new plant or extension of a present plant will be exempt from tax. There are restrictions however. The exemption will only apply to new plants or extensions for which official construction permission has been received, provided that the plant involved is included in the schedule of exemptions (see above) and provided that the cost of capital expansion (other than the cost of completely new plants) does not exceed 5% of the cost of the present plant undergoing expansion. There are two provisions which to some extent further detract from the value of the exemptions given as follows:

During or after the year 1351

i. the exemption will not apply to companies whose shares are not quoted on the stock exchange.

ii. any company which by benefiting from this exemption erects a new plant will be unable to benefit from the exemption noted in (a) above in so far as such exemption is calculated in accordance with the 1337 law.

(2) 15% of the taxable income of companies whose shares are quoted on the stock exchange and profits arising to shareholders on sale of such shares will be exempt from taxation. In addition any company with at least 100 registered shareholders and with not one person holding more than 10% of the total share capital will receive an exemption from the 10% tax normally imposed on them (before calculation of surcharges of 3% and 03%).

(See 5 and 6 above)

(c) other exemptions applicable to corporate entities are briefly as follows:-

(1) Article 100—complete exemption for 10 years from tax in the case of companies formed to construct low-cost houses in accordance with approved schemes.

(2) Article 101—complete exemption of exporters income in certain cases.

(3) Article 102—partial or total exemption of the profits arising from educational, cultural, artistic, and various health and treatment activities for a 10 year period in certain cases. (It is this article which allows a deduction from profits of development and research expenses of companies formed solely for one or the other of the above purposes).

(4) 25% of the income of hotels and motels situated within a radius of 50 kilometres of Tehran and 100% in all other cases.

(5) certain agricultural income (see B of this Appendix)

(6) certain property income (see E of this Appendix)

(7) certain interest income (see F of this Appendix)

(8) total exemption for varying periods of at least 5 years of the income of Iranian shipping and airline companies.

(9) total exemption for the income of Farm or Labour Co-operative Societies and an amount of profits equal to 6% of paid up capital of other co-operatives.

11. It is regretable that the new law, as was the case with the 1337 law, deals with admissable expenses in such manner as to leave doubt whether or not certain expenses will be allowed as deductions. Part IV of the new law deals with admissable expenses in 8 articles and in the first article (123) the law states that by such expenses are meant expenses which (to such extent as they can be evidenced by documents) solely concern the

earning of income of legal or real persons (resident in Iran and maintaining legal books) for the relevant fiscal period.

12. In this article it is not possible to reproduce the relevant articles. A brief summary is therefore provided in the following paragraphs.

13. Admissable expenses are dealt with under the main headings of cost of goods sold or services supplied, personnel costs, general expenses, and miscellaneous expenses. The remuneration of directors shareholders and legal inspectors is taxable as is any other wage of salary and provided that the individuals concerned held a position other than a nominal position the gross remuneration is deductible. Among other admissable expenses worthy of note are the following:-
(a) licence fees and taxes in respect of operations other than taxes and fines imposed by the law.
(b) research training costs, etc.
(c) accrued expenses
(d) reserves for doubtful receivables set aside as such
(e) one third of losses incurred in any fiscal period against profits of each of the following three fiscal years.

14 Depreciation expense is dealt with at greater length in the new law than it was in the old. In the case of assets acquired during the first six months of any year, depreciation for a full year will be admitted as an expense but if fixed assets are acquired during the latter half of a year then no depreciation for that year will be allowed. Whilst this is quite straight forward the same article (125) states that depreciation is to be calculated starting from the date on which an asset is ready for use. Up until now Ministry officials have rarely accepted a taxable profits figure not in agreement with actual accounting records. Establishment costs can be deducted over a three year period and book losses on sale of fixed assets can be deducted as an expense in the year of sale.

15. Depreciation rates for tax purposes will either be given as a percentage which will be applied in the declining balance method or as a useful life in which case a straight line method will apply. Major repairs or modifications can be capitalized and depreciated. No official announcement concerning depreciation rates has yet been made.

16. The following is an illustration of the remarks made in paragraph 4 and the changes in tax burden brought about by the new law.
Assume that a company having a registered share capital of Rls. 300,000,000 and whose shares are quoted on the Tehran Stock Exchange has a book profit for 1346 of Rls. 25,000,000/—. The company was established in 1341 and as of 1343 was entitled to an exemption of 50% profits from tax. Included in the profits figure is Rls. 3,250,000/— representing net export sales less relative cost of sales. In order to boost production capacity the company has submitted plans to the Ministry of Economy which have been approved and which involve extensions to existing plant. Assuming that depreciation set aside is in accordance with approved rates and that all recorded expenses are allowed for tax purposes, the tax payable is as shown below. It is also assumed that the total number of shareholders does not exceed 100 and that therefore exemption from 10% tax profit does not apply. The distribution account is as follows:-

	Rials	*Rials*
Net balance from 1345		15,000,000
Net profit for 1346		25,000,000
		40,000,000
Reserve to meet plant extension	10,000,000	
(1) Distribution to shareholders	20,000,000	
		30,000,000
Balance carried forward (before setting aside provision for tax)		10,000,000

(1) Of this sum Rls. 9,500,000— is payable to foreign shareholders and of the distribution Rls 10,000,000 is declared as being from the balance of 1345 profits.

Tax payable	*Rials*	*Tax Payable Rials*	
Net profit for 1346	25,000,000		
50% exemption	12,500,000		
15% exemption per Section 116	3,750,000		
Export income per Section 101	3,250,000		
	19,500,000		
Profits subject to tax per Section 80-D	5,500,000	550,000	(1)
Profits subject to tax per Section 80-D-1			
A Distribution from 1346 profit			
Iranian Shareholders	5,250,000	787,500	
Foreign shareholders	4,750,000	1,360,000	
	10,000,000	2,147,500	(2)
B Retained profits of 1346 (Rls 25,000,000,-10,000,000-10,000,000)	5,000,000	1,250,000	(3)
		3,947,500	
Total tax payable to be borne entirely by company		(1) and (3) 1,800,000	
3% per Section 166		54,000	
0.3% per Section 167		5,400	
		Rls 1,859,400	

Tax to be paid by company and which can be offset against total tax liability by each individual shareholder in his individual tax return (2)	2,147,500
3% per Section 166	64,425
	2,211,925
Tax on distributed profits of 1345 (6%+15%+1.5%)	699,000
	Rls 2,910,925

Tax payable under the 1337 tax law would have been:-

1. By the company and borne by the company on profits of (Rls 25,000,000-12,500,000 -3,250,000)

Rls 9,250,000 = Rls 3,791,000 (+ 15% + 625,515 1.5%)

Rls 4,416,515

2. By the company as a deduction from dividends Rls 1,398,000

17. A reduction in tax payable by companies may arise as a result of the 1345 act as illustrated in 16 above (Rls 4,770,325 compared with Rls 5,814,515). However, if it is assumed that the dividends would fall into a tax bracket of Rls 1,000,000 to Rls 2,000,000 in the hands of Iranian shareholders further tax would be payable of Rls 2,808,875 (24% of Rls 10,500,000 less Rls 811,125) which is Rls. 1,764,685 more than the apparant saving.

E.- PROPERTY INCOME

1. Article 19 of the law defines property income as:

"The income of a real or legal person arising from the assignment of his rights (permanently or otherwise) relating to real property situated in Iran whether this be freehold or usage rights pertaining to him or right of utilisation (permanent or temporary), less exemptions provided for in this law."

2. Assignment of rights dealt with in the law can be grouped as follows:

(a) rental of property
(b) permanent disposition of property
(c) transfer of key money (goodwill)

(a) Rental of property

3. All property in the use of a person other other than the owner is deemed to be rented property and taxable income consists of total rent less 25% as a deduction for depreciation, maintenance, and up-keep. Tax is deductible at source by government and corporate bodies at rates set out in Appendix "C" to the article. In the case of furnished property or property and equipment rental, total rental is considered as rent for the purposes of the act and if improvements are made which revert to the landlord the value of such improvements will be considered as non-cash rental from the year in which they are made. There exist other minor provisions not dealt with here.

4. Whenever owner-occupied property is partly let, rental not exceeding Rls 5000 a month will be exempt from taxation.

5. If leased property consists of a mine and the owner receives a share of income, material, or profits therefrom, the sum received or value of materials is considered as rental but no deduction (of 25% as noted in 3) is allowed.

(b) Permanent disposition of property

6. The tax on the sale of real property which was owned by the transferor on the date of the law will be imposed at a rate of 2% of the sale price and whenever a regional price has been or is later officially established (as has been done in many cities) at 2% on the higher of the sale price or the officially determined price. In the case of property acquired by any taxpayer after the date of the law and later disposed of by him, tax will be payable at rates set out in Appendix "C" on the difference between cost and selling price; and in all cases where selling price is lower than official regional prices the latter price will be used in calculating the tax base.

7. As regards the latter mentioned basis of calculating tax payable, the law makes the following points:-
(a) where the property disposed of includes usage rights and these are set out separately in the transfer price, the cost of the property will be compared apart from the rights and in other cases the total price will be used as a basis for comparison.
(b) where property is disposed of as a gift or is inherited and the transaction is subject to property tax, the official price to be used as a comparison basis is that of the year of actual transfer.
(c) official prices are to be set at intervals of three years by joint committees.

8. If tax is paid at 2% as noted in 5 above no further taxes are payable (article 29): but the law does not indicate if income subject to such tax is to be excluded from total income (see Appendix "C") in calculating a taxpayer's total liability.

9. Other matters of interest as regards tax on property transfers are as follows:-
(a) if transfers occur as a result of the effect of land reform laws no tax is payable.
(b) whenever one party to the transfer is the government or a municipality or a government agency the price noted in the deed is a proper base for calculating the tax base.
(c) special provisions detail the manner in which taxes are to be paid and in most cases tax will be collected by notary public officials at the time of registration of the sale deed.
(d) transfers occurring as a result of inheritence with certain exceptions are not subject to property tax but inheritance tax.

10. In Iran for all business premises key money is deemed to come into existence by occupation and, in addition, in practice, the tenant is often required to pay a lump sum as key money when first occupying business premises. Section 28 states that, provided the premises in respect of which key money is given have been included in the evaluation made for the purpose of setting official rates in the case of property transfers (see 7 above), income will be calculated as follows:-

$$I = \frac{(\text{Present value of property less value at date of acquisition of property}) \times \text{Sum received}}{\text{Present value of property}}$$

(Present value is value at the time of transfer of key money)

11. There are exceptions however as follows:-
(a) If a landlord pays key money to one tenant and receives a higher sum from the next the difference is the taxable income.
(b) If the landlord has acquired the property before the determination of an official rate (see above) tax will be payable at a flat sum of 2% of total sum received.

12. If property is exchanged for another; basically the same rules as those noted in 6 above apply. However if property transferred is not covered by the provisions of 20-29 of the law (the matters dealt with briefly in the above paragraphs) the income is deemed to be the gross amount received and will be taxable (presumably) with other income at rates set out in Appendix "C".

F- INTEREST INCOME

1. Interest or late payment penalties received (arising) in Iran and receivable by Iranian or non-Iranian real or legal persons with the exception of such income received by government agencies and companies and all banks and with the exceptions noted below, will be subject to interest tax. This tax is at the rates set out in Appendix "C" and will be considered as a tax paid on account. Exceptions from the payment of interest tax (and also from any other tax) are as follows:-
(a) interest payable to employees in respect of deductions made in accordance with savings or retirement schemes.
(b) interest on fixed deposit, savings and current accounts with Iranian banks.
(c) interest on land reform deeds
(d) interest on government loan bonds and treasury bonds
(e) interest payable to foreign banks by Iranian banks in respect of overdrafts received
(f) interest on governmental or foreign organisation credits or loans for development of agricultural, industry, mines, power, communications and all other projects concerning rehabilitation, production, construction, and training relating to the forgoing matters. The Ministries of Finance and Economy shall decide which projects will be able to benefit from the exemption noted here.

2. The official rate of interest for tax purposes stood at 12% until the passage of the new law. In section 40 it is stated that minimum rate of interest for tax purposes will be in accordance with rates notified every two years by the government and in any event the rate will not exceed 9%. Whilst the 9% rate is a minimum there are exceptions as follows:-
(a) interest on bonds issued by companies to the public will be at rates set out in the bond document.
(b) interest on current accounts between companies will be at rates recorded in official books—provided that both companies pay tax on the basis of these books.
(c) interest payable to companies resident overseas will be taxed on the basis of amounts actually paid.
(d) interest payable under conditional property transactions and under mortgage agreements will not be subject to interest tax unless interest has actually been paid.

3. Payment of interest tax will either be made on the basis of annual tax declarations made by persons who have granted loans, or will be paid on account at rates set out in Appendix "C" in the following cases:-
(a) when loan documents are registered at an official notary's office.
(b) whenever interest is paid or credited to the creditor's account and the loan documents are not registered.

4. If a lump sum payment is made in respect of both capital and interest without distinction being made between the constituent elements, accrued interest to the time of payment is presumed to be paid first.

G- MISCELLANEOUS INCOME

1. All cash and non-cash income receivable in Iran by a real or corporate person as a result of betting, national or ordinary lottery and any other transaction made for consideration or unconditionally in the form of a prize or under any other title will be subject to miscellaneous income tax. Whilst Section 46 of the act does not indicate that income taxable under other schedules will not be taxed as miscellaneous income it can be safely presumed that this is the fact. Specific exemptions granted by the act are as follows:-

(a) Life insurance benefits paid to beneficiaries

(b) A bride's dowry if immovable property and all movable and immovable property included in a marriage settlement.

(c) Scientific awards and all scholarships together with advertising publicity prizes and savings account prizes granted by banks to a maximum of Rls 30,000.

(d) government subsidies and prizes paid for promotion of export production, or purchase of agricultural products (however these income items will be taxed under other sections of the act).

2. Taxable income for purposes of the taxation noted in 1 will consist of the sum received or in the case of immovable property the higher of the market price as of the transfer date or the official regional price established as a result of the implementation of the note to Section 23. This section relating to property income tax provides for committees to be established to determine official regional prices where these do not exist and to review these prices at three yearly intervals.

3. In the case of exchange conveyances and exchange inter vivos settlements, taxable income will be the difference in values of the property transferred. There are provisions dealing with conveyances and settlements cancelled within three months of the transfer date to allow tax refunds and also dealing with separate settlements of property and income from the property so as to tax the net value only and to tax annual income arising from settlements separately.

4. Transfers made by will in so far as they are not subject to inheritance tax will be assessed miscellaneous income tax.

5. Section 53 provides that whenever transfers are registered with a notary public, these are subject to the deduction of real estate tax. In other cases details of the transaction are to be provided to the local tax office. In all other cases details are to be given by beneficiaries to the local tax office within two months of the transfer date.

PATRICK DURAND and JACQUES LATSCHA:

A New Corporate Structure in France

LE GROUPEMENT D'INTERET ECONOMIQUE

Created by a governmental ordinance of September 23rd, 1967[1], the "Groupement d'Intérêt Economique"[2] is meant to fill a legal vacuum between the standard structures of trading companies and associations. Its objective is to help medium size enterprises to join forces and create joint ventures in the field of exports, research and development, etc.

While standard trading companies[3] are meant to be profitmaking entities and associations[4] are not as such legally established with a profitable basis, the Groupement is not limited in this regard.

Furthermore, it can be incorporated with or without an issued capital.

A number of tax privileges have been granted to this new structure. They are briefly described below. Initially it should be noted that a special form of agreement, known as "Association en participation"[5] exists in French law and is very similar to a British or American partnership. However, the existence of such agreement must not be disclosed in public, since such disclosure renders it liable to corporation tax at the standard rate. When undisclosed, all profits and/or losses of such partnership are not taxable as such in the hands of the structure itself, but are deemed to be made and/or suffered directly by each partner in proportion to his rights or shares.

In this respect, as will be seen below, the groupement, as far as taxation is concerned, can be defined as an "Association en participation".

I – TAXATION OF PROFITS

Article 20-I of the ordinance of September 23rd, 1967,[6] indicates that each member of a groupement is personally liable to income tax or corporation tax for his share of the profits (or losses) made by the groupement[7].

Accordingly, the following example will show the actual mechanism:

Assuming that a given partner in a groupement holds 50% of the shares and that said groupement has made a profit of 50,000 Francs, said partner will add to his taxable income his share of 50%, i.e. 25,000 Frs. If the groupement had made a loss of 50,000 Frs, instead of showing a profit, then the same member, for the computation of this taxable income, will deduct from his income his share of the loss, i.e. 25,000 Frs.

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1 Ordonnance N° 67-821 of 23rd September, 1967, in Journal Officiel 28th September, 1967.

2 which will be referred to hereinafter as" the groupement".

3 known in France as "Sociétés commerciales" and regulated by the French Law of 24th July, 1966, which completely revamped French corporate systems.

4 as per French Law of Ist July, 1901.

5 their tax treatment is provided for in articles 206-3 and 239 of the French Tax Code.

6 hereinafter referred to as "the ordinance".

7 in deviation from article 206-1 of the French Tax Code.

II – STAMP DUTY (DROITS D'ENREGISTREMENT)

If the groupement is incorporated with a capital, all contributions to such capital are liable to a stamp duty of 1%[8]. One must remember here that the computation of stamp duty on capital contributions was recently drastically modified in France[9].

Therefore if a shareholder who is not personally liable to corporate tax makes a contribution in kind (real estate, goodwill, etc.), to a corporate structure liable to such corporate tax the stamp duty, the standard rate of which is 1%, is applied at the rate of 8% plus local taxes, thus amounting to a total 10.80% rate.

Since the groupement, as indicated above, is not as such liable to corporate tax, the Government, in order to foster the formation of new Groupements, has specifically exempted from such 10,80% rate any contribution in kind made to a groupement. Any and all contributions, whether in cash or in kind, made to a groupement, will therefore be subject to the sole rate of 1% on their amount or value.

Nothing is said in the ordinance about the rate of stamp duty applicable to the transfer of shares in the groupement. Of course, if the groupement is formed without capital, any transfer of "rights" in the groupement will be liable to the flat rate of 10 Francs.[10]

But if shares have been issued, the rate of 4.20% will be applicable[11]. If the shares transferred have been issued for consideration in kind, and if such transfer is made less than three years after the issue of said shares, then the duty applicable will be the same one as applicalbe to the sale or transfer of the assets contributed[12].

The reason for such treatment is that the groupement is not liable to corporate tax and that the special exemption provided for the transfer of shares of corporation subject to corporation tax is not applicable here[13].

III – TRANSFORMATION OF A CORPORATION OR ASSOCIATION INTO A GROUPEMENT

A number of French enterprises, before the institution of the groupement, had already joined forces by either incorporating joint-owned subsidiaries, or creating associations in order to coordinate some of their activities.

Now that the groupement exists, it will be useful, and sometimes necessary, to transform such subsidiaries or associations into groupements.

Under the standard rule[14] such transformation is considered as a liquidation of the structure, involving distribution of all its assets to the shareholders or members. Corporation tax is levied, and the shareholder is then liable to income tax at the standard rate for his share of the assets. This leads, as a matter of fact, to some kind of a fiscal suicide.

Therefore, until January 1st, 1971, a favourable tax system has been instituted[15] in

8 article 18 of the ordinance; article 714-1-1° of the French Tax Code.

9 article 13 of the Law N° 65-566 of July 12, 1965 and article I of the Decree N° 65-618 of July 28, 1965.

10 see for further details on the basic subject: Francis Lefebvre – Feuillets de Documentation – Enregistrement Div. I § 78.

11 cf. French Tax Code art. 727-1.

12 cf. French Tax Code article 728-1.

13 cf. French Tax Code article 728-11 and Law N° 65-566 of July 12, 1965, article 13-3.

14 articles IIIbis and 201 (1 and 3) of the French Tax Code.

15 article 20-II of the ordinance.

order to help corporations and associations to adopt the new structure of the groupement.
Corporate tax will of course be levied, on all profits deriving from the assumed liquidation, but no income tax will be payable by the shareholders who will be only liable to a flat 15% tax on their shares.

Let us asssume, for example, that a corporation wishes to adopt the groupement structure and that the liquidation accounts show

a total bonus of	500,000 Frs
Corporate tax (50%) is levied	250,000 Frs
thus leaving a balance of.....	250,000 Frs
If a shareholder, married, but without dependent children, owns 50% of the shares, he will receive as a dividend	125,000 Frs
Income tax (computed only on this specific amount of income) would amount to[16]	56,640 Frs

The application of the flat rate of 15% will make him liable to

$$\frac{125{,}000 \times 15}{100} = \ldots\ldots\ldots \quad 18{,}750 \text{ Frs}$$

and he will be discharged of any other kind of taxation on this slice of income.

Briefly summarized as above, the taxation of the Groupement d'intérêt économique shows real advantages.
Instead of forming jointly-owned subsidiaries[17], French enterprises will be keen to use the new structure since all its results (profits and/or losses) will not be taxed as such within the groupement, thus giving a total neutrality tax-wise and enabling the members to deduct immediately from their general profits their share of losses.
Access to this groupement is not limited to French nationals. Any foreign person or body can also use the new system, providing of course they meet the requirements of the foreign investment regulations.

16 cf. Lefebvre Memento Pratique du Contribuable 1967 page 61 (barême I.R.P.P.)
17 which are always taxable, even at a reduced scale, owing to the so-called "régime des sociétés-mères" provided for in article 216 of the French Tax Code, as amended by article 20-I of the Law N° 65-566 of July 12, 1965.

* * * * DOCUMENTS * * * *

GERMANY – CASE LAW

INFLATION AND THE TAXATION OF INTEREST

A decision of the Bundesfinanzhof, the Federal Fiscal Court in Germany, deals with the argument that the effects of inflaion cause the income tax on interest to be a tax on capital as well since part of the interest payment represents compensation for the decline of value of the underlying obligation. It was further argued that as a tax on capital it violated the Grund Gesetz or Basic Law.
The Court although denying relief states that should inflation continue and even increase it might arrive at a contrary result in a similar case in the future.
The full text of the decision is reprinted below.

Urteil vom 27. Juli 1967 IV 300/64*

1. Die bisher eingetretene Geldentwertung kann bei der Besteuerung der Einkünfte aus Kapitalvermögen nicht durch einen Abschlag vom Nennbetrag der Kapitalzinsen berücksichtigt werden.
2. Die Besteuerung der Kapitalzinsen nach Maßgabe des Nominalprinzips (Grundsatz „D-Mark = D-Mark") ist zur Zeit mit Verfassungsgrundsätzen nicht unvereinbar.

I

Streitig ist bei der Einkommensteuerveranlagung für das Jahr 1961
ob und inwieweit Zinsen aus Sparguthaben wegen des Kaufkraftschwunds der Deutschen Mark als Einkünfte aus Kapitalvermögen (§ 20 Abs. 1 Nr. 4 EStG 1961 – EStG –) außer Ansatz zu lassen sind.

Der Revisionskläger (Stpfl.) ist Rechtsanwalt. Er war im Streitjahr verheiratet. Der Stpfl. wurde mit seiner Ehefrau zusammen veranlagt. Die Eheleute erklärten für den Veranlagungszeitraum 1961 Einkünfte aus Kapitalvermögen (Zinsen aus Sparguthaben) in Höhe von 3738 DM und Einkünfte aus selbständiger Arbeit (Anwaltspraxis) in Höhe von 51 956 DM.
Das FA setzte die Einkommensteuer entsprechend der Steuererklärung fest.
Mit dem Einspruch beantragten die Eheleute, die Zinseinnahmen aus Sparguthaben bei den Einkünften aus Kapitalvermögen nicht anzusetzen, da sie durch die Geldentwertung ausgeglichen seien.
Der Einspruch blieb ohne Erfolg.
In ihrer Berufung wiederholten die Eheleute ihr früheres Vorbringen. Ergänzend führten sie das Folgende aus: Die Zinsen aus ihren Sparguthaben stellten keine Einkünfte aus Kapitalvermögen dar. Das angesammelte Kapital hätten sie zu ihrer Altersversorgung bestimmt. Durch die Verzinsung des Spar-

* Published in "Bundessteuerblatt 1967 - Teil III;', No. 29, p. 690 e.s.

kapitals werde lediglich die laufende Geldentwertung, die zur Zeit mit 3½ v.H. jährlich anzunehmen sei, wieder ausgeglichen. Ein echter Kapitalertrag liege daher nicht vor. Tatsächlich diene die Verzinsung nur der Erhaltung des bereits versteuerten Kapitals. Die Zinseinnahmen könnten daher allenfalls insoweit einkommensteuerpflichtig sein, als sie den Satz von 3½ v.H. jährlich überstiegen.

Das FG wies die Berufung als unbegründet zurück.

Zur steuerlichen Behandlung der Zinseinnahmen führte das FG aus, daß sich die Heranziehung der Zinsen zur Einkommensteuer aus dem Gesetz ergebe. Änderungen des Geldwertes berührten ausschließlich die Vermögenssphäre, nicht den Einkommensbereich. Die Besteuerung von Dividenden aus Aktien beispielsweise sei ebenfalls nicht davon abhängig, ob der Wert der Aktien im Besteuerungszeitraum gestiegen oder gefallen sei. Wäre die Auffassung des Stpfl. richtig, so müßte ein Kursanstieg im Besteuerungszeitraum eine erhöhte, ein Fallen der Kurse eine verminderte Einkommensteuer zur Folge haben. Das sei nicht der Fall. Darauf, ob und gegebenenfalls in welcher Höhe ein Wertverlust der Sparguthaben des Stpfl. tatsächlich vorliege, komme es deshalb für die Entscheidung nicht an.

Mit seiner Rb. rügt der Stpfl. unrichtige Rechtsanwendung.

II.

Der Senat gab dem BdF, der Deutschen Bundesbank, dem Deutschen Industrie- und Handelstag, der Gemeinschaft zum Schutz der deutschen Sparer, dem Bundesverband des privaten Bankgewerbes und dem Deutschen Sparkassen- und Giroverband Gelegenheit zur Stellungnahme.

1. Der B d F, der dem Verfahren nach § 287 AO a. F. beitrat, führt zu der Frage, ob bei der Ermittlung der Einkünfte aus Kapitalvermögen eine Geldentwertung im Wege der Gesetzesauslegung zu berücksichtigen sei oder ob gegen die Vorschrift des § 20 Abs. 1 Nr. 4 EStG verfassungsrechtliche Bedenken erhoben werden müßten, das Folgende aus.

Die Vereinbarkeit des § 20 EStG mit dem Grundgesetz könne nur durch das Bundesverfassungsgericht geprüft werden, da es sich um ein nachkonstitutionelles Gesetz handele. Zinsen aus Sparguthaben seien nach § 20 Abs. 1 Nr. 4 EStG in ihrer vollen nominellen Höhe als Einnahmen aus Kapitalvermögen zu erfassen. Eine Aufteilung der Zinsen in einen Anteil für Kapitalverzehr und einen „eigentlichen" Kapitalertrag finde im Gesetz keine Stütze. Der Einkommensbegriff des EStG könne nicht aus einer wirtschaftlichen Theorie abgeleitet werden. Einkommen sei nach dem geltenden EStG ein formaler Begriff. Er sei im Hinblick auf das Massenverfahren der Einkommensteuererhebung im Interesse der Rechtssicherheit und der Gleichmäßigkeit der Besteuerung pragmatisch umgrenzt. Eine Geldentwertung könne in diesem Rahmen, wenn überhaupt, dann allenfalls bei einem rapiden Währungsverfall, wie er 1923 und infolge der sogenannten gestoppten Inflation vor dem 21. Juni 1948 eingetreten sei, berücksichtigt werden. Solche Voraussetzungen lägen hier jedoch nicht vor.

Bei der Bestimmung des Begriffes „Zinsen" sei vom allgemeinen Zinsbegriff des bürgerlichen Rechts auszugehen. Danach seien Zinsen Früchte einer Geldforderung (§ 99 BGB). Für die Erfassung von Zinseinnahmen gelte das Nominalwertprinzip, wonach als Maßstab für den Wert des Geldes nur das Geld selbst zulässig sei, nicht jedoch andere Bezugsgrößen (Grundsatz Mark = Mark,

§§ 1 bis 3 des Ersten Gesetzes zur Neuordnung des Geldwesens vom 20. Juni 1948 – WährG – [Gesetz- und Verordnungsblatt des Wirtschaftsrates des Vereinigten Wirtschaftsgebietes Nr. 15 vom 2. August 1948, Beilage Nr. 5 S. 1 ff.]). Wertveränderungen der Kapitalanlage könnten mangels Rechtsgrundlage weder bei den Einnahmen noch bei den Werbungskosten berücksichtigt werden. Die Verringerung der Kaufkraft einer Geldforderung falle nicht unter die berücksichtigungsfähigen Werbungskosten (§ 9 EStG). Auch auf dem Wege über die Auslegungsvorschrift des § 1 Abs. 2 StAnpG ergebe sich nichts anderes. Die Anwendung dieser Vorschrift könne, wie der RFH wiederholt betont habe, nicht zu Befreiungen führen, die im Gesetz nicht vorgesehen seien (RFH-Urteil IV a A 34/22 vom 28. Juni 1922, RFH 10, 18, 19). Die volle Erfassung der Nominalzinsen entspreche dem Willen des Gesetzgebers. Da der Wortlaut des Gesetzes und der Wille des Gesetzgebers sich deckten, sei für eine weitergehende Auslegung kein Raum. Die derzeitige Höhe des Zinsniveaus sei kein Indiz dafür, daß der Nominalzins einen Ausgleichsbetrag für den Kapitalverzehr enthalte. Für die zutreffende Beurteilung des gegenwärtigen Zinsniveaus sei vielmehr bedeutsam, daß der Zins nicht nur ein Entgelt für die Zurverfügungstellung von Kapital, sondern vor allem ein wichtiges kreditpolitisches Steuerungsmittel darstelle. Es bestehe keine Veranlassung, eine Geldentwertung aus übergeordneten Rechtsnormen, z.B. aus dem Gleichheitsgrundsatz (Art. 3 GG) oder aus dem Sozialstaatsprinzip (Art. 20 Abs. 1 GG) bei der Ermittlung der Einkünfte aus Kapitalvermögen zu berücksichtigen. Unter der Einkunftsart „Einkünfte aus Kapitalvermögen" seien Erträge sowohl aus Sachwerten (Aktien, GmbH-Anteilen usw.) als auch aus Forderungen zusammengefaßt, die nach den gleichen Grundsätzen ermittelt und daher auch gleich besteuert würden. Das geltende Steuerrecht trage auch dem Sozialstaatsprinzip Rechnung. Nachteile besonders für wirtschaftlich schwächere Bevölkerungskreise bei der Besteuerung von Zinsen aus ungesicherten Forderungen (Spareinlagen usw.) könnten nicht eintreten. Bei Arbeitnehmern werde eine Veranlagung nur durchgeführt, wenn sich ihre Einkünfte, die nicht dem Steuerabzug unterlegen hätten, auf mehr als 800 DM beliefen (§ 46 Abs. 2 EStG). Nach § 9 a Nr. 2 EStG sei bei jedem Steuerpflichtigen ein Werbungskosten-Pauschbetrag von 150 DM (bei zusammen veranlagten Ehegatten 300 DM) von den Einnahmen aus Kapitalvermögen abzuziehen. Diese Sonderregelungen wirkten sich bei Sozialrentnern und bei Pensionären in gleich günstiger Weise aus. Das bedeute, daß die Masse der kleinen Sparer nach dem geltenden Recht für ihre Einkünfte aus Kapitalvermögen in der Regel keine Einkommensteuer zu entrichten habe, es sei denn, daß noch andere Nebeneinkünfte, z.B. aus Hausbesitz, vorhanden seien. Wenn außer Zinserträgen keine anderen Einkünfte vorlägen, werde die Besteuerung praktisch erst bei einem verhältnismäßig großen Sparkapital wirksam. Daher seien die Personengruppen, die ihre Alterssicherung in die eigene Hand genommen und dafür den Weg des Sparens gewählt hätten, nicht sozial ungerecht behandelt.

Im übrigen werde man davon ausgehen dürfen, daß viele Kleinsparer heute nicht mehr als in finanziellen Dingen unerfahren angesehen werden könnten. Zumindest von Sparern mit größerem Vermögen sowie von Steuerpflichtigen, die ihre Altersversorgung selbst in die Hand nähmen, werde man erwarten können, daß sie genau überlegten, in welchem Umfange sie ihre Ersparnisse in Sachwerten oder in Sparguthaben anlegten. Schließlich dürften die Sparbegünstigungen

durch Sparprämien, Wohnungsbauprämien oder durch Abzug der Sparbeiträge als Sonderausgaben nicht außer acht gelassen werden. Das gegenwärtige prämienbegünstigte Sparvolumen sei so hoch, daß einkommensschwächere Personen es noch nicht einmal voll ausnutzen könnten.

Ein Übergang vom geltenden Nominalwertprinzip zum Realwertprinzip sei undurchführbar. In ein und derselben Periode könne die Kaufkraft des Geldes, und zwar je nach der Verwendungsart des Geldes, sowohl zunehmen als auch abnehmen. Es müsse dann auch die Kraufkraftsteigerung steuerlich berücksichtigt werden. Das würde dazu führen, daß die öffentliche Finanzwirtschaft beeinträchtigt würde, da das Steueraufkommen in Perioden der Geldwertminderung durch die Steuerfreiheit von Einkommensteilen geschmälert würde, während umgekehrt in Zeiten der Geldwertsteigerung die öffentliche Hand über mehr Mittel verfügen würde, als sie an sich brauche. Schließlich seien die volkswirtschaftlichen Gefahren in Betracht zu ziehen die bei Einführung des Indexdenkens bestünden.

Der Gesetzgeber habe neuerdings seinen Willen bekräftigt, am Nominalwertprinzip — auch bei der Besteuerung — festzuhalten. Denn der habe es abgelehnt, bei der Aktienrechtsreform 1965 eine Substanzerhaltungsrücklage, die dann auch steuerliche Bedeutung gehabt haben würde, zuzulassen, da ein Umbau des Steuerrechts vom Nominalwertprinzip auf das Sachwertprinzip wegen der unabsehbaren Folgen für die gesamte Rechtsordnung nicht verantwortet werden könne.

2. Zu dem Ersuchen des erkennenden Senats um Äußerung vor allem zu der Frage, von welchem Hundertsatz bei der Bemessung der Geldentwertung in den einzelnen Jahren seit 1950 auszugehen sei und wie die weitere Geldwertentwicklung beurteilt werden müsse, nahm die Deutsche Bundesbank wie folgt Stellung.

Es sei zunächst auf die statistischen Schwierigkeiten hinzuweisen, die sich bei der Messung von Geldwertveränderungen ergäben. Es sei unrichtig, dabei nur den Binnenwert der Währung zu berücksichtigen. Der Außenwert der DM habe sich stetig erhöhrt. Bei der Messung des Binnenwertes der DM sei zu beachten, daß das Preisniveau lange Zeit durch staatlich regulierte Preise beeinflußt worden sei. Dazu komme, daß alle originär ermitteilten Preisindizes sich auf einen genau umschriebenen Kreis von Gütern beschränkten. Maßgebend bleibe grundsätzlich die Zusammensetzung des Warensortiments des Ausgangsjahrs. Eine statistische Fehlerquelle liege deshalb darin, daß die tatsächliche Zusammensetzung sich allmählich ändere.

Alle wichtigen Preisindizes für die Bundesrepublik wiesen für den Zeitraum der Jahre 1950 bis 1964 steigende Tendenz, wenn auch in unterschiedlichem Ausmaß, auf. Der Preisindex für die Lebenshaltung sei pro Jahr durchschnittlich um 2,1 v.H. gestiegen. Die Aussagekraft dieser Steigerungsraten sei dadurch beeinträchtigt, daß das Preisniveau im Jahre 1950 noch einen extrem niedrigen Stand aufgewiesen habe, da zu dieser Zeit noch staatliche Preisbindungen z.B. für Brot, Mieten, Verkehrstarife und Versorgungstarife bestanden hätten.

Beschränkte Aussagekraft komme auch dem Preisindex aller in die inländische Verwendung eingehenden Waren und Leistungen zu, der aus der Sozialproduktberechnung abgeleitet werde. Dieser Index weise eine jahresdurchschnittliche Steigerung von 2,8 v. H auf. Für die Jahre 1953 bis 1964 betrage die Steigerung jährlich 2,4 v. H. Dieser Index baue zum Teil auf Schätzungen auf und beziehe auch den Staatsverbrauch ein, dessen

Preisindex um 4,3 v. H. pro Jahr seit 1950 gestiegen sei. Wegen seiner hypothetischen Bestandteile sei die Verwendbarkeit dieses Index-es für die Geldwertmessung problematisch. Brauchbarer sei ein Index der Preise des privaten Verbrauchs oder – weniger umfassend – der Preisindex für die Lebenshaltung. Jedoch komme auch dem Preisindex für die Lebenshaltung nur begrenzte Aussagekraft zu. Denn dieser Index weise aus verschiedenen Gründen gewisse Übertreibungen des Preisanstiegs auf. Sie seien für die Zeit von 1950 bis 1957 auf jährlich 0,6 v. H., für die Zeit von 1958 bis 1962 mit 0,2 v. H. pro Jahr zu beziffern. Schließlich berücksichtige der Index nicht gebührend die Qualitätsverbesserungen, die gegenüber dem Basisjahr eingetreten und ebenfalls für Preissteigerungen ursächlich geworden seien. Auch habe sich oft die Qualität bei gleichbleibendem Preis verbessert. Es sei ferner zu beachten, daß die Indexsteigerung wegen der nachträglichen Preisfreigaben oder wegen der Anpassungen weiterhin gebundener Preise auf alle Fälle Elemente enthalte, die nicht mit einer Geldwertverschlechterung gleichgesetzt werden könnten. Zusammenfassend ergebe sich, daß auch der Preisindex für die Lebenshaltung kein exaktes Mittel sei, die Veränderung der Verbraucherpreise in einer für alle Verbraucher gültigen Weise über einen längeren Zeitraum hinweg zu messen. Im allgemeinen werde es nicht als Geldwertminderung zu werten sein, wenn der Preisindex für die Lebenshaltung der „mittleren" Verbrauchergruppe um etwa 1 v. H. pro Jahr steige, und nur mit Einschränkungen könne es als Indiz für eine Geldwertverschlechterung gelten, wenn der Index sich zwischen 1 und 2 v. H. pro Jahr erhöhe. Jenseits dieser Grenzen sei allerdings eindeutig eine Verringerung der Kaufkraft des Geldes auf der Verbraucherebene festzustellen.

Es sei außerdem zu berücksichtigen, daß die Einkommensentwicklung einen starken selbständigen Einfluß auf die Preise ausübe. Die Steigerung der Nominaleinkommen werde von der Preissteigerung nicht entfernt aufgezehrt. Sie ermögliche einen starken Zuwachs von Sparkapital. Auf Grund dieser vergrößerten Sparfähigkeit seien im Verhältnis zum Einkommen die Ersparnisse von 1950 bis 1964 überproportional gestiegen. Zwar könnten nicht „Geldwertminderungen" und einkommensbedingte Mehrersparnis „aufgerechnet" werden. Aber es bestünden Zusammenhänge. Ohne die bloß nominale Steigerung der Einkommen wäre die gesamte Ersparnisbildung der privaten Haushalte seit 1950 nominell um etwa ein Viertel kleiner gewesen. Das bedeute, daß die Summe aller privaten Geldersparnisse trotz der Preissteigerungen kaum einen realen Wertverlust erlitten habe, da die tatsächliche Ersparnis etwa um ebensoviel stärker gestiegen sei, als dem Anstieg des privaten Preisniveaus entspreche.
Die Annahme, daß die anhaltende leichte Preissteigerung in den jüngstvergangenen Jahren als ein notwendiger und nicht mehr zu beseitigender Bestandteil der wirtschaftlichen Entwicklung angesehen werden müsse, sei nicht zwingend. Eine Erklärung über die wahrscheinliche weitere Entwicklung der Preise und des Geldwerts könne daher nicht abgegeben werden.

3. Der Deutsche Industrie- und Handelstag nahm zu dem Rechtsproblem wie folgt Stellung.
Wenn man der Erwägung folge, wonach der vom Markt gewährte Nominalzins ein Entgelt für den Kaufkraftschwund enthalte – was von vielen Kreisen angenommen werde –, dann werde man auch davon ausgehen dürfen, daß der Markt auch die relativ kleine Marge für die zu entrichtende

Einkommensteuer vergüte. Dann aber erübrige sich eine steuerliche Berücksichtigung des Geldwertschwunds. Für die folgenden Ausführungen werde jedoch davon ausgegangen, daß ein solcher Ausgleich für die Geldentwertung im Zins nicht enthalten sei. Das vorliegende Rechtsproblem habe grundsätzliche rechtliche und volkswirtschaftliche Bedeutung. In steuerrechtlicher Hinsicht sei wesentlich, daß es für die Anwendung des § 20 EStG nur auf die Einkünfte ankomme, die aus der Kapitalanlage gezogen würden. Wertsteigerungen wie Wertminderungen des Kapitals kämen nicht als positive oder negative Einkünfte in Betracht. § 20 EStG biete daher nach seinem Wortlaut nicht die Möglichkeit, eine Geldentwertung, die sich wertmindernd auf die Vermögenssubstanz als Einkommensquelle ausgewirkt habe, bei der einkommensteuerlichen Behandlung der aus dieser Quelle zugeflossenen Zinsen zu berücksichtigen. In den einschlägigen Befreiungsvorschriften des EStG (§ 3 Nrn. 21, 26 bis 28, 45, 53, 54, 56 und § 3 a) sei eine Berücksichtigung der Geldentwertung nicht vorgesehen.

Die Entwertung des Geldkapitals könne auch nicht unter dem Gesichtspunkt der Werbungskosten berücksichtigt werden. Denn Ausgaben, die lediglich der Erhaltung des Vermögens zu dienen bestimmt seien, stellten keine Werbungskosten dar. Das gelte auch für die Wertverluste am Stammrecht (Hinweis auf RFH-Urteil VI A 1476/28 vom 28. November 1928, RStBl 1929, 65; Urteil des Obersten Finanzgerichtshofs — OFH — IV 1/47 S vom 26. März 1947, MinBlFin 1950, 323). Auch der Begriff des Einkommens biete für eine Berücksichtigung der Geldentwertung keine Stütze. Der gesetzliche Einkommensbegriff schließe sich an keine wissenschaftliche Lehrmeinung an. Es handle sich um einen nach praktischen Bedürfnissen gestalteten wirtschaftlichen Begriff. Nach geltendem Recht würden die Einkünfte nach dem Nominalwert besteuert. Es könne davon ausgegangen werden, daß die Besteuerung des Nominalzinses nach wie vor dem Willen des Gesetzgebers entspreche. Daran seien die Gerichte gebunden. Nicht jede Veränderung der Verhältnisse (§ 1 Abs. 2 StAnpG) berechtige den Richter, vom Nominalwertprinzip als Besteuerungsgrundlage abzuweichen. Von einem nachhaltigen Kaufkraftschwund erheblichen Ausmaßes, der ein Eingreifen des Richters notwendig machen könnte, könne nicht die Rede sein. Der Preisindex für die Lebenshaltung, der als Maßstab für die Geldwertentwicklung dienen könne, sei von 1950 bis 1964 um 33,8 v. H., also im Jahresdurchschnitt (bei Verteilung auf die einzelnen Jahre) um 2,4 v. H. gestiegen. Die durchschnittliche Erhöhung von Jahr zu Jahr betrage nur 2,1 v. H. Es könne nicht auf eine dauerhalfte Geldentwertung geschlossen werden. Die für die Währungspolitik verantwortlichen Stellen — Bundesregierung und Bundesbank — seien bemüht, den Geldwert stabil zu halten. Die Frage, ob die Geldentwertung nach Sinn und Zweck des EStG zu berücksichtigen sei, müsse im Zusammenhang mit dem WährG gesehen werden. Danach stelle die Nominalwertrechnung das tragende Prinzip unserer Rechts-, Wirtschafts- und Währungsordnung dar. Die unkontrollierte Anwendung von Sachwertklauseln habe deshalb der Gesetzgeber ausgeschlossen. Schon nach der bisherigen Rechtsprechung des BFH dürfe eine Berücksichtigung der Geldentwertung nur im Falle einer wesentlichen Verschlechterung des Geldwerts in Betracht gezogen werden (Hinweis auf die BFH-Urteile IV 39/51 U vom 13. März 1952, BFH 56, 305, BStBl III 1952, 120; I 42/51 U vom 13. Juni 1952, BFH 56, 510, BStBl III 1952, 199; IV 241/52 U vom 18. Juni/3. Dezember 1953,

BFH 58, 417, BStBl III 1954, 72). Auch im Zivilrecht werde der Geldentwertung unter den gegebenen Verhältnissen nicht eine Bedeutung zugemessen, die das Eingreifen der Gerichte erforderlich machen könne. So habe der Bundesgerichtshof (BGH) betont, daß es den Gerichten nicht freistehe, aus Billigkeitsgründen eine Angleichung langfristiger Vertragsverhältnisse an die durch Kaufkraftminderung des Geldes geschaffene Lage vorzunehmen. Das könne nur durch den Gesetzgeber geschehen (BGH-Entscheidung V ZR 9/58 vom 14. Oktober 1959, NJW 1959, 2203 ff.; ähnlich Entscheidung vom 21. Dezember 1960, Zeitschrift für Bergrecht, Bd. 102 [1961] S. 337 ff.). In der Rechtsprechung des Bundesarbeitsgerichts sei betont worden, daß eine Aufwertung der Ruhegelder im Hinblick auf die Verschlechterung der Kaufkraft allenfalls dann in Betracht komme, wenn die vom Arbeitgeber gezahlten Beträge so sehr an Kaufkraft eingebüßt hätten, daß es mit der Fürsorgepflicht und mit Treu und Glauben nicht zu vereinbaren wäre, den Pensionär mit solchen Zahlungen abzuspeisen (Hinweis auf die Entscheidung 3 AZR 516/63 vom 12. März 1965, Der Betrieb 1965 S. 822 ff. – DB 1965, 822 ff. –).

Die bisherige Auslegung des Begriffs Kapitaleinkünfte verstoße nicht gegen Verfassungsgrundsätze. Die gleichartige Besteuerung der Erträge aus verschiedenen Einkunftsarten und der verschiedenen Arten von Kapitalerträgen sei mit dem Gleichheitssatz vereinbar (Art. 3 Abs. 1 GG). Entscheidend sei der Nominalwert der Erträge. Es bleibe jedem Steuerpflichtigen unbenommen, sein Vermögen so anzulegen, wie es ihm am zweckmäßigsten erscheine. Er könne Sachwerte oder Nominalwerte erwerben. Ein Verstoß gegen den Grundsatz der sozialen Gerechtigkeit (Art. 20 Abs. 1 GG) könne nur dann vorliegen, wenn sich die Nichtberücksichtigung der Geldentwertung bei der Einkommensteuer oder die Gleichstellung der Erträge aus Sachvermögen und derjenigen aus Geldvermögen für bestimmte Teile der Bevölkerung, insbesondere für die wirtschaftlich oder gesellschaftlich Schwächeren, besonders nachteilig auswirken würde. In dieser Hinsicht sei jedoch der Gesetzgeber seinen Verpflichtungen nachgekommen. Zu erwähnen seien vor allem die Vorteile, die sich aus dem Wohnungsbau-Prämiengesetz (WoPG), aus dem Spar-Prämiengesetz (SparPG) und aus dem Zweiten Vermögensbildungsgesetz ergäben. Abgesehen davon blieben auf Grund des § 46 Abs. 2 Nr. 1 EStG in Verbindung mit der Härtemilderungsvorschrift des § 70 EStDV bei der Masse der kleinen Sparer die Kapitalzinsen bei der Einkommensteuerveranlagung steuerfrei. In gleicher Richtung wirke der Altersfreibetrag für Steuerpflichtige, die das 65. Lebensjahr überschritten hätten. Außerdem sei nach § 9 a Nr. 2 EStG ein Pauschbetrag für Werbungskosten von 150 DM (bei zusammen veranlagten Ehegatten von 300 DM) abzuziehen.

Währungspolitische und gesamtwirtschaftliche Erwägungen sprächen eindeutig gegen eine Berücksichtigung der Geldentwertung bei der Einkommensteuer. Sie ließen diese Berücksichtigung sogar als äußerst bedenklich erscheinen, da sie zu unübersehbaren Konsequenzen und Weiterungen in vielen Bereichen des wirtschaftlichen Lebens führen und eine erhebliche Gefahr für die Währungs- und Wirtschaftsordnung heraufbeschwören würde. Sie hätte zur Folge, daß die gesamte Volkswirtschaft mit einem Geflecht von Indexklauseln überzogen würde. Auch müßte geprüft werden ob bei einer die nominalen Zinseinkommen übersteigenden Geldentwertung ein Verlustvortrag zu gestatten sei und ob im Falle einer Steigerung des Geldwerts der Mehrheit als Ein-

künfte aus Kapitalvermögen zu erfassen sei. Durch Einführung von Indexklauseln würde die Währungseinheit zumindest ihre Funktion als Rechenmaßstab verlieren. Die Berücksichtigung der Geldentwertung bei der Einkommensteuer würde in scharfem Gegensatz zu den im WährG niedergelegten Grundsätzen der Währungsordnung stehen. Ein Geflecht von Indexbindungen für alle wesentlichen Nominalwerte würde die Flexibilität der Preise mindern und zu einer weitgehenden Erstarrung des Preisgefüges in der Volkswirtschaft führen. Eine hohe Flexibilität der Preise sei aber ein wesentliches Element der marktwirtschaftlichen Ordnung (Hinweis auf das Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft „Probleme von Index- und Preisgleitklauseln" vom 24. Februar 1957, Bundesanzeiger 1957 Nr. 70 S. 3). Hinzu komme, daß ein System von Indexklauseln dazu beitragen würde, daß schon in Gang befindliche Inflationsvorgänge sich ausbreiteten und beschleunigten. Würde durch das Urteil eines Bundesgerichts der Weg für eine solche Entwicklung gebahnt, so würden wichtige Gegenkräfte gegen einen inflationistischen Prozeß entscheidend geschwächt. Dadurch würde der Eindruck entstehen, selbst staatliche Stellen sanktionierten die Inflation. Dies würde zu einer nachhaltigen Änderung der wirtschaftlichen Verhaltensweisen führen, wodurch die Inflationstendenz verstärkt würde. Es sei nicht Aufgabe der Rechtsprechung, sondern des Gesetzgebers, im Falle einer Geldentwertung Abhilfemaßnahmen zu treffen und diese so zu gestalten, daß kein wirtschaftlicher Schaden eintrete.

4. Die Gemeinschaft zum Schutz der deutschen Sparer, deren Ausführungen in der Zeitschrift für das gesamte Kreditwesen 1965 Bd. II S. 850 abgedruckt sind, nahm im wesentlichen wie folgt Stellung. Eine Aufteilung des Zinses in einen Anteil für Kapitalverzehr und einen eigentlichen Kapitalertrag sei nicht möglich. Es könne nicht davon ausgegangen werden, daß höhere Zinssätze regelmäßig einen Ausgleich für Belastungen durch Preissteigerungen böten. Ein höherer Zins könne vielmehr Ausdruck wirtschaftspolitischer Bemühungen sein, Steigerungen des allgemeinen Preisniveaus entgegenzuwirken. Die Berücksichtigung der Geldentwertung bei der Einkommensbesteuerung von Kapitalzinsen würde dazu führen, daß beispielsweise auch die Bezieher von Arbeitseinkommen begehren könnten, Teile der Lohn- und Gehaltserhöhungen mindestens von der progressiven Besteuerung freizustellen. Die Berücksichtigung der Geldentwertung bei der Einkommensteuer würde auch dem Zweck des § 3 WährG widersprechen. Ein Urteil im Sinn der Revisionsanträge würde die Tendenzen zur Umgehung des § 3 WährG fördern. Eine gerichtlich anerkannte Geldentwertungsrate würde sich geradezu als Maßstab für eine sich verbreitende Anpassung von Geldforderungen anbieten. Eine Ausbreitung von Sicherungsklauseln würde den Inflationsprozeß beschleunigen.

Eine Berücksichtigung der Geldentwertung bei der Einkommensteuer würde das Prinzip des Nominalismus aushöhlen, nach dem Geld als Zahlungsmittel und allgemeiner Wertmesser ein Gut eigener und nur sich selbst gleicher Art sei und sich nicht als der Wert einzelner Güter oder Leistungen darstelle. Die Preisgabe des Prinzips Mark = Mark würde die Aufgabe einer geordneten Geldwirtschaft bedeuten. Eine Abkehr vom Grundsatz des Nominalismus lasse sich nur bei einer galoppierenden Inflation rechtfertigen. Die Geldentwertung wirke sich für die einzelnen Gruppen von Sparern je nach dem konkreten Sparziel unterschied-

lich aus. So müßten Bausparer eine höhere als die durchschnittliche Entwertungsquote in Anspruch nehmen können, weil die Grundstücks- und Baupreise in besonderem Maße gestiegen seien. Dabei müßten auch regionale Unterschiede berücksichtigt werden.

Ein Versuch, die Auswirkungen der Geldentwertung durch die Rechtsprechung zu beseitigen, würde für die gesamte Wirtschaft mehr Nachteile als Vorteile zur Folge haben (Hinweis auf das Gutachten des Wissenschaftlichen Beirats beim Bundeswirtschaftsministerium „Probleme von Index- und Preisgleitklauseln" vom 24. Februar 1957, a.a.O.). Den Sparer vor den Folgen der Geldentwertung zu schützen, sei nur mit den Mitteln der Wirtschafts- und Währungspolitik möglich. Dies seien Aufgaben der Bundesregierung, des Bundesrats und der Bundesbank.

5. Der Bundesverband des privaten Bankgewerbes schloß sich der Stellungnahme der Gemeinschaft zum Schutz der deutschen Sparer an. Ergänzend führte er aus, daß die gegenwärtige Lage mit der Währungssituation nach den Weltkriegen nicht verglichen werden könne. Die Verhältnisse hätten sich seit Verkündung des EStG nicht grundlegend geändert. Die gegenwärtige Entwicklung der Preise halte sich im Rahmen von langfristigen Preisbewegungen, wie sie auch dem Gesetzgeber bekannt gewesen seien. Sie erforderten daher kein Abgehen von der gesetzlichen Regelung. Hinzu komme, daß es sich bei den Preissteigerungen der letzten Jahre weniger um eine echte Geldentwertung, als um einen Reflex überproportionaler Lohnsteigerungen gehandelt habe. Im Spareinlagenzins jedenfalls sei kein Ausgleich für einen Geldwertverlust enthalten. Dieser betrage (1965) für Spareinlagen mit gesetzlicher Kündigungsfrist 3½ v.H., für Spareinlagen mit einjähriger Kündigungsfrist 4½ v.H. In keinem Jahre sei eine Entwertungsrate von 3 v.H. überschritten worden. Für das Jahr 1964 betrage die Rate 2,3 v.H. Die Bevölkerungskreise, die wegen ihrer geringen Geschäftsgewandtheit keine andere Art der Kapitalanlage kennten als das Sparen, würden in der Regel wegen des einkommensteuerfreien Betrages für Kapitalerträge in der Regel keine Steuer für ihre Spareinlagenzinsen zahlen.

6. Der Deutsche Sparkassen- und Giroverband schloß sich gleichfalls der Stellungsnahme der Gemeinschaft zum Schutz der deutschen Sparer an. Ergänzend führte er das Folgende aus. Im Sparzins sei keine Marge für Kaufkraftminderungen enthalten. Werde durch Urteil eines oberen Bundesgerichts ein Wertausgleich für Steigerungen des Preisniveaus bei Spareinlagenzinsen anerkannt, seien unübersehbare Folgewirkungen zu befürchten. Für einen großen und bevorzugt zu berücksichtigenden Kreis von Steuerpflichtigen seien auf Grund der geltenden Vorschriften die Einkünfte aus Kapitalvermögen steuerfrei. Der Bestand an Sparguthaben unter 10 000 DM betrage 60,2 v. H. des Gesamtbestandes. Es handele sich um 97,4 v. H. sämtlicher Sparkassenbücher. Die Zahl der Sparkassenbücher mit einem Guthabenbestand über 30 000 DM habe Ende 1964 0,3 v. H. der Gesamtzahl betragen. Die Guthaben auf diesen Konten hätten 18,9 v. H. des gesamten Guthabenbestandes ausgemacht. Die hiernach bestehende Benachteiligung bestimmter Sparer sei zwar ungerecht, jedoch sei das Problem nicht durch eine steuerliche Berücksichtigung der Geldentwertung bei den Zinsen zu lösen. Die Wahrung der Stabilität des Preisniveaus durch die für die Währungspolitik zuständigen politischen Gremien und Stellen sei

möglich. Daher brauche die Rechtsprechung nicht korrigierend einzugreifen.

AUS DEN GRÜNDEN:

III.

Die als Revision zu behandelnde Rb. ist unbegründet.

Die Geldentwertung kann aus den in den folgenden Abschnitten dargelegten Gründen bei der Bemessung der Einkünfte aus Kapitalvermögen weder im Wege der Auslegung des Gesetzes noch durch richterliche Rechtsfortbildung berücksichtigt werden. Auch verstößt die Vorschrift des § 20 Abs. 1 Nr. 4 EStG nicht gegen Verfassungsnormen.

Der Senat verkannte bei der Entscheidung nicht, daß die Nichtberücksichtigung der Geldentwertung bei der Besteuerung der Kapitalzinsen für die Betroffenen oft eine empfindliche Härte bedeutet. Diese ist um so schwerer zu rechtfertigen, als die Einkommensbesteuerung im ganzen infolge einer dauernden Geldentwertung erhebliche Verzerrungen aufweist. Sie bestehen vor allem darin, daß einerseits weitgehend bei Sachwertbesitzern Kapitalgewinne zum Teil ungewöhnlichen Umfangs, die in dieser Höhe nur auf Grund der eingetretenen Geldentwertung möglich waren, nicht besteuert werden, weil sie entweder von vornherein nicht der Einkommensteuer unterliegen oder weil ihre Versteuerung auf einen späteren Zeitpunkt, oder sogar auf unbestimmte Zeit hinausgeschoben wird, ferner darin, daß die Entwertungsgewinne der Geldschuldner unerfaßt bleiben, während andererseits Gewinne und Arbeitserträge, die auf Grund der Geldentwertung erhöht sind, der progressiven Einkommensteuer unterworfen werden.

Berücksichtigt man, daß sich die Sachwerte und ihre Erträge, besonders bei den betrieblichen Einkunftsarten und bei den Einkünften aus Vermietung und Verpachtung, ferner die Arbeitserträge (Gehälter und Löhne) und die Sozialversicherungsrenten bei nachhaltiger Geldentwertung stetig erhöhen, so ergibt sich, daß die einzige, durch die Geldentwertung geschädigte Bevölkerungsgruppe die der Geldsparer ist. Bei ihnen wirkt sich, wenn sie größere Geldbeträge, besonders zum Zwecke ihrer Altersversorgung, langfristig angelegt haben, die Entwertung als erhebliche Härte aus. In den dem Senat zugegangenen Stellungnahmen wird das Vorliegen einer Härte teilweise verneint. Dabei wird jedoch nicht genügend beachtet, daß durch die dort erwähnten Steuervergünstigungen, Sparprämien, Pauschalen für Werbungskosten bei Einkünften aus Kapitalvermögen und durch lediglich der Vereinfachung der Veranlagung dienende Vorschriften (§ 46 EStG; § 70 EStDV) nur die Masse der kleinen Sparer steuerlich geschützt wird. Es handelt sich im wesentlichen um die Personenkreise, bei denen die Altersversorgung durch die Sozialversicherung oder durch sonstige Pensionsverhältnisse bereits geregelt ist. Diejenigen Steuerpflichtigen jedoch, die selbst ihre Altersversorgung in die Hand nehmen und daher höhere Beträge anlegen müssen, so besonders Angehörige der freien Berufe, sind durch die Geldentwertung nachhaltig betroffen. Bei ihnen stellt die volle Versteuerung der Zinseinkünfte eine besondere Härte dar. Geht man im Streitfall davon aus, daß den Sparzinsen in Höhe von rd. 4000 DM ein Sparkapital von rd. 100 000 DM zugrunde liegt, so betragen die Nominaleinkünfte nach Abzug einer Werbungskostenpauschale von 300 DM — unter der Annahme, daß der Pauschbetrag die tatsächlichen Werbungskosten ungefähr deckt — 3700 DM, die Realeinkünfte nach Abzug einer Entwer-

tungsquote von 2,4 v.H. (das sind 2400 DM) 1300 DM. Beträgt die auf die Nominaleinkünfte von 3700 DM entfallende Einkommensteuerbelastung 25 v.H., das sind 925 DM, so verbleibt dem Stpfl. ein realer Ertrag von 375 DM. Berücksichtigt man weiter, daß der Stpfl. für das Sparkapital – nach Abzug der persönlichen Freibeträge – 1 v.H. Vermögensteuer zu leisten hat, so ergibt sich in solchen Fällen, daß, wirtschaftlich betrachtet, die gegenwärtige Besteuerung, die ihrem Wesen nach nur eine Belastung der Erträge darstellen soll, und zwar auch soweit es sich um die Vermögensteuer handelt, zu einem Eingriff in die Substanz führt.

Diese Umstände mußten den Senat veranlassen zu prüfen, ob die bisherige Auslegung der Vorschrift des § 20 Abs. 1 Nr. 4 EStG aufrechtzuerhalten ist oder ob weitergehende Rechtsfolgen in Betracht gezogen werden müssen.

IV.

Der Senat hatte zunächst zu prüfen, ob die Geldentwertung im Wege der Auslegung berücksichtigt werden kann und ob dem nicht entgegensteht, daß der Gesetzessinn auf Grund des Nominalprinzips (Grundsatz Mark = Mark, Geldnominalismus) etwa eindeutig festgelegt ist.

1. Unter rein einkommensteuerlichen Gesichtspunkten wäre es auf Grund wirtschaftlicher Auslegung des Zinsbegriffes an sich nicht ausgeschlossen, bei der Bemessung des Zinses die Entwertung der Forderung zu berücksichtigen.

a) Dem Stpfl. ist zunächst zuzugeben, daß bei einer anhaltenden Geldentwertung die Verkehrsauffassung (§ 1 Abs. 2 StAnpG) zwischen dem Nominalzins und dem Realzins zu unterscheiden pflegt. Realzins ist dabei derjenige Teil des Nominalzinses, der nach Abzug der beim Geldkapitalstamm eingetretenen Entwertung verbleibt. Dieser Gesichtspunkt einer realen Verzinsung des Kapitals wird auch in amtlichen Veröffentlichungen und im Schrifttum hervorgehoben (vgl. z. B. Zweites Jahresgutachten des Sachverständigenrats zur Begutachtung der gesamtwirtschaftlichen Entwicklung – Zweites Jg –, Bundestagsdrucksache V/123 Abschnitte 113, 181c, 184; Rittershausen, Die Zentralnotenbank, S. 88 ff.; Steffan, Handbuch des Realkredits, 1963 S. 122 ff.). Er trifft auch da zu, wo das Zinsgefüge eindeutig keine sogenannte Geldentwertungsprämie (Währungsrisikoprämie) enthält, wie das beim Kontensparzins der Fall ist. Darauf, ob im Zinssatz eine Vergütung für die Einkommensteuerbelastung enthalten sei, wie der Deutsche Industrie- und Handelstag meint, kommt es nicht an. Für das Bestehen einer Verkehrsauffassung dahin, daß die Kapitalzinsen zumindest auch den Kaufkraftschwund des Geldkapitals ausgleichen, spricht der deutliche Zusammenhang zwischen dem Zinsniveau bei langfristigen Geldanlagen (Kapitalmarktzins) und der Geldentwertung. Das Bestehen einer bestimmten Geldentwertungsquote als Zinsbestandteil und damit als zinserhöhender Bestandteil wird zwar in den dem BFH zugegangenen Stellungnahmen verneint. Gleichwohl betonte vor allem der Sachverständigenrat mit Recht wiederholt, daß zwischen dem Zinsniveau und der Geldentwertung ein fester Zusammenhang bestehe (vgl. Zweites JG, Abschnitte 184, 186, 207). Auch im Schrifttum liegen hierüber Angaben vor (vgl. Ritterhausen, a.a.O., S. 196, 276, 281; Pfleiderer, Zeitschrift für das gesamte Kreditwesen 1965 S. 886; Steffan, a.a.O., S. 122; weniger bestimmt Zimmerer, Neue Betriebswirtschaft 1965 S. 63).

Hiernach sprechen gewichtige Gründe dafür anzunehmen, daß die Verkehrsauffassung jedenfalls den privaten Kapitalzins wirtschaftlich nicht mehr in vollem Umfang als Frucht des Geldkapitals, sondern, soweit er die beim Geldvermögen eingetretene Entwertung deckt, als einen der Erhaltung der Kapitalsubstanz dienenden Zufluß betrachtet.

b) Ein dieser veränderten Betrachtungsweise Rechnung tragender Zinsbegriff ist mit der dem EStG zugrunde liegenden Trennung von Vermögensebene und Einkommens- (Einkünfte-) Ebene an sich vereinbar. Es ist deshalb denkbar, daß, soweit Zinsen einen Ersatz für die Geldentwertung des Kapitals darstellen, sie als einkommensteuerlich irrelevante Vermögenszuflüsse behandelt werden. Es geht somit nicht in erster Linie, wie der BdF annimmt, um die einkommensteuerliche Berücksichtigung der Vermögensentwertung als solcher, sondern um die Folgerung aus einer teilweisen Funktionsänderung des Zinses auf der Empfängerseite. Auch ist der Antrag des Stpfl. nicht darin zu verstehen, daß die Entwertungsrate als Werbungskosten abgezogen werden solle. Der Stpfl. begehrt vielmehr auszusprechen, daß nur der sich durch Berücksichtigung der jährlichen Geldentwertungsquote ergebende Realzins steuerbar sei.

2. Ist somit, wenn man den Wortlaut und die einkommensteuerrechtliche Systematik für sich betrachtet, eine engere Auslegung des Zinsbegriffs zwar denkbar, so verengt sich jedoch dieser Auslegungsrahmen, soweit der Begriff durch andere als einkommensteuerrechtliche Normen eindeutig in bestimmtem Sinn festgelegt wird. Diese rechtliche Bedeutung kommt dem Nominalprinzip (Grundsatz Mark = Mark) zu. Es besteht eine ähnliche Rechtslage wie bei dem Grundsatz der verfasssungskonformen Auslegung, demzufolge bei Vorliegen mehrerer Auslegungsmöglichkeiten diejenige gewählt werden muß, die der Verfassung entspricht (vgl. Spanner, Archiv für öffentliches Recht 1966, 91. Band S. 503, 507 ff. — AÖR 1966, 91. Band, 503, 507 ff. — mit weiteren Nachweisen). Das gleiche muß in Ansehung solcher Normen gelten, die, ohne Verfassungsrang zu besitzen, ihrer Natur nach die Teilrechtsordnungen durchdringen. Das Nominalprinzip ist eine solche Norm.

a) Der Nominalismus besagt, daß bei Geldschuldverhältnissen der Nennwert maßgebend ist. Den Gegensatz bildet der sogenannte Valorismus, der auf den Kurswert oder Verkehrswert, insbesondere den Kaufkraftwert des Geldes abstellt. Das Nominalprinzip ist zwar in erster Linie für das Gebiet des Privatrechts bedeutsam (vgl. Enneccerus-Nipperdey, Allgemeiner Teil des bürgerlichen Rechts, I. Halbband, S. 780; F. A. Mann, Das Recht des Geldes, 1960 S. 55 ff.; Fögen, NJW 1953, 1321). Es gilt jedoch auch für öffentlich-rechtliche Schuldverhältnisse, und zwar für die Bestimmung sowohl des gesetzlichen Tatbestandes als auch des Rechtsfolgen (z. B. für die Höhe der Steueransprüche, vgl. Jahr, Drittes JG 1966, Bundestagsdrucksache V/1160 S. 178). In der hier zu entscheidenden Frage geht es um die Bedeutung des Nominalprinzips für die inhaltliche Bestimmung des Steuertatbestandes.

aa) Gegen die Maßgeblichkeit des Nominalprinzips bei der Rechtsauslegung kann nicht eingewendet werden, daß der Grundsatz in verschiedener Hinsicht abdingbar (dispositiv) sei. Denn die Abdingbarkeit bezieht sich nur auf die Begründung und nähere Gestaltung von Rechtsverhältnissen, und zwar in erster Linie im bürgerlichen Recht auf Grund des Grundsatzes der Vertrags-

freiheit, soweit nicht Sondervorschriften, wie z. B. § 3 WährG, eingreifen (vgl. F. A. Mann, Das Recht des Geldes, 1960 S. 66 ff.; derselbe, Verhandlungen des 40. Deutschen Juristentags — 40. DJT —, Bd. II Abschn. D S. 35 ff.; Entscheidungen des Reichsgerichts in Zivilsachen Bd. 107 S. 78 [92] — RGZ 107, 78 [92] —; Entscheidungen des Bundesgerichtshofs in Zivilsachen Bd. 14 S. 306 — BGHZ 14, 306 —). Auch öffentlich-rechtliche Ansprüche können mit Wertsicherungsklauseln ausgestattet werden (vgl. Gesetz über die Zahlung der Zölle in Gold vom 21. Juli 1919, RGBl I 1919 S. 1361).

bb) Während somit das Nominalprinzip zwar für die Gestaltung von Rechtsverhältnissen keine unbedingte Geltung besitzt, besteht jedoch eine andere Rechtslage bei der Beurteilung bestehender Schuldverhältnisse und ihrer Rechtsgrundlagen, soweit weder Wertsicherungen bedungen sind noch sich die Sachwertbezogenheit schon aus der Natur des Rechtsverhältnisses ergibt. Bei der Auslegung von Gesetzen und Rechtsgeschäften, in denen bezifferte oder bezifferbare wirtschaftliche Größen genannt sind, kommt, soweit das Gesetz (z. B. § 242 BGB) nicht etwas anderes vorschreibt, das Nominalprinzip voll zur Geltung. Das ergibt sich aus dem währungsrechtlichen Grundsatz, daß die inländische Währung den alleinigen Rechenmaßstab (Recheneinheit) bildet, und daß das Geld somit ein Gut eigener und deshalb nur sich selbst gleicher Art ist (Fögen, NJW 1953, 1321; v. Caemmerer, 40. DJT, Bd. II Abschn. D S. 13). Mit der Verwendung bestimmter Nennbeträge oder mit der Bezugnahme auf bestimmte, zu beziffernde Größen in Rechtsgeschäften oder Rechtsvorschriften ist der Inhalt der Verbindlichkeit fixiert und für eine Umrechnung dieser Nennbeträge in Vergleichswerte (Kurswerte, Kaufkraft) ist kein Raum. Daher werden die in Gesetzen usw. enthaltenen Freibeträge und sonstigen festen Größen von einer Geldentwertung grundsätzlich nicht berührt (vgl. Jahr, Drittes JG, S. 184 ff.). Auch die in den gesetzlichen Tatbeständen abstrakt beschriebenen, bezifferbaren wirtschaftlichen Größen sind im Einzelfall im Sinn der inländischen Währung als Recheneinheit zu verstehen. Obgleich dies nirgends ausdrücklich vorgeschrieben ist, ist dieser selbstverständliche Grundsatz den einzelnen Rechtsvorschriften immanent.

Diese Maßgeblichkeit des Nominalprinzips ergibt sich auch aus einer weiteren Erwägung, die überall da zutrifft, wo das Steuerrecht an Begriffe des Zivilrechts anknüpft. Der Nominalismus gehört nach dem oben Ausgeführten zum Ordnungsgefüge des Zivilrechts. Dort gilt dieses Prinzip als Auslegungsgrundsatz uneingeschränkt, ausgenommen die Fälle der Aufwertung nach § 242 BGB. Es ist grundlegend für die Bestimmung des Inhalts der Geldschulden, der Forderungen und Nebenforderungen einschließlich der Zinsforderungen. Der Inhalt der zivilrechtlichen Begriffe wie Forderung, Zins usw. ist auch steuerrechtlich maßgebend, da die Ordnungsstruktur des Zivilrechts grundsätzlich steuerrechtlich zu beachten ist (BVerfGE 13, 311 [340]).

b) Das Nominalprinzip durchdringt alle Rechtsnormen, die sich auf in Geldbeträgen meßbare wirtschaftliche Größen beziehen, und damit auch die Regelungen der Steuertatbestände. Es ist diesen Vorschriften immanent. Eine Rechtsfindung, die der Einzelnorm einen Sinn beilegte, der nicht mit dem Nominalprinzip in Einklang stünde, würde deshalb die der Auslegung gesetzten Grenzen überschreiten.

Das Nominalprinzip selbst kann rechtlich

nicht in Frage gestellt werden. Auch das Reichsgericht ließ bei der Aufwertungsrechtsprechung den Grundsatz an sich unberührt (vgl. Nußbaum, Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts, 1925 S. 125). Angesichts der tragenden Bedeutung des Geldnominalismus für das Rechts- und Wirtschaftsleben ist für eine verfassungsrechtliche Prüfung des Grundsatzes kein Raum. Er stellt eine der Grundlagen der geltenden Währungsordnung und der staatlichen Wirtschaftspolitik dar. Er ermöglicht das Funktionieren der Geldpolitik, und zwar sowohl der inflationären als auch der stabilisierenden Maßnahmen (vgl. Duden und v. Caemmerer, 40. DJT 1954, Bd. I S. 46 ff., Bd. II Abschn. D S. 9). Daher kann sich im Falle einer Geldentwertung die Kritik nicht gegen die Geltung des Nominalprinzips selbst richten, sondern nur gegen diejenigen staatlichen Maßnahmen oder Unterlassungen, die auf der Grundlage dieses Prinzips bestimmte Gruppen benachteiligen und andere begünstigen.

Eine andere Frage ist jedoch, inwieweit die mittelbaren Auswirkungen des Nominalprinzips einer rechtlichen Beurteilung zugänglich sind. Denn auf der Grundlage des rechtlich nicht angreifbaren Nominalgrundsatzes können sich infolge staatlicher Maßnahmen oder Unterlassungen die wirtschaftlichen Verhältnisse so nachhaltig verändern, daß in einigen Bereichen der Rechtsordnung, so auch im Steuerrecht, unerträgliche Verzerrungen auftreten, denen dann auf rechtlichem Wege durch Gesetz oder durch Richterspruch Rechnung getragen werden muß. Auf diese Weise kann es infolge Veränderung der Verhältnisse dazu kommen, daß einzelne Rechtsvorschriften in Widerspruch zu höherrangigen Grundsätzen, besonders zu Verfassungsnormen, treten (unten VI).

3. Da somit der Inhalt des § 20 EStG durch das Nominalprinzip in dem Sinn eindeutig festgelegt ist, daß Zinsen alle diejenigen Beträge sind, die im Verkehr als solche angesehen werden, und zwar nach Maßgabe des ihnen zukommenden Nennwerts, ist für eine Auslegung gegen den Wortlaut kein Raum. Nach ständiger Rechtsprechung ist nur dann gegenüber dem an sich klaren Wortlaut eines Gesetzes dem Zweck und der wirtschaftlichen Bedeutung Geltung zu verschaffen, wenn diese Gesichtspunkte erkennbar eine vom Wortlaut abweichende Auslegung verlangen (vgl. BFH-Urteil III 193/60 S vom 11. Dezember 1964, BFH 81, 222, BStBl III 1965, 82). Unzulässig ist jedoch eine Auslegung gegen den klaren, unzweideutigen und vom Gesetzgeber auch so gewollten Wortlaut des Gesetzes. Eine sogenannte Auslegung gegen den Wortlaut kommt hiernach nur in Betracht, wenn dieser Wortlaut, gemessen am Gesetzessinn und -zweck, unvollkommen ist. Nur in diesem Fall sind die Gerichte zu einer gesetzergänzenden oder den Gesetzeswortlaut einschränkenden Rechtsfortbildung berechtigt (vgl. Larenz, Methodenlehre der Rechtswissenschaft, S. 279 ff.; BFH-Urteil IV 26/62 S vom 21. Februar 1964, BFH 78, 490, BStBl III 1964, 188). Steht dagegen der Wortlaut im Einklang mit Sinn und Zweck des Gesetzes, so gibt er den „Willen des Gesetzgebers" zutreffend wieder. Für die Annahme einer Unvollkommenheit des Ausdrucks, die durch Auslegung oder Rechtsfortbildung, sei es nach wirtschaftlicher Betrachtungsweise, sei es unter Berücksichtigung der Verkehrsanschauung oder der Entwicklung der Verhältnisse zu beheben wäre, ist dann kein Raum.

V.

Die Geldentwertung kann auch nicht im Wege einer gesetzändernden richterlichen Rechtsfortbildung berücksichtigt werden. Nach der im Anschluß besonders an die Aufwertungsrechtsprechung des Reichsgerichts zu § 242 BGB (vgl. RGZ 107, 78) in einem Teil des Schrifttums vertretenen Meinung ist die Rechtsprechung befugt, einem dem Gesetz noch fremden Rechtsgrundsatz dann Raum zu geben und dadurch die gesetzliche Regelung umzubilden, wenn andernfalls ein Rechtsnotstand entstünde, durch den der Rechtsgedanke Schaden leiden würde (vgl. Larenz, Methodenlehre der Rechtswissenschaft, S. 320). Als ein solcher Zustand wird vor allem angesehen, wenn die Natur der Sache oder ein rechtsethisches Prinzip in einer für das allgemeine Rechtsbewußtsein unerträglichen Weise unberücksichtigt bleibt. Der Rechtsnotstand muß evident und auf andere Weise nicht zu beheben sein, und mit einem alsbaldigen Eingreifen des Gesetzgebers darf nicht zu rechnen sein. Nach dieser Auffassung ist entscheidend, daß das Ergebnis im Einklang mit dem Inhalt des allgemeinen Rechtsbewußtseins steht. Um einen solchen Fall handelt es sich bei der Aufwertungsrechtsprechung des Reichsgerichts (so Larenz, Schuldrecht, Bd. I S. 108; ferner Duden und v. Caemmerer, 40. DJT, Bd. I S. 5 f., Bd. II Abschn. D S. 10). In Fällen, in denen das allgemeine Rechtsbewußtsein noch nicht so eindeutig reagiert, und in denen die Entscheidung in einer noch umstrittenen rechtspolitischen Frage zu treffen ist, dürfen die Gerichte dem Gesetzgeber jedoch nicht vorgreifen (vgl. Larenz, Methodenlehre der Rechtswissenschaft, S. 321).

Es kann dahingestellt bleiben, ob man eine derartige Befugnis des Richters, das Recht über den eindeutigen Wortlaut und den Sinn und Zweck eines Gesetzes hinaus um- oder fortzubilden, anerkennen kann. Denn selbst wenn man dieser Ansicht folgte, so wären die von ihr geforderten Voraussetzungen hier nicht gegeben.

Die seit den fünfziger Jahren eingetretene Verschlechterung des Geldwerts ist von der offenen Inflation der Jahre von 1918 bis 1923 nach Wesen und Ausmaß verschieden. Auch in der Rechtsprechung der anderen oberen Bundesgerichte wurde aus dieser sogenannten schleichenden Inflation keine vom Grundsatz Mark = Mark abweichenden Folgerungen gezogen und eine Anpassung von Schuldverhältnissen an die Änderung der Kaufkraft (Aufwertung von Ansprüchen) in die Zuständigkeit des Gesetzgebers verwiesen (vgl. BGH-Urteile V ZR 9/58 vom 14. Oktober 1959, NJW 1959, 2203; V ZR 95/64 vom 2. November 1965, NJW 1966, 105; Urteil des Bundesverwaltungsgerichts II C 15/60 vom 7. Juni 1962, NJW 1962, 1882; Urteil des Bundesarbeitsgerichts 3 AZR 516/63 vom 12. März 1965, DB 1965, 822).

Die Rechtsprechung nimmt nach alledem keine Ausnahmesituation in dem oben dargelegten Sinn an. Dieser Auffassung schließt sich der erkennende Senat an.

VI.

Da nach dem bisher Ausgeführten die Geldentwertung bei der Besteuerung der Kapitalzinsen nicht im Wege der Auslegung, auch nicht durch Auslegung gegen den Wortlaut, berücksichtigt werden kann, hatte der Senat zu prüfen, ob die Vorschrift des § 20 Abs. 1 Nr. 4 EStG gegen Verfassungsgrundsätze verstößt. Der Senat kommt aus den folgenden Gründen zur Verneinung der Frage. Daher kommt eine Vorlage an das BVerfG gemäß Art. 100 Abs. 1 GG nicht in Betracht.

Die rechtliche Unangreifbarkeit des Grundsatzes Mark = Mark schließt, wie bemerkt, nicht aus, daß eine Geldentwertung infolge des Nominalprinzips zu unerträglichen Spannungen in einzelnen Bereichen der Rechtsordnung führen und die Verfassungswidrigkeit einzelner Normen zur Folge haben kann. In Rechtsprechung und Schrifttum ist anerkannt, daß eine Vorschrift infolge der Entwicklung der Verhältnisse (der Normsituation) nachträglich mit einer Norm höheren Ranges in Widerspruch treten kann (vgl. BVerfGE 12, 341 [353]; 16, 130 [141]; BFH-Urteil IV 11/64 S vom 5. November 1964, BFH 80, 356, BStBl III 1964, 602 — VOL-Urteil — Abschn. IV 3, mit weiteren Nachweisen; Spanner, Deutsches Steuerrecht 1965 S, 91, 93). Da das geltende EStG, das im wesentlichen auf dem EStG von 1925 beruht, auf relativ stabile Geldwertverhältnisse zugeschnitten ist, könnte eine länger dauernde Geldentwertung von nicht unbeträchtlichem Grade unter verfassungsrechtlichen Gesichtspunkten bedeutsam werden.

Der Senat kommt jedoch zu dem Ergebnis, daß ein Verstoß des § 20 Abs. 1 Nr. 4 EStG weder gegen den Gleichheitssatz (Art. 3 Abs. 1 GG) noch gegen das Sozialstaatsprinzip (Art, 20 Abs. 1, 28 Abs. 1 GG) noch nach den derzeitigen Verhältnissen, die auch im Streitjahr vorlagen, eine Unvereinbarkeit mit der Eigentumsgarantie des Art. 14 Abs. 1 in Verbindung mit Art. 19 Abs. 2 GG anzunehmen ist.

1. Gleichheitssatz (Art. 3 Abs. 1 GG)

Dem Gesetzgeber ist es verwehrt, tatbestandliche Differenzierungen oder Gleichstellungen vorzunehmen, die unter keinem vernünftigen Gesichtspunkt mehr gerechtfertigt sind. Der Gleichheitssatz ist u. a. dann verletzt, wenn wesentlich Ungleiches willkürlich gleichbehandelt wird (vgl. BVerfGE 4, 31 [42]; 143 [155]; 16, 6 [24ff.]). Diese Voraussetzung ist erfüllt, wenn die gesetzliche Regelung ohne zureichende Gründe getroffen ist (vgl. Leibholz-Rinck, Grundgesetz, 1966 Anm. 2 zu Art. 3).

Der Gleichheitssatz gilt, wie das BVerfG mehrfach betonte, in besonderem Maße für Steuergesetze. Da diese einen besonders empfindlichen Eingriff in die Vermögens- und Rechtssphäre der Steuerpflichtigen enthalten, müssen sie dem Gedanken einer möglichst gleichmäßigen Belastung aller Steuerpflichtigen sorgfältig Rechnung tragen. Zwar hat der Gesetzgeber dabei weitgehende Gestaltungsfreiheit. Gewisse äußerste Grenzen sind jedoch auch ihm gesetzt (vgl. BVerfGE 21, 12[27]).

a) Eine rechtlich erhebliche Ungleichheit könnte darin gesehen werden, daß der Gesetzgeber die Erträge aus Sachvermögen und aus sonstigen, nicht der Geldentwertung unterliegenden Quellen einerseits und die Erträge aus einem der Entwertung unterliegenden Geldvermögen andererseits im gleichen Umfange, nämlich nach dem Nominalprinzip, zur Einkommensteuer heranzieht. Denn wirtschaftlich betrachtet besitzen die Erträge aus dem der Entwertung unterliegenden Geldvermögen ganz oder zum Teil die Bedeutung eines Kapitalersatzes und nicht mehr der Frucht des entwerteten Kapitals, während die Erträge aus Sachkapitalien in vollem Umfang als echte Früchte angesehen werden. Zu den nicht der Geldentwertung unterliegenden Einkunftsquellen gehören besonders die Sachwerte, die die Grundlage von Einkünften aus Land- und Forstwirtschaft, Gewerbebetrieb, selbständiger Arbeit und aus Vermietung und Verpachtung bilden. Der Gegensatz zwischen der Besteuerung beider Vermögensgruppen ist noch dadurch verschärft, daß das Sachvermögen nicht nur keine Wert-

minderungen, sondern zum Teil sogar außerordentliche Wertsteigerungen, vor allem auf dem Grundstücksmarkt, erfahren hat, die weitgehend einkommensteuerlich nicht erfaßt werden.

b) Bei der Prüfung, ob die Vorschrift des § 20 Abs. 1 Nr. 4 EStG gegen das Willkürverbot des Art. 3 Abs. 1 GG verstößt, spielt der Gesichtspunkt der Systemgerechtigkeit (Folgerichtigkeit) eine erhebliche Rolle (vgl. Leibholz-Rinck, a.a.O., Anm. 11 zu Art. 3). Dieser Gesichtspunkt spricht hier gegen die Annahme einer Verletzung des Gleichheitssatzes, da die Berücksichtigung der Geldentwertung an einer Stelle des Systems und die damit verbundene Einführung des Sachwertdenkens (Grundsatz der Substanzerhaltung) in das Einkommensteuerrecht kaum auf die Kapitalzinsen beschränkt bleiben könnte.

Einkommensteuerrechtlich erhebt sich zunächst die Frage, ob die Einschränkung der Steuerpflicht der Kapitalzinsen eine entsprechende Beschränkung der Abzugsfähigkeit der Zinsen als Betriebsausgaben, Werbungskosten oder Sonderausgaben bedingt. Dieses Problem steht im Zusammenhang mit der sachgerechten Behandlung der Inflationsgewinne der Schuldner. Denn eine Einschränkung der Abzugsfähigkeit der Zinsen kommt der Besteuerung der Schuldnergewinne gleich. Sodann liegt die Frage nahe, ob, solange die Inflationsgewinne der Schuldner nicht erfaßt werden, Geldentwertungsabschläge bei Kapitalgewinnen (z. B. nach § 17 EStG) vorgenommen werden müssen, etwa in der in mehreren Schweizer Kantonen geregelten Form, daß die den Veräußerungserlösen gegenüberzustellenden Anschaffungskosten auf das inzwischen erreichte Kaufkraftniveau umgerechnet werden (vgl. C. D. Kahn, Die Besteuerung des Kapitalgewinns, Winterthur, 1954 S. 50 ff., 56, 79; Imboden, Die Geldentwertung als Problem des Finanzrechts, Archiv für schweizerisches Abgaberecht. Bd. 25 [1956] S. 113 ff.; Höhn, Cahiers de droit fiscal international Vol. XLII [1960] S. 134).

Vor allem würde sich der Gesetzgeber vor die Frage gestellt sehen, ob der Gedanke der Substanzerhaltung auch bei der betrieblichen Gewinnermittlung anzuerkennen sei. Gegen seine Berücksichtigung im Steuerrecht sprach bisher vor allem der Grundsatz der Gleichmäßigkeit der Besteuerung. Die Einführung des Substanzerhaltungsprinzips würde das Bilanzsteuerrecht erheblich umgestalten. Vor allem wären Absetzungen für Abnutzung nach Maßgabe der Wiederbeschaffungskosten zuzulassen. In diesem Zusammenhang müßte das Problem der Besteuerung der sogenannten Scheingewinne beim Umlaufvermögen aufgegriffen werden. Nicht zu übersehen ist, ob und welche Vorkehrungen der Gesetzgeber für den umgekehrten Fall einer deflationären Entwicklung treffen müßte. Darauf wiesen mit Recht der BdF, die Bundesbank und der Deutsche Industrie- und Handelstag in ihren Stellungnahmen hin.

Die Berücksichtigung der Geldentwertung könnte nicht auf die Einkommensteuer beschränkt werden. Sie würde auch bei den Steuern vom Vermögen und bei verschiedenen Verkehrsteuern, so bei der Grunderwerbsteuer und bei der Erbschaftsteuer, eine Rolle spielen.

Die steuerliche Berücksichtigung der Geldentwertung hätte außerdem voraussichtlich Auswerkungen auf das Zivilrecht. Der Gedanke der Substanzerhaltung wäre auch im Handelsbilanzrecht anzuerkennen. Reine Geldschuldverhältnisse müßten laufend der Geldentwertung angepaßt werden; das Verbot der Wertsicherungsklauseln (§ 3 WährG) würde kaum aufrechterhalten werden können.

Wenn der Gesetzgeber angesichts einer hiernach in wichtigen Bereichen der Rechtsordnung möglichen Kettenreaktion von einer Berücksichtigung der Geldentwertung bei der Besteuerung der Kapitalzinsen abgesehen hat und absieht, so handelt er nicht willkürlich. Dabei spielt es keine Rolle, ob und inwieweit sich die gesetzgebenden Gremien in der Vergangenheit tatsächlich mit solchen Erwägungen befaßt haben. Entscheidend ist, daß dem Gesetzgeber diese Einwände zu Gebote standen und auch bei einem noch höheren Grade der schleichenden Geldentwertung zu Gebote stehen würden.

c) Die Nichtberücksichtigung der Geldentwertung bei der Besteuerung der Kapitalzinsen ist auch deshalb nicht als willkürlich zu bezeichnen, weil sich der Gesetzgeber bei diesem Unterlassen auf vernünftige wirtschaftspolitische Erwägungen stützen kann. Der Senat macht sich hierzu die währungspsychologischen Erwägungen zu eigen, die in den ihm zugegangenen Stellungnahmen ausgeführt sind.

Bei der rechtlichen Würdigung dieses Gesichtspunktes ist davon auszugehen, daß das Steuerrecht, wie in der Rechtsprechung wiederholt betont wurde, ein legitimes Lenkungsinstrument der Wirtschaftspolitik darstellt (vgl. vor allem BVerfGE 19, 119 [125]). Dieser Grundsatz ist nicht nur dahin zu verstehen, daß der Gesetzgeber berechtigt ist, steuerliche Maßnahmen zu treffen, um auf wirtschaftliche Abläufe positiv einzuwirken, sondern auch in dem negativen Sinne, daß er Maßnahmen, die an sich naheliegen könnten, unterläßt, um zu verhindern, daß die wirtschaftlichen Abläufe eine aus gesamtpolitischen Gründen unerwünschte Richtung nehmen. Das Unterlassen des Gesetzgebers ist nur dann willkürlich, wenn die zugrunde liegende Besorgnis des Gesetzgebers unter keinem vernünftigen Gesichtspunkt gerechtfertigt ist.

Diese Voraussetzung ist jedoch bei der steuerrechtlichen Nichtberücksichtigung der Geldentwertung nicht gegeben. Denn es kann nicht ausgeschlossen werden, daß ihre Berücksichtigung zur Minderung des allgemeinen Vertrauens in die Stabilität des Geldwerts beitragen würde. In Währungsangelegenheiten kommt aber dem Vertrauensmoment entscheidende Bedeutung zu. Das gilt vor allem in einer Währungsordnung, in der das Geld keinen eigenen Stoffwert besitzt. Das Papiergeld stellt reines Vertrauensgeld dar (vgl. A. Weber, Geld und Kredit, Banken und Börsen, 6. Aufl., 1959 S. 23, 25; Schmölders, Geldpolitik 1962 S. 69 ff., mit weiteren Nachweisen). Dem kann nicht entgegengehalten werden, daß die Geldentwertung auf anderen Gebieten mit Breitenwirkung öffentlich anerkannt wurde, so durch die Einführung der sogenannten dynamischen Sozialrente (Amtliche Begründung in Bundestagsdrucksache II/2437 S. 59), durch die Berücksichtigung künftiger Preissteigerungen bei der Aufstellung der öffentlichen Haushalte (vgl. Erstes JG 1964/65 S. 135), bei der aus der Tagespresse bekannten Zulassung von Inflationsklauseln in Tarifverträgen. Obschon diese Vorgänge das Vertrauen in die Währung offenbar nicht erschüttert haben, ist die Befürchtung nicht ohne weiteres von der Hand zu weisen, daß eine jährliche Änderung des EStG durch Einführung des jeweiligen Geldentwertungssatzes eine stärkere nachteilige psychologische Wirkung auf die Öffentlichkeit ausüben könnte. Zwar würde diesem Gesichtspunkt bei einem höheren Grade der Inflation kein Gewicht mehr zukommen, weil die Tatsache der Geldentwertung dann stärker in das allgemeine Bewußtsein gerückt wäre. Wenn es sich jedoch um eine schleichende Inflation niederen Grades handelt, wie sie im Streitjahr vorlag, könnte das in der offenen gesetz-

lichen Berücksichtigung der jährlichen Geldentwertungsquote liegende amtliche Eingeständnis der Geldentwertung als einer Dauererscheinung erhebliche wirtschaftspolitische Nachteile zur Folge haben.

2. Eigentumsgarantie (Art. 14 Abs. 1, 19 Abs. 2 GG) Grundsätzlich wird durch Art. 14 GG das Vermögen nicht gegen Eingriffe durch Auferlegung von Geldleistungen geschützt (vgl. BVerfGE 19, 119 [128ff.] und die dort angeführte weitere Rechtsprechung). Verfassungswidrig kann unter diesem Gesichtspunkt ein Steuergesetz nicht aus dem Grunde sein, weil es etwa zu einem enteignungsgleichen Eingriff führe – das kommt nicht in Betracht, weil Steuergesetze ihrer Natur nach alle belasten und keine Sonderopfer im Sinne des Enteignungsrechts (vgl. BGHZ 6, 270 [280]; 9, 390 [400]) auferlegen –, sondern nur dann, wenn durch den Eingriff der Wesensgehalt des Eigentums angetastet wird (Art. 19 Abs. 2 GG; vgl. BFH-Urteile III 237/58 U vom 26. April 1963 BFH 77, 258, BStBl III 1963, 413, III 106/60 U vom 10. Mai 1963, BFH 77, 267, BStBl III 1963, 415). Das wird für konfiskatorische Steuern und sogenannte Erdrosselungssteuern bejaht (vgl. BVerfGE 14, 105; Entscheidungen des Bundesverwaltungsgerichts Bd. 6 S. 247; Bonner Kommentar, Erläuterung 13 zu Art. 14 GG). Unter dem Gesichtspunkt der Eigentumsgarantie könnte die Geldentwertung bei der Einkommensteuer daher erst berücksichtigt werden, wenn die Inflation erheblich in die Substanz eingriffe. Dementsprechend kann die volle Besteuerung der Kapitalzinsen im Hinblick auf die Geldentwertung nur dann als Verstoß gegen die Eigentumsgarantie betrachtet werden, wenn in der Besteuerung von Kapitalzinsen, die dem Ersatz der Vermögensentwertung dienen, eine Verschärfung dieses Verstoßes liegt.

Die Frage, ob die Herbeiführung einer erheblichen Geldentwertung durch staatliche Maßnahmen oder Unterlassungen in die Grundrechte der Staatsbürger eingreifen kann, ist bisher nicht entschieden. Im Schrifttum liegen hierzu nur vereinzelte Stellungnahmen vor (vgl. Hettlage, Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer Heft 14 S. 8, 33 VVDStRL 14, 8, 33 –; W. Weber in Neumann-Nipperdey-Scheuner, Die Grundrechte, Handbuch der Theorie und Praxis der Grundrechte, Bd. 2 S. 361; derselbe in VVDStRL 14, 83; Hamann, Grundgesetz, Anm. B 3 zu Art. 14).

Der Senat kann jedoch für die Entscheidung der vorliegenden Frage dahingestellt sein lassen, ob eine Inflationspolitik gegen die Eigentumsinstitutsgarantie der Verfassung verstoßen würde. Denn jedenfalls kann nach den Verhältnissen des Streitjahres nicht davon die Rede sein, daß die zur Entscheidung stehende steuerliche Regelung als Eingriff in die Substanz mit der Eigentumsgarantie unvereinbar sei. Von einem solchen Eingriff könnte erst dann gesprochen werden, wenn die jährliche Geldentwertungsquote mindestens die Zinssätze für langfristiges Sparkapital übersteigt. Im Streitjahr bewegte sich die Geldentwertung jedoch unterhalb dieser Grenze (vgl. Zweites JG des Sachverständigenrats, Abschn. 113). Der Senat geht dabei von der Entwicklung des Preisindexes der Lebenshaltung aus, da diesem Index im Vergleich zu den übrigen gebräuchlichen Indizes der Güterpreise allgemeinere Aussagekraft zukommt (vgl. Erstes JG 1964/65 des Sachverständigenrats, Abschn. 149; die oben angeführten Stellungnahmen der Deutschen Bundesbank und des Deutschen Industrie- und Handelstags; O. Veit, Grundriß der Währungspolitik, 1961 S. 35 ff.). Obgleich auch gegen diesen Index gewichtige Einwände vorzubringen sind,

würde sich der Steuergesetzgeber bei einer Berücksichtigung der Geldentwertung im Einkommensteuerrecht auf ihn zu stützen haben. Denn auf dem Gebiete des Steuerrechts hat der Gesetzgeber weitgehend zu typisieren (vgl. BVerfGE 9, 20 [32]; 11, 50 [60], 245 [253]; 17, 1 [23]). Der Geldwert ist zwar, wie im geldtheoretischen Schrifttum anerkannt ist, nur eine relative Größe, die vor allem durch die Verwendungszwecke des Geldes bedingt ist (vgl. Veit, a. a. O., S. 36 ff.; Schmölders, Geldpolitik, 1962 S. 83 ff.). Da aber, wie bemerkt, für das Steuerrecht nur eine typisierende Betrachtungsweise in Frage kommt, ist der Senat nicht in der Lage, einer gesonderten Beurteilung mit Rücksicht auf einzelne Gruppen von Sparern Raum zu geben, die von der Geldentwertung, gemessen an bestimmten Sparzielen, besonders stark betroffen werden. Aus diesem Grunde muß vor allem die die Bausparer benachteiligende im Streitjahr vorliegende inflationäre Preisentwicklung auf dem Grundstücks- und Baumarkt unberücksichtigt bleiben (vgl. Erstes JG 1964/65, Abschn. 150 c).

3. Sozialstaatsprinzip (Art. 20 Abs. 1, 28 Abs. 1 GG)

Der Vorgang einer Geldentwertung berührt zwar das Prinzip der Sozialstaatlichkeit in besonders starkem Maße, da die Erhaltung einer wenigstens relativen Geldwertstabilität für einzelne Bevölkerungsgruppen eine Existenzfrage bilden kann (vgl. Hettlage, VVDStrL 14, 33). Der Senat hat jedoch nicht zu der Frage Stellung zu nehmen, ob dem Sozialstaatsprinzip überhaupt unmittelbar rechtsgestaltende Wirkung zukommt (vgl. Hamann, Grundgesetz, Anm. B 3 a zu Art. 20 S. 207 f.) oder ob es nur die Bedeutung einer Auslegungs- und Ermessensrichtlinie besitzt (vgl. Forsthoff und Bachof, VVDStrL 12, 36, 80; v. Mangoldt-Klein, Das Bonner Grundgesetz, II. Aufl., Anm. VII 2 a und b zu Art. 20). Denn eine Verletzung des Sozialstaatsprinzips mit der Folge, daß gesetzliche Vorschriften für verfassungswidrig erklärt werden müßten, könnte allenfalls dann angenommen werden, wenn der Gesetzgeber seiner Verpflichtung, die Voraussetzungen für einen erträglichen Ausgleich der widerstreitenden Interessen und für die Herstellung erträglicher Lebensbedingungen zu schaffen, willkürlich, d.h. ohne sachlichen Grund, nicht nachgekommen wäre (vgl. BVerfGE 1, 97 [105]). Diese Voraussetzung ist aber bei der laufenden Geldentwertung weniger schweren Grades, die in den hier in Betracht zu ziehenden Jahren vorlag, nicht gegeben. Wegen des Willkürgesichtspunktes wird auf die Ausführungen zum Gleichheitssatz (Abschnitt VI, 1 b und c) Bezug genommen.

Auf die Frage, ob das Sozialstaatsprinzip schon aus dem Grunde nicht für verletzt angesehen werden könne, weil — wie der BdF und mehrere Spitzenverbände ausführen — nach dem bisherigen Stande der Einkommensteuergesetzgebung und wegen der Schaffung besonderer Sparvergünstigungen die schutzbedürftigen, wirtschaftlich schwächeren Kreise der Steuerpflichtigen private Geldkapitalzinsen kaum zu versteuern bräuchten, kommt es deshalb für die Entscheidung ebenfalls nicht an.

VII.

Der Senat bemerkt im übrigen, daß steuerrechtliche Maßnahmen an sich nur ein begrenztes Mittel darstellen können, um die Inhaber privaten Geldvermögens, besonders die Sparer, gegen die nachteiligen Auswirkungen einer Geldentwertung zu schützen. Denn auch bei einer Freistellung der Kapitalzinsen in Höhe der jährlichen Entwertungsquote von der Besteuerung bleibt dennoch

im wesentlichen der Nachteil der Substanzentwertung bestehen. Je höher der Grad der Geldentwertung ist, um so geringere Bedeutung kommt, verglichen mit dem Ausmaß des Substanzverlustes, der Besteuerung des Ertrages zu, zumal auch der Geldwert der auf den Ertrag entfallenden Steuerleistung abnimmt.

Die Auswirkungen der Geldentwertung können auch nicht nur in bezug auf die Besteuerung der Kapitalzinsen gesehen werden. Von Bedeutung ist das System der Einkommensbesteuerung im ganzen, das, wie ausgeführt, infolge einer dauernden Geldentwertung erhebliche Verzerrungen aufweist. Es ist Sache des Gesetzgebers, hier – beispielsweise durch Steuerbefreiungen (Freibeträge) – den erforderlichen Ausgleich zu schaffen.

BUNDESRATSBESCHLUSS

über die Durchführung der in den Abkommen des Bundes zur Vermeidung der Doppelbesteuerung vorgesehenen Entlastung für ausländische Steuern

PAUSCHALE STEUERANRECHNUNG

(Vom 22. August 1967)

The Swiss Decree of August 22, 1967 indicates that relief for foreign taxes due provided for in Swiss tax treaties will be granted in the form of a single credit against federal, cantonal and municipal income taxes. The credit will in general be limited to the total of Swiss income taxes otherwise payable on the items of foreign source income. Aliens are not eligible for the credit in so far as they are subject to lump sum taxation. A detailed analysis of this important decree will be published in an upcoming issue of European Taxation.

Der Schweizerische Bundesrat,

gestützt auf Artikel 1 und 2, Absatz 1, Buchstaben *e* und *f* des Bundesbeschlusses vom 22. Juni 1951[1] über die Durchführung von zwischenstaatlichen Abkommen des Bundes zur Vermeidung der Doppelbesteuerung,

in Ausführung der vom Bund abgeschlossenen Abkommen zur Vermeidung der Doppelbesteuerung, die für die in der Schweiz ansässigen Empfänger von ausländischen Erträgnissen zum Ausgleich der im Ausland erhobenen Steuern eine Entlastung von den schweizerischen Steuern vorsehen,

bestimmt:

I. ALLGEMEINE BESTIMMUNGEN

1. GELTUNGSBEREICH

Art. 1

[1] Dieser Beschluss gilt für Erträgnisse (Abs. 2) aus Staaten (Vertragsstaaten), mit denen die Schweiz zwischenstaatliche Abkommen zur Vermeidung der Doppelbesteuerung (Doppelbesteuerungsabkommen) abgeschlossen hat, die diese Erträgnisse eine Entlastung von den schweizerischen Steuern vorsehen.

[2] Als Erträgnisse im Sinne dieses Beschlusses gelten Dividenden, Zinsen und Lizenzgebühren, die im Vertragsstaat, aus dem sie stammen, gemäss dem internen Recht dieses Vertragsstaates und in Übereinstimmung mit dem mit diesem Vertragsstaat abgeschlossenen Doppelbesteuerungsabkommen tatsächlich einer begrenzten Steuer unterliegen. Sieht ein Doppelbesteuerungsabkommen für bestimmte Erträgnisse ausdrücklich vor, dass für die Entlastung eine nach einem festen Satz bemessene Steuer in Rechnung

1 AS 1951, 889.

zu stellen ist, so gelten diese Erträgnisse, ohne Rücksicht auf die tatsächliche Besteuerung im Vertragsstaat, als zu diesem Satze besteuert.

2. ENTLASTUNG IN DER SCHWEIZ

Art. 2

[1] In der Schweiz ansässige natürliche und juristische Personen können für die in Übereinstimmung mit einem Doppelbesteuerungsabkommen in einem Vertragsstaat erhobene begrenzte Steuer von aus diesem Vertragsstaat stammenden Erträgnissen eine pauschale Steueranrechnung beantragen.

[2] Fliessen die Erträgnisse einer Kollektiv- oder Kommanditgesellschaft zu, so steht der Anspruch auf pauschale Steueranrechnung der Gesellschaft zu.

[3] Wer die pauschale Steueranrechnung nicht beantragt oder darauf gemäss Artikel 3 bis 7 keinen Anspruch hat, kann verlangen, dass bei der Veranlagung zu den schweizerischen Steuern vom Einkommen die im Vertragsstaat in Übereinstimmung mit dem Doppelbesteuerungsabkommen erhobenen Steuern vom Bruttobetrag der Erträgnisse abgezogen werden.

3. ALLGEMEINE VORAUSSETZUNGEN DER PAUSCHALEN STEUERANRECHNUNG

Art. 3

[1] Die pauschale Steueranrechnung kann nur für Erträgnisse beansprucht werden, die den Einkommenssteuern des Bundes, der Kantone und der Gemeinden unterliegen.

[2] Unterliegen Erträgnisse entweder nur der Einkommenssteuer des Bundes oder nur den Einkommenssteuern der Kantone und der Gemeinden, so kann die pauschale Steueranrechnung nur für einen Teil der in einem Vertragsstaat von diesen Erträgnissen erhobenen Steuer beansprucht werden. Artikel 12 findet sinngemäss Anwendung.

[3] Erträgnisse, für die die pauschale Steueranrechnung beansprucht wird, sind ohne Abzug der Steuer des Vertragsstaates zu deklarieren; gehören sie indessen zum Ertrag eines zur Führung kaufmännischer Bücher verpflichteten Unternehmens, so sind die Nettoerträgnisse, der Betrag der vom Vertragsstaat gewährten Steuerrückerstattung und der Betrag der pauschalen Steueranrechnung als Ertrag zu verbuchen.

4. SONDERFÄLLE

a. Natürliche Personen im Genuss einer Pauschalsteuer

Art. 4

[1] Natürliche Personen, die an Stelle der ordentlichen Einkommenssteuern des Bundes, der Kantone und der Gemeinden eine Pauschalsteuer (Art. 18bis des Wehrsteuerbeschlusses und ähnliche Bestimmungen des kantonalen Steuerrechts) entrichten, können die pauschale Steueranrechnung nicht beanspruchen.

[2] Natürliche Personen, die entweder nur an Stelle der ordentlichen Einkommenssteuer des Bundes oder nur an Stelle der ordentlichen Einkommenssteuern der Kantone und der Gemeinden eine Pauschalsteuer entrichten, können die pauschale Steueranrechnung nur für einen Teil der in einem Vertragsstaat erhobenen Steuer beanspruchen. Artikel 12 findet sinngemäss Anwendung.

b. Dividenden aus Beteiligungen

Art. 5

[1] Dividenden, für die bei den Einkommenssteuern des Bundes, der Kantone und der Gemeinden eine besondere Steuerermässigung (Art. 59 des Wehrsteuerbeschlusses und ähnliche Bestimmungen des kantonalen Steuerrechts) gewährt wird, gelten für die Anwendung dieses Beschlusses als nicht besteuerte Erträgnisse.

[2] Unterliegen diese Dividenden jedoch voll entweder der Einkommenssteuer des Bundes oder den Einkommenssteuern der Kantone und der Gemeinden, so kann die pauschale Steueranrechnung nur für einen Teil der in einem Vertragsstaat von diesen Dividenden erhobenen Steuer beansprucht werden. Artikel 12 findet sinngemäss Anwendung.
[3] Weist der Empfänger dieser Dividenden nach, dass die besondere Steuerermässigung weniger ausmacht als der genau berechnete Betrag der pauschalen Steueranrechnung (Art. 8, Abs. 2 und Art. 10), so wird die Differenz zwischen den beiden Beträgen vergütet.

c. Ausschluss von Abkommensvorteilen

Art. 6

Personen, denen auf Grund eines Doppelbesteuerungsabkommens oder des Bundesratsbeschlusses vom 14. Dezember 1962[1] betreffend Massnahmen gegen die ungerechtfertigte Inanspruchnahme von Doppelbesteuerungsabkommen des Bundes kein Anspruch auf Begrenzung der in einem Vertragsstaat erhobenen Steuer von aus diesem Staat stammenden Erträgnissen zusteht, können für diese Erträgnisse auch keine pauschale Steueranrechnung beanspruchen.

d. Bagatellfälle

Art. 7

Die pauschale Steueranrechnung wird nur gewährt, wenn die Steuern der Vertragsstaaten von den aus diesen Vertragsstaaten stammenden Erträgnissen (Art. 1, Abs. 2) insgesamt den Gegenwert von 30 Franken übersteigen.

II. BETRAG DER PAUSCHALEN STEUERANRECHNUNG

1. GRUNDSATZ

Art. 8

[1] Die pauschale Steueranrechnung erfolgt für die von Bund, Kantonen und Gemeinden erhobenen Steuern gesamthaft und wird in einem Betrag vergütet.
[2] Der Betrag der pauschalen Steueranrechnung entspricht, vorbehältlich des Artikels 12, der Summe der Steuern, die in den Vertragsstaaten von den im Laufe eines Jahres (Fälligkeitsjahres) fällig gewordenen Erträgnissen in Übereinstimmung mit den anwendbaren Doppelbesteuerungsabkommen erhoben worden sind, höchstens aber der Summe der auf diese Erträgnisse entfallenden schweizerischen Steuern (Maximalbetrag).
[3] Der Betrag der pauschalen Steueranrechnung wird nicht verzinst.

2. MAXIMALBETRAG

a. Vereinfachte Berechnung

Art. 9

[1] Der Berechnung des Maximalbetrags ist, vorbehältlich des Artikels 10, der Steuersatz zugrunde zu legen, der der Belastung des Empfängers der Erträgnisse mit für das Fälligkeitsjahr geschuldeten schweizerischen Einkommenssteuern entspricht.
[2] Der nach Absatz 1 massgebende Steuersatz wird wie folgt ermittelt:

a. für Aktiengesellschaften, Kommanditaktiengesellschaften, Gesellschaften mit beschränkter Haftung und Genossenschaften: durch Zusammenrechnung der Steuersätze der für das Fälligkeitsjahr

1 AS 1962, 1622.

in der Sitzgemeinde geschuldeten Einkommenssteuern des Bundes, des Kantons und der Gemeinde;

b. für natürliche Personen, Kollektiv- und Kommanditgesellschaften, Vereine und Stiftungen: auf Grund eines einheitlichen Tarifs, der vom Eidgenössischen Finanz- und Zolldepartement unter Berücksichtigung der durchschnittlichen Steuerbelastung in der Schweiz aufzustellen ist; für Kantone und Gemeinden mit wesentlichen Abweichungen von der durchschnittlichen Steuerbelastung können vom Eidgenösischen Finanz- und Zolldepartement im Benehmen mit den betroffenen Kantonen Korrekturfaktoren vorgesehen werden.

[3] Der vereinfacht berechnete Maximalbetrag kann nicht höher sein als die Summe der für das Fälligkeitsjahr geschuldeten schweizerischen Einkommenssteuern.

b. Genaue Berechnung

Art. 10

[1] Wird für Dividenden eine Vergütung nach Artikel 5, Absatz 3 beansprucht, so ist der Maximalbetrag für diese Dividenden unter Berücksichtigung der Steuern zu ermitteln, die auf dem Einkommen des Fälligkeitsjahres berechnet werden (genaue Berechnung).

[2] Übersteigen die Steuern der Vertragsstaaten von den aus diesen Vertragsstaaten stammenden Erträgnissen (Art. 1, Abs. 2) den Gegenwert von 1000 Franken, so kann die genaue Berechnung des Maximalbetrags verlangt werden.

[3] Das Eidgenössische Finanz- und Zolldepartement kann die genaue Berechnung ferner für andere Fälle und Gruppe von Personen anordnen.

[4] Mit Zustimmung des Eidgenössischen Finanz- und Zolldepartements kann ein Kanton die ausschliessliche Anwendung der genauen anstelle der vereinfachten Berechnung anordenen.

c. Berücksichtigung von Schuldzinsen und Unkosten

Art. 11

[1] Für die Berechnung des Maximalbetrags können die Erträgnisse um die Schuldzinsen, die auf sie entfallen, und um die Unkosten, die mit der Erzielung der Erträgnisse zusammenhängen, gekürzt werden.

[2] Das Eidgenössische Finanz- und Zolldepartement kann für Lizensgebühren pauschale Abzüge vorsehen.

3. HERABSETZUNG BEI TEILWEISER VERSTEUERUNG

Art. 12

[1] Unterliegen die aus den Vertragsstaaten stammenden Erträgnisse nur den ordentlichen Einkommenssteuern der Kantone und der Gemeinden, so ist der Betrag der pauschalen Steueranrechnung auf zwei Drittel der Summe der in den Vertragsstaaten erhobenen Steuern begrenzt. Für die vereinfachte Berechnung des Maximalbetrags sind

a. für die in Artikel 9, Absatz 2, Buchstabe *a* genannten Kapitalgesellschaften und Genossenschaften nur die Steuersätze der Einkommenssteuern des Kantons und der Gemeinde in Rechnung zu stellen;

b. für die in Artikel 9, Absatz 2, Buchstabe *b* genannten Anspruchsberechtigten die aus dem einheitlichen Tarif ermittelten Steuersätze um den Satz der Einkommenssteuer des Bundes zu kürzen.

[2] Unterliegen die aus den Vertragsstaaten stammenden Erträgnisse nur der ordentlichen Einkommenssteuer des Bundes, so ist der Betrag der pauschalen Steueranrechnung auf ein Drittel der Summe der in den Vertragsstaaten erhobenen Steuern begrenzt. Für die Berechnung des Maximalbetrags ist nur auf den Satz der Einkommenssteuer des Bundes abzustellen.

III. GELTENDMACHUNG DES ANSPRUCHS AUF PAUSCHALE STEUERANRECHNUNG

1. ANTRAG

Art. 13

[1] Die pauschale Steueranrechnung wird nur auf Antrag gewährt.

[2] Der Antrag ist auf einem besonderen Formular (Ergänzungsblatt pauschale Steueranrechnung zum Wertschriftenverzeichnis) der zuständigen Amtsstelle desjenigen Kantons einzureichen, in dem der Antragsteller zu Beginn des auf die Fälligkeit der Erträgnisse folgenden Kalenderjahres ansässig war.

2. FRISTEN

Art. 14

[1] Der Antrag auf pauschale Steueranrechnung kann frühestens nach Ablauf des Kalenderjahres, in dem die Erträgnisse fällig geworden sind, gestellt werden.

[2] Der Anspruch auf pauschale Steueranrechnung erlischt, wenn der Antrag nicht innert drei Jahren nach Ablauf des Kalenderjahres, in dem die Erträgnisse fällig geworden sind, gestellt wird.

IV. BEHÖRDEN UND VERFAHREN

1. BEHÖRDEN

Art. 15

Die Durchführung der pauschalen Steueranrechnung obliegt den Kantonen. Sie bestimmen die Amtsstellen, die für die Entgegennahme und Entscheidung der Anträge auf pauschale Steueranrechnung zuständig sind.

VERFAHREN

a. Pflichten des Antragstellers

Art. 16

Wer die pauschale Steueranrechnung beansprucht, hat der zuständigen Amtsstelle über alle Tatsachen, die für die Beurteilung des Anspruchs von Bedeutung sein können, nach bestem Wissen und Gewissen Auskunft zu erteilen. Artikel 48 des Verrechnungssteuergesetzes[1] findet sinngemäss Anwendung.

b. Entscheid

Art. 17

[1] Die zuständige Amtsstelle prüft die eingereichten Anträge. Es stehen ihr hierfür die gleichen Befugnisse zu wie für die Prüfung der Anträge auf Rückerstattung der eidgenössischen Verrechnungssteuer (Art. 50, Abs. 1 und 3 des Verrechnungssteuergesetzes)

[2] Wird dem Antrag nicht oder nicht in vollem Umfange entsprochen, so ist der Entscheid kurz zu begründen.

c. Einsprache und Beschwerde

Art. 18

Die Entscheide über die pauschale Steueranrechnung unterliegen den gleichen Rechtsmitteln wie die Entscheide über die Rückerstattung der eidgenössischen Verrechnungssteuer durch die Kantone (Art. 53 bis 56 des Verrechnungssteuergesetzes).

d. Auszahlung oder Verrechnung des Betrags der pauschalen Steueranrechnung

Art. 19

[1] Der von der zuständigen Amtsstelle festgesetzte Betrag der pauschalen Steueran-

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1 AS 1966, 371.

rechnung wird entweder ausbezahlt oder mit Steuern des Bundes, des Kantons oder der Gemeinde verrechnet.
[2] Die Kantone führen besondere Register über die pauschale Steueranrechnung.

3. ABRECHNUNG ZWISCHEN BUND UND KANTONEN

a. Belastung des Bundes

Art. 20
[1] Ein Drittel der Beträge der pauschalen Steueranrechnung geht, vorbehältlich der Absätze 2 und 3, zu Lasten des Bundes.
[2] Die Belastung des Bundes entfällt, wenn der Betrag der pauschalen Steueranrechnung gemäss Artikel 12, Absatz 1 auf zwei Drittel der in den Vertragsstaaten erhobenen Steuern begrenzt ist.
[3] Der Betrag der pauschalen Steueranrechnung ist voll dem Bund zu belasten, wenn er gemäss Artikel 12, Absatz 2 auf ein Drittel der in den Vertragsstaaten erhobenen Steuern begrenzt ist.
[4] Auf die Abrechnung der Kantone mit dem Bund und auf die Pflicht zur Rückleistung zu Unrecht erfolgter Auszahlungen oder Verrechnungen (Art. 19) finden die Artikel 57 und 58 des Verrechnungssteuergesetzes entsprechende Anwendung, wobei Artikel 58, Absätze 1, 2 und 5 gleichermassen für die zu Lasten des Bundes wie für die zu Lasten des Kantons gewährten Anrechnungsbeträge gilt.

b. Belastung der Kantone und Gemeinden

Art. 21
Die Aufteilung des dem Bund gemäss Artikel 20 nicht zu belastenden Teils der Beträge der pauschalen Steueranrechnung auf den Kanton und die Gemeinden ist Sache der Kantone.

4. REVISION UND BERICHTIGUNG VON ENTSCHEIDEN

Art. 22
Die Revision und Berichtigung von Entscheiden über die pauschale Steueranrechnung richten sich nach den Artikeln 59 und 60 des Verrechnungssteuergesetzes.

V. STRAFBESTIMMUNGEN

Art. 23
[1] Wer vorsätzlich oder fahrlässig zum eigenen oder zum Vorteil eines anderen eine ungerechtfertigte pauschale Steueranrechnung erwirkt, unterliegt den Strafdrohungen des Artikels 61, Absätze 1 und 2 des Verrechnungssteuergesetzes.
[2] Wer, ohne dass der Tatbestand von Absatz 1 erfüllt ist,
a. in einem Antrag auf pauschale Steueranrechnung unwahre Angaben macht oder erhebliche Tatsachen verschweigt oder unwahre Belege über erhebliche Tatsachen vorlegt,
b. als Antragsteller unrichtige Auskünfte erteilt,
c. Ansprüche geltend macht, die ihm nicht zustehen oder für die er bereits befriedigt worden ist,
d. die ordnungsgemässe Durchführung einer Buchprüfung oder anderen amtlichen Kontrolle erschwert, behindert oder verunmöglicht,

unterliegt den Strafdrohungen des Artikels 62, Absatz 1 des Verrechnungssteuergesetzes.
[3] Im übrigen finden auf die Widerhandlungen die Vorschriften des Artikels 61, Absätze 3 und 4 und der Artikel 65 bis 67 des Verrechnungssteuergesetzes sinngemäss Anwendung.

VI. SCHLUSSBESTIMMUNGEN

1. DURCHFÜHRUNG

Art. 24

[1] Das Eidgenössische Finanz- und Zolldepartement erlässt die für die pauschale Steueranrechnung erforderlichen Verfahrensvorschriften.

[2] Es bestimmt insbesondere den für natürliche Personen, Kollektiv- und Kommanditgesellschaften, Vereine und Stiftungen anwendbaren einheitlichen Tarif (Art. 9, Abs. 2, Buchstabe *b*) und veröffentlicht die Liste der in den Vertragsstaaten erhobenen abkommensmässigen Steuersätze, für welche die pauschale Steueranrechnung beansprucht werden kann.

2. INKRAFTTRETEN

Art. 25

[1] Dieser Beschluss tritt am 1. September 1967 in Kraft.

[2] Er findet auf Erträgnisse Anwendung, die nach dem 31. Dezember 1966 fällig geworden sind, sofern nicht ein Doppelbesteuerungsabkommen die Entlastung (Art. 1) ausdrücklich für später fällig werdende Erträgnisse vorsieht.

[3] Für Dividenden aus der Bundesrepublik Deutschland finden ausschliesslich die Bestimmungen des Bundesratsbeschlusses vom 17. April 1959[1] über die Ausführung des schweizerisch-deutschen Doppelbesteuerungsabkommens Anwendung.

Bern, den 22. August 1967.

Im Namen des Schweizerischen Bundesrates,

Der Bundespräsident:

BONVIN

Der Bundeskanzler:

CH. OSER

1 AS 1959, 332.

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EDITORIAL:

TVA LAWS - THE VIRTUES OF SIMPLICITY AND FAIRNESS

This issue contains a French translation of the Dutch draft legislation for the adoption of a tax on value added. Holland—following France and Germany, which have already adopted the TVA—is the third country in the EEC to come up with such draft legislation.

It is our view that the Dutch draft in its international aspects has the advantages of greater fairness and simplicity over the French and German systems. It provides, for example, in all cases for the refunding to foreign entrepreneurs of TVA paid by them in Holland in their entrepreneurial capacity (See Art. 17). There is no necessity that a taxable delivery or rendering of services by them have taken place or that a permanent establishment exist in Holland, as is the case under the German system. The equalization tax at import is in most cases to be paid by the Dutch purchaser (see Art. 12) and indeed collection of this tax is waived in many cases (see Art. 23). As a result of the cancel-out effect this waiver does not result in a lower tax burden, but rather only facilitates the actual import procedure.

The Dutch draft also only envisages a two rate system as opposed to the extremely complex four rate French system. In fact there have been indications of the possibility that the tax will eventually be imposed at a unitary rate as is the case in Denmark.

The Dutch Parliament will debate the draft on May 21 and 22 and it is expected that enactment will take place as soon as possible thereafter. It is to become effective on January 1, 1969.

DR. J.C.L. HUISKAMP

JOHN CRYSTAL:

THE CURIOUS NATURE OF "KNOW-HOW"

Sale of Technical "Know-how" and section 106 (1)(d) of the Canadian income tax act

1 DEFINITION

It is suggested that "Know-how" is a special fund of knowledge and ability acquired by experience in a particular field of endeavor. In the Judgment of GIBSON, J. in the Exchequer Court of Canada, October 18th, 1967, in the case of QUALITY CHEKD DAIRY PRODUCTS ASSOCIATION (CO-OPERATIVE) v. Minister of National Revenue 67 D.T.C. 5303, at Page 5305:

"'Know-how' is not a word of art but instead of the vernacular. Again Webster's Third New International Dictionary describes 'Know-how' as:

'KNOW-HOW':

practical knowledge of how to do or accomplish something with smoothness and efficiency: ability to get something done with a minimum of wasted effort: accumulated practical skill or expertness (Business 'know-how') (needed the 'know-how' of a good carpenter) (salesmanship 'know-how') (the 'know-how' involved in producing a play) (developed his bowling 'know-how'); esp: technical knowledge, ability, skill, or expertness of this sort (the company needed to use all its ingenuity and 'know-how' to succeed in laying the oil lines)"

2 ASSET OR SERVICE "KNOW-HOW" ROLLSROYCE CASE

In the case of COMMISSIONERS OF NATIONAL REVENUE VS. ROLLS-ROYCE LTD. 40 T.C. 443 (1962 in the House of Lords) the Lords stated that "Know-how" was a fixed capital asset and to discuss it any further was to beg the question. Lord Radcliffe, at Page 493, however, did discuss the meaning of "Know-how" in order to lay the groundwork for his ratio-decidendi of the case.

First, as to "know-how". I see no objection to describing this as an asset. It is intangible: but then, so is goodwill. It would be difficult to identify with any precision the sources of the expenditure which has gradually created it, and, patents apart, I would not have thought of it as a natural balance-sheet item. But it is a reality when associated with production and development such as that of Rolls-Royce, and a large part, though not the whole of it, finds its material record in all those lists, drawings and manufacturing and engineering data that are specified in the various licence agreements.

It is fundamental to the Company's case that we should categorise this asset as being part of its fixed capital. Indeed, its argument proceeds from the premise that it is fixed capital. This, I think, is to start from too assured a base. An asset of this kind is—I am afraid that I must use the phrase—sui generis. It is not easily compared with factory or office buildings, warehouses, plant and machinery, or such independent legal rights as patents, copyright or trade marks, or even with goodwill. "Know-how" is an ambience that pervades a highly specialised

production organisation, and, although I think it correct to describe it as fixed capital so long as the manufacturer retains it for his own productive purposes and expresses its value in his products, one must realise that in so describing it one is proceeding by an analogy which can easily break down owing to the inherent differences that separate "know-how" from the more straightforward elements of fixed capital. For instance, it would be wrong to confuse the physical records with the "know-how" itself, which is the valuable asset; for, if you put them on a duplicator and produce one hundred copies, you have certainly not multiplied your asset in proportion. Again, as the facts of the present appeal show, "know-how" has the peculiar quality that it can be communicated to or shared with others outside the manufacturer's own business without in any sense destroying its value to him. It becomes, if you like, diluted, and its value to him may be affected, though in my view it begs the question to say that that value is necessarily reduced because the asset is used for outside instruction. These considerations lead me to say that, although "know-how" is properly described as fixed capital by way of analogy, it is the kind of intangible entity that can very easily change its category according to the use to which its owner himself decides to put it. I am not sure that it is too much to say that it is his use of it that determines the category. It is not like a single physical entity which must be employed for production or else broken up: it is more like a fluid in store which can be pumped down several channels. I do not, therefore, think that this appeal can be decided by the simple set of propositions. "Know-how" is an item of fixed capital. A lump sum received by a trader on a sale of such an item should not go to his income account. It makes no difference that the item is disposed of by several separate transactions divided from each other by time intervals.

In effect, he stated (1) that "Know-how" firstly was an intangible entity, (2) that it was described as an asset, a fixed capital asset and (3) that it had an inherent quality of changing its quality of category by the type of use the owner made of it. If the owner retained the "Know-how" for himself, then it was a fixed capital asset.

In the further ratio of the Lords, they all agreed:

1 That if the capital asset were sold to many users in areas where Rolls-Royce could not or would not sell or manufacture its principal product, being aero-engines, then it would be considered to be trading in its "Know-how" for profit as an alternative to selling or manufacturing aero-engines and that the asset would thereby no longer, by this type of business, be considered to be a fixed capital asset. (It is suggested that since this intangible entity by its use was no longer an asset, it could simply be described as it obviously is, as a service, because selling "Know-how" was in the opinion of the Lord Radcliffe "a teaching by long range."

2 That the case of EVANS MEDICAL SUPPLIES LTD. V. MORIARTY (H.M. Inspector of Taxes(, 34 T.C. 540, had to be disginguished. Evans Medical Supplies had been trading in Burma when it sold its "Know-how" (secret process) to the Burmese Government, which had the effect of disposing of its Burmese trade. This, the House of Lords stated was the selling of a part of the fixed capital asset of "Know-how" and that this asset did not change by this type of use, and the profit resulting therefrom was a capital receipt. However, the use by sale to many users, destroying its category or quality

as an asset, the profit resulting therefrom was an income receipt. Capital or income was the issue to be decided in this case and the Decision rested on the category of "Know-how."

3 SECTION 106 (1) (d) OF CANADIAN INCOME TAX ACT

Now the said ratio in the ROLLS-ROYCE case has an extremely important bearing on the application of Section 106 (1) (d) where the word "property" in its context in this Section can only mean asset property and not service property, pursuant to the following argument.

1

Sec. 106(1)(d)

[§ 16-345] Rents, Royalties, etc.

[Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,]

(*d*) rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing any such a payment

(i) for the use in Canada of property,

(ii) in respect of an invention used in Canada, or

(iii) for any property, trade name, design or other thing whatsoever used or sold in Canada,

but not including

(A) a royalty or similar payment on or in respect of a copyright, or

(B) a payment in respect of the use by a railway company of railway rolling stock as defined by paragraph (25) of section 2 of the *Railway Act.*

2 "Property" as defined in Section 139 (1) (ag) includes everything and anything including goods, services and rights.

3 Section 106 (1) (d) states that a Non-Resident must pay an income tax of 15% if he receives from a Canadian Resident "rent, royalty or similar payment" for use or sale of his "property" in Canada.

4 By dictionary definition "rent or royalty" can only be paid on account of land or other corporeal hereditament, which is asset property.

Corporeal hereditaments are again, by dictionary definition, visible and tangible objects, such as lands and houses, whereas incorporeal hereditaments which includes service property, are intangible in nature.

5 Therefore the type of Property referred to in this section must be Asset Property (and not Service Property).

6 In the Judgment of W.O. Davies, Q.C., at Page 433 in the case of TECHNICAL TAPE CORPORATION V. M.N.R., 64 D.T.C. 428, Davies said "property as contemplated by Section 106(1)(d) (iii) of the Income Tax Act," and in the said QUALITY CHEKD case, in the Judgment of Gibson, J., at Page 5305, Gibson said "at least and in any event not 'property' within the meaning of the word as it is employed in Section 106(1)(d) (iii) in The Act.'

It is to be understood that although this is a tax owed by the Non-Resident, the Canadian Resident is obliged to withhold the tax and pay it at source.

Hence, in the sale of "Know-how" by a non-resident to a Canadian resident (1) if the "Know-how" is ascertained by its type of use to be an asset form, the word "Property" as contemplated by Section 106 (1)(d), would apply and if the payment was in the form of a "rent, royalty or similar payment," then the Canadian resident

would be subject to a 15% withholding tax, pursuant to the said section, however, (2) if the payment was in the form of a negotiated lump-sum, then pursuant to the said Technical Tape case, the Canadian resident would not be subject to a 15% withholding tax.

However, (1) if the sale of the "Know-how" by a nonresident to a Canadian resident is ascertained by its type of use to be in Service form, then Section 106(1)(d) would not apply and the Canadian resident will not be subject to a 15% withholding tax irrespective of the type of payment as decided in the said QUALITY CHEKD DAIRY case. In Fact, in this case, Gibson, J. at page 5305, describes "Know-how" as asset "Know-how" and service "Know-how" refers to the English Jurisprudence and comments that "the line between Asset "Know-how" and Service "Know-how" is illusory."

It is to be noted in fact that the QUALITY CHEKD case was a co-operative dairy association incorporated in the U.S.A., having no offices or place of business in Canada, which at the material time had on its staff certain itinerant personnel experienced and trained in dairy industry, essentially in the fluid milk, ice cream, cottage cheese, sour cream, dips and other related products, business. In 1964 there were 97 members who were independently in business dealing in the said products and nine of these members were from Canada. The co-op, for consideration, which consideration was adjudged to be a royalty, allowed its members to use a certification mark "Quality Chekd," and for a further consideration provided services which in brief were as described on page 5304 of the case as follows:

> "(1) production advice on an AD HOC basis to individual members according to their needs; (2) the holding of production seminars on an annual basis in each district at which sometimes experts outside the staff of the appellant were included in such things as panel discussions; (3) laboratory analysis of products; (4) preparation of advertising programmes and materials; (5) marketing and sales advice, also on an AD HOC basis; and (6) the holding of sales workshops at which sales people from various member companies attended to exchange ideas and also to share other ideas and suggestions, from the staff to the appellant and sometimes outside consultants."

In the said ROLLS-ROYCE case, over the course of years from 1946 to 1953, Rolls-Royce entered into Licensing Agreements in diverse areas in China, France, U.S.A. (twice), Italy, Belgium, Australia and Sweden.

Looking back at the history of Rolls-Royce, the House of Lords said that it appears that the Company embarked on a course of conduct that resulted in a trading policy of selling its "Know-how" for a fee. The course of conduct showed many sales rather than an isolated sale or two for definite trading profit motives.

Hence, one must examine the history or course of conduct and reasons behind the use of the owner's "Know-how" in a particular field of endeavor to ascertain if the "Know-how" remains an asset or becomes "Service Know-how." But this assumes a certain passage of time in order to ascertain motive, history and course of conduct. What would the House of Lords have said if they had to judge the First and possibly the Second sale. It would certainly be a difficult task and one would have to look at business policy or intent behind original sales and especially for situations where the owner lost his trading business in the jurisdiction of the sale of

the "Know-how." It is basically a question of fact to be judged in each case and not on law. I rather agree with the statement made, supra, that "the line between Asset "Know-how" and Service "Know-how" is illusory."

4. THE ISSUE IN THE ROLLS-ROYCE AND QUALITY CHEKD CASES COMPARED

The difference in the issues in the ROLLS-ROYCE and the QUALITY CHEKD cases was in the former case, the category of "Know-how" had to be determined to ascertain if profit resulting from its sale was capital or income, whereas in the latter case, the category of "Know-how" had to be determined to ascertain if "Property" as contemplated in Section 106(1)(d) was applicable, in order to determine if the non-resident was subject to a 15% tax to be withheld by the Canadian resident at source.

5. "KNOW-HOW" FROM OLD BUSINESS OR FROM NEW VENTURE

Comparing these two cases brings out an important point for consideration, to wit:

Does it matter whether the owner acquires the "Know-how" through experience in a particular field of endeavor or whether the owner acquires "Know-how" by hiring others who have it, for the purpose of engaging in the business of selling this "Know-how?"

In answer to this query, it is suggested that it does not matter how the "Know-how" is acquired but simply, how the owner uses it as regards its classification as Asset "Know-how" or Service "Know-how."

It could be argued to the contrary, that since the company incorporates for engaging in the sale of "Know-how" in a particular field of endeavor, and acquired the "Know-how" by hiring consultants, then this would automatically presume (until proved in fact otherwise) that its use would be to many users and therefore, the original sales of this "property" by a non-resident corporation to a resident corporation would be in the nature of service "Know-how" and would not come under the definition of "property" as contemplated in Section 106(1)(d) and therefore, no withholding tax would be involved in the said original sales. If Section 106(1)(d) is to apply three characteristics must be strictly complied with: (1) asset property must be used or sold (2) in Canada and (3) payment must be by way of "rent, royalty or similar payment," and if one of the characteristics is missing, then Section 106(1)(d) would not apply.

6. CONCLUSION

It is suggested that, in order to cope with Section 106(1)(d) the non-resident corporation should make a policy declaration as to how it intends to treat the sale of its "Know-how" and this should be sufficient for the Tax Department with reference to its original sales.

Further it is suggested that if the payment is a lump sum, it is immaterial how the "Know how" is sold, for Section 106(1)(d) would not apply.

K.C. KHANNA:

INDIA: FINANCE BILL, 1968

Summary of proposed changes in personal taxation

India's Finance Bill 1968 proposes substantial, substantive and rate changes in the Indian Tax System. Its tax system is of general interest because of the developing countries' tax systems, it is among, if not, the most sophisticated. In addition, in view of India's extensive international commercial activities, its tax laws are often of great practical importance. The editors are therefore pleased to provide a summary of these changes.

1 No annuity deposits will be required on salary on other income arising on and after first April, 1968.

2 At present a surcharge is levied on unearned income in excess of Rs. 30,000. This surcharge will be withdrawn and tax will be charged at the same rates on both earned and unearned incomes.

3 Existing basic rates of income-tax on incomes over rupees one lakh will be slightly increased. The highest marginal rate of income-tax, will be 82.5% as against the existing rates of 82.2% on earned income and 89.4% on unearned income. A statement is attached showing the proposed and existing total burden in the case of a resident Indian individual married with more than one dependent child.

4 At present a resident married individual is entitled to tax relief (spouse allowance) of Rs. 75, even if the husband or wife, as the case may be, has an independent taxable income. It is now proposed to entirely disallow this relief in all those cases where both husband and wife have independent incomes exceeding Rs. 4,000 per annum each.

5 At present a salaried employee owning a conveyance and using it for the purposes of employment is, entitled to a deduction for the conveyance expenses incurred in case he is not granted a conveyance allowance or reimbursement of conveyance expenses. The deductible expenses are estimated by the Income-tax Officer at the time of regular assessment. It is now proposed to provide standard deductions on account of such expenditure on the following basis depending on the type of conveyance used and salary earned:-

(See table on page 201)

6 To encourage savings a public provident fund is proposed to be set up enjoying all those tax benefits available to recognised provident funds. Five years fixed deposits, carrying tax-free interest, are also proposed to be introduced.

7 At present dividends from Indian companies are excluded from total income only if the aggregate of such dividends does not exceed Rs. 500. It is now proposed to allow the exemption of Rs. 500 even if the total dividend income exceeds that amount.

8 Capital gains realised from sale or transfer of capital assets within a period 24 months from the date of purchase or

Category of Conveyance	Amount of the standard deduction for every month or part of the month during which the conveyance has been used for the purpose of employment
(1) MOTOR CARS:	
(a) Where the amount of the gross salary income during the year does not exceed Rs. 15,000	Rs. 150
(b) Where the gross salary income is between Rs. 15,001 and Rs. 25,000.	Rs. 200
(c) Where the gross salary income exceeds Rs. 25,000	Rs. 250
(2) Motor Cycles, Scooters or other Mopeds	Rs. 50
(3) Bicycles.	Rs. 5

acquisition will be treated and taxed as ordinary income.

9 Certain changes are proposed in assessment of income from house property. It is suggested that the whole of the tax levied by a local authority or a State government in respect of property, and borne by the owner, should be allowed as a deduction; at present only half of such tax is deducted. Interest on mortgage will be allowed only if the funds are utilised for acquiring, constructing or maintaining the property. An annual charge on property will be allowed only if it has been created involuntarily.

10 Wealth tax rates are proposed to be increased by half percent in case of wealth over Rs. 10 lakhs.

11 Stringent penalties are proposed for concealment of income or wealth. A minimum of 100 percent and a maximum of 200 percent of the concealed income or wealth may be charged as penalty.

12 To expedite disposal of tax assessments it is proposed to reduce the time limit from 4 years to 2 years beginning from the assessment year commencing on 1.4.69. *(See table on page 202).*

TABLE SHOWING THE EXISTING AND PROPOSED TOTAL LIABILITY OF A RESIDENT INDIAN MARRIED INDIVIDUAL WITH MORE THAN ONE DEPENDANT CHILD, DERIVING INCOME FROM SALARY

Income	Annuity deposits required to be made and tax payable on the income as reducted by the annuity deposits, at current rates			Tax at the rates in the Bill for deduction of tax at source from "Salaries" and computation of "advance tax" during the financial year 1968-69
	Annuity Deposit	Tax	Tax *plus* annuity deposit	
Rs.	Rs.	Rs.	Rs.	Rs.
1.	2.	3.	4.	5.
20,000	200	2,442	2,642	2,486
25,000	380	4,011	4,391	4,136
40,000	3,600	9,856	13,456	11,836
70,000	8,400	24,992	33,392	30,536
100,000	15,000	41,261	56,261	51,986
200,000	30,000	104,539	134,539	128,986
300,000	45,000	170,319	215,319	208,736
400,000	60,000	238,601	298,601	291,236
500,000	75,000	308,492	383,492	373,736

Note: There is no change in liability for incomes upto Rs. 15,000

SUMMARY OF PROPOSED CHANGES IN CORPORATE TAXATION

1 7½% tax on dividends in excess of 10% of capital will be withdrawn.

2 Surtax on company profits is proposed to be reduced from 35% to 25%.

3 120% of expenditure incurred by companies after 29th February, 1968 in providing agricultural inputs such as fertilisers seeds, implements and pesticides and extension services will be allowed as a deduction from business profits.

4 Seed processing industry will be classified as a priority industry and will be entitled

to 8% deduction of its profits from total income.

5 Development rebate at the rate of 35% will be allowed on new plant and machinery installed in seed processing industry and in industries producing processed concentrates for cattle and poultry feed, processed (including frozen) fish and fish products, vegetable oils and oil-cakes (specified process only).

6 An export markets development allowance will be allowed equal to 133⅓% of the revenue expenditure incurred by Indian companies under specific heads for development of export markets.

7 Entertainment expenditure incurred by companies will include expenses incurred by employees out of specific and taxed entertainment allowances.

8 At present allowable expenditure on grant of perquisites and benefits to employees is limited to 20% of the salary of the employee. It is now proposed to add a monetary limit of Rs. 1000 per month with the result that the amount to be allowed will be 20% of the employee's salary or Rs. 1000 per month, whichever is less. Expenditure is proposed to include cost of maintaining accomodation and equipment provided to the employees and the depreciation allowance admissible thereon.

9 It is proposed to disallow any payment of an amount in excess of Rs. 2,500 for expenditure incurred in case the payment is made, otherwise, than by a crossed cheque or bank draft. The date from which this provision will come into force will be notified later, but it will be sometime before 31st March, 1969. The Government will have the power to make any exceptions to this rule having regard to the nature and extent of banking facilities available, considerations of business expediency, etc. etc.

10 It is also proposed to disallow any payment made to an associate concern in respect of expenditure incurred to the extent the expenditure is considered by the income-tax officer to be unreasonable or excessive.

11 Short term capital gains will now include gains realised on sale of capital assets if such assets are disposed of in a period less than 24 months from the date of acquisition. The present period is 12 months from the date of acquisition.

12 Dividends received by an Indian company from a foreign company on shares allotted in consideration of technical know-how or technical services supplied and any fees, royalties, etc. received by an Indian Company from a foreign company for supply of technical know-how and technical services shall be wholly exempt from tax; at present exemption is available to 60% of such income.

13 The amount due on tax credit certificates will be either adjusted or refunded to the certificate holder on production of the certificate; at present a period of 12 months must elapse from the date of production before cash refund can be given.

14 It is proposed to reduce the present time limit of four years for completion of assessments to two years. Likewise, the period for filing refund claims will be reduced to two years, beginning from 1st April, 1968.

15 Stringent penalties are proposed for concealment of income. A minimum of 100% and a maximum of 200% of the concealed income may be charged as penalty.

SUMMARY OF PROPOSED CHANGES IN GOODS TAXATION

CUSTOMS:

a) Increase in import duty on whisky, brandy, etc., from Rs. 44 per litre or 170% ad valorem to Rs. 45 per litre or 170% ad valorem, whichever is higher.
b) Increase in import duty on cloves, cinnamon and cassia.
c) Increase in import duty on iron and steel billets.
d) Increase in import duty on certain alloy steels, not used in the manufacture of small tools.
e) Increase in import duty on high silicon electrical sheets.
f) Increase in import duty on chemicals, excluding those required for drugs, medicines, pesticides, etc.

CENTRAL EXCISE DUTY

Excise duty will be levied on six new items, namely:

1 Confectionary and chocolates manufactured with the aid of power—Rs. 0.80 per kg.
2 Embroidery in piece, strips or motifs, manufactured with the aid of power—20% ad valorem.
3 Steel furniture, made partly or wholly of steel with the aid of power—20 percent ad valorem.
4 Crown corks—at the rate of Rs. 0.01 per piece.
5 Specified parts of wireless receiving sets, that is, valves and transistors at Rs. 3 and Re. 1 per piece respectively.
6. Leather cloth—25 per cent ad valorem.

Excise duty will be increased, at varying rates on unmanufactured tobacco, refrigerators and air-conditioners, jute manufactures, etc.

"TEXTE DU PROJET DE LOI NEERLANDAISE RELATIVE A LA TAXE SUR LE CHIFFRE D'AFFAIRES 1968 (SELON LE SYSTEME DE LA TAXE SUR LA VALEUR AJOUTEE)"*

(Année parlementaire 1967-1968, doc. 9324)

On October 5, 1967, the Netherlands Government submitted a bill to the Parliament proposing the introduction of a tax on value added (TVA) as of January 1969.
The text of this bill is published in an unofficial French translation, infra. A commentary to this bill in the English language has been published in European Taxation, February 1968 issue.

CHAPITRE I

Dispositions préliminaires

Article 1

Sous la dénomination «taxe sur le chiffre d'affaires» est perçue une taxe frappant:
a) des livraisons de biens et des prestations de services, effectuées à l'intérieur du Royaume par des «entrepreneurs» dans le cadre de leur entreprise;
b) des importations de biens.

Article 2

De la taxe due au sujet des livraisons de biens et des prestations de services est déduite la taxe ayant frappé les livraisons de biens effectuées à l'«entrepreneur» et les services qui lui sont rendus, ainsi que les importations de biens qui lui sont destinés.

CHAPITRE II

Imposition des livraisons et des prestations de services

SECTION 1

Acte imposable

Article 3

1 Constituent des livraisons de biens:
a) le transfert de propriété de biens en vertu d'un contrat,
b) la remise matérielle de biens en vertu d'un contrat de location – vente,
c) la délivrance à façon de biens par celui qui a fabriqué les biens,
d) la transmission de la propriété de biens en vertu d'une réquisition faite par ou au nom de l'autorité publique,
e) le transfert de biens à la suite duquel ceux-ci sortent du patrimoine d'un «entrepreneur»,
f) la transmission de la propriété de biens qui font l'objet d'un contrat prévoyant l'incorporation de ces biens à un autre bien,

* Unofficial translation by the E.E.C. Commission, no 14.200/IV/67-F.

g) l'utilisation de biens à des fins autres qu'aux fins de l'entreprise, à la suite de laquelle ces biens sortent du patrimoine d'un «entrepreneur»,

h) l'utilisation pour les besoins de son entreprise de biens produits dans l'entreprise elle-même dans les cas où, si les biens avaient été acquis chez un autre «entrepreneur», la taxe grevant ces biens n'ouvrirait pas, pas intégralement ou pas en une seule fois, droit à déduction; sont assimilés aux biens produits dans l'entreprise elle-même les biens qui ont été fabriqués sur commande de l'entreprise avec des matériaux fournis par celle-ci.

2 Sont également considérés comme livraisons de biens l'établissement, le transfert, la modification et la cession de droits réels, à l'exception des hypothèques et des rentes foncières, sur des biens immeubles, à la condition que le droit ait été établi au moins pour une durée fixe de dix ans.

3 Si plus d'une personne concluent des contrats contenant l'obligation de livrer un même bien, lequel est ensuite remis directement par la première personne au dernier acquéreur, ce bien est censé être livré par chacune de ces personnes.

4 Des biens commercialisés aux enchères sont censés être livrés au et en suite par le titulaire de l'enchère.

5 Des biens livrés et la prestation de services rendues par l'intermédiaire d'un commissionnaire ou d'un «entrepreneur» similaire, qui conclut des contrats en son propre nom, mais sur l'ordre et pour le compte d'un autre, sont censés être livrés ou rendus à et ensuite par cet «entrepreneur».

6 Le transfert de propriété à titre de caution et le retransfert ne constituent pas des livraisons.

Article 4

Constituent des prestations de services toutes les opérations qui ne sont pas des livraisons de biens et qui sont effectuées à titre onéreux.

Article 5

Sont considérés comme biens tous les biens corporels.

Article 6

1 Le lieu où une livraison est effectuée, est:

a) dans le cas, où le bien en rapport avec la livraison est transporté, l'endroit où commence le transport,

b) dans les autres cas, l'endroit où le bien se trouve au moment de la livraison.

2 Le lieu où une prestation de services est effectuée, est:

a) dans le cas où la prestation de services est rendue par un «entrepreneur» qui a son domicile ou qui est établi à l'intérieur du Royaume, l'endroit où l'«entrepreneur» a son domicile ou est établi,

b) dans le cas où la prestation de services est effectuée par un «entrepreneur» qui n'a pas son domicile à l'intérieur du Royaume, ou qui n'y est pas établi:

1° à partir d'un établissement stable situé à l'intérieur du Royaume, l'endroit où l'établissement est situé;

2° pas à partir d'un établissement stable situé à l'intérieur du Royaume à un «entrepreneur» ayant son domicile ou étant établi à l'intérieur du Royaume ou à un organisme au sens de la «Algemene Wet inzake rijksbelastingen (Stb. 1959, 301)», qui y est établi, l'endroit où ce dernier entrepreneur a son domicile ou l'endroit où cet organisme est établi;

3° dans les autres cas, l'endroit où la prestation de services est effectivement effectuée.

3 Par dérogation au paragraphe 2, la prestation de services consistant en transport de personnes ou de biens est effectuée sur les territoires où l'action du transport est effectuée en fait.

Article 7

1 Est considéré comme «entrepreneur», quiconque exploite d'une façon indépendante une entreprise.

2 Où il est question d'entreprise dans cette loi, cela englobe également l'exercice d'une profession.

3 Notre ministre peut prescrire que des organismes de droit public qui, autrement qu'en tant que «entrepreneur», effectuent des prestations de services qui par leur nature peuvent également être effectuées par d'autres «entrepreneurs» soient considérés comme «entrepreneurs» en ce qui concerne ces prestations.

SECTION 2

Base et taux d'imposition

Article 8

1 La taxe est calculée sur la rémunération.

2 La rémunération est le montant total – ou, dans le mesure où la contre-prestation ne consiste pas en une somme d'argent, la valeur totale de la contrepartie –, qui est porté en compte du chef de la livraison ou de la prestation de services, la taxe sur le chiffre d'affaires non comprise. Dans les cas où il est acquitté plus pour la livraison ou la prestation de services que ce qui a été porté en compte, ce qui a été acquitté se substitue au montant porté en compte.

3 Pour les livraisons visées à l'article 3, par. 1, litt. g et h, la rémunération est déterminée par les coûts de l'acquisition ou le prix de revient de ces biens, la taxe sur le chiffre d'affaires non comprise.

4 Nous nous réservons de déterminer par arrêté dans quelle mesure:

a) le rabais pour paiement comptant, les coûts d'emballage, de frêt et d'assurance, des avances d'impôt et autres montants à assimiler à ceux comptabilisés dans des comptes de passage ne font pas partie de la rémunération;

b) à l'égard de la propriété grevée de rente foncière, des droits d'emphytéose ou de superficie («opstal» et «beklemming»), des appartements, des droits d'affiliation et des droits similaires, les charges qui y sont liées font partie de la rémunération;

c) dans le cas de la propriété grevée d'un droit d'emphytéose ou de superficie («opstal» et «beklemming»), la rémunération est diminuée des charges liées à ces droits.

Article 9

1 La taxe s'élève à 12%.

2 Par dérogation au paragraphe 1 la taxe s'élève à:

a) 4% pour les livraisons de biens et les prestations de services figurant dans le tableau I joint à la présente loi,

b) 0% pour les livraisons de biens et les prestations de services figurant dans le tableau II joint à la présente loi, à condition que soient remplies les conditions que Nous déterminerons par arrêté.

Article 10

Si en cas de la livraison d'un bien pour la fabrication duquel des matières ont été confiées, le taux d'imposition pour le bien est plus élevé que celui applicable aux matières, celui qui effectue la livraison doit, dans les cas que Nous déterminerons par arrêté, en même temps la taxe sur le chiffre d'affaires calculée sur la valeur des matières confiées selon un taux correspondant à la différence entre les deux taux visés ci-dessus.

SECTION 3

Exonérations

Article 11

Sont exonérés de la taxe, sous les conditions que Nous déterminerons par arrêté:

a) la livraison de biens immeubles, à l'exception de la livraison par l' «entrepreneur» qui a fabriqué le bien ainsi que des livraisons suivantes du bien pour le cas où la taxe ayant grevé la livraison précédente de ce bien a été déduite intégralement ou partiellement;

b) la location (y compris l'affermage) de biens immeubles, à l'exception de:
1. la location de machines et d'installations d'exploitation;
2. la location dans le cadre de l'industrie hôtelière ou dans celui de l'exploitation de pensions, camps et lieux de vacances, à des personnes qui n'y résident que pendant une période brève.
Par «location» de biens, il faut également entendre toute autre forme par laquelle des biens sont mis à la disposition pour l'usage, autrement que pour une durée fixe de 10 ans au moins;

c) la fourniture de boissons et de repas par un «entrepreneur» qui exploite un établissement par lequel il ne recherche ni réalise de bénéfici, ainsi que la fourniture de soins, de médicaments et d'objets de pansement à des personnes hébergées ou hospitalisées dans un tel établissement;

d) la prestation de services à la jeunesse et aux chefs de mouvements de jeunesse par des organisations d'oeuvre générale de jeunesse, reconnues comme telles par les pouvoirs publics;

e) la prestation de services – à l'exception de la fourniture d'accès aux compétitions, manifestations, etc. – effectuée par des organisations qui s'assignent comme but l'exercice ou la promotion du sport, à leurs membres, à condition qu'aucun bénéfice ne soit pas recherché ni réalisé avec ces services;

f) les livraisons et les prestations de services de nature sociale ou culturelle, que Nous désignerons par arrêté, à condition que l' «entrepreneur» ne recherche ou ne réalise aucun bénéfice et qu'aucune perturbation sérieuse des conditions de concurrence ne se produise à l'égard d' «entrepreneurs» qui recherchent ou réalisent des bénéfices;

g) la prestation de services par des médecins – à l'exception des médecins vétérinaires – des psychologues, des infirmiers et des infirmières, des spécialistes en logopédie, des sages-femmes, des spécialistes en physiothérapie; les soins et livraisons effectués par des dentistes et des techniciens dentaires; le transport de malades par ambulances automobiles;

h) les prestations de services par des entreprises de pompes funèbres;

i) la livraison de monnaies ayant dans un pays quelconque la qualité de moyen de paiement légal, ainsi que la cession d'effets et autres valeurs;

j) l'octroi de crédits; le transfert, la perception et le paiement de créances en argent, y compris les opérations de virements, chèques et comptes-courants;

k) les assurances et la prestation de services par des intermédiaires auprès des assurances;

l) les jeux de hasard au sens de l'article 2, par. 1, de la «Wet op de kansspelbelasting (Stb. 1961, 313)»;

m) les prestations de services effectuées dans le cadre du trafic postal, téléphonique et télégraphique, ainsi que les services, que Nous désignerons par arrêté, effectués pour les besoins de ces opérations;

n) les émissions de radio et de télévision du Royaume et des organismes y habilités, à l'exception des émissions publicitaires;

o) 1. l'enseignement dispensé par des établissements destinés à cette fin, comme il est défini par ou en vertu des lois concourant à la réglementation de l'enseignement qui – pour autant qu'il ne s'agisse

pas d'enseignement scientifique – est soumis, en vertu des prescriptions légales, à la surveillance scolaire du Royaume ou à toute autre surveillance exercée par le Ministre ou au nom du Ministre chargé de l'enseignement considéré;

2. l'enseignement que Nous désignerons par arrêté et par lequel il peut être précisé que l'exonération ne s'applique qu'à l'égard des «entrepreneurs» qui ne recherchent ou ne réalisent aucun bénéfice par cet enseignement;

p) les conférences et similaires dans les cas que Notre ministre désignera, à condition que la rémunération serve principalement à couvrir les frais;

q) les prestations de services effectuées par des écrivains, des journalistes et des photographes de presse;

r) la livraison des moyens d'exploitation déjà utilisés et d'autres biens utilisés dans l'entreprise, à condition que l' «entrepreneur» effectue en outre exclusivement ou principalement des livraisons et des prestations de services exonérées.

SECTION 4

Modalités de perception

Article 12

1 La taxe est perçue auprès de l' «entrepreneur» qui effectue la livraison ou la prestation de services.

2 Au cas où l' «entrepreneur» qui effectue la livraison ou la prestation de services n'a pas son domicile ou n'est pas établi à l'intérieur du Royaume et n'y possède pas un établissement stable et si celui à qui la livraison est effectuée ou la prestation de services est rendue est un «entrepreneur» ayant son domicile ou étant établi à l'intérieur du Royaume ou un organisme au sens de la «Algemene wet inzake rijksbelastingen» qui y est établi, la taxe sur le chiffre d'affaires est toutefois perçue auprès de celui à qui la livraison est effectuée ou la prestation de services est rendue.

Article 13

1 La taxe est due:

a) dans le cas où, d'après l'article 33, une facture doit être délivrée au moment de sa remise, ou, si la remise de la facture n'a pas eu lieu dans le délai prescrit, au moment où la facture aurait dû être délivrée au plus tard;

b) dans les autres cas, au moment où la livraison ou la prestation de services est effectuée.

2 Par dérogation au paragraphe 1, la taxe ou la part correspondante de la taxe est due au plus tard au moment où la rémunération est encaissée intégralement ou partiellement.

Article 14

La taxe devenue exigible au cours d'une période déterminée doit être versée sur déclaration.

Article 15

1 La taxe visée à l'article 2 à déduire par l' «entrepreneur» est:

a) la taxe qui, au cours de la période de déclaration, a été portée en compte sur une facture établie de façon prescrite par d'autres «entrepreneurs» pour leurs livraisons qui lui sont effectuées et leurs services qui lui sont rendus;

b) la taxe devenue exigible au cours de la période de déclaration:

1. pour l'importation de biens, destinés à l' «entrepreneur», à condition que soient remplies les conditions que Notre ministre déterminera;

2. en vertu de l'article 12, paragraphe 2, pour les livraisons effectuées et les services rendus à l' «entrepreneur»;

3. pour l'utilisation par l' «entrepreneur» de biens pour les besoins de son entreprise; et ce dans la mesure où les biens et les

services sont utilisés par l' «entrepreneur» dans le cadre de son entreprise.

2 La déduction de la taxe n'a pas lieu dans la mesure où les biens et les services sont utilisés aux fins des opérations effectuées par l' «entrepreneur», visées à l'article 11.

3 Notre ministre édictera des règles complémentaires en ce qui concerne la déduction de la taxe au cas où des biens et des services sont également utilisés à des besoins autres que ceux de l'entreprise ou aux fins des opérations visées à l'article 11. A cet égard, il peut être prescrit que le fait pour l' «entrepreneur» de se défaire de biens utilisés dans son entreprise peut être négligé.

4 Nous nous réservons de désigner par arrêté des biens et des services pour lesquels, étant donné la nature de leur utilisation, la taxe n'ouvre pas intégralement ou partiellement droit à la déduction.

Article 16

1 En ce qui concerne la taxe ayant grevé des biens utilisés comme moyens d'exploitation, Notre Ministre, en accord avec Notre Ministre des affaires économiques, peut prescrire que:

a) la déduction est répartie sur plus d'une période,

b) la déduction n'est pas accordée du tout ou n'est pas accordée intégralement.

2 Après la promulgation d'un décret pris par Notre Ministre en vertu du paragraphe 1, une proposition de loi en vue de l'approbation de ce décret sera transmise aussitôt que possible, et au plus tard dans les deux mois, à la deuxième Chambre des Etats généraux. Au cas où cette proposition est retirée ou au cas où l'une des Chambres des Etats généraux décide de ne pas l'adopter, le décret sera abrogé sans délai.

Article 17

Au cas où le montant de taxe déductible dépasse le montant de taxe dû au cours de la période considérée, l'excédent est remboursé à l' «entrepreneur» sur sa demande.

CHAPITRE III

Imposition des importations

SECTION 1

Acte imposable

Article 18

L'importation de biens est la mise en libre pratique de ces biens.

SECTION 2

Base et taux d'imposition

Article 19

1 La taxe est calculée sur la rémunération portée en compte du chef de la livraison à celui à qui les biens sont destinés.

2 La taxe est calculée sur la valeur en douane, dans les cas où les biens ne sont pas livrés ou dans le cas où la valeur en douane est supérieure à la rémunération.

3 Par valeur en douane, il faut entendre la valeur établie conformément aux dispositions pour l'application des droits de douane, avec cette restriction que s'il est question dans ces dispositions du territoire des Pays-Bas, de la Belgique et du Luxembourg ou du territoire européen des Etats membres des communautés européennes, il faut lire: le territoire des Pays-Bas.

4 Sont à comprendre dans la rémunération ou la valeur en douane:

a) les impôts et taxes néerlandais, à l'exception de la taxe sur le chiffre d'affaires;
b) les frais de transport jusqu'au lieu de destination;
c) les coûts d'incorporation si le bien importé est livré au sens de l'article 3, par. 1, litt. f.

Article 20
1 La taxe s'élève à 12%.
2 Par dérogation au paragraphe 1, la taxe s'élève à:
a) 4% pour les importations de biens figurant dans le tableau I, litt. I, joint à la présente loi;
b) 0% pour les importations de biens figurant dans le tableau II, litt. a, position 3, joint à la présente loi.

SECTION 3

Exonérations

Article 21
1 Les exonérations concernant les droits de douane définies aux articles 23, 24, paragraphe 1, litt. a), pour autant qu'il s'agisse de réparation de biens, 25, 26, 27, 28, 29, litt. a), 30, 31, 32, 33, 34 et 35 du «Tariefbesluit 1960 (Stb 30)» sont d'application correspondante, avec cette restriction que, s'il est question dans ces dispositions du territoire des Pays-Bas, de la Belgique et du Luxembourg, il faut lire: le territoire des Pays-Bas.
2 Les exonérations définies aux articles 23 et 29, litt. a), du «Tariefbesluit 1960» ne sont applicables que dans les cas où l'exonération des droits de douane est également accordée.

SECTION 4

Modalités de perception

Article 22
La «Algemene wet inzake de douane en de accijnzen» (Loi générale en matière de douane et accises) (Stb 1961, 31) est d'application, comme si la taxe était un droit de douane.

Article 23
1 Par dérogation à l'article 22, la taxe due pour les importations de biens destinés à des «entrepreneurs» désignés à cet effet pour être utilisés par eux dans le cadre de leur entreprise, est perçue chez ces «entrepreneurs». La désignation est effectuée, sur demande ou non, par ou au nom de Notre Ministre, à des conditions fixées par ou au nom de Notre Ministre.
2 La taxe est due au moment où les biens sont acquis après l'importation, mais au plus tard le huitième jour après l'importation.
3 La taxe devenue exigible au cours d'une période déterminée doit être versée sur déclaration.

CHAPITRE IV

Exportation de biens

Article 24
Il est restitué, sur demande, aux organismes au sens de la «Algemene wet inzake rijksbelastingen (Stb 1959, 301)» qui ne sont pas «entrepreneurs» et qui exportent des biens non utilisés ou qui les stockent en entrepôt de douane, la taxe sur le chiffre d'affaires acquittée pour ces produits.

CHAPITRE V

Réglementations particulières

SECTION 1

Diminution de la taxe (petits «entrepreneurs»)

Article 25

1 Si la taxe due par une «entrepreneur» au cours d'une année civile – après application de la déduction visée à l'article 15 – n'est pas supérieure à Fl. 1.800, ce dernier montant est diminué de Fl. 1.200, mais sans que la diminution ne puisse dépasser le montant de la taxe. Si la taxe est supérieure à Fl. 1.800, elle est diminuée d'un montant égal à la différence entre Fl. 3.000 et cette taxe.

2 Notre Ministre arrête des règles en ce qui concerne l'attribution aux périodes de l'année civile de la diminution visée au paragraphe 1.

3 Notre Ministre arrête les règles suivant lesquelles un «entrepreneur» qui, en vertu du paragraphe 1, ne doit verser aucune taxe, peut être dispensé sur sa demande des obligations imposées par les ou en vertu des articles 32 et 33. L' «entrepreneur» ne peut alors en aucune manière faire état sur une facture de la taxe sur le chiffre d'affaires; la restitution sur la base de l'article 17 ne lui est pas accordée.

4 La diminution visée au paragraphe 1 n'est pas appliquée, si l' «entrepreneur» ne respecte pas au cours de l'année civile considérée les prescriptions des articles 32, 33 ou du paragraphe 3, ou les dispositions prises en vertu de ceux-ci.

SECTION 2

Perception selon les recettes

Articles 26

Notre Ministre peut arrêter des règles selon lesquelles certains «entrepreneurs» désignés dans cet arrêté, qui habituellement n'effectuent pas de livraisons ou ne rendent pas de services à d'autres «entrepreneurs», sont redevables de la taxe frappant les livraisons et les services au moment où la rémunération est payée. La taxe est alors calculée d'après la rémunération acquittée.

SECTION 3

Réglementation concernant l'agriculture

Article 27

1 Des exploitants agricoles, des éleveurs, des horticulteurs et des sylviculteurs ne sont pas considérés comme «entrepreneurs» si leurs livraisons et prestations de services consistent seulement en:

a) livraisons de biens mentionnés au tableau I, litt. a) qu'ils ont produits ou cultivés en leur qualité précitée;

b) livraisons de moyens d'exploitation utilisés et d'autres biens utilisés dans l'entreprise;

c) autres livraisons et prestations de services, dont la rémunération totale annuelle ne dépasse pas Fl. 10.000.

2 Les «entrepreneurs» auxquels les personnes visées au paragraphe 1 livrent des biens visés au litt. a) peuvent déduire, sur base de l'article 15, par 1, litt. a) et sous les conditions que Notre Ministre détermine-

ra, 4% du montant qui leur a été porté en compte.

3 Les personnes visées au par. 1 peuvent demander à l'inspecteur d'être considérées comme «entrepreneurs». En cas d'acceptation de la demande, la qualité d'«entrepreneur» s'applique jusqu'à la résiliation par l'intéressé, mais au moins pour une période de 5 ans; dans ce cas, le paragraphe 2 n'est pas d'application. Une demande renouvelée ne peut être acceptée que 5 ans après la résiliation. L'inspecteur statue sur la demande par voie de décision.

4 L'article 25 n'est pas d'application aux agriculteurs, éleveurs, horticulteurs et sylviculteurs, qui effectuent des livraisons de biens mentionnés au tableau I, litt. a), qu'ils ont cultivés ou élevés.

SECTION 4

Produits de tabac

Article 28

La perception de la taxe frappant la livraison et l'importation de tabacs manufacturés, visés à l'art. 2, par. 1, de la «Wet op de accijns van tabaksfabrikaten (Stb 1964, 208)» (Loi en matière de droit d'accise sur les tabacs manufacturés) s'effectue avec application correspondante des règles applicables à cette accise, avec cette restriction que le taux s'élève au douze cent douzième du prix de détail entrant en considération pour le calcul de l'accise. Cette taxe n'ouvre pas droit à la déduction visée à l'article 15.

CHAPITRE VI

Dispositions particulières

Article 29

1 La restitution de la taxe frappant les livraisons et les services est octroyée, sur demande, dans la mesure où la rémunération:
a) n'est pas et ne sera pas reçue;
b) est remboursée parce qu'une diminution de la rémunération a été accordée ou parce que les biens ont été repris sans avoir été utilisés.

2 L'«entrepreneur» qui a déduit la taxe conformément à l'article 15 est redevable, à titre de taxe, d'une somme égale au prorata du montant déduit au moment et pour autant qu'il faille raisonnablement admettre qu'il ne paiera pas, qu'il ne paiera pas intégralement ou qu'il a récupéré la rémunération à laquelle ce montant se rapporte. En tout cas, la taxe sera due deux ans après l'exigibilité de la rémunération, pour autant que celle-ci n'ait pas encore été payée à ce moment. La taxe devenue exigible est versée sur la base de l'article 14.

3 Nous nous réservons de déclarer par arrêté que les premier et deuxième paragraphes du présent article ne sont pas applicables aux montants qui n'on pas été reçus ou payés par suite d'un rabais accordé pour un paiement comptant.

Article 30

L'«entrepreneur» qui a son domicile ou qui est établi à l'intérieur du Royaume est réputé avoir effectué ses livraisons et prestations de services à l'intérieur du Royaume, pour autant qu'il ne prouve pas le contraire au moyen de livres comptables et de documents. Cette disposition est également applicable pour l'«entrepreneur» ayant un établissement stable situé à l'intérieur du Royaume, pour autant que les livraisons et les prestations de services soient effectuées à partir de cet établissement.

Article 31

1 La demande de restitution de la taxe est introduite avec la déclaration portant sur la période au cours de laquelle le droit à restitution est né.

2 Lorsqu'aucune déclaration ne doit être déposées sur la base de l'art. 14, la demande de restitution s'effectue au moyen d'une déclaration dont Notre Ministre détermine le formulaire. Cette déclaration doit être déposée dans les trois mois qui suivent le terme du trimestre au cours duquel le droit à restitution est né.

3 L'inspecteur statue sur la demande de restitution par voie de décision.

Article 32

L'«entrepreneur» est tenu, tout en respectant les règles à arrêter par Notre Ministre, de tenir des annotations sur les livraisons de biens et les prestations de services qui ont été effectuées par lui et sur les biens qui lui sont livrés et les services qui lui sont rendus, ainsi que sur les importations et les exportations des biens.

Article 33

1 L'«entrepreneur» est tenu de délivrer une facture numérotée et datée pour les livraisons et les prestations de services effectuées à un autre «entrepreneur»; cette facture doit mentionner d'une manière claire et distincte:

a) le jour auquel la livraison ou la prestation de services est effectuée;

b) le nom et l'adresse de l'«entrepreneur» qui effectue la livraison ou la prestation de services;

c) le nom et l'adresse de l'«entrepreneur» à qui la livraison est effectuée ou la prestation de services est rendue;

d) une description claire des biens livrés ou de la prestation de services;

e) la quantité des biens livrés;

f) la rémunération;

g) le montant de la taxe qui est dû pour la livraison ou la prestation de services. Il n'est pas permis de mentionner un montant autre que le montant de la taxe due.

2 La facture doit être délivrée avant le quinzième jour qui suit le mois au cours duquel la livraison ou la prestation de services a été effectuée.

3 Dans le cas où l'«entrepreneur» a convenu que la rémunération de la prestation qu'il effectue à un autre «entrepreneur» sera acquittée préalablement soit intégralement, soit partiellement, chaque fois une facture établie conformément au par. 1, doit être délivrée pour ce paiement ou ces paiements partiels avant la date d'exigibilité.

4 L'«entrepreneur» est tenu de conserver un double de la facture délivrée.

5 Notre Ministre peut dispenser certains «entrepreneurs» ou groupes d'«entrepreneurs» des obligations qui leur sont imposées aux termes du présent article.

Article 34

Les articles 25, par. 3 et 29, par. 1 de la «Algemene Wet inzake rijksbelastingen» trouvent application correspondante au cas où les obligations imposées par ou en vertu des articles 32, 33 et 36 n'ont pas été intégralement respectées.

Article 35

Celui qui, de quelque manière que ce soit, mentionne sur une facture la taxe sur le chiffre d'affaires dont il n'est pas devenu redevable autrement que sur la base du présent article, est redevable de cette taxe au moment où il a délivré la facture; il est tenu de verser cette taxe surla base de l'article 14.

Article 36

Nous Nous réservons, par voie d'arrêté:

a) d'édicter des règles supplémentaires dérogeant, le cas échéant, aux dispositions de la présente loi, qui sont susceptibles de faciliter la perception de la taxe;

b) d'édicter, dans le cadre de la présente loi, des règles supplémentaires en vue de compléter les sujets réglés par la présente loi.

CHAPITRE VII

Recouvrement

Article 37

Le recouvrement des arriérés s'effectue selon les dispositions applicables au recouvrement des impôts directs autres que l'impôt foncier.

Article 38

Les arriérés sont recouvrables un mois après la date figurant sur l'avertissement.

CHAPITRE VIII

Disposition pénale

Article 39

Toute personne qui ne respecte pas l'une des obligations qui lui sont imposées aux termes des articles 32 ou 33 ou qui contrevient à une interdiction contenue dans lesdits articles est punie d'une amende d'un maximum de 5.000 florin .

CHAPITRE IX

Dispositions transitoires et finales

Article 40

1 Il est accordé à l'«entrepreneur» qui, au début du 1er janvier 1969, possède en stock à l'intérieur du pays des biens non utilisés autrement que comme moyens d'exploitation, la restitution de la taxe sur le chiffre d'affaires payée pour ces biens et pour les matières premières et produits auxiliaires utilisés pour la fabrication de ces biens. La restitution englobe également la taxe sur le chiffre d'affaires payée pour les moyens d'exploitation et les prestations de services utilisés dans la fabrication des biens en stock, si l'«entrepreneur» exporte au cours de l'année 1969 les biens en question non utilisés et en l'état où ils se trouvent au début du 1er janvier 1969.

2 Notre Ministre édicte en matière de restitution des règles supplémentaires qui permettent de la fixer selon des critères généraux.

3. La restitution n'est accordée que pour autant que l'«entrepreneur» ait eu le droit à déduire, sur la base de l'article 15, la taxe qui lui serait portée en compte si les biens lui étaient livrés après le 31 décembre 1968.

4 Le droit à restitution s'ouvre, chaque fois à raison d'un quart, au terme de chaque trimestre de l'année 1969. Toutefois, le droit à restitution en raison de l'exportation de biens, s'ouvre au terme du trimestre au cours duquel l'exportation a eu lieu.

Article 41

1 Par dérogation aux articles 2 et 15, il n'est accordé pour les biens destinés à être utilisés par l'«entrepreneur» comme moyens d'exploitation, qu'une déduction de:
a) 40% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1969;
b) 60% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1970;
c) 80% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1971.

2 Le premier paragraphe du présent article n'est pas applicable aux navires, à l'exception des habitations flottantes et des bateaux de plaisance.

Article 42

1 Nous Nous réservons, en ce qui concerne l'introduction de la présente loi, d'effectuer l'aménagement nécessaire des taux de l'article 3 de la «Wet op de accijns van tabakfabrikaten» (loi en matière des droits d'accise sur les tabacs manufacturés).

2 Cet aménagement s'effectuera pour les différentes catégories des tabacs manufacturés de telle sorte que, d'après les distinctions prévues à l'article 2, par. 1 de la «Wet op de accijns van tabaksfabrikaten», le montant de l'accise dû par suite de l'introduction de la présente loi, soit approximativement égal au montant de l'accise dû avant cette introduction. En outre, Nous Nous réservons de fixer les arrondissements que Nous considérons nécessaires.

3 Après la promulgation de l'arrêté pris en vertu du paragraphe 1, une proposition de loi en vue de l'approbation de cet arrêté sera transmise sans délai à la deuxième Chambre des Etats généraux.

4 Au cas où la proposition est retirée ou au cas où l'une des Chambres des Etats généraux décide de ne pas l'adopter, Notre arrêté sera abrogé sens délai.

Article 43

L'article 101, paragraphe 1, de la «Registratiewet 1917 (Stb. 243)» est complété comme suit avant la subdivision c:

a) les actes par lesquels les biens immeubles corporels et incorporels sont transférés par un «entrepreneur» qui est redevable de la taxe sur le chiffre d'affaires à cause de ce transfert, à moins que les biens ne soient utilisés par cet «entrepreneur» comme moyens d'exploitation et que celui à qui le bien est transféré peut déduire intégralement ou partiellement la taxe sur le chiffre d'affaires, sur la base de l'article 15 de la «Wet op de omzetbelasting 1968»;

b) les actes par lesquels un parent transfert des biens immeubles corporels et incorporels à un ou plusieurs de ses enfants, de ses beaux-parents ou de ses enfants recueillis, si ces biens font partie d'une entreprise agricole, horticole, d'élevage ou de sylviculture du parent, dont l'exploitation est poursuivie intégralement par l'enfant ou par les enfants.

Article 44

1 La «Wet op de accijns van alcoholhoudende stoffen (Stb. 1963, 240)» (loi concernant les accises sur les matières contenant de l'alcool) est modifiée comme suit:
A. Article 7, par. 1 en 2, il faut lire:
Article 7
1. L'accise sur l'alcool, à laquelle sont soumises les matières contenant de l'alcool fabriquées à l'intérieur du pays, est calculée d'après la quantité d'alcool pur qu'elles contiennent à la température de 15° C et s'élève à fl. 1.540 par hectolitre d'alcool pur.
2. L'accise sur l'alcool à laquelle sont soumises les matières contenant de l'alcool importées s'élève par hectolitre pour:
A. les liquides ne contenant aucune autre

substance que l'alcool et l'eau et pour les boissons alcoolisées ne relevant pas des catégories B et C:

I. ne titrant pas plus de 65 degrés si l'importation s'effectue dans des emballages ne dépassant pas 2 litres Fl. 1.001,—

II. autres par degré .....Fl. 15,40

B. Les liqueurs et autres boissons alcoolisées, sucrées même aromatisées:

I. ne titrant pas plus de 15 degrés Fl. 231,—

II. titrant plus de 15 degrés et pas plus de 65 degrés ..... Fl. 1.001,—

III. autres, par degré .....Fl. 15,40

C. Les boissons fermentées relevant de la position 22.04 du tarif des droits d'entrée, si elles titrent plus de 22 degrés, ou relevant des positions 22.05-B-V, 22.06-C, 22.07-A-II-a-2, 22.07-A-II-b-2, 22.07-B-II-a-2 ou 22.07-B-II-b-2, de ce tarif, ainsi que les autres boissons relevant des positions 22.04, 22.05, 22.06 et 22.07 de ce tarif qui, par leur absence de coloration, présentent l'aspect de l'alcool rectifié ou encore sont complètement désacidifiées:

I. ne titrant pas plus de 65 degrés Fl. 1.001,—

II. autres, par degré .....Fl. 15,40

D. toutes les autres matières contenant de l'alcool dont le titre est:

I. de plus de 5 degrés et pas plus de 10 degrés .....Fl. 154,—

II. de plus de 10 degrés et pas plus de 20 degrés .....Fl. 308,—

III. de plus de 20 degrés et pas plus de 35 degrés .....Fl. 539,—

IV. de plus de 35 degrés et pas plus de 50 degrés .....Fl. 770,—

V. de plus de 50 degrés et pas plus de 75 degrés ..... Fl. 1.155,—

VI. de plus de 75 degrés .... Fl. 1.540,—

B. A l'article 73, paragraphe 2, il faut lire au lieu de «Fl. 700»: «Fl. 770,—».

2 Les matières contenant de l'alcool soumises à l'accise sur l'alcool qui, à la date de l'entrée en vigueur de la présente loi, se trouvent dans un lieu autre qu'une distillerie de 1ère classe ou entrepôt et qui, en vertu de l'article 40, ouvrent droit à la restitution de la taxe sur le chiffre d'affaires, sont soumises au rappel de l'accise pour un montant de:

a) Fl. 70,— par hectolitre d'alcool pur, à une température de 15 degrés C., pour les matières contenant de l'alcool auxquelles s'applique une exonération partielle de l'accise;

b) Fl. 140,— par hectolitre d'alcool pur, à une température de 15 degrés C., pour d'autres matières contenant de l'alcool.

3 Le paragraphe 2 n'est pas applicable:

a) aux matières contenant de l'alcool auxquelles s'applique une exonération intégrale de l'accise;

b) aux bonbons, tablettes, bâtons et similaires de chocolats ou autres sucreries contenant de l'alcool.

4 Toute personne qui, en vertu de l'article 40, a droit à la restitution de la taxe sur le chiffre d'affaires, est tenue de déclarer dans les deux jours qui suivent l'entrée en vigueur de la présente loi, la quantité, la catégorie, le titre et la quantité d'alcool pur des matières contenant de l'alcool soumises au recouvrement d'arriérés, ainsi que le lieu où elles se trouvent.

5 Toute personne qui est tenue, en application du paragraphe 4, de faire une déclaration est redevable de l'accise à laquelle sont soumises en application du paragraphe 2 les matières contenant de l'alcool.

6 Les déclarations font l'objet d'une vérification.

7 L'accise est établie par l'inspecteur et à raison du quart, acquittée chez le receveur désigné par l'inspecteur, aux dates à partir desquelles le droit à la restitution s'ouvre,

conformément à l'article 40, paragraphe 4, phrase 1. Elle est calculée conformément à la déclaration et compte tenu des résultats de la vérification. Si aucune déclaration n'a été faite, l'accise est calculée à l'aide de données connues et, le cas échéant, par voie d'estimation.

8 Toute personne qui possède des matières contenant de l'alcool qui n'ont pas été déclarées, conformément au paragraphe 4, dans le délai prescrit, est punie d'une amende qui n'excède pas 5.000,— florins ou, si la somme dépasse ce montant, à 5 fois l'accise à laquelle ces biens sont soumis en application du paragraphe 2.

9 Si le coupable commet le fait décrit au paragraphe 8 dans le dessein de se soustraire intégralement ou partiellement à l'accise ou d'encourager cette fraude, il est puni soit d'une peine de prison de 2 ans ou plus et d'une amende qui n'excède pas 20.000,— florins, ou si la somme dépasse ce montant, à 10 fois l'accise à laquelle ces biens sont soumis en application du paragraphe 2, soit d'une des peines susmentionnées.

10 Notre Ministre des finances est habilité à édicter des règles en exécution du présent article.

Article 45

1 Sous la dénomination «taxe d'égalisation» est perçue une taxe complémentaire sur le chiffre d'affaires, qui frappe les livraisons effectuées par le fabricant et l'importation des voitures de tourisme.

2 Par voitures de tourisme, il faut entendre les véhicules à moteur sur 3 roues ou plus qui, en raison de leur type de construction, peuvent servir au transport de personnes par la route, y compris les voitures mixtes et les «station-cars», à l'exception des:

a) véhicules dont le nombre de places est généralement supérieur à 8, le chauffeur non compris,

b) véhicules manifestement conçus pour le transport de malades ou de prisonniers,

c) véhicules manifestement conçus pour être utilisés par la police ou par le service d'incendie, ou à des fins militaires,

d) véhicules automobiles à 3 roues à l'usage des handicapés et des invalides.

3 Est fabricant de voitures de tourisme l'«entrepreneur qui met un bien dans un état tel qu'il puisse être considéré comme une voiture de tourisme au sens du paragraphe 2. Pour l'application de l'article 3, une telle transformation équivaut à une fabrication.

4 Les dispositions de la présente loi sont d'application correspondante à cette taxe, avec cette restriction que

a) la taxe d'égalisation est calculée sur le montant qui est ou serait porté en compte lors de la vente de la voiture à un non-entrepreneur, au moment où un certificat est délivré attestant la communication du numéro d'immatriculation visée à l'article 9 de la «Wegenverkeerswet (Stb. 1935, 554);

b) la taxe d'égalisation – également pour l'application des articles 8 et 19 – est comprise dans le montant sur la base duquel la taxe est calculée;

c) la taxe d'égalisation n'entre pas en considération pour la déduction visée aux articles 2 et 15;

d) la taxe d'égalisation ne doit pas nécessairement être mentionnée séparément sur les factures.

5 Nous Nous réservons d'édicter par voie d'arrêté des règles complémentaires pour la détermination du montant visé au paragraphe 4 sur la base duquel est calculée la taxe d'égalisation.

6 Le taux s'élève à 15%.

7 Il est restitué, sur demande, la taxe d'éga-

lisation payée pour ces voitures à l'«entrepreneur» qui exporte des voitures de tourisme non utilisées ou qui les stocke en entrepôt de douane.

Article 46

Toute personne qui est tenue, en vertu d'un contrat conclu avant l'entrée en vigueur d'une modification de la législation en matière de taxe sur le chiffre d'affaires, de livrer des biens ou d'effectuer des prestations de services peut réclamer chez celui à qui il doit livrer les biens ou rendre le service, la différence entre le montant exigible au titre de la taxe sur le chiffre d'affaires frappant ces biens ou cette prestation de services et le montant moins élevé qui aurait pu être exigé avant l'entrée en vigueur de la modification. Les conditions incompatibles avec ces dispositions sont nulles.

Article 47

Toute personne à qui sont livrés des biens ou rendue une prestation de services, en vertu d'un contrat conclu avant l'entrée en vigueur d'une modification de la législation en matière de taxe sur le chiffre d'affaires, peut réclamer de celui qui doit livrer les biens ou effectuer la prestation de services, la différence entre le montant exigible au titre de la taxe sur le chiffre d'affaires frappant ces biens ou cette prestation de services et le montant plus élevé qui aurait pus être exigé avant l'entrée en vigueur de la modification. Les conditions incompatibles avec ces dispositions sont nulles.

Article 48

1 La «Wet op de Omzetbelasting 1954 (Stb. 558)» et la loi du 29 décembre 1966 (Stb. 592) sont abrogées, sauf en ce qui concerne les livraisons et les prestations de services déjà effectuées et les faits punissables.
2 Notre Ministre est habilité à édicter des dispositions complémentaires en matière de transition.

Article 49

1 La présente loi entre en vigueur à compter du 1er janvier 1969.
2 Elle peut être citée comme «Wet op de omzetbelasting 1968».

TABLEAU I JOINT A LA LOI RELATIVE A LA TAXE SUR LE CHIFFRE D'AFFAIRES 1968

a) 1 Pommes de terre,
2 beurre, margarine, graisse à frire et à rôtir et autres huiles et graisses, en tant que tels propres à l'alimentation humaine,
3 pain sous toutes ses formes, biscottes et biscottes en boules,
4 chocolaterie et sucreries si normalement utilisés comme substances à tartiner,
5 oeufs,
6 fruits- à l'exception des fruits tropicaux, oranges, citrons et autres – frais,
7 céréales; farines de céréales et fleurs de ces farines,
8 légumes frais, préparés ou conservés et compotes de pommes,
9 flocons d'avoine, d'orge et de grains,
10 sirop de ménage et sirop de pommes,
11 confiture, beurre d'arachides et miel naturel,
12 fromages,
13 café, chicoré-café et succédanés du café,
14 lait, y compris le lait en poudre d'une teneur maximum en matières grasses de 1,5% en poids et d'une teneur maximum en humidité de 5% en poids,

15 pain d'épices et toutes sortes d'autres pains similaires à trancher,
16 chevaux – à l'exception des chevaux de course,
17 bouillie de lait, yogourt,
18 légumineuses, même impropres à l'alimentation humaine,
19 plants destinés au repiquage pour la culture de légumes,
20 animaux de basse-cour et autres volailles et gibiers, y compris les lapins domestiques, ainsi que leurs parties, frais, préparés ou conservés, manifestement destinés à l'alimentation humaine;
21 bovins, ovins, caprins et porcins,
22 lard, frais, préparé ou conservé,
23 vinaigres comestibles,
24 thé,
25 vermicelle, macaroni, spaghetti et «mie»,
26 poissons, crevettes, moules, buccins et bigorneaux, ainsi que leurs parties, frais, préparés où conservés, à l'exception du saumon fumé, du caviar et autres sortes d'oeufs utilisés comme caviar,
27 viandes des espèces bovine, porcine, ovine, caprine et chevaline, fraîches, préparées ou conservées; saucisses et autres charcuteries faites à partir des viandes susmentionnées, ainsi que paté de foie, non préparé à partir de foie d'oie ou de canard; abats et tripes des animaux susmentionnés,
28 eau,
29 livres; quotidiens, hebdomadaires, revues et autres éditions périodiques paraissant au moins trois fois par an,
30 imprimés en écriture braille; ardoises, machines à écrire et autres articles servant à l'écriture braille,
31 gaz et électricité,
32 produits pharmaceutiques et articles de pansements que Nous déterminerons par arrêté,
33 membres artificiels, à savoir: prothèses des bras, des mains, des jambes et des pieds; bottines et articulations artificielles; yeux et oreilles artificiels; prothèses du visage, du nez et du larynx; prothèses d'implantation chirurgicale,
34 pétrole, gasoil, fuel-oil et autres huiles minérales, au sens des articles 4, 5, 6 et 7 de la «Wet op de accijns van minerale oliën (Stb 1964, 207» (loi concernant les accises sur les huiles minérales),
35 tableaux peints, dessins, eaux-fortes, gravures et articles similaires de plus de cent ans,
36 houilles, lignites, briquettes, cokes et tourbe,
37 savons, à savoir: savons durs en morceaux à usage domestique, savons jaunes, verts et autres à usage domestique, produits de lavage synthétiques à usage domestique, savons en poudre, préparations pour lessives contenant du savon et cristaux de soude,
38 betteraves,
39 semences pour l'agriculture et l'horticulture dans la mesure où elles servent à la culture des produits et des grains oléagineux figurant dans le présent tableau,
40 engrais à usage agricole,
41 bois rond,
42 pailles et fourrages,
43 lin.

b) 1 la fabrication de chaussures,
2 la location de livres et de journaux, hebdomadaires, revues et autres périodiques paraissant au moins trois fois par an,
3 les publicités dans les journaux, hebdomadaires, revues et autres périodiques paraissant au moins trois fois par an,
4 la fourniture de chaleur,
5 l'intervention dans la conclusion d'accords prévoyant la livraison de biens visés au point a,

6 le transport de personnes par chemin de fer, tramway ou trolleybus ou par bac, ainsi que le transport de personnes visé à l'article 1, litt. g) et h) de «Wet autovervoer Personen (Stb 1939, 527)».

NOTE GENERALE

Ne sont pas compris dans les biens préparés mentionnés dans le présent tableau, les biens destinés à être utilisés sur place.

TABLEAU II JOINT A LA LOI RELATIVE A LA TAXE SUR LE CHIFFRE D'AFFAIRES 1968

a) 1 biens importés «se trouvant sous le régime douanier» au sens de la «Algemene wet inzake de douane en de accijnzen» (Loi générale concernant la douane et les accises)

2 biens qui sont destinés à être expédiés directement en dehors du royaume ou qui sont stockés dans un entrepôt de douane et sont ensuite considérés comme biens importés «se trouvant sous le régime douanier»,

3 navires de mer, à l'exception des bateaux de plaisance, et aéronefs utilisés principalement comme moyens de transport public dans le trafic international.

b) 1 les prestations de services se rapportant à des biens visés au point a, 1, 2 et 3,

2 le transport de biens importés jusqu'au lieu de destination,

3 le transport de personnes au moyen de navires de mer ou d'aéronefs, si le lieu de destination ou le lieu de départ est situé à l'extérieur du royaume,

4 les prestations de services dont la rémunération est portée en compte à une personne qui n'a pas son domicile à l'intérieur du Royaume ou n'y est pas établie et qui n'y possède pas un établissement stable, à condition que cette personne ou encore une autre personne à qui la prestation de services est rendue n'ait pas la jouissance de la prestation à l'intérieur du Royaume.

YUGOSLAVIA:

LAW ON THE PROFITS TAX OF FOREIGN PERSONS INVESTING MEANS IN A DOMESTIC ECONOMIC ORGANIZATION FOR THE PURPOSE OF JOINT OPERATIONS *

The development of joint business activity by Western European entrepreneurs in Eastern Europe has stimulated interest in the tax laws of these countries. Yugoslavia is one of the countries in which interest of this nature is great. Our January 1968 issue contained an article by Prof. Dr. Marijan Hanžeković, titled "The Taxation of Foreign Enterprises in Yugoslavia". The Bureau has recently received a booklet, entitled "Joint Investment and Production-technical Co-operation of Yugoslav Economic Organizations and Foreign Firms", published by the Federal Chamber of Economy, Council for Economic Relations with Foreign Countries, Belgrade. It contains a translation of the law providing for the taxation of profits earned by foreigners in joint activities with Yugoslavian enterprises. The text of the translation is reprinted below.

Article 1
Foreign legal and physical persons (hereinafter: „foreign persons") shall pay tax on the part of the income obtained by them as their profit by virtue of investment of means in a domestic economic organization for the purpose of joint operations (profits tax) pursuant to the provisions of Federal law.

Article 2
The profits tax shall belong to the Federation.

Article 3
The taxable base for the profits tax shall be constituted by a foreign person's share of the income obtained from joint operations in the course of one calendar year (hereinafter; „the profit of the foreign person"), whatever the form in which it is obtained.
In establishing the profit of foreign persons there shall be taken the undeclared receipts directly originating from joint operations and whereby the profit of foreign persons is augmented, such as particularly the profit in the operations with the domestic economic organization in which means have been invested by virtue of the difference between the prices obtained and the normal prices on the foreign market.
The income obtained by a foreign person on account of interest by virtue of the obligation to place on deposit in a bank in Yugoslavia a part of the share of the income from joint operations with a domestic organization in terms of the Law on Assets of Economic Organizations shall not be taxable.

Article 4
Profits tax shall be paid at the rate of 35%.

Article 5
If a foreign person uses at least 25% of the profit made in one year to increase his share

* Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 31 of 1967.

in the means for joint operations, or if he invests it in another domestic economic organization for joint operations, or if he places it on deposit in a bank in Yugoslavia, the part of the tax assessment affecting such part of the profit shall be reduced by 15%.
If a foreign person uses over 25% and up to 50% of the profit made for the purposes referred to in the last foregoing paragraph, the tax assessment affecting 25% of the profit shall be reduced by 15% and that affecting the part of the profit in excess of 25% shall be reduced by 30%.
If a foreign person uses over 50% of the profit made for the purposes referred to in the first paragraph of this article, besides the tax facilities referred to in the last foregoing paragraph, the tax assessment affecting the part of the profit in excess of 50% shall be reduced by 50%.
In event that a part of the profit is placed on deposit in a bank, the tax facilities referred to in the first, second and third paragraphs of this article shall not be granted if the placing on deposit is for a notice period of less than 5 years, whereas if the placing on deposit is for a notice period of over 5 and up to 10 years one-half of the said facilities shall be granted.
If a foreign person transfers his rights and obligations under the agreement respecting investment of means in joint operations to the domestic economic organization in which he has invested a part of the profit made by him or to another domestic economic organization before the lapse of 5 years from the date when the part of the profit has been invested, the foreign person shall lose the right to the tax facilities specified in the first, second and third paragraph of this article, and his profits tax shall be assessed subsequently up to the full amount.
If a foreign person acts in the mode referred to in the last foregoing paragraph after 5 and not later than 10 years from the date when the investment for the purposes referred to in the first paragraph of the article has been made, the foreign person shall lose the right to one-half of the tax facility granted, and the corresponding part of his profits tax shall be assessed subsequently.

Article 6
If for any reason the amount of profit whereby the share has been augmented is returned to a foreign person before the lapse of the period for which the tax facility has been granted, the profits tax shall be assessed subsequently on the amount of profit returned in proportion to the time whereby the amount has been returned before the lapse of the said period.

Article 7
The taxable base of the profits tax in terms of this Law shall be established on the basis of the final statement of accounts of the domestic economic organization in which the foreign person has invested means.
The domestic economic organization shall be bound to show separately in its final statement of accounts the profit made from joint operations.
Together with the statement of accounts, the domestic economic organization shall be bound to submit to the Social Auditing Service also all other data of relevance for establishing the profit of the foreign person.
The Federal Secretary of Finance shall prescribe the method of determining the data referred to in the last foregoing paragraph and their statement forms.

Article 8
The domestic economic organization in which means of a foreign person have been invested shall compute and pay the profits tax within the prescribed time limits.

Article 9

The domestic economic organization in which means of a foreign person have been invested shall be bound to pay during the year monthly advances on the profits tax amounting to one-twelfth of the profits tax established in accordance with the final statement of accounts for the preceding year.

If during a year the domestic economic organization is drawing up periodic statements of accounts respecting the joint operations with a foreing person, the advances on the profits tax shall be paid in accordance with such periodic statements.

If in the first year joint operations are commenced in the first half of the year, the domestic economic organization shall be bound to draw up an interim statement of accounts within 6 months from the date of commencement of the joint operations and shall pay advances for the period in accordance therewith, and until the end of the year it shall pay monthly advances in accordance with the tax established by the said statement of accounts. If the joint operations have commenced in the second half of the year, the domestic economic organization shall be bound to prepare an interim statement of accounts within 30 days from the expiry of the year and to pay advances for the period in accordance therewith.

The advances shall be paid within 15 days from the expiry of each month respectively from the submission of the statement of accounts to the Social Auditing Service.

Article 10

A domestic economic organization in which means of a foreign person have been invested shall be bound to compute and pay the profits tax on the taxable base established according to the statement of accounts, in terms of Article 3 hereof.

If the advances paid in the course of a calendar year should be less than the amount of profits tax which has been established for the year, the domestic economic organization shall be bound to pay the difference simultaneously with the submission of the final statement of accounts to the Social Auditing Service.

If the advances paid should exeed the established amount of profits tax according to the final statement of accounts, the surplus advances paid shall serve to cover the advances in the succeeding year, unless the domestic economic organization requests the refunding of the surplus advances paid.

Article 11

If a domestic economic organization in which means of a foreign person have been invested fails to compute and pay, or to pay timeously the profits tax, it shall pay, besides the normal tax, penalty interest at the rate of 0.1% per diem on the unpaid tax or on tax not paid timeously.

Article 12

Supervision of the correctness of the computation and payment of profits tax shall be exercised by the Social Auditing Service.

Article 13

The Social Auditing Service shall be bound to control the correctness of the establishment of the taxable base of the profits tax and of the computation of the profits tax within three months from the date of receipt of the final statement of accounts of a domestic economic organization in which means of a foreign person have been invested.

If the Social Auditing Service established that the taxable base has not been correctly established or that the computation of the profits tax has not been correctly effected, it shall make a decision whereby it shall order the domestic economic organization to pay

the less computed and paid tax within 15 days from the date of delivery of the decision.
The Social Auditing Service shall deliver the decision referred to in the last foregoing paragraph to the domestic economic organization and the foreign person.

Article 14
For unpaid profits tax the domestic economic organization in which means of a foreign person have been invested and the foreign person shall be held liable.

Article 15
A foreign person may have recourse to legal remedies against a decision of the Social Auditing Service within 60 days from the date of delivery of the decision, subject to the conditions and in the mode prescribed by the Law on the Social Auditing Service.

Article 16
The right to assess the profits tax shall be subject to a period of limitation of five years from the expiry of the year in which assessment was to have been effected.
The right to collect profits tax, penalty interest and the costs of forcible collection shall be subject to a period of limitation of five years from the expiry of the year in which collection was to have been effected.
The right of a taxpayer to the refunding of amounts paid on account of profits tax, penal interest and fines which should not have been paid shall be subject to a period of limitation of five years from the expiry of the year when collection has been effected.

Article 17
A domestic economic organization in which means of a foreign person have been invested shall be liable to a fine up to 100,000 dinars for economic contravention if it fails to show separately in its final statement of accounts the income from the joint operations, as well as all other data of relevance for establishing the profit of the foreign person (second and third paragraphs of Article 7).
Also the responsible person in the domestic economic organization shall be fined, up to 3,000 dinars, for the offence referred to in the last foregoing paragraph.

Article 18
The provisions of this Law shall also be applicable when a foreign person invests means in another domestic work organization or in a domestic business association with a view to joint operations.

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Library International Bureau of Fiscal Documentation, no. B 1887.

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Proposals to reduce the problems of double taxation consequent to the enforcement of Section 482, which gives the Internal Revenue Service the authority to reapportion or reallocate the income of affiliated U.S. and foreign

companies where it considers it necessary to prevent tax evasion.

Library International Bureau of Fiscal Documentation, no. L 1877.

COMMITTEE ON INTERNATIONAL TAXATION
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VERGÜTUNGSGRUPPENVERZEICHNIS FÜR DIE UMSATZSTEUER-AUSFUHRVERGÜTUNG, release 1.
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Commerce Clearing House ,Inc., Chicago.

The Netherlands: 1968 Bill to Introduce a Turnover Tax on Value Added

February 1968 issue of EUROPEAN TAXATION

Every Dutch exporter, importer, producer, seller and consumer—and ALL who trade with The Netherlands—will be crucially affected by the proposals in the bill submitted to the Dutch Parliament on October 5, 1967, for the introduction of the TAX ON VALUE ADDED (TVA). It is expected that a tax generally following the measures proposed, will become effective by January 1, 1969.

The International Bureau of Fiscal Documentation, and the Editors of its monthly journal, "European Taxation", have devoted the entire February issue to the presentation of a detailed and comprehensive review of the Dutch TVA bill. This discussion, which also partially up-dates the detailed comparative study of "The Common System of Tax on Value Added" in the July/August, 1967, issue of "European Taxation", is a useful analysis and important guide to the many who will be directly affected by the introduction of TVA in The Netherlands.

Section I examines the concepts used in the bill to define the scope of the TVA's general application. These include the types of transactions on which the tax is imposed, the territory in which it applies, and the persons and entities liable for its payment.

Section II discusses the main provisions limiting the application of the proposed TVA. These consist of the exemption of certain transactions from the tax, and the imposition of TVA at a zero rate in respect to certain goods and services.

Section III specifically discusses the determination of the base upon which TVA is levied, the rate of tax, and the operation of the credit procedure.

The concluding Section examines the significant aspects of the proposed TVA, with emphasis on the special exemptions and relief for persons or entities engaged in agriculture or small business operations, the taxation of deliveries of immovable property and the problem of "self-deliveries". A CHART comparing the proposed Dutch TVA with the existing turnover tax, forms a valuable Appendix to the discussion.

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Treaty for East-African Co-operation

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Agreement between the Federal Republic of Germany and the Kingdom of Thailand for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital

A WARNING AGAINST SPECIAL TAX PROVISIONS

C. Lowell Harriss in Objectives of Fiscal Policies: Looking at Goals[1] states: "in short, the best interests of long-run growth and efficiency today seem to me to call for reduction in "special tax provisions", not increase". In volume 12 of the series published by the Karl-Bräuer Institute of the Federation of Taxpayers (Institut des Bundes der Steuerzahler), entitled "Mit Steuern steuern?" one finds —translated into English—:

"Unfortunately it is already considered self-understood, especially in those cases where the imagination of political economists and politicians in their own area of knowledge is exhausted that special tax provisions be called upon, regardless whether the measure chosen is an anti-noise tax or tax benefitting of washing machines for use in the home. But popular methods are not necessarily correct or sensible."[2]

Thus we have two warnings; one from American side, one from German side against the effectiveness of special tax provisions. We think it worth while to call attention to these scientific views.

The issue may be a suitable subject for a thorough international study. Every special tax provision is in itself complex to apply. If a massive administrative burden is to be avoided, structures must be adopted, which provide greater simplicity and clarity, these in our opinion being basic attributes essential to a tax structure appropriate for the present day. We believe reaching this goal in the near future is possible. As a result of the internationalization of taxation, made necessary by economic co-operation between nations, the historical foundations of every national tax structure have, and continue to become weaker and less relevant. A new structure must be found!

DR. J.C.L. HUISKAMP

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[1] The Tax Magazine, October 1967, p. 678.
[2] p. 35.

J. W. HARDIMAN:

NEW ZEALAND - THE TAXATION OF NON-RESIDENTS

1. The liability for New Zealand tax is dependent on either:
being resident in New Zealand, or
deriving income from a source in New Zealand.
The Land and Income Tax Act 1954, the principle enactment governing the assessment and collection of income tax in New Zealand provides that all income derived from New Zealand is liable for New Zealand income tax irrespective of whether the person deriving the income is resident in New Zealand or elsewhere. New Zealand residents are liable for tax on their world income (i.e. income from New Zealand and abroad) while non-residents are liable only on income derived from New Zealand.

2. Income tax in New Zealand is a central government tax. Taxes on income are not levied by local or provincial governments.

3. The term "non-resident", although commonly used, has no statutory definition. It does however mean any taxpayer who is not deemed to be resident in New Zealand under the provisions of Section 166 of the Act. This Section deems any person other than a company to be resident in New Zealand if his or her home is in New Zealand. In this context home can be regarded something akin to but less than domicile.

4. Section 166 also deems companies (or corporations) to be resident in New Zealand if:
they were incorporated in New Zealand, or
their centre of administrative management is in New Zealand.
This means that the New Zealand incorporated subsidiaries of overseas (or foreign) enterprises are taxed as New Zealand companies. A New Zealand branch of an overseas concern on the other hand would be taxed as a non-resident (see paragraph 8).

5. The classes of income which are deemed to be derived from New Zealand are set out in Section 167 of the Act. They can be broadly described as:
(a) Business Income: This is not confined to the income arising from operations conducted through a permanent establishment in New Zealand. The provisions of the Act extend to—
Income derived from any business carried on in New Zealand;
Income derived from contracts made or wholly or partly performed in New Zealand;
Income derived from the carriage by sea or by air of merchandise, goods, livestock, mails or passengers shipped or embarked in New Zealand (see paragraph 12).
The Commissioner of Inland Revenue who is responsible for the assessment and collection of New Zealand income tax is empowered under the Act to make arbitrary assessments where it appears to him from the returns of income made on behalf of a business controlled by non-residents that the business does not produce a taxable profit or the amount of the income disclosed is less than might have been effected.

(b) Investment Income which would embrace—
Dividends on shares in New Zealand companies (Dividends received by individuals resident in New Zealand are assessable with a maximum of 35%. Dividends received by non-resident individuals of companies are subject to withholding tax as set out later).
Interest on New Zealand Government stock and securities issued by local or public authorities but excluding interest on Government or local body stock which is payable out of New Zealand;
Income from money lent in New Zealand and on money lent outside of New Zealand if the money is used in a business carried on in New Zealand through a fixed establishment and on money lent outside New Zealand if the loan is primarily secured by a mortgage over land in New Zealand.
Income derived as the owner of land in New Zealand—rents for example.
(c) Royalties: Cultural, commercial and industrial royalties and "know how" payments (i.e. payments for the supply of technical knowledge, or assistance) are deemed to have a source in New Zealand if they are paid by a person or company resident in New Zealand in respect of business operations in New Zealand or by a non-resident if the amount is deductible in calculating his assessable (taxable) New Zealand income.
(d) Income from employment in New Zealand—All salaries, wages, allowances and emoluments of any kind earned in New Zealand in the service of any employer resident in New Zealand or elsewhere are taxable in New Zealand. There is however a provision which exempts from New Zealand tax the remuneration of non-residents (other than "public entertainers") earned in New Zealand as an employee of a non-resident employer if the length of the visit is not more than 92 days or not more than 92 days in the aggregate on visits during an income year. This exemption is subject to the remuneration being liable for tax in the country of residence.
(e) Pensions or annuities payable by the New Zealand Government or by any superannuation fund established in New Zealand.

6. New Zealand has entered into double taxation agreements with Australia, Canada, Japan, Sweden, the United Kingdom and the United States of America. In varying degrees these agreements modify the provisions of the Land and Income Tax act as they affect residents in these countries. Without going into the agreements in detail, the following aspects should be noted:
Briefly industrial and commercial profits derived from New Zealand by residents in the six double tax countries are not liable for tax in New Zealand unless the profit arises from the operation of a permanent establishment in New Zealand.
The general position under the agreements is that profits from the operation of ships or aircraft are taxed on a residence basis. An exception is the agreement with Australia—under that agreement shipping and/or air transport profits are taxed in the country in which the ship or aircraft is registered.
Under the agreement with the United Kingdom the New Zealand tax on industrial royalties paid to residents in the United Kingdom cannot exceed 10% of the gross royalty.
With the exception of the agreement with the United States, pensions and annuities are assessed on a residence basis.

7. The rates of tax payable by non-resident individuals are—
(a) Ordinary Income Tax:
The rate of ordinary income tax for indi-

viduals is 15% for the first $1,000 and thereafter rises in graduated steps to a maximum of 60% which is reached at $7,200. At the time of writing a rebate of the lessor of 10% or $200 is in force.

Resident individuals are allowed authorised deductions which are made from their assessable income to arrive at the amount of income on which ordinary income tax is payable. These deductions are known as special exemptions and are allowed on the following basis—

	NZ $	
Personal	936	
Spouse	312	(reducible if spouse is in receipt of income in excess of $312)
Housekeeper	312	(only allowed in specified circumstances and reduced proportionately if the housekeeper is only employed for part of a year)
Each dependent child	156	
Each dependent relative	156	
Charitable donations	50	
School fees to private schools	100	(reducible by amount allowed for donations)
Life Insurance Premiums and Superannuation Contributions	500	(the maximum allowance is $650 for persons who are not members of a subsidised superannuation fund)

Non-residents are not generally allowed any special exemptions in determining the amount of income on which ordinary income tax is payable unless the New Zealand income consists of a pension or superannuation from a former New Zealand employer in respect of past employment in New Zealand. The special exemption which is allowable in these circumstances is restricted to the personal exemption (NZ$ 936) or the amount of the pension whichever is the smaller.

When a non-resident derives salary or wages while in New Zealand which are liable for New Zealand tax he is generally entitled to the special exemptions (other than the exemption for life insurance premiums and superannuation contributions) which are allowed to a New Zealand resident. His entitlement is however only a proportionate part of the annual exemptions available to residents and is based on the period during which he was employed in New Zealand.

(b) Social Security Income Tax:

Social Security income tax is payable at a flat rate of 7½%.

Non-resident individuals are not generally liable for this tax unless they are personally present in New Zealand for more than 183 days or derive income from personal services while in New Zealand.

8. Non-resident companies are liable for both ordinary income tax and social security income tax. Both resident and non-resident companies are not allowed any special exemptions. They are of course allowed a deduction for expenditure incurred in producing their assessable income.

Social security income tax is payable by all companies at the rate of 7½% on assessable income. Ordinary income tax is payable by companies at graduated rates—

(a) For non-resident companies the rate commences at 17½ cents in the dollar and increases by 1/480th of a cent for every dollar of income until an income of $7,200 is reached. Thereafter the rate is 47½ cents in the dollar on the excess over $7,200. The maximum rate of tax which the income of non-resident companies will attract is therefore 55%.

(b) The rate of ordinary income tax for resident companies commences at 12½ cents in the dollar and rises to a maximum of 42½ cents in the dollar on the excess over $7,200. This results in the tax payable by non-resident companies being always 5 cents in the dollar higher than that payable by resident companies. This means that the maximum tax for companies resident in New Zealand is 50% and for non-resident companies 55%. The object of this is to achieve some balance in the taxation of overseas enterprises which operate in New Zealand through subsidiaries and those which trade as branches of non-resident companies.

(c) Dividends paid by a New Zealand company to an overseas company are subject to a 15% non-resident withholding tax (see paragraph 9). A New Zealand branch of an overseas company does not pay dividends as such and profits remitted to Head Office are not subject to the 15% withholding tax. The higher rate of tax can be regarded as being in lieu of the 15% withholding tax on dividends and is designed to prevent a taxation advantage accruing to overseas concerns which operate branches in New Zealand.

9. A tax deduction of 15% is made from the following classes of income flowing to non-residents:

Dividends
Interest
Royalties
Know-how payments

When paid to non-residents income in these four categories generally comes within the meaning of non-resident withholding income as defined in the Act. The tax deducted is known as non-resident withholding tax and has to be deducted at the time non-resident withholding income is paid or credited to a non-resident.

In the case of dividends and cultural royalties the 15% withholding tax discharges the liability for New Zealand tax i.e. it is a "final" tax (but see paragraph 10).

The withholding tax on interest, royalties other than cultural royalties and know-how payments is a "minimum" tax. Non-residents, except companies with New Zealand income of not more than $1,000 are subject to later assessment if the tax payable on an annual assessment basis is greater than the 15% tax deducted at source. A credit for the tax deducted is allowed when the assessment notice is issued.

Although the 15% withholding tax is deducted from the gross income without any allowance for expenses the non-resident is entitled to an allowance or deduction for expenditure incurred when tax is assessed on an annual basis. It is recognised that non-residents receiving royalties and know-how payments from New Zealand could find it difficult to give accurate details of expenditure incurred in connection with this income and in practice the Commissioner of Inland Revenue allows a minimum deduction in an annual assessment on the following scale without supporting details:

(a) Trade-mark royalties	25%
(b) Patent royalties	35%
(c) Know-how payments	50%
(d) Any combination of (a) or (b) with (c)	40%

Two other points to note regarding the 15%

non-resident withholding tax are—
The first $60 of interest paid or credited to a non-resident individual is exempt from tax.
When a payment for know-how is wholly a reimbursing payment i.e. it does no more than cover the expenses incurred by the recipient in deriving the amount received it is not regarded as income and therefore is not subject to the tax deduction. If a know-how payment is not wholly a reimbursing payment the total amount is liable for the 15% tax deduction.

10. There are special concessions for non-resident investment companies which are defined for this purpose in the Act. The concessions are—
(a) Automatic exemption from social security income tax provided their only income from New Zealand is interest and they have no assets in New Zealand other than the principal which earns the interest.
(b) Exemption from social security income tax and a reduced rate of ordinary income tax where in the opinion of the Commissioner—
the assets of the company consist mainly of interest bearing investments; and
the assets are used wholly or principally in an undertaking which has been declared by Order in Council to be a "development project".
The exemption from social security tax applies only to income derived from interest and the rate of ordinary income tax is reduced to the rate which the company would pay in its country of residence.

12. The Act provides that the assessable income of non-resident shipowners deemed to arise in New Zealand shall be 5% of the gross amount of outward freights, fares and passage money. Provision is made for reciprocal exemption of tax on shipping profits deemed to arise in New Zealand where the Commissioner is satisfied that New Zealand resident shipowners would be exempt from income tax in the other country in similar circumstances (see also paragraph 6 regarding double tax agreements).

13. A non-resident principal who sells through an agent in New Zealand, goods or merchandise already in New Zealand or which are to be imported into New Zealand, is deemed to be carrying on business in New Zealand through the agency of the person in New Zealand (but see paragraph 6 regarding double tax agreements). Persons or companies which operate through agents resident in New Zealand in this way are commonly referred to as non-resident traders.
It is important to bear in mind the liability for New Zealand tax under this provision (Section 201 of the Act) which arises not from trading with New Zealand but from trading in New Zealand. For example there is no liability for New Zealand tax on the profit derived by a non-resident on goods sold direct to a person or firm in New Zealand. Sales made or effected in New Zealand through the instrumentality of a New Zealand agent on the other hand give rise to a liability for New Zealand income tax.
The agent is required to make returns and is liable for tax on the income derived by his non-resident principal. This does not relieve the principal from liability as under the provisions of the Act the agent is entitled to retain from money payable to principal such amounts as may be required for the payment of tax.
Usually the New Zealand profit is based on a percentage of the gross proceeds from the goods sold in New Zealand. This percentage varies with different classes of goods and ranges from 2½% to 32½%. If the non-

resident considers the rate of profit is too high he should supply a profit and loss account covering the New Zealand sales which must be certified by a chartered accountant.

The Commissioner of Inland Revenue may exempt a non-resident principal from New Zealand tax if he is satisfied that—

(a) the income derived by a New Zealand resident in similar circumstances is not liable for tax in the other country (i.e. country of residence of the non-resident principal); or that

(b) exemption from income tax in the other country is granted on a reciprocal basis to New Zealand residents in similar circumstances.

14. A number of tax incentives aimed at assisting New Zealand export drive and encouraging development have been introduced. These incentives are available to non-residents and include—

(a) Accelerated depreciation allowances.

(b) A deduction for expenditure on scientific research.

(c) A deduction for specified items of capital expenditure on farms.

(d) An additional deduction of 50% on expenditure on export market development and tourist promotion. This means that for each $1 spent on approved export or tourist promotion a deduction of $1.50 is made from the gross assessable income—$1 as normal business expenditure and 50 cents as a special incentive deduction.

(e) Exporters of certain goods (other than basic primary products) are allowed a special deduction of 15% of their increase in exports calculated by reference to increased export sales. Increased export sales are determined by reference to export sales for a moving base period.

(f) In the case of companies whose main source of income is from mining other than petroleum mining for specified minerals, the taxable income is based on dividend distributions to shareholders. The taxable income for any year is one half of the dividends paid until the total dividends paid since the company commenced business exceed twice the amount of the paid-up capital of the company. From this point on the taxable income is the total dividends paid during the year.

In the case of petroleum mining companies, the taxable income is nil until the total dividends paid since the company commenced business exceed the amount of irrecoverable expenditure. Thereafter as in other mining companies, the taxable income is the total dividends paid during each year. This provision only applies to New Zealand companies engaged solely or mainly in mining for petroleum in New Zealand.

15. This article briefly surveys legislation in force as at the 31st March, 1968.

E. D. HAYDEN:

THE ECONOMY OF GUYANA AND ITS FISCAL POLICY SINCE INDEPENDENCE

PHYSICAL SETTING

Guyana is about the size of the United Kingdom—83,000 square miles. It is situated on the north coast of South America, bordered by Surinam on the east, Venezuela on the west, Brazil on the south and the Atlantic Ocean on the north. It lies completely in the tropical zone and its climate is characterised by high rainfall and moderately high temperatures tempered in coastal areas by trade winds from the Atlantic.

The population of Guyana is 650,000. Ninety five per cent of the population lives on the narrow coastal strip of about 250 square miles in a total area of perhaps 2,500 square miles. All main towns, industries and commerce are located in this area. Thus, far from being an underpopulated country, as often depicted, with vast fertile open spaces beckoning to land-hungry immigrants, Guyana has a population density of over 300 per square mile in the effectively developed area. Soil surveys undertaken with the aid of the United Nations have confirmed that vast areas of the interior consist of virtually useless land, and only relatively small zones are suitable for supporting viable agriculture. In addition the fertile coastal strip devoted to sugar and rice cultivation lies below sea level and has to be protected by an elaborate costly system of sea defence. It does not share in the tourist trade enjoyed by its neighbours in the Caribbean because its delightful climate is negatived by a muddy sea and an absence of beaches. The physical environment of Guyana therefore does not ease the difficult problem of economic development. However, Guyana is only at the threshold of learning what its endowment of natural resources in the largely unexplored interior may be, and it is hoped that these may give reason for the interior to be opened up and eventually help to expand exports and boost the economy.

SOCIAL SETTING

The present complexity of Guyanese society began with the immigration of European sugar planters and their intermingling with the native Amerindians and African slaves. It developed further with the abolition of slavery in the middle of the last century. Guyana—British Guiana before Independence—was traditionally a colonial sugar growing country based on African slaves, but with the freeing of slaves, labour became scarcer. Indentured labourers, chiefly Indians but some Portugese and Chinese were imported to fill the gap. The Indians who are now more than 50% of the population and mainly rural, developed the cultivation of rice. The more urbanised Africans represent about 40% of the population, and the remainder are Portuguese, Chinese, mixed and European. This conglomeration of races lived harmoniously together up to the last decade when political and ideological and trade union cleavages developed. Their differences climaxed in the civil strife of 1964 which left in its aftermath a distinct polarization of relationships between the main social communities.

The removal of this tension must be the major challenge to Guyanese statesmen. The uneasy bitterness and fear engendered by the intercommunal strife of 1964 possibly made

the inhabitants realise that a change of administration might help and following elections in October 1964 a new Coalition Government took office. The new Government lead by Mr. Forbes Burnham, head of the P.N.C. a mildly reformist socialist party, had as its Finance Minister, Mr. D'Aguiar, head of the U.F. a right centered grouping of the urban Portugese and creole middle and upper professional and business classes.

The new Government claiming its policy to be one of consultative democracy immediately rejected the pro Communistic ideology of the previous government and aligned itself with the Western bloc.

Upon the assurances given by the new Government of political stability relative calm with renewed hope returned to Guyana, and its Government having demonstrated that it was able to keep the peace and to generate sympathy and goodwill amongst the developed nations, it was granted Independence in May 1966.

The fiscal policy of Guyana since Independence was launched a year before Independence when the first Budget of the coalition Government was presented. The Finance Minister Mr. D'Aguiar put his faith in the momentum of recovery and since he felt that raising taxation might jeopardise this, refrained from increasing taxes. Indeed in an endeavour to stimulate investment in the private sector he removed minimum income tax (commonly known as turnover tax) imposed by the former Government, which had proved to be so obnoxious to the commercial community and restored advertising and entertainment as allowable expenses for tax. In addition he reduced Capital Gains tax from 45% to 10% and limited such tax to short term gains up to seven years. In order to encourage savings he lifted the limit of deductible premiums for life insurance invested in companies holding not less than two thirds of their funds locally. As further encouragement to savings he arranged that property tax should be dischargeable by investing double the amount of tax assessed in approved Government securities. Finally, and perhaps of most importance to the morale of the community, he revoked the exchange restrictions upon transactions within the sterling area.

During 1966 with the advice of foreign experts the Government elaborated and adopted an official Development Programme 1966-72 setting forth its growth aspirations and targets, its development strategy and its investment programmes for achieving them. This programme called for expenditure over seven years of $300 m. The programme envisaged that over 50% of the investment should be in non-revenue earning basic infra-structure, mainly roads and sea defences. Of the total sum of $300 m it was hoped that $200 m would be borrowed of which $50 m should be raised locally. It was hoped that grants would be found for the other $100 m.

The Development Programme was examined in detail by the World Bank and subject to certain amendments given its approval.

The efforts of the Government since Independence to restore stability and to institute a sound financial programme have been acknowledged in the private sector. Two new commercial banks have opened in Georgetown, the first new banks for almost half a century. The bauxite industry has launched a mammoth investment programme and many private companies have invested in improvements and alterations long postponed because of depressed trading conditions. Renewed efforts have been made to explore for the minerals for which there appears to be a strong potential. Several oil companies have been granted concessions and have commenced drilling.

The Government used Independence as a stimulus to Guyanese to become nationally minded and to support their country. Buy local campaigns were advocated, local industry given encouragement and Guyanese abroad exhorted to return to help build their country. In addition, tax incentives and various concessions were given to foreign investors particularly those setting up industries using local raw materials and labour. Guyanese were also urged to explore and develop the hinterland.

The first signs of business prosperity in independent Guyana unfortunately encouraged the trade unions to agitate for an increased share of this apparent prosperity. The labour force in Guyana has proved itself to be undisciplined and irresponsible as is evidenced by the extraordinary number of wild cat strikes during 1966 and 1967. The labour unrest and consequent pay increases since Independence have contributed to mild inflation and severely affected the balance of payments so that in his 1966 and 1967 budgets, the Minister of Finance found it desirable to impose substantial increases in import duties. It was hoped that the increased duties on imports would encourage higher consumption of local produce but imports have continued at a high level, the cost of living has increased sharply and although revenue from import duties rose the country's balance of payments position was not materially improved.

The Finance Minister in presenting the 1965 Budget referred on numerous occasions in his speech to the inefficiencies of the previous Government's accounting and the amount of work necessary in order to bring the accounts up to date. He also inherited a poorly paid and inefficient public service and in each of the Budgets presented by him in 1965, 1966 and 1967 made reference to the inability of the Public Service to control its expenditure and the lack of responsibility of its members. To make good these shortcomings he arranged for increases in salaries and the filling of vacant posts in the Public Service. The measure of inefficiency in the administration of public finances in Guyana is indicated by the fact that personal emoluments accounted for 44% of the expenditure under current estimates in the Budget of 1967. Nevertheless, the members of the Public Service obviously considered that the increases in salaries did not compensate them for the increases in the cost of living, for there were many resignations particularly of senior officials from the Public Service in 1966 and 1967. The Inland Revenue Department has been one of the hardest hit Government departments and the assessment and collection of income tax has fallen badly behind hand. In an effort to remedy the worsening situation in this Department, the services of several foreign technical experts were sought to advise on the establishment of internal training arrangements and on the improvement of the organisation and methods for curbing tax evasion.

Tax evasion is rampant especially amongst the privately employed and particularly amongst the farming community. This is because the Inland Revenue Department does not have the staff (or the machinery) to investigate suspected false income tax returns, and because the rate of personal tax in Guyana is one of the highest in the world.

The assessment of tax is hindered by the shortage of experienced professional staff and it is widely believed that the failure of Government to appoint expatriate staff to administer the Inland Revenue Department led to Mr. D'Aguiar's resignation from the Cabinet in late 1967.

The deficiencies in accounting for public monies referred to in the Budget Speech of 1967, also the general lack of control and

poor administration referred to in annual reports of the Director of Audit prompted the Prime Minister to set up a National Efficiency Committee in mid 1967 and he called on the nation to consider the ensuing 12 months as "Efficiency Year". Whether due to the Prime Minister's appeal to the patriotism of the members of the Public Service or as a result of the improved accounting methods introduced, the records of 1967 were substantially better than the previous years'.

The decline in the country's foreign reserves which had continued through 1965 and 1966 came to an end for although there was a larger trade deficit occasioned by higher imports of machinery and equipment in connection with foreign investment, this was paid for by capital inflows in the form of direct investment. The improvement in the monetary balance of the economy is probably mainly due to the rigid control exercised by the newly established Bank of Guyana over the Government which, in accordance with the intentions of the 1967 Budget, did not have further recourse to the commercial banks.

The Guyana dollar was devalued in November 1967 in order to maintain parity with sterling. In his Budget Speech for 1968 the New Minister of Finance stated his determination to ensure that the higher receipts earned by local companies from exporting to nondevalued countries should suffer immediate taxation. He considered that the country should share the benefit of the "Windfall profits". He therefore proposed that company taxation should be assessed on a current year basis so that the Treasury would benefit in the year the profits were earned. He also proposed that investments in approved Government securities should be allowable deductions against chargeable income for income tax.

The Minister also opined that fiscal policy in a developing country must differ considerably from that of advanced countries where the emphasis is generally on social expenditure. In a developing country the main emphasis he said must be on increased growth and the most important source of finance for such growth was taxation. He referred to the arrears of taxation owing to the Government and warned of his intention to launch a campaign to recover amounts outstanding.

Apart from the income tax measures referred to above the Minister proposed a Special Development Tax as a surcharge on Income Tax, of 4.5% to be levied only in the year 1968. This special tax is obviously meant to tax even further the increased profits the Minister expects to accrue to companies exporting to hard currency areas in 1968, and is made necessary because of the inability of the Government to utilise the loans offered by foreign sources because of lack of counterpart funds.

The Minister referred to the high level of confidence by foreign countries and international agencies in the basic soundness of the economy of the country and to the continued promises of aid.

Capital inflow has been to the tune of $102 m since 1965 and together with substantial increases in local savings has enabled investments totalling $182 m to be made so that the country's capacity to produce has been increased.

Economic growth in developing countries is dependent to a large extent upon the technological skills available. The shortage of these skills in Guyana, despite the mammoth aid received from the United Nations, American A.I.D., Canada, Germany and elsewhere, has slowed the rate of growth so confidently predicted by the Government in 1965. Nevertheless it is hoped that given political stability, the country may yet develop its full potential.

APPENDIX:

TAXES IN FORCE IN GUYANA

INCOME TAX

Income Tax legislation is contained in the Income Tax Ordinance, Cap. 299 and the Income Tax (In Aid of Industry) Ordinance Cap. 300.

Income Tax is payable on the chargeable income of any person accruing in or derived from Guyana or elsewhere and whether received in Guyana or not.

Chargeable Income means the aggregate amount of the income of any person including–

(a) gains or profits from any trade, business, profession or vocation:

(b) gains or profits from any office or employment including any allowances received in respect of such employment,

(c) dividends, interest or discounts,

(d) any pension charge or annuity,

(e) rents, royalties, premiums and any other profits arising from property after allowing the appropriate deductions and exemptions pertaining to each source separately.

Such deductions are—

(a) all outgoings and expenses wholly and exclusively incurred in the production of the income i.e. rent, bad debts, repairs to premises, plant and machinery, annual payments chargeable to tax in the hands of the recipients, etc.,

(b) wear and tear on plant and machinery and on buildings, housing, machinery.

LOSSES

Losses of any business may be carried forward indefinitely but in any year of assessment the set off allowed is restricted to 50% of the taxable profits for that year of assessment.

An individual resident in Guyana is entitled to—

(1) a personal allowance of $800
(2) marriage allowance of 600
(3) children's allowance of 300 for each child wholly maintained by him
(4) dependent relative allowance of 200
(5) life assurance premium allowance up to $1,500 p.a. for any policy taken out prior to 1968 or 1/5 of chargeable income in the case of a policy with a local approved life assurance company
(6) interest on a loan obtained for the specific purpose of erecting a residence. In the case of income arising outside Guyana which is earned income or which arises to a person who is not ordinarily resident in Guyana or domiciled therein, tax is payable on the amount received in Guyana.

RATES OF TAX:—

On Companies — at 45% of chargeable income

On Individuals — at a sliding scale from 6 cents to 70 cents in the dollar as follows:—

TAXABLE INCOME		RATE
$1,000	@	6 cents
1,000	@	12 cents
1,000	@	20 cents
1,000	@	25 cents
1,000	@	30 cents
1,000	@	35 cents
2,500	@	40 cents
3,000	@	50 cents
3,000	@	60 cents
Balance	@	70 cents

The Income Tax (In Aid of Industry) Ordinance Cap. 300 was enacted to encourage the setting up of trades or business wholly of a developmental and risk bearing nature and

likely to be instrumental to the development of the resources of and beneficial to Guyana. Companies answering these requirements may be given a five year tax holiday. This Ordinance also provides for initial allowances on capital expenditure of 10% for industrial buildings and of 40% for plant and machinery for certain approved industries and trades.

DEVELOPMENT TAX

The Development Tax Act became law on 25th March, 1968 and became effective from 1st January, 1968.

The tax is payable on the chargeable income of every company calculated in the same manner as for income tax.

RATE OF TAX

4.5% on chargeable income.

PROPERTY TAX

The Property Tax and Gift Tax Ordinance as amended by the Property Tax (Amendment) Ordinance 1965 imposed a tax known as Property Tax on the net property of every person being—

(a) an individual resident in Guyana in the year preceding the year of assessment who on the last day of the year preceding the year of assessment possessed net property wherever situated of the value of $25,000 or more,

(b) an individual not resident in Guyana in the year preceding the year of assessment who on the last day . . . possessed net property in Guyana of the value of $25,000 or more,

(c) a body of persons or company registered in Guyana.

RATES OF TAX

For a person other than a company—	Rate per cent
On the first $50,000 of net property	Nil
For every dollar of the next $150,000 property	½
For every dollar of the next $300,000 property	¾
For every dollar of the next $500,000 property	1
For every dollar of remainder property	1½
For a company—	
On all net property	½

CAPITAL GAINS TAX

Capital Gains Tax legislation is contained in the Capital Gains Tax Ordinance 1966 as amended by the Capital Gains Tax (Amendment) Act 1967.

This act imposes a tax on the net chargeable capital gain of any person provided that the gain does not exceed $1,000.

Capital losses may be carried forward and set off against capital gains for the next six years.

RATES OF TAX

15% p.a. on capital gains arising from property not more than seven years after the date of acquisition,

10% p.a. on capital gains arising from property more than seven but less than twenty-five years after acquisition.

RELATED TAXPAYERS - REALLOCATION OF INCOME NEW U.S. REGULATIONS

The U.S. Treasury's long and intensive effort to formulate rules to assure a proper allocation of income in transactions between related entities and persons has culminated in the adoption of comprehensive Regulations to Section 482 of the Internal Revenue Code.
The problems which these Regulations attempt to resolve are common to all the industrialized States, and it is therefore felt that much is to be gained from a thorough examination of the approach of one of the world's most highly developed tax systems. The full text of the Regulations is reprinted below.

§ 1.482-1. Allocation of income and deductions among taxpayers.

(a) DEFINITIONS. When used in this section and in § 1.482-2—

(1) The term "organization" includes any organization of any kind, whether it be a sole proprietorship, a partnership, a trust, an estate, an association, or a corporation (as each is defined or understood in the Internal Revenue Code or the regulations thereunder), irrespective of the place where organized, where operated, or where its trade or business is conducted, and regardless of whether domestic or foreign, whether exempt, whether affiliated, or whether a party to a consolidated return.

(2) The term "trade" or "business" includes any trade or business activity of any kind, regardless of whether or where organized, whether owned individually or otherwise, and regardless of the place where carried on.

(3) The term "controlled" includes any kind of control, direct or indirect, whether legally enforceable, and however exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted.

(4) The term "controlled taxpayer" means any one of two or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests.

(5) The terms "group" and "group of controlled taxpayers" mean the organizations, trades, or businesses owned or controlled by the same interests.

(6) The term "true taxable income" means, in the case of a controlled taxpayer, the taxable income (or, as the case may be, any item or element affecting taxable income) which would have resulted to the controlled taxpayer, had it in the conduct of its affairs (or, as the case may be, in the particular contract, transaction, arrangement, or other act) dealt with the other member or members of the group at arm's length. It does not mean the income, the deductions, the credits, the allowances, or the item or element of income, deductions, credits, or allowances, resulting to the controlled taxpayer by reason of the particular contract, transaction, or arrangement, the controlled taxpayer, or the interests controlling it, chose to make

(even though such contract, transaction, or arrangement be legally binding upon the parties thereto).

(b) SCOPE AND PURPOSE. (1) The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer. The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income from the property and business of each of the controlled taxpayers. If, however, this has not been done, and the taxable incomes are thereby understated, the district director shall intervene, and, by making such distributions, apportionments, or allocations as he may deem necessary of gross income, deductions, credits, or allowances, or of any item or element affecting taxable income, between or among the controlled taxpayers constituting the group, shall determine the true taxable income of each controlled taxpayer. The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

(2) Section 482 and this section apply to the case of any controlled taxpayer, whether such taxpayer makes a separate or a consolidated return. If a controlled taxpayer makes a separate return, the determination is of its true separate taxable income. If a controlled taxpayer is a party to a consolidated return, the true consolidated taxable income of the affiliated group and the true separate taxable income of the controlled taxpayer are determined consistently with the principles of a consolidated return.

(3) Section 482 grants no right to a controlled taxpayer to apply its provisions at will, nor does it grant any right to compel the district director to apply such provisions. It is not intended (except in the case of the computation of consolidated taxable income under a consolidated return) to effect in any case such a distribution, apportionment, or allocation of gross income, deductions, credits, or allowances, or any item of gross income, deductions, credits, or allowances, as would produce a result equivalent to a computation of consolidated taxable income under subchapter A, chapter 6 of the Code.

(c) APPLICATION. Transactions between one controlled taxpayer and another will be subjected to special scrutiny to ascertain whether the common control is being used to reduce, avoid, or escape taxes. In determining the true taxable income of a controlled taxpayer, the district director is not restricted to the case of improper accounting, to the case of a fraudulent, colorable, or sham transaction, or to the case of a device designed to reduce or avoid tax by shifting or distorting income, deductions, credits, or allowances. The authority to determine true taxable income extends to any case in which either by inadvertence or design the taxable income, in whole or in part, of a controlled taxpayer, is other than it would have been had the taxpayer in the conduct of his affairs been an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

(d) METHOD OF ALLOCATION. (1) The method of allocating, apportioning, or distributing income, deductions, credits, and allowances to be used by the district director in any case, including the form of the adjustments and the character and source of amounts allocated, shall be determined with

reference to the substance of the particular transactions or arrangements which result in the avoidance of taxes or the failure to clearly reflect income. The appropriate adjustments may take the form of an increase or decrease in gross income, increase or decrease in deductions (including depreciation), increase or decrease in basis of assets (including inventory), or any other adjustment which may be appropriate under the circumstances. See § 1.482-2 for specific rules relating to methods of allocation in the case of several types of business transactions.

(2) Whenever the district director makes adjustments to the income of one member of a group of controlled taxpayers (such adjustments being referred to in this paragraph as "primary" adjustments) he shall also make appropriate correlative adjustments to the income of any other member of the group involved in the allocation. The correlative adjustment shall actually be made if the United States income tax liability of the other member would be affected for any pending taxable year. Thus, if the district director makes an allocation of income, he shall not only increase the income of one member of the group, but shall decrease the income of the other member if such adjustment would have an effect on the United States income tax liability of the other member for any pending taxable year. For the purposes of this subparagraph, a "pending taxable year" is any taxable year with respect to which the United States income tax return of the other member has been filed by the time the allocation is made, and with respect to which a credit or refund is not barred by the operation of any law or rule of law. If a correlative adjustment is not actually made because it would have no effect on the United States income tax liability of the other member involved in the allocation for any pending taxable year, such adjustment shall nevertheless be deemed to have been made for the purpose of determining the United States income tax liability of such member for a later taxable year, or for the purposes of determining the United States income tax liability of any person for any taxable year. The district director shall furnish to the taxpayer with respect to which the primary adjustment is made a written statement of the amount and nature of the correlative adjustment which is deemed to have been made. For purposes of this subparagraph, a primary adjustment shall not be considered to have been made (and therefore a correlative adjustment is not required to be made) until the first occurring of the following events with respect to the primary adjustment:

(i) The date of assessment of the tax following execution by the taxpayer of a Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) with respect to such adjustment,
(ii) Acceptance of a Form 870-AD (Offer of Waiver of Restriction on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment),
(iii) Payment of the deficiency,
(iv) Stipulation in the Tax Court of the United States, or
(v) Final determination of tax liability by offer-in-compromise, closing agreement, or court action.

The principles of this subparagraph may be illustrated by the following examples in each of which it is assumed that X and Y are members of the same group of controlled entities and that they regularly compute their incomes on the basis of a calendar year:

Example (1). Assume that in 1968 the district director proposes to adjust X's income for 1966 to reflect an arm's length rental charge for Y's use of X's tangible

property in 1966; that X consents to an assessment reflecting such adjustment by executing a Waiver, Form 870; and that an assessment of the tax with respect to such adjustment is made in 1968. The primary adjustment is therefore considered to have been made in 1968. Assume further that both X and Y are United States corporations and that Y had net operating losses in 1963, 1964, 1965, 1966, and 1967. Although a correlative adjustment would not have an effect on Y's United States income tax liability for any pending taxable year, an adjustment increasing Y's net operating loss for 1966 shall be deemed to have been made for the purposes of determining Y's United States income tax liability for 1968 or a later taxable year to which the increased operating loss may be carried. The district director shall notify X in writing of the amount and nature of the adjustment which is deemed to have been made to Y.

Example (2). Assume that X and Y are United States corporations; that X is in the business of rendering engineering services; that in 1968 the district director proposes to adjust X's income for 1966 to reflect an arm's length fee for the rendition of engineering services by X in 1966 relating to the construction of Y's factory; that X consents to an assessment reflecting such adjustment by executing a Waiver, Form 870; and that an assessment of the tax with respect to such adjustment is made in 1968. Assume further that fees for such services would properly constitute a capital expenditure by Y, and that Y does not place the factory in service until 1969. Although a correlative adjustment (increase in basis) would not have an effect on Y's United States income tax liability for a pending taxable year, an adjustment increasing the basis of Y's assets for 1966 shall be deemed to have been made in 1968 for the purpose of computing allowable depreciation or gain or loss on disposition for 1969 and any future taxable year. The district director shall notify X in writing of the amount and nature of the adjustment which is deemed to have been made to Y.

Example (3). Assume that X is a United States taxpayer and Y is a foreign taxpayer not engaged in a trade or business in the United States; that in 1968 the district director proposes to adjust X's income for 1966 to reflect an arm's length interest charge on a loan made to Y; that X consents to an assessment reflecting such allocation by executing a Waiver, Form 870; and that an assessment of the tax with respect to such adjustment is made in 1968. Although a correlative adjustment would not have an effect on Y's United States income tax liability, an adjustment in Y's income for 1966 shall be deemed to have been made in 1968 for the purposes of determining the amount of Y's earnings and profits for 1966 and subsequent years, and of any other effect it may have on any person's United States income tax liability for any taxable year. The district director shall notify X in writing of the amount and nature of the allocation which is deemed to have been made to Y.

(3) In making distributions, apportionments, or allocations between two members of a group of controlled entities with respect to particular transactions, the district director shall consider the effect upon such members of an arrangement between them for reimbursement within a reasonable period before or after the taxable year if the taxpayer can establish that such an arrangement in fact existed during the taxable year under consideration. The district director shall also consider the effect of any other non-arm's length transaction between them in the taxable year which, if taken into account, would result in a set-off against any allocation which would otherwise be made, provided the tax-

payer is able to establish with reasonable specificity that the transaction was not at arm's length and the amount of the appropriate arm's length charge. For purposes of the preceding sentence, the term arm's length refers to the amount which was charged or would have been charged in independent transactions with unrelated parties under the same or similar circumstances considering all the relevant facts and without regard to the rules found in § 1.482-2 by which certain charges are deemed to be equal to arm's length. For example, assume that one member of a group performs services which benefit a second member, which would in itself require an allocation to reflect an arm's-length charge for the performance of such services. Assume further that the first member can establish that during the same taxable year the second member engages in other non-arm's-length transactions which benefit the first member, such as by selling products to the first member at a discount, or purchasing products from the first member at a premium, or paying royalties to the first member in an excessive amount. In such case, the value of the benefits received by the first member as a result of the other activities will be set off against the allocation which would otherwise be made. If the effect of the set-off is to change the characterization or source of the income or deductions, or otherwise distort taxable income, in such a manner as to affect the United States tax liability of any member, allocations will be made to reflect the correct amount of each category of income or deductions. In order to establish that a set-off to the adjustments proposed by the district director is appropriate, the taxpayer must notify the district director of the basis of any claimed set-off at any time before the expiration of the period ending 30 days after the date of a letter by which the district director transmits an examination report notifying the taxpayer of proposed adjustments or before July 16, 1968, whichever is later. The principles of this subparagraph may be illustrated by the following examples, in each of which it is assumed that P and S are calendar year corporations and are both members of the same group of controlled entities:

Example (1). P performs services in 1966 for the benefit of S in connection with S's manufacture and sale of a product. S does not pay P for such services in 1966, but in consideration for such services, agrees in 1966 to pay P a percentage of the amount of sales of the product in 1966 through 1970. In 1966 it appeared this agreement would provide adequate consideration for the services. No allocation will be made with respect to the services. No allocation will be made with respect to the services performed by P.

Example (2). P renders services to S in connection with the construction of S's factory. An arm's length charge for such services, determined under paragraph (b) of § 1.482-2, would be § 100,000. During the same taxable year P makes available to S a machine to be used in such construction. P bills S $125,000 for the services, but does not bill for the use of the machine. No allocation will be made with respect to the excessive charge for services or the undercharge for the machine if P can establish that the excessive charge for services was equal to an arm's length charge for the use of the machine, and if the taxable income and income tax liabilities of P and S are not distorted.

Example (3). Assume the same facts as in example (2), except that, if P had reported $25,000 as rental income and $25,000 less service income, it would have been subject to the tax on personal holding companies. Allocations will be made to reflect the correct amounts of rental income and service income.

(4) If the members of a group of controlled taxpayers engage in transactions with one another, the district director may distribute, apportion, or allocate income, deductions, credits, or allowances to reflect the true taxable income of the individual members under the standards set forth in this section and in § 1.482-2 notwithstanding the fact that the ultimate income anticipated from a series of transactions may not be realized or is realized during a later period. For example, if one member of a controlled group sells a product at less than an arm's length price to a second member of the group in one taxable year and the second member resells the product to an unrelated party in the next taxable year, the district director may make an appropriate allocation to reflect an arm's length price for the sale of the product in the first taxable year, notwithstanding that the second member of the group had not realized any gross income from the resale of the product in the first year. Similarly, if one member of a group lends money to a second member of the group in a taxable year, the district director may make an appropriate allocation to reflect an arm's length charge for interest during such taxable year even if the second member does not realize income during such year. The provisions of this subparagraph apply even if the gross income contemplated from a series of transactions is never, in fact, realized by the other members.

(5) Section 482 may, when necessary to prevent the avoidance of taxes or to clearly reflect income, be applied in circumstances described in sections of the Code (such as section 351) providing for non-recognition of gain or loss. See, for example, National Securities Corporation v. Commissioner of Internal Revenue, 137 F. 2d 600 (3rd Cir. 1943), cert. denied 320 U. S. 794 (1943).

(6) If payment of reimbursement for the sale, exchange, or use of property, the rendition of services, or the advance of other consideration among members of a group of controlled entities was prevented, or would have been prevented, at the time of the transaction because of currency or other restrictions imposed under the laws of any foreign country, any distributions, apportionments, or allocations which may be made under section 482 with respect to such transactions may be treated as deferrable income or deductions, providing the taxpayer has, for the year to which the distributions, apportionments, or allocations relate, elected to use a method of accounting in which the reporting of deferrable income is deferred until the income ceases to be deferrable income. Under such method of accounting, referred to in this section as the deferred income method of accounting, any payments or reimbursements which were prevented or would have been prevented, and any deductions attributable directly or indirectly to such payments or reimbursements, shall be deferred until they cease to be deferrable under such method of accounting. If such method of accounting has not been elected with respect to the taxable year to which the allocations under section 482 relate, the taxpayer may elect such method with respect to such allocations (but not with respect to other deferrable income) at any time before the first occurring of the following events with respect to the allocations:

(i) Execution by the taxpayer of Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment);

(ii) Expiration of the period ending 30 days after the date of a letter by which the district director transmits an examination report notifying the taxpayer of proposed adjustments reflecting such allocations or before July 16, 1968, whichever is later; or

(iii) Execution of a closing agreement or offer-in-compromise.

The principles of this subparagraph may be illustrated by the following example in which it is assumed that X, a domestic corporation, and Y, a foreign corporation, are members of the same group of controlled entities:

Example. X, which is in the business of rendering a certain type of service to unrelated parties, renders such services for the benefit of Y in 1965. The direct and indirect costs allocable to such services are $60,000, and an arm's length charge for such services is $100,000. Assume that the district director proposes to increase X's income by $100,000, but that the country in which Y is located would have blocked payment in 1965 for such services. If, prior to the first occurring of the events described in subdivision (i), (ii), or (iii) of this subparagraph, X elects to use the deferred income method of accounting with respect to such allocation, the $100,000 allocation and the $60,000 of costs are deferrable until such amounts cease to be deferrable under X's method of accounting.

§ 1.482-2 Determination of taxable income in specific situations.

(a) LOANS OR ADVANCES—(1) In general. Where one member of a group of controlled entities makes a loan or advance directly or indirectly to, or otherwise becomes a creditor of, another member of such group, and charges no interest, or charges interest at a rate which is not equal to an arm's length rate as defined in subparagraph (2) of this paragraph, the district director may make appropriate allocations to reflect an arm's length interest rate for the use of such loan or advance.

(2) Arm's length interest rate. For the purposes of this paragraph, the arm's length interest rate shall be the rate of interest which was charged, or would have been charged at the time the indebtedness arose, in independent transactions with or between unrelated parties under similar circumstances. All relevant factors will be considered, including the amount and duration of the loan, the security involved, the credit standing of the borrower, and the interest rate prevailing at the situs of the lender or creditor for comparable loans. If the creditor was not regularly engaged in the business of making loans or advances of the same general type as the loan or advance in question to unrelated parties, the arm's length rate for purposes of this paragraph shall be—

(i) The rate of interest actually charged if at least 4 but not in excess of 6 per cent per annum simple interest,

(ii) 5 per cent per annum simple interest if no interest was charged or if the rate of interest charged was less than 4, or in excess of 6 per cent per annum simple interest,

unless the taxpayer establishes a more appropriate rate under the standards set forth in the first sentence of this subparagraph. For purposes of the preceding sentence if the rate actually charged is greater than 6 per cent per annum simple interest and less than the rate determined under the standards set forth in the first sentence of this subparagraph, or if the rate actually charged is less than 4 per cent per annum simple interest and greater than the rate determined under the standards set forth in the first sentence of this subparagraph, then the rate actually charged shall be deemed to be a more appropriate rate under the standards set forth in the first sentence of this subparagraph. Notwithstanding the other provisions of this subparagraph if the loan or advance represents the proceeds of a loan obtained by the lender at the situs of the borrower the arm's length rate shall be

equal to the rate actually paid by the lender increased by an amount which reflects the costs or deductions incurred by the lender in borrowing such amounts and making such loans, unless the taxpayer establishes a more appropriate rate under the standards set forth in the first sentence of this subparagraph.

(3) Loans or advances to which subparagraph (1) applies. Subparagraph (1) of this paragraph applies to all forms of bona fide indebtedness and includes:

(i) Loans or advances of money or other consideration (whether or not evidenced by a written instrument), and

(ii) Indebtedness arising in the ordinary course of business out of sales, leases, or the rendition of services by or between members of the group, or any other similar extension of credit.

Subparagraph (1) of this paragraph does not apply to alleged indebtedness which was in fact a contribution of capital or a distribution by a corporation with respect to its shares. The interest period shall commence at the date the indebtedness arises, except that with respect to indebtedness described in subdivision (ii) of this subparagraph that is not evidenced by a written instrument requiring payment of interest, the interest period shall not commence until a date 6 months after the date the indebtedness arises, or until a later date if the taxpayer is able to demonstrate that either it or others in its industry, as a regular trade practice, permit comparable balances in the case of similar transactions with unrelated parties to remain outstanding for a longer period without charging interest. For the purpose of determining the period of time for which a balance is outstanding, payments or credits shall be applied against the earliest balance outstanding, unless the taxpayer applies such payments or credits in some other order on its books in accordance with an agreement or understanding of the parties if the taxpayer can demonstrate that either it or others in its industry, as a regular trade practice, enter into such agreements or understandings.

(b) PERFORMANCE OF SERVICES FOR ANOTHER—(1) General rule. Where one member of a group of controlled entities performs marketing, managerial, administrative, technical, or other services for the benefit of, or on behalf of another member of the group without charge, or at a charge which is not equal to an arm's length charge as defined in subparagraph (3) of this paragraph, the district director may make appropriate allocations to reflect an arm's length charge for such services.

(2) Benefit test. (i) Allocations may be made to reflect arm's length charges with respect to services undertaken for the joint benefit of the members of a group of controlled entities, as well as with respect to services performed by one member of the group exclusively for the benefit of another member of the group. Any allocations made shall be consistent with the relative benefits intended from the services, based upon the facts known at the time the services were rendered, and shall be made even if the potential benefits anticipated are not realized. No allocations shall be made if the probable benefits to the other members were so indirect or remote that unrelated parties would not have charged for such services. In general, allocations may be made if the service, at the time it was performed, related to the carrying on of an activity by another member or was intended to benefit another member, either in the member's overall operations or in its day-to-day activities. The principles of this subdivision may be illustrated by the following

examples in each of which it is assumed that X and Y are corporate members of the same group of controlled entities:

Example (1). X's International Division engages in a wide range of sales promotion activities. Although most of these activities are undertaken exclusively for the benefit of X's international operations, some are intended to jointly benefit both X and Y and others are undertaken exclusively for the benefit of Y. The district director may make an allocation to reflect an arm's length charge with respect to the activities undertaken for the joint benefit of X and Y consistent with the relative benefits intended as well as with respect to the services performed exclusively for the benefit of Y.

Example (2). X operates an international airline, and Y owns and operates hotels in several cities which are serviced by X. X, in conjunction with its advertising of the airline, often pictures Y's hotels and mentions Y's name. Although such advertising was primarily intended to benefit X's airline operations, it was reasonable to anticipate that there would be substantial benefits to Y resulting from patronage by travelers who responded to X's advertising. Since an unrelated hotel operator would have been charged for such advertising, the district director may make an appropriate allocation to reflect an arm's length charge consistent with the relative benefits intended.

Example (3). Assume the same facts as in Example (2) except that X's advertising neither mentions nor pictures Y's hotels. Although it is reasonable to anticipate that increased air travel attributable to X's advertising will result in some benefit to Y due to increased patronage by air travelers, the district director will not make an allocation with respect to such advertising since the probable benefit to Y was so indirect and remote that an unrelated hotel operator would not have been charged for such advertising.

(ii) Allocations will generally not be made if the service is merely a duplication of a service which the related party has independently performed or is performing for itself. In this connection, the ability to independently perform the service (in terms of qualification and availability of personnel) shall be taken into account. The principles of this subdivision may be illustrated by the following examples, in each of which it is assumed that X and Y are corporate members of the same group of controlled entities:

Example (1). At the request of Y, the financial staff of X makes an analysis to determine the amount and source of the borrowing needs of Y. Y does not have personnel qualified to make the analysis, and it does not undertake the same analysis. The district director may make an appropriate allocation to reflect an arm's length charge for such analysis.

Example (2). Y, which has a qualified financial staff, makes an analysis to determine the amount and source of its borrowing needs. Its report, recommending a loan from a bank, is submitted to X. X's financial staff reviews the analysis to determine whether X should advise Y to reconsider its plan. No allocation should be made with respect to X's review.

(3) Arm's length charge. For the purpose of this paragraph an arm's length charge for services rendered shall be the amount which was charged or would have been charged for the same or similar services in independent transactions with or between unrelated parties under similar circumstances considering all relevant facts. However, except in the case of services which are an integral part of the business activity of either the member rendering the services or the member receiving the benefit of the

services, the arm's length charge shall be deemed to be equal to the costs or deductions incurred with respect to such services by the member or members rendering such services unless the taxpayer establishes a more appropriate charge under the standards set forth in the first sentence of this subparagraph.

(4) Costs or deductions to be taken into account. (i) Where the amount of an arm's length charge for services is determined with reference to the costs or deductions incurred with respect to such services, it is necessary to take into account on some reasonable basis all the costs or deductions which are directly or indirectly related to the service performed.

(ii) Direct costs or deductions are those identified specifically with a particular service. These include, but are not limited to, costs or deductions for compensation, bonuses, and travel expenses attributable to employees directly engaged in performing such services, for material and supplies directly consumed in rendering such services, and for other costs such as the cost of overseas cables in connection with such services.

(iii) Indirect costs or deductions are those which are not specifically identified with a particular activity or service but which relate to the direct costs referred to in subdivision (ii) of this subparagraph. Indirect costs or deductions generally include costs or deductions with respect to utilities, occupancy, supervisory and clerical compensation, and other overhead burden of the department incurring the direct costs or deductions referred to in subdivision (ii) of this subparagraph. Indirect costs or deductions also generally include an appropriate share of the costs or deductions relating to supporting departments and other applicable general and administrative expenses to the extent reasonably allocable to a particular service or activity. Thus, for example, if a domestic corporation's advertising department performs services for the direct benefit of a foreign subsidiary, in addition to direct costs of such department, such as salaries of employees and fees paid to advertising agencies or consultants, which are attributable to such foreign advertising, indirect costs must be taken into account on some reasonable basis in determining the amount of costs or deductions with respect to which the arm's length charge to the foreign subsidiary is to be determined. These generally include depreciation, rent, property taxes, other costs of occupancy, and other overhead costs of the advertising department itself, and allocations of costs from other departments which service the advertising department, such as the personnel, accounting, payroll, and maintenance departments, and other applicable general and administrative expenses including compensation of top management.

(5) Costs and deductions not to be taken into account. Costs or deductions of the member rendering the services which are not to be taken into account in determining the amount of an arm's length charge for services include—

(i) Interest expense on indebtedness not incurred specifically for the benefit of another member of the group,

(ii) Expenses associated with the issuance of stock and maintenance of shareholder relations, and

(iii) Expenses of compliance with regulations or policies imposed upon the member rendering the services by its government which are not directly related to the service in question.

(6) Methods. (i) Where an arm's length charge for services rendered is determined with reference to costs or deductions, and

a member has allocated and apportioned costs or deductions to reflect arm's length charges by employing in a consistent manner a method of allocation and apportionment which is reasonable and in keeping with sound accounting practice, such method will not be disturbed. If the member has not employed a method of allocation and apportionment which is reasonable and in keeping with sound accounting practice, the method of allocating and apportioning costs or deductions for the purpose of determining the amount of arm's length charges shall be based on the particular circumstances involved.

(ii) The methods of allocation and apportionment referred to in this subparagraph are applicable both in allocating and apportioning indirect costs to a particular activity or service (see subparagraph (4) (iii) of this paragraph), and in allocating and apportioning the total costs (direct and indirect) of a particular activity or service where such activity or service is undertaken for the joint benefit of two or more members of a group (see subparagraph (2) (i) of this paragraph). While the use of one or more bases may be appropriate under the circumstances, in establishing the method of allocation and apportionment, appropriate consideration should be given to all bases and factors, including, for example, total expenses, asset size, sales, manufacturing expenses, payroll, space utilized, and time spent. The costs incurred by supporting departments may be apportioned to other departments on the basis of reasonable overall estimates, or such costs may be reflected in the other departments' costs by means of application of reasonable departmental overhead rates. Allocations and apportionments of costs or deductions must be made on the basis of the full cost as opposed to the incremental cost. Thus, if an electronic data processing machine, which is rented by the taxpayer, is used for the joint benefit of itself and other members of a controlled group, the determination of the arm's length charge to each member must be made with reference to the full rent and cost of operating the machine by each member, even if the additional use of the machine for the benefit of the other members did not increase the cost to the taxpayer.

(iii) Practices actually employed to apportion costs or expenses in connection with the preparation of statements and analyses for the use of management, creditors, minority shareholders, joint venturers, clients, customers, potential investors, or other parties or agencies in interest shall be considered by the district director. Similarly, in determining the extent to which allocations are to be made to or from foreign members of a controlled group, practices employed by the domestic members of a controlled group in apportioning costs between themselves shall also be considered if the relationships with the foreign members of the group are comparable to the relationships between the domestic members of the group. For example, if, for purposes of reporting to public stockholders or to a governmental agency, a corporation apportions the costs attributable to its executive officers among the domestic members of a controlled group on a reasonable and consistent basis, and such officers exercise comparable control over foreign members of such group, such domestic apportionment practice will be taken into consideration in determining the amount of allocations to be made to the foreign members.

(7) (Reserved).

(8) Services rendered in connection with the transfer of property. Where tangible or intangible property is transferred, sold, assigned, loaned, leased, or otherwise made available in any manner by one

member of a group to another member of the group and services are rendered by the transferor to the transferee in connection with the transfer, the amount of any allocation that may be appropriate with respect to such transfer shall be determined in accordance with the rules of paragraph (c), (d), or (e) of this section whichever is appropriate and a separate allocation with respect to such services under this paragraph shall not be made. Services are rendered in connection with the transfer of property where such services are merely ancillary and subsidiary to the transfer of the property or to the commencement of effective use of the property by the transferee. Whether or not services are merely ancillary and subsidiary to a property transfer is a question of fact. Ancillary and subsidiary services could be performed, for example, in promoting the transaction by demonstrating and explaining the use of the property, or by assisting in the effective "starting-up" of the property transferred, or by performing under a guarantee relating to such effective starting-up. Thus, where an employee of one member of a group, acting under the instructions of his employer, reveals a valuable secret process owned by his employer to a related entity, and at the same time supervises the integration of such process into the manufacturing operation of the related entity, such services could be considered to be rendered in connection with the transfer, and, if so considered, shall not be the basis for a separate allocation. However, if the employee continues to render services to the related entity by supervising the manufacturing operation after the secret process has been effectively integrated into such operation, a separate allocation with respect to such additional services may be made in accordance with the rules of this paragraph.

(c) USE OF TANGIBLE PROPERTY (1) General rule. Where possession, use, or occupancy of tangible property owned or leased by one member of a group of controlled entities (referred to in this paragraph as the owner) is transferred by lease or other arrangement to another member of such group (referred to in this paragraph as the user) without charge or at a charge which is not equal to an arm's length rental charge (as defined in subdivision (i) of subparagraph (2) of this paragraph), the district director may make appropriate allocations to properly reflect such arm's length charge. Where possession, use, or occupancy of only a portion of such property is transferred, the determination of the arm's length charge and the allocation shall be made with reference to the portion transferred.

(2) Arm's length charge. (i) For the purposes of this paragraph, an arm's length rental charge shall be the amount of rent which was charged, or would have been charged for the use of the same or similar property, during the time it was in use, in independent transactions with or between unrelated parties under similar circumstances considering the period and location of the use, the owner's investment in the property or rent paid for the property, expenses of maintaining the property, the type of property involved, its condition, and all other relevant facts. If neither the owner nor the user was engaged in the trade or business of renting property, the arm's length rental charge for the taxable year shall be deemed to be equal to the amount specified in subdivision (ii) or (iii) of this subparagraph, whichever is appropriate, unless the taxpayer establishes a more appropriate charge under the standards set forth in the first sentence of this subdivision. For purposes of this subdivision, an owner or user shall be considered to be in the trade or business

of renting property if it engages in the trade or business of renting property of the same general type as the property in question to unrelated parties. An owner or user will not be considered to be engaged in the trade or business of renting property of the same general type solely on the basis of casual or infrequent rentals of property which is predominantly used in its trade or business.

(ii) Except as otherwise provided in subdivision (iii) of this subparagraph the amount referred to in subdivision (i) of this subparagraph for the taxable year shall be equal to the sum of the following amounts attributable to the property:

(*a*) The amount which bears the same ratio to the depreciable basis of the property divided by the total useful life of the property in the hands of the owner as the number of days which the property is owned by the owner (in the taxable year) bears to 365. For this purpose, the depreciable basis of the property shall be the original cost or other basis of the property in the hands of the owner adjusted by items properly chargeable to capital account (as provided in § 1.1016-2) and reduced by estimated salvage value, but without adjustment for exhaustion, wear and tear, obsolescence, etc. (as provided in § 1.1016-3). For this purpose, total useful life, depreciable basis, and salvage value shall be estimated on the basis of facts and circumstances known to exist at the time that possession, use, or occupancy of the property was transferred to the user. However, if substantial adjustments to the adjusted basis other than for exhaustion, wear and tear, obsolescence, etc., are made, total useful life, depreciable basis, and salvage value shall be redetermined on the basis of the facts and circumstances known to exist as of the time at which such adjustments become substantial. For purposes of the preceding sentence, adjustments shall be considered substantial if at any time the total adjustments subsequent to the time at which the property was transferred to the user or subsequent to the most recent redetermination under this subdivision (*a*), whichever is later, exceeds 25 per cent of the depreciable basis of the property.

(*b*) The amount which bears the same ratio to 3 per cent of the depreciable basis of the property (as determined in subdivision (ii) (*a*) of this subparagraph) as the number of days which the property is owned by the owner (in the taxable year) bears to 365.

(*c*) The amount of all expenses directly and indirectly connected with the property paid or accrued by the owner of the property during the taxable year. Such expenses include real estate, personal property, or other taxes on the property, expenses of maintenance and repair, cost of utilities, management expenses, and other similar expenses. Such amount does not include interest expense.

(*d*) The amount of all expenses directly and indirectly connected with the possession, use, or occupancy of the property by the user paid or accrued by the owner during the taxable year. Such expenses include services rendered in connection with the transfer of the property within the meaning of paragraph (b) (8) of this section and other similar expenses. For purposes of this subdivision any capital expenditures, within the meaning of section 263 of the Code, with respect to the possession, use, or occupancy of the property by the user incurred in any taxable year shall be deemed to be expenses paid or accrued by the owner during the taxable year to the extent that they may be properly amortized for the taxable year.

If the property was used by more than one party (whether related or unrelated) during the taxable year of the owner, then only a portion of the sum of the amounts provided

in (*a*) through (*c*) of this subdivision shall be taken into account with respect to each user. Such portion is that proportion of such sum which the number of days (in the taxable year) the property was actually used by the user bears to the number of days (in the taxable year) the property was actually used by all parties (whether related or unrelated), unless it appears that some other measure (such as hours of use) is more appropriate. There must also be taken into account with respect to each user those expenses which are included in the amount provided in (*d*) of this subdivision which are attributable to the possession, use, or occupancy of the property by the particular user during the taxable year of the owner.

(iii) Where possession, use, or occupancy of tangible property leased by the owner (lessee) is transferred by sublease or other arrangement to the user, the amount referred to in subdivision (i) of this subparagraph shall be equal to all the deductions claimed by the owner (lessee) which are attributable to the property for the period such property is used by the user. Where only a portion of such property was transferred, any allocations shall be made with reference to the portion transferred. The deductions to be considered include the rent paid or accrued by the owner (lessee) during the period of use and all other deductions directly and indirectly connected with the property paid or accrued by the owner (lessee) during such period. Such deductions include deductions for maintenance and repair, utilities, management, and other similar deductions.

(d) TRANSFER OR USE OF INTANGIBLE PROPERTY—(1) In general. (i) Except as otherwise provided in subparagraph (4) of this paragraph, where intangible property or an interest therein is transferred, sold, assigned, loaned, or otherwise made available in any manner by one member of a group of controlled entities (referred to in this paragraph as the transferor) to another member of the group (referred to in this paragraph as the transferee) for other than an arm's length consideration, the district director may make appropriate allocations to reflect an arm's length consideration for such property or its use. Subparagraph (2) of this paragraph provides rules for determining the form and amount of an appropriate allocation, subparagraph (3) of this paragraph provides a definition of "intangible property", and subparagraph (4) of this paragraph provides rules with respect to certain cost-sharing arrangements in connection with the development of intangible property. For purposes of this paragraph, an interest in intangible property may take the form of the right to use such property.

(ii) (*a*) In the absence of a bona fide cost-sharing arrangement (as defined in subparagraph (4) of this paragraph), where one member of a group of related entities undertakes the development of intangible property as a developer within the meaning of (*c*) of this subdivision, no allocation with respect to such development activity shall be made under the rules of this paragraph or any other paragraph of this section (except as provided in (*b*) of this subdivision) until such time as any property developed, or any interest therein, is or is deemed to be transferred, sold, assigned, loaned, or otherwise made available in any manner by the developer to a related entity in a transfer subject to the rules of this paragraph. Where a member of the group other than the developer acquires an interest in the property developed by virtue of obtaining a patent or copyright, or by any other means, the developer shall be deemed to have transferred such interest in such property to the acquir-

ing member in a transaction subject to the rules of this paragraph. For example, if one member of a group (the developer) undertakes to develop a new patentable product and the costs of development are incurred by that entity over a period of 3 years, no allocation with respect to that entity's activity shall be made during such period. The amount of any allocation that may be appropriate at the expiration of such development period when, for example, the patent on the product is transferred, or deemed transferred, to a related entity for other than an arm's length consideration, shall be determined in accordance with the rules of this paragraph.

(*b*) Where one member of a group renders assistance in the form of loans, services, or the use of tangible or intangible property to a developer in connection with an attempt to develop intangible property, the amount of any allocation that may be appropriate with respect to such assistance shall be determined in accordance with the rules of the appropriate paragraph or paragraphs of this section. Thus, where one entity allows a related entity, which is the developer, to use tangible property, such as laboratory equipment, in connection with the development of intangible property, the amount of any allocation that may be appropriate with respect to such use shall be determined in accordance with the rules of paragraph (c) of this section. In the event that the district director does not exercise his discretion to make allocations with respect to the assistance rendered to the developer, the value of the assistance shall be allowed as a set-off against any allocation that the district director may make under this paragraph as a result of the transfer of the intangible property to the entity rendering the assistance.

(*c*) The determination as to which member of a group of related entities is a developer and which members of the group are rendering assistance to the developer in connection with its development activities shall be based upon all the facts and circumstances of the individual case. Of all the facts and circumstances to be taken into account in making this determination, greatest weight shall be given to the relative amounts of all the direct and indirect costs of development and the corresponding risks of development borne by the various members of the group, and the relative values of the use of any intangible property of members of the group which is made available without adequate consideration for use in connection with the development activity, which property is likely to contribute to a substantial extent in the production of intangible property. For this purpose, the risk to be borne with respect to development activity is the possibility that such activity will not result in the production of intangible property or that the intangible property produced will not be of sufficient value to allow for the recovery of the costs of developing it. A member will not be considered to have borne the costs and corresponding risks of development unless such member is committed to bearing such costs in advance of, or contemporaneously with, their incurrence and without regard to the success of the project. Other factors that may be relevant in determining which member of the group is the developer include the location of the development activity, the capabilities of the various members to carry on the project independently, and the degree of control over the project exercised by the various members.

(*d*) The principles of this subdivision (ii) may be illustrated by the following examples in which it is assumed that X and Y are corporate members of the same group:

Example (1). X, at the request of Y, undertakes to develop a new machine which will function effectively in the climate in which Y's factory is located. Y agrees to bear all the direct and indirect costs of the project whether or not X successfully develops the machine. Assume that X does not make any of its own intangible property available for use in connection with the project. The machine is successfully developed and Y obtains possession of the intangible property necessary to produce such machine. Based on the facts and circumstances as stated, Y shall be considered to be the developer of the intangible property and, therefore, Y shall not be treated as having obtained the property in a transfer subject to the rules of this paragraph. Any amount which may be allocable with respect to the assistance rendered by X shall be determined in accordance with the rules of (*b*) of this subdivision.

Example (2). Assume the same facts as in example (1) except that Y agrees to reimburse X for its costs only in the event that the property is successfully developed. In such case X is the developer and Y is deemed to have received the property in a transfer subject to the rules of this paragraph. Therefore, the district director may make an allocation to reflect an arm's length consideration for such property.

Example (3). In 1967 X undertakes to develop product M in its research and development department. X incurs direct and indirect costs of $1,000,000 per year in connection with the project in 1967, 1968, and 1969. In connection with the project, X employs the formula for compound N, which it owns, and which is likely to contribute substantially to the success of the project. The value of the use of the formula for compound N in connection with this project is $750,000. In 1968, 4 chemists employed by Y spend 6 months working on the project in X's laboratory. The salary and other expenses connected with the chemists' employment for that period ($100,000) are paid by Y, for which no charge is made to X. In 1969, product M is perfected and Y obtains patents thereon. X is considered to be the developer of product M since, among other things, it bore the greatest relative share of the costs and risks incurred in connection with this project and made available intangible property (formula for compound N) which was likely to contribute substantially in the development of product M. Accordingly, no allocation with respect to X's development activity should be made before 1969. The property is deemed to have been transferred to Y at that time by virtue of the fact that Y obtained the patent rights to product M. In such case the district director may make an allocation to reflect an arm's length consideration for such transfer. In the event that the district director makes such an allocation and he has not made or does not make an allocation for 1968 with respect to the services of the chemists in accordance with the principles of paragraph (b) of this section, the value of the assistance shall be allowed as a set-off against the amount of the allocation reflecting an arm's length consideration for the transfer of the intangible property.

(2) Arm's length consideration. (i) An arm's length consideration shall be in a form which is consistent with the form which would be adopted in transactions between unrelated parties under the same circumstances. To the extent appropriate, an arm's length consideration may take any one or more of the following forms: (*a*) royalties based on the transferee's output, sales, profits, or any other measure; (*b*) lump-sum payments; or (*c*) any other form, including reciprocal licensing rights, which

might reasonably have been adopted by unrelated parties under the circumstances, provided that the parties can establish that such form was adopted pursuant to an arrangement which in fact existed between them. However, where the transferee pays nominal or no consideration for the property or interest therein and where the transferor has retained a substantial interest in the property, an allocation shall be presumed not to take the form of a lump-sum payment.

(ii) In determining the amount of an arm's length consideration, the standard to be applied is the amount that would have been paid by an unrelated party for the same intangible property under the same circumstances. Where there have been transfers by the transferor to unrelated parties involving the same or similar intangible property under the same or similar circumstances the amount of the consideration for such transfers shall generally be the best indication of an arm's length consideration.

(iii) Where a sufficiently similar transaction involving an unrelated party cannot be found, the following factors, to the extent appropriate (depending upon the type of intangible property and the form of the transfer), may be considered in arriving at the amount of the arm's length consideration:

(*a*) The prevailing rates in the same industry or for similar property,

(*b*) The offers of competing transferors or the bids of competing transferees,

(*c*) The terms of the transfer, including limitations on the geographic area covered and the exclusive or nonexclusive character of any rights granted,

(*d*) The uniqueness of the property and the period for which it is likely to remain unique,

(*e*) The degree and duration of protection afforded to the property under the laws of the relevant countries,

(*f*) Value of services rendered by the transferor to the transferee in connection with the transfer within the meaning of paragraph (b) (8) of this section,

(*g*) Prospective profits to be realized or costs to be saved by the transferee through its use or subsequent transfer of the property,

(*h*) The capital investment and starting up expenses required of the transferee,

(*i*) The next subdivision is (*j*),

(*j*) The availability of substitutes for the property transferred,

(*k*) The arm's length rates and prices paid by unrelated parties where the property is resold or sublicensed to such parties,

(*l*) The costs incurred by the transferor in developing the property, and

(*m*) Any other fact or circumstance which unrelated parties would have been likely to consider in determining the amount of an arm's length consideration for the property.

(3) Definition of intangible property.

(i) Solely for the purposes of this section, intangible property shall consist of the items described in subdivision (ii) of this subparagraph, provided that such items have substantial value independent of the services of individual persons.

(ii) The items referred to in subdivision (i) of this subparagraph are as follows:

(*a*) Patents, inventions, formulas, processes, designs, patterns, and other similar items;

(*b*) Copyrights, literary, musical, or artistic compositions, and other similar items;

(*c*) Trademarks, trade names, brand names, and other similar items;

(*d*) Franchises, licenses, contracts, and other similar items;

(*e*) Methods, programs, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, technical data, and other similar items.

(4) Sharing of costs and risks. Where a member of a group of controlled entities acquires an interest in intangible property

as a participating party in a bona fide cost sharing arrangement with respect to the development of such intangible property, the district director shall not make allocations with respect to such acquisition except as may be appropriate to reflect each participant's arm's length share of the cost and risks of developing the property. A bona fide cost sharing arrangement is an agreement, in writing, between two or more members of a group of controlled entities providing for the sharing of the costs and risks of developing intangible property in return for a specified interest in the intangible property that may be produced. In order for the arrangement to qualify as a bona fide arrangement, it must reflect an effort in good faith by the participating members to bear their respective shares of all the costs and risks of development on an arm's length basis. In order for the sharing of costs and risks to be considered on an arm's length basis, the terms and conditions must be comparable to those which would have been adopted by unrelated parties similarly situated had they entered into such an arrangement.

(e) SALES OF TANGIBLE PROPERTY (1) In general. (i) Where one member of a group of controlled entities (referred to in this paragraph as the "seller") sells or otherwise disposes of tangible property to another member of such group (referred to in this paragraph as the "buyer") at other than an arm's length price (such a sale being referred to in this paragraph as a "controlled sale"), the district director may make appropriate allocations between the seller and the buyer to reflect an arm's length price for such sale or disposition. An arm's length price is the price that an unrelated party would have paid under the same circumstances for the property involved in the controlled sale. Since unrelated parties normally sell products at a profit, an arm's length price normally involves a profit to the seller.

(ii) Subparagraphs (2), (3), and (4) of this paragraph describe three methods of determining an arm's length price and the standards for applying each method. They are, respectively, the comparable uncontrolled price method, the resale price method, and the cost plus method. If there are comparable uncontrolled sales as defined in subparagraph (2) of this paragraph, the comparable uncontrolled price method must be utilized because it is the method likely to result in the most accurate estimate of an arm's length price (for the reason that it is based upon the price actually paid by unrelated parties for the same or similar products). If there are no comparable uncontrolled sales, then the resale price method must be utilized if the standards for its application are met because it is the method likely to result in the next most accurate estimate in such instances (for the reason that, in such instances, the arm's length price determined under such method is based more directly upon actual arm's length transactions than is the cost plus method). A typical situation where the resale price method may be required is where a manufacturer sells products to a related distributor which, without further processing, resells the products in uncontrolled transactions. If all the standards for the mandatory application of the resale price method are not satisfied, then, as provided in subparagraph (3) (iii) of this paragraph, either that method or the cost plus method may be used, depending upon which method is more feasible and is likely to result in a more accurate estimate of an arm's length price. A typical situation where the cost plus method may be appropriate is where a manufacturer sells products to a related entity which performs

substantial manufacturing, assembly, or other processing of the product or adds significant value by reason of its utilization of its intangible property prior to resale in uncontrolled transactions.

(iii) Where the standards for applying one of the three methods of pricing described in subdivision (ii) of this subparagraph are met, such method must, for the purposes of this paragraph, be utilized unless the taxpayer can establish that, considering all the facts and circumstances, some method of pricing other than those described in subdivision (ii) of this subparagraph is clearly more appropriate. Where none of the three methods of pricing described in subdivision (ii) of this subparagraph can reasonably be applied under the facts and circumstances as they exist in a particular case, some appropriate method of pricing other than those described in subdivision (ii) of this subparagraph, or variations on such methods, can be used.

(iv) The methods of determining arm's length prices described in this section are stated in terms of their application to individual sales of property. However, because of the possibility that a taxpayer may make controlled sales of many different products, or many separate sales of the same product, it may be impractical to analyze every sale for the purposes of determining the arm's length price. It is therefore permissible to determine or verify arm's length prices by applying the appropriate methods of pricing to product lines or other groupings where it is impractical to ascertain an arm's length price for each product or sale. In addition, the district director may determine or verify the arm's length price of all sales to a related entity by employing reasonable statistical sampling techniques.

(2) Comparable uncontrolled price method. (i) Under the method of pricing described as the "comparable uncontrolled price method", the arm's length price of a controlled sale is equal to the price paid in comparable uncontrolled sales, adjusted as provided in subdivision (ii) of this subparagraph.

(ii) "Uncontrolled sales" are sales in which the seller and the buyer are not members of the same controlled group. These include (*a*) sales made by a member of the controlled group to an unrelated party, (*b*) sales made to a member of the controlled group by an unrelated party, and (*c*) sales made in which the parties are not members of the controlled group and are not related to each other. However, uncontrolled sales do not include sales at unrealistic prices, as for example where a member makes uncontrolled sales in small quantities at a price designed to justify a nonarm's length price on a large volume of controlled sales. Uncontrolled sales are considered comparable to controlled sales if the physical property and circumstances involved in the uncontrolled sales are identical to the physical property and circumstances involved in the controlled sales, or if such properties and circumstances are so nearly identical that any differences either have no effect on price, or such differences can be reflected by a reasonable number of adjustments to the price of uncontrolled sales. For this purpose, differences can be reflected by adjusting prices only where such differences have a definite and reasonably ascertainable effect on price. If the differences can be reflected by such adjustment, then the price of the uncontrolled sale as adjusted constitutes the comparable uncontrolled sale price. Some of the differences which may affect the price of property are differences in the quality of the product, terms of sale, intangible property associated with the sale, time of sale, and the level of the market and the geographic market in which the sale takes place.

Whether and to what extent differences in the various properties and circumstances affect price, and whether differences render sales noncomparable, depends upon the particular circumstances and property involved. The principles of this subdivision may be illustrated by the following examples, in each of which it is assumed that X makes both controlled and uncontrolled sales of the identical property:

Example (1). Assume that the circumstances surrounding the controlled and the uncontrolled sales are identical, except for the fact that the controlled sales price is a delivered price and the uncontrolled sales are made f.o.b. X's factory. Since differences in terms of transportation and insurance generally have a definite and reasonably ascertainable effect on price, such differences do not normally render the uncontrolled sales noncomparable to the controlled sales.

Example (2). Assume that the circumstances surrounding the controlled and uncontrolled sales are identical, except for the fact that X affixes its valuable trademark in the controlled sales, and does not affix its trademark in uncontrolled sales. Since the effects on price of differences in intangible property associated with the sale of tangible property, such as trademarks, are normally not reasonably ascertainable, such differences would normally render the uncontrolled sales noncomparable.

Example (3). Assume that the circumstances surrounding the controlled and uncontrolled sales are identical except for the fact that X, a manufacturer of business machines, makes certain minor modifications in the physical properties of the machines to satisfy safety specifications or other specific requirements of a customer in controlled sales, and does not make these modifications in uncontrolled sales. Since minor physical differences in the product generally have a definite and reasonably ascertainable effect on prices, such differences do not normally render the uncontrolled sales noncomparable to the controlled sales.

(iii) Where there are two or more comparable uncontrolled sales susceptible of adjustment as defined in subdivision (ii) of this subparagraph, the comparable uncontrolled sale or sales requiring the fewest and simplest adjustments provided in subdivision (ii) of this subparagraph should generally be selected. Thus, for example, if a taxpayer makes comparable uncontrolled sales of a particular product which differ from the controlled sale only with respect to the terms of delivery, and makes other comparable uncontrolled sales of the product which differ from the controlled sale with respect to both terms of delivery and terms of payment, the comparable uncontrolled sales differing only with respect to terms of delivery should be selected as the comparable uncontrolled sale.

(iv) One of the circumstances which may affect the price of property is the fact that the seller may desire to make sales at less than a normal profit for the primary purpose of establishing or maintaining a market for his products. Thus, a seller may be willing to reduce the price of a product, for a time, in order to introduce his product into an area or in order to meet competition. However, controlled sales may be priced in such a manner only if such price would have been charged in an uncontrolled sale under comparable circumstances. Such fact may be demonstrated by showing that the buyer in the controlled sale made corresponding reductions in the resale price to uncontrolled purchasers, or that such buyer engaged in substantially greater sales promotion activities with respect to the product involved in the controlled sale than with respect to other products. For example, assume X, a

manufacturer of batteries, commences to sell car batteries to Y, a subsidiary of X, for resale in a new market. In its existing markets X's batteries sell to independent retailers at $20 per unit, and X sells them to wholesalers at $17 per unit. Y also sells X's batteries to independent retailers at $20 per unit. X's batteries are not known in the new market in which Y is operating. In order to engage competitively in the new market Y incurs selling and advertising costs substantially higher than those incurred for its sales of other products. Under these circumstances X may sell to Y, for a time, at less than $17 to take into account the increased selling and advertising activities of Y in penetrating and establishing the new market. This may be done even though it may result in a transfer price from X to Y which is below X's full costs of manufacturing the product.

(3) Resale price method. (i) Under the pricing method described as the "resale price method", the arm's length price of a controlled sale is equal to the applicable resale price (as defined in subdivision (iv) or (v) of this subparagraph), reduced by an appropriate markup, and adjusted as provided in subdivision (ix) of this subparagraph. An appropriate markup is computed by multiplying the applicable resale price by the appropriate markup percentage as defined in subdivision (vi) of this subparagraph. Thus, where one member of a group of controlled entities sells property to another member which resells the property in controlled sales, if the applicable resale price of the property involved in the controlled sale is $100 and the appropriate markup percentage for resales by the buyer is 20 per cent, the arm's length price of the controlled sale is $80 ($100 minus 20 per cent × $100), adjusted as provided in subdivision (ix) of this subparagraph.

(ii) The resale price method must be used to compute an arm's length price of a controlled sale if all the following circumstances exist:

(*a*) There are no comparable uncontrolled sales as defined in subparagraph (2) of this paragraph.

(*b*) An applicable resale price, as defined in subdivision (iv) or (v) of this subparagraph, is available with respect to resales made within a reasonable time before or after the time of the controlled sale.

(*c*) The buyer (reseller) has not added more than an insubstantial amount to the value of the property by physically altering the product before resale. For this purpose packaging, repacking, labeling, or minor assembly of property does not constitute physical alteration.

(*d*) The buyer (reseller) has not added more than an insubstantial amount to the value of the property by the use of intangible property. See § 1.482-2(d)(3) for the definition of intangible property.

(iii) Notwithstanding the fact that one or both of the requirements of subdivision (ii) (*c*) or (*d*) of this subparagraph may not be met, the resale price method may be used is such method is more feasible and is likely to result in a more accurate determination of an arm's length price than the use of the cost plus method. Thus, even though one of the requirements of such subdivision is not satisfied, the resale price method may nevertheless be more appropriate than the cost plus method because the computations and evaluations required under the former method may be fewer and easier to make than under the latter method. In general, the resale price method is more appropriate when the functions performed by the seller are more extensive and more difficult to evaluate than the functions performed by the buyer (reseller). The principle of this

subdivision may be illustrated by the following examples in each of which it is assumed that corporation X developed a valuable patent covering product M which it manufactures and sells to corporation Y in a controlled sale, and for which there is no comparable uncontrolled sale:

Example (1). Corporation Y adds a component to product M and resells the assembled product in an uncontrolled sale within a reasonable time after the controlled sale of product M. Assume further that the addition of the component added more than an insubstantial amount to the value of product M, but that Y's function in purchasing the component and assembling the product prior to sale was subject to reasonably precise valuation. Although the controlled sale and resale does not meet the requirements of subdivision (ii) (*c*) of this subparagraph, the resale price method may be used under the circumstances because that method involves computations and evaluations which are fewer and easier to make than under the cost plus method. This is because X's use of a patent may be more difficult to evaluate in determining an appropriate gross profit percentage under the cost plus method, than is evaluation of Y's assembling function in determining the appropriate markup percentage under the resale price method.

Example (2). Corporation Y resells product M in an uncontrolled sale within a reasonable time after the controlled sale after attaching its valuable trademark to it. Assume further that it can be demonstrated through comparison with other uncontrolled sales of Y that the addition of Y's trademark to a product usually adds 25 per cent to the markup on its sales. On the other hand, the effect of X's use of its patent is difficult to evaluate in applying the cost plus method because no reasonable standard of comparison is available. Although the controlled sale and resale does not meet the requirements of subdivision (ii)(*d*) of this subparagraph, the resale price method may be used because that method involves computations and evaluations which are fewer and easier to make than under the cost plus method. This is because, under the circumstances, X's use of a patent is more difficult to evaluate in determining an appropriate gross profit percentage under the cost plus method, than is evaluation of the use of Y's trademark in determining the appropriate markup percentage under the resale price method.

(iv) For the purposes of this subparagraph the "applicable resale price" is the price at which it is anticipated that property purchased in the controlled sale will be resold by the buyer in an uncontrolled sale. The "applicable resale price" will generally be equal to either the price at which current resales of the same property are being made or the resale price of the particular item of property involved.

(v) Where the property purchased in the controlled sale is resold in another controlled sale, the "applicable resale price" is the price at which such property is finally resold in an uncontrolled sale, providing that the series of sales as a whole meets all the requirements of subdivision (ii) of this subparagraph or that the resale price method is used pursuant to subdivision (iii) of this subparagraph. In such case, the determination of the appropriate markup percentage shall take into account the function or functions performed by all members of the group participating in the series of sales and resales. Thus, if X sells a product to Y in a controlled sale, Y sells the product to Z in a controlled sale, and Z sells the product in an uncontrolled sale, the resale price method must be used if Y and Z together have not added more than an insubstantial amount to the value of the

product through physical alteration or the application of intangible property, and the final resale occurs within a reasonable time of the sale from X to Y. In such case, the applicable resale price is the price at which Z sells the product in the uncontrolled sale, and the appropriate markup percentage shall take into account the functions performed by both Y and Z.

(vi) For the purposes of this subparagraph, the appropriate markup percentage is equal to the percentage of gross profit (expressed as a percentage of sales) earned by the buyer (reseller) or another party on the resale of property which is both purchased and resold in an uncontrolled transaction, which resale is most similar to the applicable resale of the property involved in the controlled sale. The following are the most important characteristics to be considered in determining the similarity of resales:

(*a*) The type of property involved in the sales. For example: machine tools, men's furnishings, small household appliances.

(*b*) The functions performed by the reseller with respect to the property. For example: packaging, labeling, delivering, maintenance of inventory, minor assembly, advertising, selling at wholesale, selling at retail, billing, maintenance of accounts receivable, and servicing.

(*c*) The effect on price of any intangible property utilized by the reseller in connection with the property resold. For example: patents, trademarks, trade names.

(*d*) The geographic market in which the functions are performed by the reseller.

In general, the similarity to be sought relates to the probable effect upon the markup percentage of any differences in such characteristics between the uncontrolled purchases and resales on the one hand and the controlled purchases and resales on the other hand. Thus, close physical similarity of the property involved in the sales compared is not required under the resale price method since a lack of close physical similarity is not necessarily indicative of dissimilar markup percentages.

(vii) Whenever possible, markup percentages should be derived from uncontrolled purchases and resales of the buyer (reseller) involved in the controlled sale, because similar characteristics are more likely to be found among different resales of property made by the same reseller than among sales made by other resellers. In the absence of resales by the same buyer (reseller) which meet the standards of subdivision (vi) of this subparagraph, evidence of an appropriate markup percentage may be derived from resales by other resellers selling in the same or a similar market in which the controlled buyer (reseller) is selling, providing such resellers perform comparable functions. Where the function performed by the reseller is similar to the function performed by a sales agent which does not take title, such sales agent will be considered a reseller for the purpose of determining an appropriate markup percentage under this subparagraph and the commission earned by such sales agent, expressed as a percentage of the sales price of the goods, may constitute the appropriate markup percentage. If the controlled buyer (reseller) is located in a foreign country and information on resales by other resellers in the same foreign market is not available, then markup percentages earned by United States resellers performing comparable functions may be used. In the absence of data on markup percentages of particular sales or groups of sales, the prevailing markup percentage in the particular industry involved may be appropriate.

(viii) In calculating the markup percentage earned on uncontrolled purchases and resales, and in applying such percentage to the

applicable resale price to determine the appropriate markup, the same elements which enter into the computation of the sales price and the costs of goods sold of the property involved in the comparable uncontrolled purchases and resales should enter into such computation in the case of the property involved in the controlled purchases and resales. Thus, if freight-in and packaging expense are elements of the cost of goods sold in comparable uncontrolled purchases, then such elements should also be taken into account in computing the cost of goods sold of the controlled purchase. Similarly, if the comparable markup percentage is based upon net sales (after reduction for returns and allowances) of uncontrolled resellers, such percentage must be applied to net sales of the buyer (reseller).

(ix) In determining an arm's length price appropriate adjustment must be made to reflect any material differences between the uncontrolled purchases and resales used as the basis for the calculation of the appropriate markup percentage and the resales of property involved in the controlled sale. The differences referred to in this subdivision are those differences in functions or circumstances which have a definite and reasonably ascertainable effect on price. The principles of this subdivision may be illustrated by the following example:

Example. Assume that X and Y are members of the same group of controlled entities and that Y purchases electric mixers from X and electric toasters from uncontrolled entities. Y performs substantially similar functions with respect to resales of both the mixers and the toasters, except that it does not warrant the toasters, but does provide a 90-day warranty for the mixers. Y normally earns a gross profit on toasters of 20 per cent of gross selling price. The 20-per cent gross profit on the resale of toasters is an appropriate markup percentage, but the price of the controlled sale computed with reference to such rate must be adjusted to reflect the difference in terms (the warranty).

(4) Cost plus method. (i) Under the pricing method described as the "cost plus method", the arm's length price of a controlled sale of property shall be computed by adding to the cost of producing such property (as computed in subdivision (ii) of this subparagraph), an amount which is equal to such cost multiplied by the appropriate gross profit percentage (as computed in subdivision (iii) of this subparagraph), plus or minus any adjustments as provided in subdivision (v) of this subparagraph.

(ii) For the purposes of this subparagraph, the cost of producing the property involved in the controlled sale, and the costs which enter into the computation of the appropriate gross profit percentage shall be computed in a consistent manner in accordance with sound accounting practices for allocating or apportioning costs, which neither favors nor burdens controlled sales in comparison with uncontrolled sales. Thus, if the costs used in computing the appropriate gross profit percentage are comprised of the full cost of goods sold, including direct and indirect costs, then the cost of producing the property involved in the controlled sales must be comprised of the full cost of goods sold, including direct and indirect costs. On the other hand, if the costs used in computing the appropriate gross profit percentage are comprised only of direct costs, the cost of producing the property involved in the controlled sale must be comprised only of direct costs. The term "cost of producing", as used in this subparagraph, includes the cost of acquiring property which is held for resale.

(iii) For the purposes of this subparagraph, the appropriate gross profit percentage is

equal to the gross profit percentage (expressed as a percentage of cost) earned by the seller or another party on the uncontrolled sale or sales of property which are most similar to the controlled sale in question. The following are the most important characteristics to be considered in determining the similarity of the uncontrolled sale or sales:

(*a*) The type of property involved in the sales. For example: machine tools, men's furnishings, small household appliances.

(*b*) The functions performed by the seller with respect to the property sold. For example: contract manufacturing, product assembly, selling activity, processing, servicing, delivering.

(*c*) The effect of any intangible property used by the seller in connection with the property sold. For example: patents, trademarks, trade names.

(*d*) The geographic market in which the functions are performed by the seller.

In general, the similarity to be sought relates to the probable effect upon the margin of gross profit of any differences in such characteristics between the uncontrolled sales and the controlled sale. Thus, close physical similarity of the property involved in the sales compared is not required under the cost plus method since a lack of close physical similarity is not necessarily indicative of dissimilar profit margins. See subparagraph (2) (iv) of this paragraph, relating to sales made at less than a normal profit for the primary purpose of establishing or maintaining a market.

(iv) Whenever possible, gross profit percentages should be derived from uncontrolled sales made by the seller involved in the controlled sale, because similar characteristics are more likely to be found among sales of property made by the same seller than among sales made by other sellers. In the absence of such sales, evidence of an appropriate gross profit percentage may be derived from similar uncontrolled sales by other sellers whether or not such sellers are members of the controlled group. Where the function performed by the seller is similar to the function performed by a purchasing agent which does not take title, such purchasing agent will be considered a seller for the purpose of determining an appropriate gross profit percentage under this subparagraph and the commission earned by such purchasing agent, expressed as a percentage of the purchase price of the goods, may constitute the appropriate gross profit percentage. In the absence of data on gross profit percentages of particular sales or groups of sales which are similar to the controlled sale, the prevailing gross profit percentages in the particular industry involved may be appropriate.

(v) Where the most similar sale or sales from which the appropriate gross profit percentage is derived differ in any material respect from the controlled sale, the arm's length price which is computed by applying such percentage must be adjusted to reflect such differences to the extent such differences would warrant an adjustment of price in uncontrolled transactions. The differences referred to in this subdivision are those differences which have a definite and reasonably ascertainable effect on price.

E.W.G.

Vorschlag einer Dritten Richtlinie des Rats zur Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuer — Gemeinsame Modalitäten für die Anwendung der Mehrwertsteuer auf Umsätze von landwirtschaftlichen Erzeugnissen —

On February 28, 1968 the EEC Commission submitted a third draft directive concerning the harmonization of the legislations of the EEC countries with respect to the turnover taxation of agricultural products (Document COM (68) 89 def., dated February 23, 1968). The official German text of this draft is published below.

DER RAT DER EUROPÄISCHEN GEMEINSCHAFTEN –

gestützt auf den Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft, insbesondere auf die Artikel 99 und 100,

auf Vorschlag der Kommission,

nach Stellungnahme des Europäischen Parlaments,

nach Stellungnahme des Wirtschafts- und Sozialausschusses,

in Erwägung nachstehender Gründe:

Aus Gründen der Wettbewerbsneutralität wie auch aus Gründen, die in der Entwicklung der gemeinsamen Agrarpolitik liegen, ist es erforderlich, die gemeinsamen Modalitäten für die Anwendung der Mehrwertsteuer auf Umsätze von landwirtschaftlichen Erzeugnissen, die in Artikel 15 Absatz 1 der zweiten Richtlinie des Rats vom 11. April 1967 über die Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuer[1] vorgesehen sind, festzulegen und dadurch insbesondere zu vermeiden, daß die Mehrwertsteuer, die auf den Ankäufen und den in Anspruch genommenen Dienstleistungen im Sektor Landwirtschaft lastet, zu einer verborgenen, unterschiedlichen Steuerbelastung in diesem Sektor führt und darüber hinaus auf den nachfolgenden Umsatzstufen Kumulativwirkungen und Verzerrungen bewirkt.

Um einesteils den freien Verkehr mit landwirtschaftlichen Erzeugnissen im Gemeinsamen Markt durch eine möglichst weitgehende Beseitigung der Mehrwertsteueranwendung an den Binnengrenzen zu erleichtern und zum andern, um eine gleiche mehrwertsteuerliche Einwirkung auf die landwirtschaftlichen Preise herbeizuführen, ist es erforderlich, einen gemeinsam ermäßigten Satz auf die Erzeugnisse anzuwenden, die in einer gemeinsamen Liste aufgeführt sind, welche die meisten der im Anhang II des Vertrages genannten Erzeugnisse enthält und durch andere Erzeugnisse erweitert ist; die Festsetzung des gemeinsamen ermäßigten Satzes soll dem Rat überlassen bleiben, der einstimmig auf Vorschlag der Kommission entscheidet.

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1 Amtsblatt der Europäischen Gemeinschaften Nr. 71 vom 14. April 1967, Seite 1303/67

Zur Erreichung der gesetzten Ziele muß der gemeinsame ermäßigte Satz bis zur Einzelhandelsstufe einschließlich gelten; die Anwendung dieses Satzes auf den Einzelhandel könnte in einigen Mitgliedstaaten jedoch auf bestimmte praktische und politische Schwierigkeiten stoßen; aus diesem Grund wird den Mitgliedstaaten die Möglichkeit belassen, auf der Einzelhandelsstufe eine unterschiedliche Steuerbelastung zu haben; für das gute Funktionieren des Gemeinsamen Marktes und insbesondere, um den Zielen der gemeinsamen Agrarpolitik Rechnung zu tragen, ist es jedoch zweckmäßig, soweit wie möglich zu einer Konvergenz der Steuerlast auf der Endstufe zu gelangen und folglich zu diesem Zweck geeignete Maßnahmen vorzusehen.

Wegen der besonderen Lage des landwirtschaftlichen Produktionssektors in der Gemeinschaft sind zahlreiche landwirtschaftliche Erzeuger noch nicht imstande, alle Pflichten zu übernehmen, die für die normale Anwendung des Mehrwertsteuersystems in der zweiten Richtlinie vorgesehen sind; für diese landwirtschaftlichen Erzeuger müssen deshalb in einer noch einzuführenden Regelung besondere Anwendungsmodalitäten vorgesehen werden, um sie einerseits von der Verpflichtung zur Buchführung, Rechnungserteilung, Steuererklärung und Steuerentrichtung zu befreien und um andererseits die auf ihren Ankäufen und auf den ihnen erbrachten Dienstleistungen lastenden Steuern pauschal auszugleichen.

Diese Pauschalregelung ist also nur ein steuertechnisches Mittel, um die Anwendung der Mehrwertsteuer auf den landwirtschaftlichen Produktionssektor zu ermöglichen, und muß die Zielsetzungen des gemeinsamen Mehrwertsteuersystems und insbesondere die Wettbewerbsneutralität beachten; der durch diese Regelung vorgesehene Pauschalausgleich muß demgemäß möglichst genau sein, um die mit jedem Pauschalsystem verbundenen Vor- und Nachteile zu verringern; der Pauschalsatz muß folglich für jeden Mitgliedstaat soweit als möglich nach Maßgabe der tatsächlichen Belastung festgesetzt werden, die von der Gesamtheit der dieser Regelung unterliegenden landwirtschaftlichen Erzeuger getragen wird; die Festsetzung des Pauschalsatzes soll dem Rät überlassen bleiben, der einstimmig auf Vorschlag der Kommission entscheidet.

Ein einfaches und schnelles Verfahren für etwa erforderliche technische Berichtigungen der Pauschalsätze eines Mitgliedstaates ist für den Fall vorzusehen, daß dieser Staat eine Änderung seines Mehrwertsteuersystems beabsichtigt, die auch die auf den Wareneinkäufen landwirtschaftlicher Erzeuger und auf den diesen erbrachten Dienstleistungen lastende Mehrwertsteuer der Höhe nach verändern könnte —

HAT FOLGENDE RICHTLINIE ERLASSEN:

Artikel 1

(1) Die Modalitäten für die Anwendung der Mehrwertsteuer auf Umsätze von landwirtschaftlichen Erzeugnissen werden von den Mitgliedstaaten nach folgenden Bestimmungen festgelegt und ab 1. Januar 1970 angewendet.

(2) Soweit diese Richtlinie nicht gegenteilige Bestimmungen enthält, sind die Bestimmungen der ersten und zweiten Richtlinie des Rats vom 11. April 1967 zur Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuer[2] anzuwenden.

2 Amtsblatt der Europäischen Gemeinschaften Nr. 71 vom 14. April 1967
– Erste Richtlinie des Rats vom 11. April 1967 zur Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuer (S. 1301/67).

(Fortsetzung auf Seite 274).

Artikel 2

Mehrwertsteuerpflichtig sind auch die landwirtschaftlichen Interventionsstellen mit ihren Umsätzen von landwirtschaftlichen Erzeugnissen, die sie in Anwendung der Verordnungen über die gemeinsame Marktorganisation dieser Erzeugnisse bewirken.

Artikel 3

In den Bestimmungen dieser Richtlinie bedeuten:

– „Listengüter" die im Anhang A aufgeführten Güter;

– „landwirtschaftlicher Erzeuger" ein Steuerpflichtiger, der im Rahmen seines landwirtschaftlichen, forstwirtschaftlichen oder Fischereibetriebes die im Anhang B genannten Erzeugertätigkeiten ausübt:

– „Pauschallandwirt" ein landwirtschaftlicher Erzeuger, der unter die in Artikel 7 festgelegte Pauschalregelung fällt.

Artikel 4

(1) Lieferungen und Einfuhren von Listengütern unterliegen dem gemeinsamen ermäßigten Mehrwertsteuersatz von x Prozent.

(2) Der gemeinsame ermäßigte Satz wird spätestens am 1. Juli 1969 auf Vorschlag der Kommission unter Zugrundelegung der Hälfte des arithmetischen Mittels der in den Mitgliedstaaten am 1. Januar 1970 anzuwendenden Normalsätze der Mehrwertsteuer vom Rat einstimmig festgesetzt. Jeder Mitgliedstaat gibt der Kommission spätestens am 1. Mai 1969 den Normalsatz für die Berechnung des gemeinsamen ermäßigten Satzes bekannt.

(3) Wenn infolge der Anwendung des gemeinsamen ermäßigten Satzes der Betrag der nach Artikel 11 der zweiten Richtlinie zulässigen Abzüge den für einen Erklärungszeitraum geschuldeten Mehrwertsteuerbetrag übersteigt, wird der überschießende Betrag spätestens am Ende des Kalendervierteljahres erstattet.

(4) Bis zur Beseitigung der Besteuerung der Einfuhr und der steuerlichen Entlastung der Ausfuhr im Handelsverkehr zwischen den Mitgliedstaaten im Sinne des Artikels 4 der ersten Richtlinie steht es den Mitgliedstaaten frei, auf Lieferungen von Gegenständen aus Teil I der Liste an Nichtsteuerpflichtige und auf die von diesen bewirkte Einfuhr solcher Güter einen vom gemeinsamen ermäßigten Satz abweichenden Satz anzuwenden. Will ein Mitgliedstaat auf diese Umsätze einen niedrigeren Satz als den gemeinsamen ermäßigten Satz anwenden oder eine Befreiung mit etwaiger Erstattung der auf der Vorstufe entrichteten Steuern gewähren, finden die Artikel 16 und 17 letzter Gedankenstrich der zweiten Richtlinie Anwendung.

(5) Jeder Mitgliedstaat, der bereits vor Annahme dieser Richtlinie eine der Regelungen nach Absatz 4 anwendet oder deren Anwendung beabsichtigt, teilt dies der Kommission rechtzeitig mit, die mit den Mitgliedstaaten prüft, inwieweit eine Konvergenz der von den Mitgliedstaaten angewendeten oder beabsichtigten Maßnahmen erreicht werden könnte.

Artikel 5

(1) Im Handelsverkehr zwischen den Mitgliedstaaten ist unter Voraussetzungen, die der Rat festlegt, die Einfuhr von Listengütern, die für einen steuerpflichtigen Abnehmer bestimmt sind, befreit.

(2) Die in Absatz (1) genannte Befreiung wird nicht gewährt, wenn

a) diese Güter für einen Pauschallandwirt bestimmt sind, und/oder

—Zweite Richtlinie des Rats vom 11. April 1967 zur Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuer-Struktur und Anwendungsmodalitäten des gemeinsamen Mehrwertsteuersystems (S. 1303/67).

b) auf diese Güter bei der Einfuhr Zölle oder Abschöpfungen erhoben werden.
(3) Die in Absatz (1) genannten Voraussetzungen werden spätestens am 1. Juli 1969 auf Vorschlag der Kommission vom Rat einstimmig festgesetzt, und zwar derart, daß der Grenzübergang zwischen den Mitgliedstaaten soweit als möglich frei von Formalitäten und Kontrollen ist.

Artikel 6

(1) Auf Lieferungen von Listengütern, die ein landwirtschaftlicher Erzeuger bewirkt, wird die Mehrwertbesteuerung nach der in Artikel 7 bezeichneten Pauschalregelung vorgenommen.
(2) Die Sonderregelung für Kleinunternehmen gemäß Artikel 14 der zweiten Richtlinie ist auf landwirtschaftliche Erzeuger nicht anwendbar.

Artikel 7

(1) Die von einem Pauschallandwirt bewirkten Lieferungen von Listengütern unterliegen der Mehrwertsteuer zum gemeinsamen ermäßigten Satz. Von dieser Steuer schuldet:
a) der Pauschallandwirt einen Anteil von y Prozent,
b) der mehrwertsteuerpflichtige Abnehmer, sofern er nicht Pauschallandwirt ist, den übrigen Anteil von x-y Prozent.
(2) Der Pauschalsatz von y Prozent wird für jeden Mitgliedstaat spätestens am 1. Juli 1969 auf Vorschlag der Kommission vom Rat einstimmig festgesetzt. Er wird unter Zugrundelegung der verfügbaren makro-ökonomischen Gegebenheiten so hoch festgesetzt, daß ein globaler Ausgleich der abzugsfähigen Mehrwertsteuer, die auf den Ankäufen aller Pauschallandwirte insgesamt und auf den ihnen erbrachten Dienstleistungen lastet, erfolgen kann. Der Satz kann gegebenenfalls für bestimmte Produktionsbereiche differenziert werden. Jedoch dürfen der oder die Pauschalsätze nicht höher festgesetzt werden als der in Artikel 4 genannte gemeinsame ermäßigte Satz.
(3) Der in Absatz (1) Buchstabe b) bezeichnete Abnehmer
a) muß einen Ankaufsbeleg in zwei Exemplaren ausstellen, der an die Stelle der Rechnung tritt und in dem der Preis ohne Steuer und der vom Pauschallandwirt gemäß Absatz (1) Buchstabe a) geschuldete anteilige Steuerbetrag gesondert ausgewiesen werden;
b) muß dem Pauschallandwirt ein Exemplar des unter Buchstabe a) genannten Ankaufsbelegs aushändigen;
c) ist vorbehaltlich der Bestimmungen in Artikel 11 der zweiten Richtlinie berechtigt, von der von ihm geschuldeten Steuer abzuziehen:
– den Mehrwertsteuerbetrag, der in dem unter Buchstabe a) genannten Ankaufsbeleg ausgewiesen ist, von dem er ein vom Pauschallandwirt gegengezeichnetes Exemplar aufbewahren muß;
den Mehrwertsteuerbetrag, den er gemäß Absatz (1) Buchstabe b) entrichtet hat.
(4) Die Bestimmungen der Artikel 10 Absatz (1) Buchstabe a), 11 und 12 der zweiten Richtlinie sind auf Pauschallandwirte nicht anwendbar.
(5) Den Mitgliedstaaten steht es vorbehaltlich der in Artikel 16 der zweiten Richtlinie vorgesehenen Konsultation frei, für die Lieferungen von Listengütern, die ein Pauschallandwirt an einen Nichtsteuerpflichtigen oder an einen anderen Pauschallandwirt bewirkt, eine ergänzende Anpassungsregelung vorzusehen, um dadurch eine gleichgewichtige, vom Wirtschaftsablauf unabhängige Steuerbelastung zu erreichen.

Artikel 8

(1) Von der Pauschalregelung sind ausgeschlossen:
a) Vereinigungen landwirtschaftlicher Er-

zeuger, wie insbesondere landwirtschaftliche Genossenschaften, Erzeugergemeinschaften und andere Erzeugerorganisationen sowie deren Zusammenschlüsse;
b) landwirtschaftlicher Erzeuger, die mit anderen als den in Artikel 6 bezeichneten Umsätzen der Mehrwertsteuer unterliegen, sofern der Jahresbetrag dieser anderen Umsätze einen von jedem Mitgliedstaat festzulegenden Betrag übersteigt.
(2) Jedem Mitgliedstaat steht es frei, bestimmte Gruppen landwirtschaftlicher Erzeuger und auch diejenigen landwirtschaftlichen Erzeuger, bei denen die normale Anwendung des Systems keine besonderen verwaltungsmäßigen Schwierigkeiten aufwirft, von der Pauschalregelung auszuschließen.

Artikel 9
Jeder Pauschallandwirt hat das Recht, für die normale Mehrwertbesteuerung zu optieren.

Artikel 10
Beabsichtigt ein Mitgliedstaat Änderungen seines Mehrwertsteuersystems, durch die sich die Mehrwertsteuer, die auf den Warenankäufen landwirtschaftlicher Erzeuger und auf den ihnen erbrachten Dienstleistungen lastet, verändern kann, so setzt er die Kommission rechtzeitig hiervon in Kenntnis und gibt ihr alle erforderlichen Auskünfte, insbesondere das Zahlenmaterial für die gemäß Artikel 7 Absatz (2) vorzunehmenden Berichtigungen der für diesen Mitgliedstaat festgesetzten Pauschalsätze.
Nach Konsultation der Mitgliedstaaten nimmt die Kommission die Berichtigungen der für den betreffenden Mitgliedstaat festgesetzten Pauschalsätze vor, die erforderlich sind, um der festgestellten Änderung der Steuerbelastung Rechnung zu tragen.

Artikel 11
Anläßlich der Vorlage des in Artikel 18 der zweiten Richtlinie vorgesehenen Berichtes an den Rat unterbreitet die Kommission gegebenenfalls Vorschläge zur Überprüfung des gemeinsamen ermäßigten Satzes und/oder der nationalen Pauschalsätze sowie zur Ergänzung oder Änderung der Bestimmungen dieser dritten Richtlinie.

Artikel 12
Die Kommission prüft, ob es zweckmäßig ist, gemeinsame Modalitäten für die Anwendung der Mehrwertsteuer auf bestimmte, im Rahmen landwirtschaftlicher, forstwirtschaftlicher oder Fischereibetriebe erbrachte Dienstleistungen festzulegen. Gegebenenfalls unterbreitet sie vor dem 1. Juli 1969 dem Rat hierüber Richtlinienvorschläge.

Artikel 13
Die Mitgliedstaaten, die vor dem 1. Januar 1970 ein Mehrwertsteuersystem anwenden, passen sich soweit als möglich den Bestimmungen dieser Richtlinie an, indem sie insbesondere sowohl die Bestimmungen über die Anwendung des Artikels 2 als auch die Grundsätze des Artikels 4 Absatz (3) und die die Pauschalregelung betreffenden Grundsätze der Artikel 6 bis 9 in ihre Gesetzgebung einführen.

Artikel 14
Diese Richtlinie ist an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am

Im Namen des Rats
Der Präsident

ANHANG A

Liste der dem gemeinsamen ermäßigten Steuersatz unterliegenden landwirtschaftlichen Erzeugnisse und Produktionsmittel

TEIL I

Zolltarif-Nr.	Warenbezeichnung
01.01	Pferde, Esel, Maultiere und Maulesel, lebend
01.02	Rinder (einschließlich Büffel), lebend
01.03	Schweine, lebend
01.04	Schafe und Ziegen, lebend
01.05	Hausgeflügel (Hühner, Enten, Gänse, Truthühner und Perlhühner), lebend
01.06 A	Hauskaninchen
01.06 B	Tauben
ex 01.06 C	Bienen, Frösche, Seidenraupen
02.01	Fleisch und genießbarer Schlachtabfall von den in den Tarifnummern 01.01 bis 01.04 genannten Tieren, frisch, gekühlt oder gefroren
02.02	Hausgeflügel, nicht lebend, und genießbarer Schlachtabfall hiervon (ausgenommen Lebern), frisch, gekühlt oder gefroren
02.03	Geflügellebern, frisch, gekühlt, gefroren, gesalzen oder in Salzlake
02.04 A	Fleisch und genießbarer Schlachtabfall von Haustauben oder Hauskaninchen, frisch, gekühlt oder gefroren
02.05	Schweinespeck sowie Schweinefett und Geflügelfett, weder ausgepreßt noch ausgeschmolzen, frisch, gekühlt, gefroren, gesalzen, in Salzlake, getrocknet oder geräuchert, ausgenommen Schweinespeck mit mageren Teilen (durchwachsener Schweinespeck)
02.06 A	Fleisch und genießbarer Schlachtabfall aller Art (ausgenommen Geflügellebern),
02.06 B	gesalzen, in Salzlake, getrocknet oder geräuchert:
ex 02.06 C	A. Fleisch von Pferden, gesalzen, in Salzlake oder getrocknet B. von Schweinen C. von Rindern, Schafen, Ziegen, Hauskaninchen und Haustauben
03.01	Fische, frisch (lebend oder nicht lebend), gekühlt oder gefroren
03.02	Fische, nur gesalzen, in Salzlake, getrocknet oder geräuchert
03.03	Krebstiere und Weichtiere (auch ohne Panzer oder Schale), frisch (lebend oder nicht lebend), gekühlt, gefroren, getrocknet, gesalzen oder in Salzlake; Krebstiere in ihrem Panzer, nur in Wasser gekocht
04.01	Milch und Rahm, frisch, weder eingedickt noch gezuckert
04.02	Milch und Rahm, haltbar gemacht, eingedickt oder gezuckert
04.03	Butter
04.04	Käse und Quark
ex 04.05	Vogeleier, frisch oder haltbar gemacht
04.06	Natürlicher Honig
05.04	Därme, Blasen und Magen von anderen Tieren als Fischen, ganz oder geteilt
05.05	Abfälle von Fischen
05.15 A	Kleinfische bis zu 6 cm Länge und Garnelen, getrocknet
ex 05.15 B	Nichtlebende Tiere der in dieser Liste unter Tarifnummern 01.01 bis 01.06 und 03.01 bis 03.03 genannten Art, ungenießbar; Tierblut, Fischrogen und Fischmilch, ungenießbar
06.01	Bulben, Zwiebeln, Knollen, Wurzelknollen und Wurzelstöcke, ruhend, im Wachstum oder in Blüte

Zolltarif-Nr.	Warenbezeichnung
06.02	Andere lebende Pflanzen und Wurzeln, einschließlich Stecklinge und Edelreiser
ex 06.03	Blüten und Blütenknospen, geschnitten, zu Binde- oder Zierzwecken, frisch oder getrocknet
ex 06.04	Blattwerk, Blätter, Zweige und andere Pflanzenteile, Gräser, Moose und Flechten, zu Binde- oder Zierzwecken, frisch oder getrocknet, ausgenommen Blüten und Blütenknospen der Tarifnummer 06.03
07.01	Gemüse und Küchenkräuter, frisch oder gekühlt
07.02	Gemüse und Küchenkräuter, gekocht oder nicht, gefroren
07.03	Gemüse und Küchenkräuter, zur vorläufigen Haltbarmachung in Salzlake oder in Wasser mit einem Zusatz von anderen Stoffen eingelegt, jedoch nicht zum unmittelbaren Genuß besonders zubereitet
07.05	Trockene ausgelöste Hülsenfrüchte, auch geschält oder zerkleinert
07.06	Wurzeln oder Knollen von Manihot, Maranta und Salep, Topinambur, süße Kartoffeln und ähnliche Wurzeln und Knollen mit hohem Gehalt an Stärke oder Inulin, auch getrocknet oder in Stücken; Mark des Sagobaumes
08.01	Datteln, Bananen, Ananas, Mangofrüchte, Mangostanfrüchte, Avocatofrüchte, Guaven, Kokosnüsse, Paranüsse, Kaschu-Nüsse, frisch oder getrocknet, auch ohne Schalen
08.02	Zitrusfrüchte, frisch oder getrocknet
08.03	Feigen, frisch oder getrocknet
08.04	Weintrauben, frisch oder getrocknet
08.05	Schalenfrüchte (ausgenommen solche der Tarifnummer 08.01), frisch oder getrocknet, auch ohne äußere Schalen oder enthäutet
08.06	Äpfel, Birnen und Quitten, frisch
08.07	Steinobst, frisch
08.08	Beeren, frisch
08.09	Andere Früchte, frisch
08.10	Früchte, gekocht oder nicht, gefroren, ohne Zusatz von Zucker
08.11	Früchte, vorläufig haltbar gemacht (z. B. durch Schwefeldioxyd oder in Wasser, dem Salz, Schwefeldioxyd oder andere vorläufig konservierend wirkende Stoffe zugesetzt sind), zum unmittelbaren Genuß nicht geeignet
08.12	Früchte (ausgenommen solche der Tarifnummern 08.01 bis 08.05), getrocknet
08.13	Schalen von Zitrusfrüchten oder von Melonen, frisch, gefroren, getrocknet oder zur vorläufigen Haltbarmachung in Salzlake oder in Wasser mit einem Zusatz von anderen Stoffen eingelegt
09.04	Pfeffer der Gattung „Piper"; Früchte der Gattungen „Capsicum" und „Pimenta"
09.05	Vanille
09.06	Zimt und Zimtblüten
09.07	Gewürznelken, Mutternelken und Nelkenstiele
09.08	Muskatnüsse, Muskatblüte und Kardomomen
09.09	Anis-, Sternanis-, Fenchel-, Koriander-, Kümmel- und Wacholderfrüchte
09.10	Thymian, Lorbeerblätter und Safran; andere Gewürze
10.01	Weizen und Mengkorn
10.02	Roggen
10.03	Gerste
10.04	Hafer
10.05	Mais
10.06	Reis
10.07	Buchweizen, Hirse aller Art und Kanariensaat; anderes Getreide
11.01	Mehl von Getreide
11.02	Grobgrieß und Feingrieß; Getreidekörner, geschält, geschliffen, perlförmig ge-

Zolltarif-Nr.	Warenbezeichnung
	schliffen, geschrotet oder gequetscht (einschließlich Flocken), ausgenommen enthülster, geschliffener oder glasierter Reis und Bruchreis; Getreidekeime, auch gemahlen
11.03	Mehl von Hülsenfrüchten der Tarifnummer 07.05
11.04	Mehl von Früchten des Kapitels 8
11.05	Mehl, Grieß und Flocken von Kartoffeln
11.06	Mehl und Grieß von Sagomark, von Manihot, Maranta, Salep oder anderen Wurzeln oder Knollen der Tarifnummer 07.06
ex 11.07	Malz, nicht geröstet
12.01	Ölsaaten und ölhaltige Früchte, auch zerkleinert
12.03	Samen, Sporen und Früchte zur Aussaat
ex 12.04	Zuckerrüben, auch Schnitzel, frisch oder getrocknet; Zuckerrohr
12.05	Zichorienwurzeln, frisch oder getrocknet, auch geschnitten, nicht geröstet
ex 12.06	Blütenzapfen von Hopfen
12.07	Pflanzen, Pflanzenteile, Samen und Früchte der hauptsächlich zur Riechmittelherstellung oder zu Zwecken der Medizin, Insektenvertilgung, Schädlingsbekämpfung und dergleichen verwendeten Art, frisch oder getrocknet, ganz, in Stücken, als Pulver oder sonst zerkleinert
12.08	Johannisbrot, frisch oder getrocknet, auch als Pulver oder sonst zerkleinert; Fruchtkerne und andere Waren pflanzlichen Ursprungs der hauptsächlich zur menschlichen Ernährung verwendeten Art, anderweit weder genannt noch inbegriffen
12.09	Stroh und Spreu von Getreide, roh, auch zerkleinert
12.10	Runkelrüben, Kohlrüben und andere Wurzeln zu Futterzwecken; Heu, Luzerne, Klee, Futterkohl, Lupinen, Wicken und ähnliches Futter
14.01 A	Korbweiden
15.01	Schweineschmalz; Geflügelfett, ausgepreßt oder ausgeschmolzen
15.02	Talg von Rindern, Schafen oder Ziegen, roh oder ausgeschmolzen, einschließlich Premier Jus
15.07	Fette, pflanzliche Öle, flüssig oder fest, roh, gereinigt oder raffiniert
15.17	Rückstände aus der Verarbeitung von Fettstoffen oder von tierischen oder pflanzlichen Wachsen
ex 16.01	Würste und dergleichen, aus Fleisch, aus Schlachtabfall oder aus Tierblut, ausgenommen in luftdicht verschlossenen Behältnissen
17.01	Rüben- und Rohrzucker, fest
17.03	Melassen, auch entfärbt
ex 20.07	Fruchtsäfte (einschließlich Traubensaft) und Gemüsesäfte, nicht gegoren, ohne Zusatz von Alkohol, auch mit Zusatz von Zucker, ausgenommen in luftdicht verschlossenen Behältnissen
22.04	Traubenmost, teilweise vergoren, auch ohne Alkohol stummgemacht
22.05	Wein aus frischen Weintrauben; mit Alkohol stummgemachter Most aus frischen Weintrauben
22.07	Apfelwein, Birnenwein, Met und andere gegorene Getränke
ex 22.10	Weinessig
23.01	Mehl von Fleisch, von Schlachtabfall, von Fischen, von Krebstieren oder von Weichtieren, ungenießbar; Grieben
23.02	Kleie und andere Rückstände vom Sichten, Mahlen oder von anderen Bearbeitungen von Getreide oder Hülsenfrüchten
23.03	Ausgelaugte Zuckerrübenschnitzel, Bagasse und Abfälle von der Zuckergewinnung; Treber, Schlempen und Abfällen aus Brauereien oder Brennereien; Rückstände von der Stärkeherstellung und ähnliche Rückstände
23.04	Ölkuchen und andere Rückstände von der Gewinnung pflanzlicher Öle, ausge-

Zolltarif-Nr.	Warenbezeichnung
	nommen Öldraß
23.05	Weintrub; Weinstein, roh
23.06	Waren pflanzlichen Ursprungs der als Futter verwendeten Art, anderweit weder genannt noch inbegriffen
23.07	Futter, melassiert oder gezuckert, und anderes zubereitetes Futter; andere Zubereitungen der bei der Fütterung verwendeten Art (z. B. Zusatzfutter)
24.01	Tabak, unverarbeitet; Tabakabfälle
44.01	Brennholz in Form von Rundlingen, Scheiten, Zweigen oder Reisigbündeln; Holzabfälle einschließlich Sägespäne
44.03	Rohholz, auch entrindet oder nur grob zugerichtet
44.04	Holz, vierseitig oder zweiseitig grob zugerichtet, aber nicht weiter bearbeitet
44.05	Holz, in der Längsrichtung gesägt, gemessert oder rundgeschält, aber nicht weiter bearbeitet, mit einer Dicke von mehr als 5 mm
45.01	Naturkork, unbearbeitet, und Korkabfälle; Korkschrot, Korkmehl
53.01	Wolle, weder gekrempelt noch gekämmt
54.01	Flachs, roh, geröstet, geschwungen, gehechelt oder anders bearbeitet, jedoch nicht versponnen; Werg und Abfälle (einschließlich Reißspinnstoff), aus Flachs
57.01	Hanf (Cannabis sativa), roh, geröstet, geschwungen, gehechelt oder anders bearbeitet, jedoch nicht versponnen; Werg und Abfälle (einschließlich Reißspinnstoff), aus Hanf

TEIL II

Zolltarif-Nr.	Warenbezeichnung
ex 28.38	Kupfersulfat und andere Schädlingsbekämpfungsmittel dieser Tarifnummer
31.01	Guano und andere natürliche tierische oder pflanzliche Düngemittel, auch untereinander gemischt, jedoch nicht chemisch bearbeitet
31.02	Mineralische oder chemische Stickstoffdüngemittel
31.03	Mineralische oder chemische Phosphatdüngemittel
31.04	Mineralische oder chemische Kalidüngemittel
31.05	Andere Düngemittel; Erzeugnisse des Kapitels 31 in Tabletten, Pastillen oder ähnlichen Formen oder in Packungen mit einem Gewicht von 10 kg oder weniger
38.11	Desinfektionsmittel, Insecticide, Fungicide, Herbicide, Mittel gegen Nagetiere, Schädlingsbekämpfungsmittel und dergleichen, in Zubereitungen oder in Formen oder Aufmachungen für den Einzelverkauf oder als Waren (z.B. Schwefelbänder, Schwefelfäden, Schwefelkerzen und Fliegenfänger).

ANHANG B

Liste der Tätigkeiten landwirtschaftlicher Erzeuger im Sinne des Artikels 3

I — **Landbau im eigentlichen Sinne:**
1. Allgemeine Landwirtschaft einschließlich Weinbau
2. Obstbau (einschließlich Olivenbau) und Gartenbau (Gemüse, Blumen und Zierpflanzen), auch in Treibhäusern
3. Forstwirtschaft
4. Erzeugung von Pilzen, Gewürzen und Kräutern; Erzeugung von Saat- und Pflanzgut; Baumschule

II — **Tierzucht und Tierhaltung** (einschließlich der mit der Bodenausnutzung zusammenhängenden Erzeugung von tierischen Produkten):
1. Viehzucht und Viehaltung
2. Geflügelwirtschaft
3. Kaninchenzucht und -haltung
4. Imkerei
5. Seidenraupenzucht
6. Schneckenzucht

III — **Fischerei:**
1. Süßwasserfischerei
2. Teichwirtschaft
3. Muschel- und Austernzucht und Zucht von anderen Weich- und Schalentieren
4. Froschzucht.

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An explanation of the provisions of law no. 66-10 of January 6, 1966, amending the value added tax on the construction, transportation and other related enterprises.

Library International Bureau of
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MEHRWERTSTEUER DER IMPORTEURE, EXPORTEURE UND HAFENBETRIEBE, by Ammann, G. and F. Kröger. Published by Verlag Neue Wirtschafts-Briefe GmbH, Herne, 1968, 196 pp.
An explanation of provisions under the tax on value added law (effective January 1, 1968) which affect importers, exporters and sea transporters. Segments bearing on this subject, of the text of the Law of May 29, 1967, as amended, its implementing ordinances and regulations, are appended.

Library International Bureau of
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From Forkel-Verlag, Stuttgart, the series Rechts- und Wirtschaftspraxis – Steuerrecht has been published (1968), consisting of the following volumes:
1: Abgabenordnung Finanzgerichtsordnung
2: Einkommensteuer Vorschriften

3: Einkommensteuer Grunddarstellung Rechtsprechung
4: Einkommensteuer Einzelfragen
5: Körperschaftsteuer Lohnsteuer
6: Gewerbesteuer Umsatzsteuer
7: Bewertungsrecht Vermögensteuer
8: Erbschaftsteuer, Grundwerbsteuer, Grundsteuer
9: Lastenausgleichsabgaben
10: Übrige Steuerarten und Querschnitte A bis C
11: Übrige Steuerarten und Querschnitte D bis K
12: Übrige Steuerarten und Querschnitte L bis Z

This loose-leaf service is a compilation of German tax laws arranged for practical use. The text of the laws and its implementary ordinances, regulations and rulings are published separately and supplemented by articles by tax experts. Case law as from 1960 is covered. Supplements will be issued twice monthly.

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DIE NEUE EINHEITSBEWERTUNG DES GRUNDVERMÖGENS, by Falterbaum, H. and A. Harbich. Published by Erich Fleischer Verlag, Achim/Bremen, 1968, 170 pp.
The authors explain by way of 34 examples, the new valuation schedule of January 1, 1964 on real property.

Library International Bureau of
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A comparison of the affects of the value added tax of 1968 and the previous turnover tax on imports and exports. The text of the tax on value added law of May 29, 1967, and the implementing ordinances and decrees, as far as relevant thereto, are appended.

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Fiscal Documentation, no. B 1994.

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This book considers all aspects of taxation or exemption on pensions, annuities, social security and other payments, with examples and references to case law.

Library International Bureau of
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PROBLEME DER ENTWICKLUNGSHILFE, published by Institut "Finanzen und Steuern", Bonn am Rhein, vol. 88, March 1968, 68 pp.
A consideration of the problems arising from aid to developing countries with particular references to the German Federal Republic, and the measures taken, including tax incentives, to ameliorate the problems.

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Unofficial translation, page-by-page, into English of the text of the German value added tax law of May 29, 1967, as amended on October 18, 1967, introducing as of January 1, 1968, the value added tax system in Germany.

Library International Bureau
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An explanation of the new system of turnover tax at importation and refund of turnover tax at exportation effective January 1, 1968, provided under the new tax on value added law of May 29, 1967, as amended on October 18, 1967.

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1967-68 SUPPLEMENT TO DIRECT TAX LAWS 1966-67, by Dastur, S.E., H.M. Damania and J.E. Dastur. Published by N.M. Tripathi Private Ltd., Bombay, 1967, 148 pp.
A supplement to the previous publication Direct Tax Laws 1966-67, commenting on some of the amendments issued under the Finance (No. 2) Act, 1967, and the Taxation Laws (Amendment) Ordinance 1967. The amendments pertain to income tax (individual and company), wealth tax, gift tax, and the company profit surtax.

Library International Bureau of
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INTERNATIONAL

WOHNSITZ- ODER URSPRUNGSPRINZIP? Die Vermeidung der internationalen Doppelbesteuerung sowie der internationalen Steuerflucht durch Wohnsitzverlagerung bei ausschliesslicher Anwendung des Ursprungsprinzips, by Endriss, H.W. Published by Verlag Dr. Otto Schmidt KG., Cologne, 1967, 108 pp.
"Place of Residence or Place of Source Assessment?" The author claims to prove that exclusive use of "place of source" assessment in tax treaties would avoid double taxation on income.

Library International Bureau of
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ITALY

L'IMPOSTA SUL VALORE AGGIUNTO, by Perfetti, A. and E. Tamburro. Published by l'Istituto per l'Economia Europea, Rome, 1967, 168 pp.
An explanation of the value added tax system and the reasons for its introduction in the Common Market countries. Mention is also made of other turnover tax systems. The two EEC Directives of April 11, 1967, and an unofficial Italian translation of the text of the German value added tax law of May 29, 1967, are included.

Library International Bureau of
Fiscal Documentation, no. B 2029.

NETHERLANDS

ONTWERP VAN WET OP DE OMZETBELASTING 1968 (WETSGESCHIEDENIS), by Ploeger, L.F., A.L.C. Simons and K. Millenaar. Published by N.V. Uitgeversmij. AE.E. Kluwer, Deventer, 1967 (loose-leaf).
This loose-leaf service is intended as a compilation of documents relative to the proposed value added tax system, to be introduced in the Netherlands as of 1969. In the first part are: the text of the Bill, its official explanatory note and comments; the first and second directive of April 11, 1967, of the Council of the EEC, and the text of the advice report by the Sociaal Economische Raad. Supplements will follow.

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Text and explanation of the laws pertaining to the tax on motor vehicles with especial reference to the provisions for contributions to the national road fund and subsidies for the maintenance and extension of roads in the provinces.

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NEW ZEALAND TAXATION BOARD OF REVIEW DECISIONS (Official Reports), Vol. 3, 1965-1967, by Thompson, M.I. Published by Butterworth & Co. (New Zealand) Ltd., Wellington, 1968, 472 pp.
Compilation of relevant decisions made by the New Zealand Taxation Board of Review on income tax cases from 1965 through 1967, including various reference indexes.

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PUERTO RICO

WHAT SHOULD YOU KNOW ABOUT TAXES IN PUERTO RICO. A publication of the Commonwealth of Puerto Rico, Department of the Treasury, Office of Economic and Financial Research, San Juan, 1968, 94 pp.
The most important facts about taxation in Puerto Rico, written for the layman.

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OVERSEAS INVESTMENT. A guide to planning for UK manufacturers. Published by the British Institute of Management, London, 1968, 36 pp.
A discussion of the many factors, such as risks, taxes, markets, financing, which a company must consider in planning an overseas investment.

Library International Bureau of Fiscal Documentation, no. L 2035.

U.S.A.

1968 U.S. EXCISE TAX GUIDE. Published by Commerce Clearing House, Inc., Chicago, 1968, 464 pp.
An explanation of all the 1967 changes enacted in federal excise taxes, and new regulations as well as important rulings and court decisions.

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This volume contains unabridged federal and state court decisions arising under the federal tax law and previously reported in Prentice-Hall Federal Taxes.

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PRENTICE-HALL FEDERAL TAX HANDBOOK 1968. Published by Prentice Hall, Inc., Englewood Cliffs, 1968, 580 pp.
This book gives information on all new tax laws, regulations, court decisions, rulings and procedures of importance for purposes of filing company and personal tax returns for 1967, and outlines methods for minimizing the 1968 tax.

Library International Bureau of Fiscal Documentation, no. B 1951.

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A guide for individuals in the preparation of 1968 tax returns.

Library International Bureau of Fiscal Documentation, no. L 2037.

1968 U.S. MASTER TAX GUIDE, published by Commerce Clearing House, Inc., Chicago, 1967, 560 pp.
A complete guide to the preparation of income tax returns for 1967, for individuals and corporations.

Library International Bureau of Fiscal Documentation, no. B 2070.

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BULLETIN DE DOCUMENTATION PRATIQUE DES TAXES SUR LE CHIFFRE D'AFFAIRES ET CONTR. INDIRECTES, release 3.
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Editions Techniques, Paris.
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Convention between the United Kingdom of Great Britain and Northern Ireland and Portugal for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of March 27, 1968.

XXIInd IFA-CONGRESS AT MONTEVIDEO

The IFA will hold its XXIInd Congress in Montevideo (Uruguay) this year. On this occasion a number of South American tax experts were kind enough to provide detailed summaries of their countries' taxation systems. We take pleasure in publishing these in this issue of the Bulletin.

We wish all IFA members a pleasant and fruitful Congress in Montevideo.

XXIIE CONGRES DE L'IFA A MONTEVIDEO

L'IFA tiendra cette année son 22e. Congrès à Montevideo (Uruguay). A cette occasion un certain nombre d'experts fiscaux ont eu l'amabilité de présenter un aperçu détaillé du système fiscal de leur pays, que nous avons le plaisir de publier dans ce numéro du Bulletin. Nous souhaitons à tous les membres de l'IFA un très agréable Congrès à Montevideo.

Dr. J.C.L. Huiskamp

* * * * ARTICLES * * * *

RAMÓN VALDES COSTA* and JORGE ROSSETTO**:

TAXATION IN URUGUAY

I

BRIEF DESCRIPTION OF THE POLITICAL STRUCTURE AND TAX SYSTEM OF THE COUNTRY

DISTRIBUTION OF POWERS AND FUNCTIONS

In spite of the small territorial extension of the country and its unitarian political structure, the Uruguayan Constitution distributes the taxing powers between the National Government and 19 Departmental Governments, which can be compared, to a certain extent, to the Member States or Provinces of Federal States.

The concrete organization of this decentralization and the degree of autonomy conferred to the Departments, suffered a perceptible change through the different Constitutions sanctioned in 1917, 1934/42, 1952 and 1967. We can assert that the experience was not satisfactory, especially with taxes which affect the whole National Economy, such as the rural land tax.

The Constitution here in force, quite similarly to the Brazilian Constitution of 1965[1] has deprived the Departments of their competence to establish this kind of tax, though its income (profits) is destined to them. On the other hand, the granting of taxing competence to the Departments did not solve their financial problem, so that the Central Government was driven to transfer the yield of different national taxes, and grant subventions to them[2].

Both in the national and departmental scope there is a clear division between the Administrative and Legislative functions. The Judicial function is exercised by the National Judicial Power and by the 'Tribunal de lo Contencioso Administrativo', the latter being a body created by the Constitution and thus independent of the three Powers. From 1934 on, the attributions of Parliament and those of the Executive Power suffer a profound evolution by which the former were diminished and the latter increased. This tendency has been based on the convenience of centralizing the responsibility

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1 Gomes de Sousa R. "Tax reform in Brazil" in Bull. Int. Fisc. Doc., V.XX, No 9, p. 353.

2 About the originality and characteristics of this solution see: Baleeiro A. "Ensayo sobre algunos problemas y soluciones en torno a la autonomía local en materia tributaria", report presented to "I Jornadas Latinoamericanas de Derecho Tributario". Fac. of Law., Mont., 1957, p. 336.

Valdes Costa R. "Ingresos Locales" in "Régimen Tributario de Montevideo" Fac. of Law, Mont., 1955; "Los impuestos sobre la propiedad inmueble rural" in "Temas de Finanzas" "Cuaderno No 20", Fac. of Law, Mont., 1967.

of the financial policy in hands of the Government, and on the avoidance of an unadvisable generosity of Parliament. However, the taxing power belongs exclusively to Parliament; this solution was actually maintained due to the traditional political stability of the country, quite unusual in Latin America.

GENERAL CHARACTERISTICS

They are those common to developing countries. Indirect taxes prevail and according to the last official estimations in relation to the calculated total resources of the Central Government, they represent 85% without taking special funds into account. This percentage includes: Turnover Taxes (especially Sales and Services Taxes): 51.7%; different Excises Taxes: 14,7%; Foreign Trade Taxes: 18,6%. Direct Taxes (15%) arise from Income Tax which is only 6,6% of the total income, but Net Wealth and Holding and Transfer of Capital Goods Taxes reach the amount of 8,4% which is, besides, evidently contradictory with respect to the policy of saving incentives and to investments, pursued with the establishment of other taxes such as Income Tax.

The legislation in force is based upon a law sanctioned on 30th November 1960 (No 12.804) which can be considered as a 'Taxation Amendment', and which introduced Income Tax, reorganized and arranged previous taxes and established 'General Rules' referring to Administrative and Judicial procedures, sanctions and prescription applied to all kinds of taxes and assessments[3]. Subsequent laws, especially those sanctioned in 1964 and 1967, introduced different amendments, some of them very important, such as those referring to Turnover Taxes and to the organization of Income Tax. Our analysis will be based on the legislation in force up to 31st December 1967, including the law of the 21st of this same month, which became effective on the 15th January 1968.

A – The most remarkable aspect of taxation in Uruguay is the late introduction of Income Tax. For political reasons based on economic interests, the Party that ruled our country up to 1958 strongly objected the establishment of this kind of tax. In 1960, the already mentioned law N° 12.804 organized it as a Progressive Tax to Individual Income, perfected by a Corporations Income Tax, and other complementary taxes on the incomes derived from specific activities – industrial, commercial and financial –, and on excess profits.

Its most outstanding characteristics are:

1°) Income discrimination according to their source. Earned incomes are clearly and constantly favoured by partial computation.

2°) Rural Incomes are computed by estimated value, equivalent to the yielding which is likely to be obtained from regularly worked lands. This system which was established in 1960 arises from the Italian Doctrine and Legislation and is a peculiar characteristic of Uruguayan Law. Later, it was supported by different Latin American doctrine[4].

3 For further information about the development of Uruguayan Tax Law, see Valdes Costa R. in "Enquête sur les Tarifs d'impôts" Arch. Int. Fin. Publ. 1964, p. 353.

4 Valdes Costa R. "El impuesto a la Renta en el Uruguay" in Rev. Impuestos, Bs. Aires, 1962 p. 1; IV Jornadas Latinoamericanas de Der. Trib., "Los impuestos como instrumentos de promoción agropecuaria"; Investigations: p. 205

3°) In spite of the fluctuations through different laws, this tax stimulates saving and investment. An important characteristic incentive policy is that of "those who must pay Income Tax abroad may take advantage of exemptions established by Uruguayan Law only in case they actually benefit them, according to the legislation of the different countries". This is a unilateral protection of the Uruguayan National Treasury from countries like the U.S.A. which do not admit tax-sparing deductions abroad, and also another innovation in Latin American Law, decidedly supported by the Doctrine of the Continent[5].

B – Income Tax, Net Wealth Tax and Death Duties all contain special provisions with regard to dividends and with regard to the holding and transfer of bearer-stock. The latter are very common and almost impossible to deal with especially from an administrative point of view. Therefore, our legislation establishes Proportional Property Taxes either on the dividends or on the capital of the corporations that issue such securities.

C – Another peculiar characteristic of taxation in Uruguay is the onerous system of Social Security Assessments. Our Constitution (Art. 67) establishes: "General Pensions and Social Insurances will be organized to guarantee adequate retirements and allowances in case of accidents, illness, disability, unemployment, etc. to all the workmen, employers, employees and wage earners; and to assure appropiate Pensions to their families. Old-age Pension is a right for those who, being in lack of vital resources, reach the limit of active life, after a long period of residence in the country".
This comprehensive system of social security, known as one of the most advanced and generous in the world, represents a heavy financial burden which perceptibly increases production costs. The most responsible estimations establish the total amount of these contributions as 10% of the Gross National Product, but the percentage reaches 25%, including the 15% derived from taxes. Moreover, it represents a most important factor in Latin American integration problems within ALALC (Latin American Association for Free Trade), as it was emphasized in our report for the 20th Congress of I.F.A. held in Lisbon in 1966[6].

D – Finally, the influence of inflation on the organization of our tax system and on those of other Latin American countries must be emphasized. In order to give an accurate idea of its importance we can say that the quotation of Uruguayan peso (urug. $) in relation to U.S. dollar, within the period

to 285; debates: p. 275, 344; Conclusions: p. 31, B.A., Cont. Mod. 1964.
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Atchabahian, Adolfo. "El estímulo de la explotación agropecuaria mediante la tributación" in Rev. Der. Fisc., B. Aires, No 173, p. 225.
5 Interamerican Bar Association, XIII Conference, Panama 1963 and XIV Conf. Puerto Rico 1965; IV Jornadas Latinoamericanas de Derecho Tributario, Buenos Aires 1964; International Seminar on "Aspectos Jurídicos de ALALC", Montevideo 1964.
Valdès Costa, R. "Tendances actuelles de la politique Fiscal en Amerique Latine" in Rev. Sc.Fin. 1964, p. 47; "Regimen impositivo de las inversiones extranjeras en América Latina" in Rev. Impuestos B.Aires, 1967, T. XXV, p. 93.
Vaz, Daniel A. "El sistema del descuento impositivo y los incentivos tributarios" in Rev. Impuestos B. Aires 1963, T.XXI, p. 541.

6 Cahiers de Droit Fiscal International, V.LI, T.1, p. 58, together with Peirano Facio, J.C., Ibarra San Martin, R. and Gnazzo, Edison.

1963-1967, rose from urug. $ 11.— to urug. $ 200.—, and that the increase of the cost of living has been around 100% a year during these last years, having reached 136% in 1967. –

To avoid the distortional effects of these phenomena, especially on the taxpaying ability, the minimum exempt from Income and Net Wealth Taxes can be periodically regulated according to the variations in the cost of living; a solution that was taken from the Chilean legislation. These minimum exempts are, in their turn, a unit of measurement for the determination of progressive scales for those taxes. On the contrary, we can state that in the case of Death Duties whose scale refers to absolute values, the majority of taxpayers are nowadays imposed with the highest rates; and thus this tax has become proportional and extraordinarily expensive.

Finally, we must add that the attempt to establish a system to regulate the amount of the liability in relation to the monetary devaluation, similar to the Brazilian one, has definitely failed in Uruguay.

II

DIFFERENT KINDS OF INCOME TAX

The Income Tax in Uruguay is organized as follows:

A – INCOME TAX AND SPECIFIC INCOME TAXES.

This group is composed of:

1. Individual Aggregate Income Progressive Tax, of a "personal" character, for which each taxpayer must compute all his annual incomes; only stock dividends and the undermentioned debenture interests, are excluded, due to modifications introduced in the original structure of the tax. After the legal deductions net incomes are subject to progressive rates which rise up to 55%.

2. A Tax on the dividends of bearer-stock, which levies these dividends with 25% and which is paid by means of definitive withholding in their source. There is also a similar tax levying with 35% the interest on bearer-debentures. The dividends or interest on registered stock and debentures are not withheld, but incorporated to the total income of each taxpayer for the liquidation of the tax mentioned in the last paragraph.

B – CORPORATION TAX

This kind of tax consists of:

1. The "Corporate Income Tax" for corporations founded in Uruguay, is levied at 10% of the Net Incomes of Uruguayan source, distributed or not, of each accounting period. In Uruguay, "Corporation" means, essentially, those associations whose capital is wholly or partially represented by shares.

2. When the incomes are obtained by branches, agencies, or establishments in Uruguay of corporate bodies of Private Law established abroad, they are also subject to a 10% rate. Besides, when these incomes are remitted or credited to the main office, 25% of the corresponding remission or credit must be paid. Certain exemptions are permitted: for example, for some external financing.

3. Finally, the income which is obtained by corporate bodies of Private Law established abroad which do not act in Uruguay through a branch, agency or establishment, is taxed at a 40% rate; the same exemptions of the former case are applied.

C – ADDITIONAL TAXES

They are:

1. "Industry and Commerce Income Tax", which levies Net Incomes of Uruguayan source distributed or not, derived from industrial or commercial activities (also agricultural, in some cases) of each accounting period. For this tax purposes the incomes must not necessarily be obtained by individuals or body corporates, whatever their characteristics may be, including branches, agencies or establishments of foreign corporations. The rate of tax is in every case a 6%. Recently an "Additional" rate of 4% was established, so that the addition of both makes a total rate of a 10%.

2. "Financial Activities Tax" which lies on incomes of Uruguayan source, distributed or not, of each accounting period, from specific activities considered as "financial" (such as banking), with progressive rates ranging from 10% up to 18%. For this tax purposes the income must not necessarily be obtained by individuals or corporate bodies whatever their characteristics may be, including branches, agencies or establishments of foreign corporations. This income does not substitute those mentioned before, but it is additional; however, the exemptions are the same as in B 3°).

3. Though they were in force until 1967, there are no taxes on excess profits or increased returns nowadays; that is to say, taxes levying income when exceeding a given percentage of the capital which produces it.

As far as "Individual Income Tax" is concerned, Uruguayan Law adopts the "source" system, levying exclusively income from Uruguayan source. Nevertheless, Uruguayan citizens must also compute their income from foreign origin, but they can deduce, to a certain extent, the taxes paid abroad from those which they must pay in Uruguay. In this way, the Law favours the establishment of foreigners in Uruguay, because they are not obliged to compute their income from foreign source.

The concepts "Income" and "Source" are defined by Law in a general way, but there are several specific rules of exception.

Individuals and "family groups" and undivided successions are liable to tax. The tax is of a "personal" system as we have settled before (that is to say it is not based upon a schedular system), but income is classified in five Categories, according to the "prevailing factor of production"; these categories are:

I – "Real Estate Category" (income derived from the lease of real estate and similar situations).

II – "Chattel" (interest and other income derived from credits, intangible assets, royalties, etc.

III – Industry and Commerce (income from Commercial and Industrial activities).

IV – "Agriculture" (income from agricultural activities).

V – "Personal" (salaries and fees earned by employees, professional men, etc).

The prevailing factor of production in Categories I and II is capital; in Category V work; and in Categories III and IV the union of both elements.

The income in which the prevailing factor of production cannot be precisely determined, must be computed in Category III, in which any increase of patrimony is considered "income".

The scope of this tax is the Net Income, that is to say Gross Income minus the necessary expenses to obtain it; in some cases these expenses are impliedly determined.

In each Category of income there are special rules besides specific deductions and, or, exemptions.

In Category III the legislation adopts the

principle of "replacement cost" for the assets comprehended in the "fixed assets", based on coefficients which must be periodically determined by the Executive Power. This same Power is legally authorized to extend this principle to the valuation of raw materials and goods in general.

In Category III there are special rules which stimulate investment on industrial equipment; similar precepts can be found in Category IV "Agriculture". Other activities, such as new industries and export are also given incentives.

In the same Category there are also special dispositions to determine income from Uruguayan source emerging from certain international activities (Insurance Companies; Maritime or Air Navigation Companies; Producing, Distributing or Intermediating Film Companies; News Agencies; International Trade in general).

In Category IV (Agriculture), as it was stated in Chapter I, the computed income is not the actual or effective one, but an "estimated or implied" income based on a level established according to the Average Actual National Product, adapted to the specific characteristics of the land belonging to each unit subject to tax, and appraised according to the average price in the market. This solution not only avoids the difficulties to determine the actual agricultural income, which is greater in underdeveloped countries with extensive rural properties; but also, it is based on a principle, expressly remarked by its creators, which is to stimulate productivity, taxing low production with a heavier tax, while when the level established by law is exceeded, it is levied with a lower rate.

In Category V, as it was also stated in Chapter I, a special deduction, nowadays, only the amount of Earned Income exceeding double the minimum exemption and deduction for "persons to take care of", is included in the estimation of the total taxable income.

Total income is the result of the addition of the taxable net income from all the Categories. In order to determine levied total (taxable) income we must deduct the minimum exempt, the deduction for "persons to take care of" (dependents) and any other deduction legally allowed.

The individual minimum exempt is urug. $ 80,000.— per year; for family groups is urug. $ 160,000;— in both cases the deduction of urug. $ 36,000.— for "dependents" is also admitted. These amounts must be regulated every year by the Executive Power according to the Official Index of the Cost of Living as mentioned in Chapter I; these amounts correspond to the fiscal year 1967. The tax is calculated on the "levied total income" according to a progressive scale which begins at 15% and rises up to 55%; this scale is not determined on the basis of absolute figures, but on the minimum exempt above mentioned in Chapter I.

In the case of beneficiaries of income from Uruguayan source who live abroad, or non-individualized income holders, the tax is paid by means of withholding at their source; in these cases the withholding is 55% of the net income, paid or credited. Income subject to the tax as explained above in A 2°) of this Chapter is not included in this mechanism.

Withholdings applied to people who live abroad are not definite, except those cases included in the taxes mentioned in A 2°). These individuals can make a total return at the end of the year, if they wish to for the income which was withheld at 55%, using the general tax scale, and demanding the return of the amount retained in excess thereof. In these cases minimum exempt and deduction for dependents are not applied.

As far as income from legal entities (taxes mentioned in B and C except B 3°), is concerned, to determine the leviable amount, we always apply the method established in Category III, except when the corporation runs rural real property; in this case, we apply the method in Category IV.

In case B 3°) we apply the same rule as for individuals in general, that is to say, those of the corresponding categories of income.

III

TAXES LEVYING PATRIMONIAL ELEMENTS OR PATRIMONY AS A WHOLE

In Uruguay, taxation on "patrimony", or on some of its isolated elements, is based upon the following taxes:

A – A "Net Wealth Tax", that annually levies individual subject to the tax.

B – A "Substituting Tax for Death Duties" which annually encumbers the capital of corporations.

C – Different taxes levy the holding of isolated elements of patrimony; the most important of these are "Property Taxes" for the different Departments.

A – NET WEALTH TAX

It is essentially a yearly tax that levies the aggregate net wealth. Individuals, family groups and undivided successions are subject to an individual progressive tax, similar to Income Tax; in order to establish the liabilities all their belongings, including shares of partnerships and registered stock, are computed.

On the contrary, those assets which have no individualized owner (bearer-stock and debentures, etc) are levied with a proportional tax, also similar to Income Tax, as mentioned in Chapter I, A-2.

The branches, agencies or establishments of foreign corporate bodies of Private Law pay taxes on their Uruguayan patrimony.

Each taxpayer's patrimony is determined by the difference between their assets and liabilities, appraised according to the rules given by the Law and its regulations, and includes all assets located, invested or economically utilized in the Republic. However, Uruguayan citizens and corporate bodies founded in Uruguay must also compute their assets abroad; just as with Income Tax, there is a discrimination that benefits foreigners.

The general criteria for valuation of assets is that of its real value in the market, except for corporate bodies and commercial and industrial activities which must apply the valuation rules as of Category III for Income Tax.

There are different exemptions, such as: loans and deposits in foreign currency of foreign individuals or corporate bodies living abroad. Individuals, family groups and undivided successions have a minimum exempt which equals ten times the minimum exempt allowed to them for Income Tax. Net Wealth Tax is applied to the surplus of that minimum, according to a progressive scale beginning at 0.50% up to 1.5%.

The remaining obligors have no minimum exempt; the rate for corporate bodies is fixed: 1.25%. For impersonal bank accounts, debentures and other similar securities, the rate is also fixed: 1.50%.

B – SUBSTITUTING TAX FOR DEATH DUTIES

This tax must be paid by corporations, by partnerships which include corporate bodies of Private Law founded abroad in the corresponding proportion and by the branches or agencies of corporate bodies of Private Law founded abroad.

Net capital is the difference between the assets and liabilities at the end of each accounting year; the rules for the appraisal of the assets are alike the ones applied to Industry and Commerce Category for Income Tax.

There are different exemptions, such as: assets permanently located abroad. The Substituting Tax for Death Duties applies, to a certain extent, the "territoriality" principle which is not used in the case of Patrimony Tax to Uruguayan individuals and corporate bodies.

The rate of the tax, equal for all the obligors, is: 1%.

As the name of the tax suggests, the shares of the corporations imposed by it are exonerated from inheritance, legacy and gift tax, in case of death.

When their assets are composed exclusively by foreign investments (except the necessary availability for their local expenses), some Stock Finance Companies ("Holdings") pay a Substituting Tax for Death Duties of 0,3% instead of a 1%; being this the only tax paid by them. This preferential treatment intends to stimulate the foundation of "Holdings", under Uruguayan legislation, thus, includes the exempt from the Income Tax of the dividends distributed by these companies.

C – TAXES LEVYING PATRIMONIAL ELEMENTS

Under this title we shall include the principal real estate property taxes, though there are other contributions of Departmental competence which levies the possession of other kind of assets: i.e. licenses of vehicles for transportation.

1. Tax on Real Property

As we have already said, it is a Departmental tax. Departmental Governments are authorized to administrate and enact taxes on suburban or city real-estates. It is impossible in this occasion to enumerate the systems applied by each of the 19 Departments of the country; generally the tax is a percentage of the amount of the appraisal, which is administratively established; but there are several variations.

Rural real-estate taxes must be established by the Parliament, though its collection and product belongs to the corresponding Departmental Government. The Law has established a yearly tax of 2% on the actual value of each real estate and it is added to the rates of Patrimony Tax and Real Estate Surtax, with which high percentages are attained, around a yearly 4% on the actual value.

2. Absentee Tax

Those owners who are not living in Uruguay, or who, living in Uruguay, are absent for more than a certain period, must pay a double Real Estate Tax. This disposition is also applied to corporate bodies founded abroad, with some exceptions.

3. Real-Estate Surtax

It is an annual national tax levying with a progressive rate (minimum tax 1% and maximum 4%) the addition of the fiscal value of every city, suburban or rural real estate, owned or held by individuals or corporate bodies; in the case of joint ownership by husband and wife, the individual's

or couple's properties are computed as a single economic unit.
The assets are declared according to an official appraisal which is at present quite lower than the actual value; the debts guaranteed by mortgage which encumber those assets, are deductible, to a certain extent.

4. Primary School Tax
This national tax has been modified several times.
It lies on the estimated income from city, suburban or rural real estate. In spite of the fact that the leviable amount is determined in this way, the tax belongs to the group of "real estate taxes" since what is subject to the tax is the ownership of the real estate and not their rents.
In the Department of Montevideo, the estimated income is a monthly 1% of the revaluation of the real estate; the tax is calculated according to a progressive scale which rises up to 7%.
In the remaining Departments the tax is calculated directly on the "actual value" of each real estate; the rate varies from 1% to 3% on this "actual value".
There are several exemptions.

5. Other Tributes
There are several other national and departmental taxes on real estate, especially rural properties, and on certain personal properties; it would be impossible to analyze them in this article.

IV

TAXES LEVYING TRANSFER OF ASSETS, TRADERS' AND, OR, PRIVATE PERSONS' ACTS OR TRANSACTIONS

TAXES LEVYING CONSUMPTION OR EXPENSES

We shall classify the Uruguayan taxes included in this Chapter in five groups:
A – Taxes levying transfers in case of inheritance, legacy or gift.
B – Taxes levying transfers of real estate.
C – General taxes levying circulation of assets.
D – Specific taxes levying the negotiation or consumption of determined assets.
E – Taxes levying acts, contracts and juridical acts in general.

A – TAXES LEVYING TRANSFERS IN CASE OF INHERITANCE, LEGACY OR GIFT.

Since 1893 there is in Uruguay a tax called "Inheritance, Legacy and Gift Tax" which lies on transference of assets in case of death (inheritances and legacies) and also gifts "inter vivos", even though the donee is not the intended heir of the donor.
The tax is determined according to a scale whose intervals are fixed in absolute values, as mentioned in Chapter I, increasing according to two elements: the degree of kinship and the amount of the transferred assets. The minimum rate is 3% and the maximum 55%.
There are different exempt assets (Government bonds; shares levied by Substituting Tax for Death Duties, etc); there are also minimum exempts though very low, according to the "present actual values".

B – TAXES LEVYING REAL-ESTATE TRANSFERS

1. Taxes on Transferences of Real Estate

The main tax of this group, the "Tax on transferences of Real Estate", lies on the alienation of real estate, compensated or gratuitous, and other acts by which certain rights on real estate are transferred or established; the same rule is applied to individuals, corporate bodies, traders or not.

The liability depends on the value of the real estate which is always established in an estimated form, based on the fiscal revaluation of it. The rate applicable to the compensated transferences is 16%; but for gratuitous transferences is 2%. These rates correspond to suburban or city real estate; as for the rural ones, these taxes increase 2% (that is to say, they become 18% and 4% respectively).

C – GENERAL TURNOVER TAXES

Here the hesitations of Uruguayan taxation policy are more evident. We have applied every possible system: single-stage tax, from 1941 ("Impuesto a las Ventas") sometimes applied to the first stage and sometimes to the last one; all stage tax, – "snowball" – ("Impuesto a las Entradas Brutas") from 1964, which worked at the same time with the first one, and is still in force; and finally, added value tax since 1968 (Impuesto a las Ventas y Servicios), established without the necessary previous analysis and with some characteristics which make it difficult to apply.

1. Sales and Services Tax – "Impuesto a las Ventas y Servicios"

From 1941 to December 1967, the single stage "Impuesto a las Ventas" which was enacted when the product received any transformation, was in force in Uruguay.

Starting from 1968, this system has been substituted by the "Impuesto a las Ventas y Servicios" (estimated as 25% of the total revenues), based on the principle of added value.

As the name of the tax suggests, sales and services are levied in Uruguay; but it also lies on the lease of personal real estate. The tax is only applied in cases where the taxpayer's activity is included in Industry and Commerce Category for Income Tax.

The rate is 10%; there are not different rates for each kind of goods.

Among the characteristics of Uruguayan legislation we must point out that many exemptions have been established; this is, in a way, against one of the positive aspects of the system: its "neutrality" with respect to the different structures that the production and trade of goods acquire. As a matter of fact, when exempt goods requiring raw material subject to tax, are produced, the circumstance that those raw materials may be produced by the same enterprise or purchased from another independent one carries to different fiscal effects.

Exports are exempt from this tax; besides, exporters are the only exempt taxpayers to which the National Treasury returns the amount of the tax which their suppliers have transferred to them.

Nowadays, both Fiscal Administration and the taxpayer, suffer the natural inconveniences of the establishment of the new system, which is expected to produce positive effects as soon as it is settled.

2. Gross Income Tax – "Impuesto a las Entradas Brutas"

It is a snowball tax levying 1% the "usual" income of the individuals or corporate bodies; it derives from the working or trade

of goods and from services rendered, when these transactions are not subject to the added value tax. Gross Income Tax is applied to each stage without any deduction.
There are different exemptions, such as: fees from personal services, exports, sale or lease of real estate, sale of non-manufactured agricultural products.

3. Cash Sales Tax
Since cash sales are immediately paid, they do not require any receipt.
To substitute Stamp Duties which for this reason are not paid, (see E.1 further on), there is a tax levying 1.8% cash sales effected by traders.

D – TAXES ON NEGOTIATION OR EXCISE OF SPECIFIC ASSETS

The most important taxes in this group are:

1. Excise Taxes
It is estimated that these taxes represent 14.7% of the total revenue. Here mentioned according to their importance, the main levied goods are by order: combustibles; alcohols and spirits; tobacco and cigarettes.
Some services rendering are also levied by this kind of tax: for example, passages and transportation companies.
These are fixed taxes (per unit) and, or, per cent (according to the selling price) which are paid by means of stamps on the product and, or, by means of an assessment made by the obligor.

2. Agricultural Sales Tax
This tax must be paid by those who export manufactured agricultural production specified by law.
The rate is 6% on the selling price of the products at their last stage, and the tax is paid 50% by the two parties of the transaction.

3. Other Taxes
In this group there are other taxes such as the one 4% tax on all the stages of the selling price of motorcars in general, and another called "Luxury Tax" which taxes the sales of cars and furs in their first stage at 25%.

E – TAXES ON ACTS, CONTRACTS AND JURIDICAL ACTS IN GENERAL

In this group we can consider the following taxes:

1. Stamp Duties
This old tax lies on contracts, commercial papers, receipts and other documents in general. According to a recent provision it is compulsory to formalize and levy any kind of cancellation.
The tax is paid by means of stamps or stamped paper, according to the different situations. There are fixed rate and per cent ones. The rate corresponding to receipts and contracts is, in general, 1.8% on the amount of the business.
The yield of this tax is exceptionally high within comparative jurisprudence; it is calculated as 15.2% of the total estimated revenue.

2. Other Taxes
There are still other taxes in this group, such as:
The "Single Tax on Banking" which levies 0.6% per month, all kinds of loans and guarantees given by banks and other financial institutions, either official or private ones, except the exemptions legally established.
The "Tax on Agreements of Commercial Enterprises Sale" which lies on these transactions being the rate 2% of the conventional price.
The "Special Licenses" are paid per year by certain activities and are applied according

to their income, or assets or other principles, according to the circumstances.
The fixed tax urug. $ 20,000.— yearly paid for the issue of the compulsory identification certificate of Stock Corporations.
The "Unified Tax" established in order to simplify the imposition and collection of other taxes; this tax is only applied in case that the total income of traders does not exceed a given limit, yearly regulated according to the Official Index of the Cost of Living. Those who pay it are exempt from taxes on: Sales and Services; Gross Income; Industry and Commerce Income and Special Licenses.

V

TAXES AND DUTIES ON FOREIGN TRADE

Due to the economic structure of our country, these revenues were the most important resources up to a few decades ago. In 1914 they were 45% of the total revenue. Growing industrialization diminished their significance, but they still maintain a high percentage, estimated at 18.6%.
The most typical of these are Customs Duties which arise almost exclusively from import. Since the end of last century (1888) this legislation has been strongly protectionist, establishing higher taxes for imported articles similar to those manufactured in the country and reducing and even establishing total exemptions for raw materials (1912) and machinery (1912 and 1935).
From 1959 on, Uruguay, just as other Latin American countries, according to the rules enacted by I.M.F. established a liberalistic trade system, suppressing the contingent and import allowances system, and creating the so called "charges on imports and withholding on exports", which at the beginning were supposed to regulate foreign trade; by means of this regulating function, imports would be automatically restricted and fair remuneration for exporters maintained. In practice, it became a mechanism to increase the revenue. Nowadays, it is the main resource derived from foreign trade (urug. $ 3,550: from a total $ 5,904:) which is calculated to represent 11% of the total estimated revenue.
From a juridical point of view its nature was strongly controverted, for it was legally organized not as a tax or Customs duty, but as an alteration of the quotation in the Stock Exchange; this allows the Executive Power to increase or diminish the rates without Parliamentary consent.
Other onerous charges are: port duties and consular fees, which from the juridical point of view are paid for port services monopolized by the Government and for consular services. In spite of their retributive character, they have reached extraordinarily high levels which distort their intrinsic nature.

VI

SOCIAL SECURITY TAXES AND CONTRIBUTIONS[7]

They are not only onerous but also very complex.

Social Security is administered by Government organizations (Pension Funds) and other institutions which though they are established and controlled by the Government are not a part of it and their management and administration are in hands of private institutions interested in their correct functioning.

The majority of these incomes belong to employers' and employees' contributions. As for pensions and retirements these contributions, which are calculated on the wages of the beneficiaries vary from 16% to 20% by each side. There are also contributions for family allowances, unemployment insurance, health insurance and other risks which vary according to the different industrial and commercial activities. In some sectors these pensions oscillate from 80% to 100% of the salaries.

Besides these contributions by the parties in interest, our legislation established Government support which becomes effective by means of subsidies or creating taxes for the benefit of those institutions.

This high proportion of resources is due not only to the numerous benefits granted to the worker, his family and successors but also to the generosity with which they are granted. According to well-based opinions this system needs to be restricted and harmonized and there are concrete initiatives in the economic policy of the Government for revising it.

7 Valdes Costa, R. and Garbarino, M. "La seguridad social. Régimen jurídico y financiero" in IV Semana Tributaria, Inst. Urug. de Der. Trib. Mont. 1964, p. 83.

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TAXATION IN ARGENTINA**

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III. EXCHANGE CONTROL

APPENDIX A: TABLE OF INCOME TAX RATES

I. INCOME TAXATION

A. INCOME TAXATION IN GENERAL

1. Residents (individuals and corporations)

According to Section 23 of the income tax law, a person is considered resident in Argentina when he has spent more than six months of the fiscal year inside the country.

* Of Arthur Young & Co., Buenos Aires Office.

** The article describes the state of the law as of 1967. The changes effective 1968 are not major. They are summarized in the 1968 issues of Tax News Service. (Ed.)

Persons abroad on official business — i.e., in the service of the national, provincial, or municipal governments—are considered, for the purposes of this section, as being inside the country. As will be explained later, the only importance of establishing whether an individual is an Argentine resident or not is for the purpose of determining whether he is entitled to certain allowances.

Corporations are considered resident when they have been constituted in the country, or when, having been constituted abroad, they have a permanent establishment within the country. For this purpose, Section 54 of the law defines "permanent establishment" as any establishment engaged in commerce, industry, agriculture, animal husbandry, mining, or other business provided it is organized in the form of a stable enterprise. It will be seen in the following that for corporations the fact of residence does not affect the determination of what constitutes taxable income but only affects the manner in which the tax is liquidated and paid.

Residents, whether individuals or corporations, are taxed only on Argentine-source income. The only circumstance under which foreign income may be taxed in Argentine is when it is distributed as a dividend by a corporation resident in Argentina.

2. Nonresidents (individuals and corporations)

An individual is considered nonresident if he has been both outside the limits of Argentina and not in the service of the national, provincial, or municipal governments for at least six months in a fiscal year. Corporations are considered nonresident if they neither are constituted in Argentina nor have a permanent establishment in Argentina.

Both kinds of taxpayers are subject to tax only on Argentine-source income—i.e., income earned within the country—and the tax is usually collected by way of withholding, since anyone paying Argentine-source income to a nonresident is obliged to withhold the corresponding income tax and is personally liable for the tax, jointly and severally with the beneficiary, in case of noncompliance.

B. TAXATION OF RESIDENT CORPORATIONS

Under the Argentine laws, persons desiring to engage in business activities can do so in any of the following legal forms:

1. as private individuals;
2. as ordinary partnerships ("sociedades colectivas");
3. as limited liability partnerships ("sociedades de responsabilidad limitada");
4. as corporations ("sociedades anonimas");
5. as ordinary silent partnerships ("sociedades en comandita simple");
6. as corporate silent partnerships ("sociedades en comandita por acciones"); or
7. as branches of foreign entities.

Ordinary and limited-liability partnerships are formed by a limited number of individuals (at least two and, in practice, seldom more than twenty) and are administered by the partners, the main difference between the two types being that in an ordinary partnership the partners are responsible to the extent of all their assets including private assets for the debts of the partnership, whereas in a limited-liability partnership, as the name implies, the partners' responsibility is limited to the extent of their capital investment in the partnership.

Corporations are similar to those existing in most countries — i.e., they are "capital entities," or companies in which the identity of the members is unimportant, all the

capital being represented by shares, which are in almost all cases extended to bearer. The administration is in the hands of a board of directors, elected at a shareholders' meeting for a period determined by the company's by-laws but which may not exceed three years and which usually is for only one year. A so-called "sindico" or statutory auditor is elected yearly by the shareholders to act as a permanent representative of the shareholders to review the board's activities. The "sindico" has no right to interfere in the administration of the corporation but is entitled to inspect the books, attend the board meetings, and veto any decision he considers contrary to the interests of the shareholders. Should such a "veto" take place, a shareholders' meeting must be immediately called to pass a final decision on the matter. A minimum of ten shareholders is required for the constitution of a corporation, but there is no maximum limit to the number of shareholders permitted.

All corporations are subject to a certain (mild) measure of Government control, but corporations whose shares are admitted for quotation in any stock exchange in the country are subject to the additional (much more severe) control of the stock exchanges themselves and also of a special Government body which can be characterized as the Argentine equivalent of the Securities and Exchange Commission.

Silent partnerships include both partners with unlimited liability, called "socios solidarios," and partners with limited liability ("socios comanditarios"). The latter may have a nominative participation (ordinary silent partnerships or "comanditas simples"), or their capital may be represented by shares, usually to bearer (corporate silent partnerships or "comanditas por acciones").

In either case the situation of the partners with unlimited liability (including the tax situation) is the same as the situation of partners in ordinary partnerships, whereas the limited-liability partners are assimilated to partners in a limited-liability partnership in the case of the "comandita simple" and to corporate shareholders in the case of the "comandita por acciones."

Any foreign business venture, whether individual or corporate, may establish a branch in Argentina. The liability of the branch is, in practice, limited to its assets in the country, although in theory it is also possible to sue the head office and its owners or partners, who will be liable for the branch's debts to the same degree as they are responsible for the debts of the head office, according to the law of the country in which the latter is located.

According to the legal form of the enterprise, the tax regulations vary. These variations are the following:

1. Entities taxed as corporations

As a general rule, it may be stated that the principles described in paragraphs (2), (3), (4), (8), and (9) below apply to all business enterprises, whether individual or corporate, regardless of the legal form adopted. Paragraph (5) indicates the various rules applicable in the different cases possible. Paragraph (6) refers only to entities which are taxed as corporations and paragraph (7) to branches.

According to Argentine income tax law, the only entities taxed as corporations (see paragraph (6) below) are the corporations proper ("sociedades anonimas") and the corporate silent partnerships ("comanditas por acciones") for that part of taxable income corresponding to share capital. Branches are subject to special rules (see paragraph (7) below).

2. Income subject to tax

Only that income meeting the legal defini-

tion of income is taxable, and then only if it is of Argentine source. Taxable income is defined as income of a periodic nature, such as share of profits, salaries, wages, fees, and other compensation received in payment for personal services of any nature; profits arising from the sale, exchange, or rental of any kind of movable or immovable goods, provided these operations are carried out regularly as a business and are not of an occasional nature; and interest, dividends and other income produced by investments. All profits of Argentine source not falling within the definition of taxable income—except for profit arising from the sale or exchange of bonds and shares, which is subject to a separate special tax—are subject to capital gains tax.

Profit or loss from sales of fixed assets employed in a business would be subject to capital gains tax in accordance with the rule given above, but by an exceptional rule in the tax law are subject to income tax, except when arising from the sale of land and/or buildings effected after two years of non-use in the firm's business, in which case they are capital gains and taxed accordingly.

3. Deductions

The general rule is that all expenses "made in order to acquire, maintain, and conserve income" are deductible from the respective income (Section 61). If expenses are incurred for the purpose of obtaining both taxable income and income not subject to tax, such expenses must be prorated in proportion to the respective income.

(a) The following expenses are specifically mentioned in the law as being deductible: interest on loans and debts and expenses connected therewith; direct taxes on income-producing goods or services and fines for nonpayment of same (except fines for fraud); insurance premiums; extraordinary losses due to "force majeure" and losses due to misappropriation and other frauds by employees, to the extent of the amount not covered by insurance; contributions to national, provincial, or municipal pension funds; entertainment and travel expenses; gifts to national, provincial, or municipal bodies and to properly recognized charitable institutions, including churches; depreciation (see (b) below); and special deductions for the encouragement of certain industries (see (8) and (9) below).

(b) As a general rule, urban land and buildings are depreciated at a rate of 2% on the valuation made for the purpose of land tax, for as long as the building is in use (even if more than 50 years). If the value of the land, however, exceeds 33% of the total fiscal valuation, a depreciation of 3% on the difference only is allowed. In the case of rural property, a depreciation of 3% on buildings only is allowed.

For machinery and equipment, as well as for land improvements and other installations, the general principle is that depreciation should be calculated on a straight-line basis, on the estimated life of the asset, disregarding any eventual scrap value. The tax authorities are willing to accept any rate, provided technical evidence is given as to its correctness in accordance with this principle. In practice, depreciation for machinery and equipment is generally calculated at 5% per annum, furniture and fixtures at 10%, and automobiles and trucks at 20% or, in some cases, at 25%. These rates presuppose use during a normal eight-hour-day's work, and may be adjusted proportionately if the enterprise or a section thereof is working more than one shift.

(c) No deductions are allowed for: living expenses of the owner and his family, interest on his own capital, or remuneration paid to the owner or his wife (There is an

exception in the event that she performs effective work for the business, in which case her remuneration must be reasonable and not exceed the amount paid to the highest paid employee who is not a relative of the owner); income tax and taxes of a capital nature, such as capital gains tax, inheritance taxes, land improvement contributions, and taxes on unused property; amounts set aside for reserves, except when specifically allowed by the law; depreciation of goodwill, trademarks, and similar assets; gifts to persons, natural or corporate, not recognized as charitable institutions; and losses resulting from illegal activities.

(d) Normally, deductions are permitted for the cost of interest, royalties, and management fees, whether paid to affiliated companies or to outsiders. However, such payments are not deductible when made by a branch to its head office. In the case of management fees for services rendered outside the country, Argentine income tax must have been withheld on the payment made, or else the payment may not be deducted. Interest and royalties paid abroad are subject to withholding tax in all cases.

4. Operating losses

Operating losses may not be carried back, but they may be carried forward for ten years and offset against the taxable income of those years.

5. Liquidations and mergers

(a) The annual profits of entities not taxed as corporations are always deemed to have been distributed to the respective owners, and the corresponding tax must be paid by them. No special situation arises, therefore, in the case of liquidation. On the other hand, taxes on profits made by entities taxed as corporations are paid by the company, and a further additional tax is collected when distributed—also from the corporation and never from the shareholders. When the entity is liquidated, this additional tax is payable on the excess of the amount received by the shareholders over the paid-up capital (increased by the amount of any tax-free revaluations allowed).

(b) There are no provisions for tax-free liquidations, but in the case of closely-held corporations it is possible to transfer the assets and liabilities of the corporation to a small number of entities, each to be held by a group of shareholders, thus effecting in practice a tax-free liquidation.

(c) In the case of a merger of two or more existing entities, there are two possibilities: If the merger is effected at book value, no taxable profit arises, even though the value of the assets at the time of transfer may be greatly in excess of book value; if, on the other hand, the transfer is made at a price in excess of book value, the surplus becomes taxed according to the general rules, except where it can be proven that at least 80% of the original ownership has not changed, in which case no tax is payable on the transfer but the new book value is disregarded for all tax purposes (i.e., depreciation continues on the old cost, profits on sale are determined on the basis of this old cost, etc.).

6. Tax rates

Resident corporations are taxed at 33% of their taxable income; in addition, an emergency tax is currently in force, representing 15% of the income tax, thus increasing the effective rate to 37.95%. The corporation is also subject to an 8% tax on all dividends it distributes.

7. Branches

Branches are taxed as a general rule at 38.36% (this rather unusual rate is determined by adding to the 33% tax paid by resident

corporations an 8% dividend tax on the remaining 67%), which, with the emergency tax of 15% thereon, represents at the present an effective tax rate of 44.114%.

If evidence is presented showing that a branch is in reality owned by an individual or by partners having unlimited liability, however, the profits are taxed in the same manner as they would be if they had been earned directly by the nonresident individual owners.

8. Special industries

There are no special rates for different kinds of industries. There are, however, special rules for determining the taxable income for certain types of business, and there are tax concessions (see (9) below) for specialized cases.

Foreign shipping companies or airlines transporting persons and goods between Argentina and other countries are considered to make profits from an Argentine source, and thus are subject to Argentine tax equivalent to 10% of the total amount collected for performing such transport. Argentine companies of a similar nature, on the other hand, are taxed on all their income, regardless of where obtained. The first part of this rule may be modified (and has in fact been partially modified) by international tax treaties establishing reciprocal tax exemptions for foreign shipping companies and/or airlines. International news agencies are deemed to obtain profits from an Argentine source equivalent to 10% of the gross fee collected from Argentine users of such services, but they may submit proof that their actual profits are lower.

When persons or goods situated in Argentina are insured, the insurance must be carried by Argentine companies and is subject to Argentine taxes. When such risks are reinsured with foreign companies (which are not allowed to operate directly in Argentina), the total income tax payable by such companies is a flat 3.8% of the net premium paid for the reinsurance. This rate is now, in effect, 4.37% as a consequence of the emergency tax.

Profits accruing to foreign companies or to individuals residing abroad deriving from the exhibition or distribution of foreign films are deemed to be equivalent to 50% of the total amounts paid to such companies or individuals and no proof may be submitted to the contrary.

9. Concessions

For many years Argentina granted a significant tax concession to all taxpayers engaged in industry, with the object of encouraging reinvestment of profits in the enterprise so as to increase its productive capacity. But as of January 1, 1965 this general concession was revoked, and it has been replaced by a law which applies to certain specified industries (those producing steel, petrochemicals, pulp and paper or engaged in construction work) and to most industries located in those zones of the country that are considered "poverty areas."

The most important concession granted to these favored industries is the allowance of a special deduction relating to the amounts invested in the acquisition of new fixed assets employed for the production of goods. As a general rule, an amount equivalent to 50% (in some cases this percentage is increased to 100% and in others reduced to 10%) of such investments is deductible from the taxable profit. It should be realized that this is not a special depreciation allowance on such assets but a direct deduction for the purpose of determining the taxable income: the full value of these assets can still be depreciated in the normal manner over the number of years corresponding to their useful life.

There are other concessions granted to these selected industries, but the rules are rather lengthy and complicated and for the most part refer to the assessment of other taxes than income tax.

C. WITHHOLDING TAXES ON PAYMENTS TO NONRESIDENTS

Under Argentine income tax law, nonresident corporations and nonresident individuals are treated differently. It should be remembered that all nonresidents are taxed as corporations, except when evidence is submitted that the income has been earned by a person or group of persons with unlimited liability.

1. Nonresident corporations

In this case, the withholding of tax occurs when income is paid, remitted, or merely credited to a nonresident corporation calculated on the gross income, although in certain cases a deduction is allowed with respect to assumed expenses. The rate of tax has been mentioned previously—i.e., 38.36% or, with the emergency tax, 44.114%.

In those cases where no immediate payment is intended, it is a common practice in Argentina not to credit the income (say, interest or royalties) to an account in the name of a nonresident but instead to credit an "impersonal account," thus rendering the amount deductible as an expense of the corporation making the credit but deferring the withholding of tax until the date of actual payment or credit to current account. It should be kept in mind, as has already been indicated, that tax on dividends is paid by the corporation and not by the recipient; therefore dividends are not subject to withholding tax when paid or credited to nonresidents.

2. Nonresident individuals

Nonresident individuals may be of two different classes from the point of view of Argentine taxation on income: (a) they may have a legally and formally nominated representative in the country, or (b) they may operate entirely from abroad. The rate of tax applicable is generally the same, but there are important differences in the determination of the amount on which the tax is calculated and the time and manner in which it must be paid.

(a) Payments to legally and formally nominated representatives in the country

When payment is made to a representative of a nonresident individual, there is no obligation to withhold tax, except in the case of payments to members of boards of directors or other administrative bodies meeting abroad, and of payments of fees for technical, financial, or other advice rendered from abroad. In these exceptional circumstances, the rules under (b) below apply. In all other cases, it is the duty of the representative to present a tax return on behalf of the nonresident in the same form and at the same time as for residents (see E below), with the sole exception that the basic tax-free allowances for living expenses and family deductions are not applicable to nonresidents.

(b) Direct payments to nonresident individuals

When income is remitted abroad, paid locally to a nonresident individual, credited to a foreign resident not having a representative in the country, or credited or paid to a nonresident having a representative in those exceptional cases specifically excluded from the rules under (a) above, the person remitting, paying, or crediting the income must withhold income tax. In the case of interest, royalties and technical service fees the tax is applied to the gross payment less a deduction in respect of assumed expenses. In the case of

the fees excluded from (a) above, the rate of tax applicable is again 38.36% or, with emergency tax added, 44.114%. In certain other cases, such as rental payments on land and partnership profits, withholding is required according to the general basic rates and progressive surtax applicable to resident individuals (see E below). Where more than one payment is made during a calendar year, previous payments must be accumulated to determine the amount of tax to be withheld, and previous withholdings deducted from the result.

As already stated, in the event that it would be advantageous to do so, nonresidents are allowed to submit evidence that they operate in their individual name or as members of partnerships with unlimited liability, in order to become eligible for these rules rather than having tax liquidated in accordance with the rules applicable to nonresident corporations.

It is important to remember that tax on dividends is paid by and is a liability of the corporation and not of the shareholder.

D. OTHER INCOME TAX MATTERS

1. Tax returns

All residents, as well as all local representatives of nonresidents, must file annual tax returns. In the case of corporations and other entities taxed as such, filing must take place within five months after the end of the corporation's fiscal year. Business enterprises not taxed as corporations must file a return within three months after the end of their fiscal year, but these returns merely adjust the fiscal income to taxable income and determine how the latter is distributed among the partners or how much income the individual owner must declare. The partners or individual owner must include this declared income in their own individual tax return(s) for the calendar year in which the fiscal year of the business ended. Individuals must file their tax returns not later than April 21 of the following year.

2. Audited statements

The tax authorities have the right to demand that all business enterprises exceeding a certain amount of capital or a certain amount of total annual sales present audited statements with their tax returns; this is done on a provincial basis, since audited statements are required only in those provinces in which the accounting profession is well organized (this is now true of the greater part of the country, including all major cities). The requirement is independent of the nature of the enterprise and consequently audited statements (of the branch's operations only) must be presented by branches of foreign corporations in the same circumstances as by local enterprises.

3. Payments on account

After the first year of operation, corporations must make payments on account of the current year's tax. These payments, each equal to one-quarter of the total amount of tax paid for the previous year, must be made during the eighth, tenth, and twelfth months of the firm's fiscal year. The firm is allowed to submit evidence that profits have been materially reduced in comparison with those earned in the previous year and to claim as a consequence a reduction of or complete exemption from the obligation to make such payments on account.

E. TAXATION OF RESIDENT INDIVIDUALS

1. Income subject to tax

Under B(2) above, the legal definition of income has been given and the types of income that are taxable have been enumer-

ated. It should be mentioned once more that the tax on dividends is paid by the corporation and these are therefore not taxable in the shareholders' hands.

2. Deductions from income

The provisions applicable to individuals are the same as those that apply to corporations (B(3) above).

3. Exemptions

Resident individuals (but not nonresidents) are entitled to deduct the following amounts from their "taxable income" in order to arrive at the "income subject to tax" (a nice distinction contained in Section 5 of the income tax law):

(a) General tax-free allowance: As of January 1, 1967, resident individuals are entitled to deduct $ 192,000 in all cases and $ 300,000 if they have obtained income arising out of personal work. This deduction is increased to $ 504,000 if the income is obtained as a public employee, or for other work performed under orders of another (this includes all workers, employees, and managers, but not partners or members of a board of directors), or as a working partner in a cooperative, or, finally, as a pension arising from work performed in the past. (The "$" sign, used here and elsewhere in this summary, always means Argentine paper pesos.)

(b) Family allowances: These have been increased as of January 1, 1967 to the following amounts: wife, $ 96,000 per annum; each son or stepson who is under 22 years of age or incapacitated for work, and each daughter or stepdaughter, $ 48,000 per annum; other male descendants, if under 22 years of age or incapacitated for work, and other female descendants; all ascendants; stepfather and stepmother; brothers-in-law and sons-in-law, if under 22 years of age or incapacitated for work; sisters-in-law and daughters-in-law, $ 18,000 per annum, each. These deductions can be claimed for these persons only if they have no more than $ 192,000 yearly income, and only by the nearest relative having taxable income. If there are two or more relatives with the same degree of relationship, they may all claim an allowance for the same person.

(c) The amount of medical expenses incurred by the taxpayer, for himself or any of the relatives he can claim as a deduction under (b), up to a maximum of $ 50,000 per person; if no evidence can be presented in support of these expenses, a deduction of $ 6,000 per person is allowed without proof.

(d) Burial expenses, up to a maximum of $ 50,000 per person.

4. Tax rates

The rate of tax for individuals, which is the same for residents and nonresidents, is determined on a sliding scale depending on the total income subject to tax, and varies between 8% (for income under Arg. $ 50,000) and 50% (for income over Arg. $ 5,000,000). (See Appendix I for a complete table of rates.)

Emergency tax, equivalent to 15% on the total income tax payable, less Arg. $ 50,000, must be added to the above.

5. Payments on account

Individuals, like corporations, also have to make, during each calendar year, payments on account of the current year's tax, based on the total tax determined for the previous year, less all withholdings suffered. Payment must be made not later than the 15th day of July, September, and November of each year. Evidence of a lesser income may be submitted to claim a reduction and/or exemption from the obligation to make these payments on account.

II. OTHER FORMS OF TAXATION

A. EMERGENCY TAX

This tax has been covered above, as it is liquidated and paid together with the income tax. It consists of 15% on the total income tax payable in the case of corporations, and 15% on the total income tax payable less Arg. $ 50,000 in the case of individuals.

B. CAPITAL GAINS TAX

This tax is usually not paid by commercial enterprises but only by private individuals. Theoretically, it is a tax applicable to all profits made as a result of occasional transactions and not to income arising out of the normal trade of a business enterprise. The sale of fixed assets could, in theory, be considered the result of an occasional transaction; however, the income tax law, as previously stated, specifically subjects such profits to income tax, the only exception being the sale of land or buildings after two years of non-use in the firm's business.

Capital gains tax is payable at the rate of 10% on the difference between sale price and cost; expenses relating to the purchase or to the sale which are considered nondeductible for income tax purposes are deductible for the purpose of determining the capital gain. Land tax paid on unexploited property is considered a capital expenditure and is therefore a deductible expense for the purpose of determining the amount of capital gain to be taxed.

In order to compensate for the effects of inflation, charges to cost may be increased by 25% for each year from the year of purchase to the year in which the sale is made.

Capital losses may be offset against capital gains in the year in which they are incurred, or they may be carried forward to be offset against future capital gains for a period not exceeding ten years. They can never be used for reducing profits subject to income tax.

Capital gains tax is always calculated on a calendar-year basis, and returns must be filed no later than April 21 of the following year, regardless of the date of closing of the taxpayer's fiscal year.

In the case of sales of land and in a few other instances, tax must be withheld when the purchase price is paid and deposited within five days. This is a provisional payment; the final tax return must be presented as usual and the amount of this provisional payment deducted from the actual tax determined.

Capital gains tax is not deductible for the purpose of determining any of the other taxes payable in Argentina.

C. TAX ON TRANSFER OF SHARES

Before 1963, the benefits arising from the sale of shares were subject to income tax or to capital gains tax according to the general rules—i.e., they were subject to income tax when the sale of shares was part of the normal business of the taxpayer, and to capital gains tax in all other cases. A law promulgated in the latter part of 1962 made the transfer of shares, by sale, exchange, or similar gainful operations, subject to a special tax, and consequently exempted these operations from the two taxes mentioned above. Transfer of shares through non-gainful operations (gifts, inheritance) are exempt from all taxes, since corporations pay a substitute inheritance tax in lieu thereof (see D below).

The collection of this tax was left in suspense during 1963, and a rate of 0.5% was fixed for 1964 and of 1% for 1965 and 1966; the rate has recently been reduced to 0.25% for

1967 and subsequent years. The tax is imposed on the value at which the shares are transferred.

D. SUBSTITUTE INHERITANCE TAX

This tax must be paid by all business enterprises established in Argentina, regardless of their form of organization. It is fixed at 1.5% of the difference between assets and liabilities, adjusted in accordance with the income tax law.

A sworn declaration must be presented, and the resulting tax liquidated and paid, within five months after the close of the fiscal year of the business. A payment on account of the current year's tax, equivalent to 50% of the tax for the preceding year, must be made during the eleventh month of the fiscal year.

E. INSPECTION-OF-CORPORATIONS TAX

This tax must be paid only by corporations and not by the other entities which for fiscal purposes are frequently treated as corporations (e.g., corporate silent partnerships). It falls due on January 31 of each year and is calculated on the basis of the nominal value of the subscribed capital, at a fixed amount of Arg. $ 6,000 plus an additional $ 600 for each $ 1,000,000 of nominal subscribed capital or fraction thereof, up to a maximum of $ 40,000 per annum. Branches are also subject to this tax.

F. SALES TAX

This tax is payable only on the first sale made in Argentina of any product not specifically exempt, and it is liquidated in such a way that sales tax is paid only once on each product. The rate is, in general, 10% of the taxable amount, but some products are taxed at the lower rate of 3% and others are subject to higher rates, such as 15% and 20%. From the foregoing it follows that this tax applies generally only to importers and to manufacturers. Importers pay it on the total price realized on the sale of goods imported, or, when goods are imported for their own use, on the cost price. Manufacturers pay it on the sales price of the goods manufactured, after deducting therefrom the value of any raw materials, packing materials, etc., forming an integral part of the finished product, on which the tax has already been paid.

In addition to this deduction from the sales price, the amount of certain taxes which are deemed to be included in the sales price of the finished product (e.g., as internal revenue taxes on wines and liqueurs, proprietary drugs, etc.), trade discounts given directly to customers, etc. can also be deducted.

Importers and manufacturers who, in addition to the goods imported or manufactured, also sell goods bought locally (and which, therefore, have already been subject to sales tax) in the same state as bought, do not pay tax on the sale of these goods. Since these sales are not usually invoiced separately from those of goods subject to tax, nor carried in separate accounts in the firms' books, the law provides that the importer or manufacturer may deduct from total sales the amount of all local purchases of goods to be sold in the same state as bought, plus a percentage of net amount equivalent to the gross profit realized on the sale of such goods.

Since materials or goods purchased are not necessarily sold in the same year as bought, in some cases purchases may exceed sales; in such cases, the difference is carried forward, to be deducted from the next year's sales.

This tax must be liquidated on a calendar-year basis and the tax return must be filed, and the resulting tax paid, not later than February 28 of the following year. On the

25th of each month, from April to December, a provisional payment must be made on account of the tax for the current year. The amount of these provisional payments is established by applying to the gross sales of the months from January to September, respectively, the percentage determined by relating the total tax paid in the preceding calendar year to the total gross sales of that year.

G. INTERNAL REVENUE

Internal revenue is a tax imposed on certain products, and in Argentina it can be subdivided into two classes: (1) a tax that is calculated on the same lines and according to the same principles as the sales tax and (2) a tax that is calculated on a different basis.

Class (1) applies to matches, beer, toilet articles, luxury items (including jewelry and gold articles), tires, sugar, silk yarn and cloth, carbonated drinks (excluding soda and mineral waters), and other soft drinks and syrups. The rates applicable are in general 15% and 20%, but for some products a fixed amount per unit is charged.

Class (2) applies to tobacco, alcohol and alcoholic drinks (spirits), lighters, insurance policies, fuels, lubricating oils, playing cards, wines and ciders. The main difference between class (2) and class (1) is that in class (2) the tax is paid on the production rather than the sale of the respective articles, so that the mere possession of these articles without prior payment of the tax constitutes an infringement of the law. For class (2) articles, the tax is almost always established at a fixed amount per unit and has no numerical relation to the cost or sales price of the article; generally it must be liquidated every month or, in some cases, paid in advance through prior purchase of stamps or similar controls.

H. TECHNICAL EDUCATION TAX

This tax, formerly called the "industrial apprenticeship tax," must be paid only by manufacturers and is liquidated together with the sales tax on a calendar-year basis and not later than February 28 of the following year.

The tax amounts to 1% on all industrial salaries and wages, and on 50% of all administrative salaries and wages, but excluding all salaries and wages relating to sales, propaganda, and dispatch, which are not subject to this tax.

I. LUCRATIVE ACTIVITIES (GROSS TURNOVER) TAX

This tax, unlike those mentioned above, is not a national tax, but is imposed by the provinces and some municipalities, including the municipality of the Federal Capital. These taxes have to be paid in the place where an enterprise engages in gainful activities, either by selling in that particular locality or by having a factory, warehouse, etc. there.

Under an agreement between the various provinces and the municipality of the city of Buenos Aires (Federal Capital), 70% of the gross income is allocated between the various taxing bodies on the basis of the expenses incurred in their respective territories and 30% on the basis of the place where the income is actually obtained.

The exemptions, as well as the basic tax and surcharges applicable, vary considerably from province to province, but as a general rule it can be stated that the tax is fixed at about 1% of the gross receipts and that a surcharge, generally of 20% of the basic tax, is applied to corporations. Wages and salaries, but not professional fees, are the only type of income that is uniformly exempt

throughout the country.
Partial or total exemption from this tax, as well as from taxes on land (see K below) are granted by a number of provinces to "new" industries—i.e., those manufacturing goods not previously manufactured in that particular province.

J. STAMP TAX

Stamp tax is also a provincial tax, except in the Federal Capital, where a national tax is applicable.
This tax applies mainly to written contracts, and its amount varies from province to province, usually between 0.6% and 1% of the amount involved. In the case of renewable contracts, the taxable amount is usually determined on the basis of the total amount payable during the original period and one further renewal; if no date of expiry is set in the contract, the amounts payable in two years usually serve as a basis for calculating the tax.
In the Federal Capital and some provinces, stamp tax is also payable on certain accounting records, namely those referring to loans, deposits, and similar accounts, provided they bear interest. This type of tax is usually liquidated on a monthly basis, by means of a sworn return to be presented within the first 15 days of the following month, and the tax must be paid at the same time.

K. TAXES ON LAND

These taxes also vary from province to province and in many cases are supplemented by municipal taxes. As a general rule, they are payable on the basis of a special assessment value assigned to the land for this specific purpose only. This value used to be much less than the real value, but it is now readjusted periodically to compensate for the effects of inflation, and is fast approaching the real value.
The rate of tax varies according to the total value and/or extent of the land held, and in some provinces a surcharge is applied if more than one piece of land is owned by one person or if the owner is a corporation.

L. SOCIAL SECURITY CHARGES

Although theoretically they cannot be considered taxes, compulsory contributions must be made by both business enterprises and their employees to cover various fringe benefits which have a considerable influence on commercial and industrial costs in Argentina.
Such "social security charges," in their widest sense, include both regular contributions to certain funds and payments to be made directly to employees and/or workmen in case of dismissal, vacations, holidays with pay, etc.. For the purposes of this summary, we will, however, restrict ourselves to the former, which comprise:

1. Pension funds contribution
2. Family allowance
3. Contributions to "Instituto de Remuneraciones" and to "Fondo de Turismo"
4. Maternity law
5. Preventive medicine

1. Pension funds contribution

There are various pension funds, all of national extent and run as departments of a semi-autonomous entity forming part of the national Government, the two most important being the "Commercial Fund" and the "Industrial Fund." For the purpose of giving a general idea of the importance of these charges it is only necessary, however, to distinguish between the funds applicable to paid employees (so-called "dependent" staff) and those applicable to "independent"

persons. The former apply to all people having to work a definite number of hours or to report periodically on the use of their time, such as ordinary office employees, workmen, traveling salesmen, etc., and the latter to people who are paid fees for work done in their own time and at their own convenience, such as lawyers, auditors, etc. Directors usually are considered to belong to the latter class with respect to fees voted to them at the shareholders' meetings (though there are certain exceptional cases), but they are included in the former if they have a permanent post in the firm for which they are paid a monthly remuneration.

The rules vary slightly from one pension fund to another, but in general it may be stated that for "dependent" personnel the firm must contribute to the fund 15% of the total wages and salaries paid, and must retain from the employees and workers an additional 1.1%. (Payment of these sums to the fund must be made within the first 15 days of the following month.) In the case of "independents," the firm has no contributions to make nor any obligation to make retentions; the independent worker must pay his, or her, own contribution, which is usually between 11% and 15%, but there are certain limitations as to the minimum and maximum amounts to be contributed.

2. Family allowance

This allowance is in theory paid by the Government, but a contribution must be made by all employers in order to provide the necessary funds. In practice, the employer must pay directly to the employee the family allowance, which is equivalent to 10% of the minimum salary established by law ("salario vital minimo") for each family charge (wife and/or children under 15 years of age, and under 18 years in certain cases). On the other hand, a contribution to the general fund equivalent to 12% of all salaries paid, with a maximum of $ 3,600 per employee, has to be determined, and the employer either pays or claims the resulting difference.

3. Contributions to "Instituto de Remuneraciones" and "Fondo de Turismo"

These contributions are payable on the compulsory 13th-month's salary ("aguinaldo" or legal bonus) which must be paid to all "dependent" personnel at the end of every calendar year. They are liquidated together with the pension funds contributions which must be paid on the same legal bonus. Together the two contributions amount to 5% (2% for the "Instituto" and 3% for the "Fondo"), of which 3% is borne by the employer and 2% is withheld from the employee or workman. Payment to the appropriate Government institutions must be made not later than January 15 of the following year.

4. Maternity law

This law requires a quarterly payment of $ 6.40—half of which amount is borne by the employer and half by the employee—for each female employee of between 15 and 45 years of age. Payment must be made within the first 15 days of the following quarter.

5. Preventive medicine

The contribution toward the expenses of a National Health Service in charge of prevention of diseases is fixed at $ 2 for every employee, must be liquidated on the basis of the staff working during the month of July of each year, and must be paid together with the pension funds contribution corresponding to the same month (i.e., not later than August 15 of the same year).

III. EXCHANGE CONTROL

As of March 13, 1967, exchange control has again been abolished in Argentina. There still remain certain restrictions on the importation of goods, mostly in the form of heavy surcharges on an "ad valorem" basis. The proceeds from the export of Argentine goods must be negotiated within the country and within an established (short) period of time. All exports, except those qualified as "non-traditional" exports and a few others, are also subject to an export retention intended to prevent excessive profits arising from the difference between internal production costs and international market prices resulting from the current undervaluation of the Argentine peso. The Government has announced its intention to reduce these retentions gradually as the price level adjusts.

Appendix A

TABLE OF INCOME TAX RATES

NET TAXABLE INCOME		TAX PAYABLE		
Of more than A$P	Up to A$P	A$P	Plus	On the excess over A$P
—	50,000	—	8%	—
50,000	75,000	4,000	10%	50,000
75,000	100,000	6,500	12%	75,000
100,000	125,000	9,500	14%	100,000
125,000	150,000	13,000	16%	125,000
150,000	200,000	17,000	18%	150,000
200,000	250,000	26,000	20%	200,000
250,000	300,000	36,000	22%	250,000
300,000	400,000	47,000	24%	300,000
400,000	500,000	71,000	26%	400,000
500,000	750,000	97,000	28%	500,000
750,000	1,000,000	167,000	30%	750,000
1,000,000	1,500,000	242,000	32%	1,000,000
1,500,000	2,000,000	402,000	34%	1,500,000
2,000,000	3,000,000	572,000	38%	2,000,000
3,000,000	4,000,000	952,000	42%	3,000,000
4,000,000	5,000,000	1,372,000	46%	4,000,000
5,000,000		1,832,000	50%	5,000,000

ENRIQUE PIEDRABUENA*:

TAXATION IN CHILE

I. POLITICAL AND FISCAL BACKGROUND

The Chilean Constitution provides certain general rules on taxation which must be followed by law:

1. The Constitution provides that public burdens must be uniform for all taxpayers. No law may be enacted which would result in discrimination between similar taxpayers.
2. Only the law may impose or authorize a tax, whatever its nature may be, and no authority may establish or levy any tax which is not based on a law, even in the case of an emergency.
3. Only the law may establish the basis for the application of taxes, including the rates, which may be fixed, proportional or progressive.

The Constitution also follows the traditional separation of power between the Executive, Legislative and the Judiciary.

Chile is a united as opposed to a federal republic. The laws, therefore, apply to the whole territory unless it is expressly provided to the contrary.

Chilean currency is the escudo (E°). One U.S. dollar is equivalent to seven escudos at the brokers' market rate at this date.[1]

II TAXES ON INCOME

A) GENERAL DESCRIPTION

The law establishes various types of taxes, as follows:

i) Category tax[2]

First Category: This tax is levied on income derived from capital investments and businesses, whether the recipient is an individual, a partnership, a branch of a foreign concern, a corporation, etc.

Second Category: This tax affects income earned by employees and professionals.

ii) Global complementary tax (Surtax):

This tax is applied to all individuals resident in Chile on total income earned however classified in the various categories.

iii) Additional tax

This tax is applied to nonresidents (individuals or entities) doing business in Chile through branches or any kind of permanent establishments or receiving payments such as dividends, royalties, fees for technical assistance, interest, etc.

iv) Capital gains tax

This tax is applied to profits obtained by individuals or entities on the transfer of certain properties such as real estate, mining properties, shares in a partnership, etc.

It should be noted that residents in Chile pay

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1 January, 1968.

2 It is the Government's intention to set up a single tax embracing the entire personal income, abolishing the categories.

taxes on their total income regardless of origin and that nonresidents only pay on income attributed to Chilean sources. An individual is considered to be resident in Chile if he stays physically in the country more than six months in a year, or more than six months in two subsequent years, (for instance, if an individual were in Chile for four months in 1967 and four in 1968, he would be considered as resident as from 1968). Legal entities are considered residents when constitued or domiciled in Chile and therefore branches of foreign concerns are considered nonresident taxpayers and are obliged to pay taxes on local income only.

B) FIRST CATEGORY TAX

Income derived from real estate (urban or agricultural), investments (except dividends), commercial, industrial or similar activities, is taxed under this category.

Rates applicable on net taxable income are the following:

Individuals, partnerships, branches of foreign corporations, etc.	20%
Corporations	30%

In the case of enterprises other than corporations or branches, a portion of the net taxable income is considered entrepreneur's salary and is taxed at the rate of 3.5%.

The law does not give a comprehensive definition of taxable income but does lay down how to arrive at net taxable income as follows:

i) Receipts not qualified as income due to their nature, e.g. capital contributions or simply because they are exempt by law, e.g. some indemnities, capital gains derived from the sale of corporate shares etc., must be deducted from all revenues in order to determine gross receipts.

ii) All expenses paid or incurred in the production of income such as interest, taxes other than income or real estate taxes, depreciation charges, salaries, wages, rents, fees, etc., must be deducted in order to arrive at net income.

iii) There are some additions and special rebates for the determination of the net taxable income. Examples of additions would be provisions for the payment of income tax charged to operations, real estate taxes paid, capital losses (as opposed to capital gains), etc.

Examples of special rebates would be profits obtained from another enterprise (in order to avoid double taxation), capital gains (which are taxed independently), exempt income and the charge against profits of up to 20% of the income previously determined and which is a consequence of the system allowing revaluation of the net worth devoted to the business.

Due to the permanent inflation which has affected the Chilean economy, the law embodies a compulsory system for the revaluation of net worth of businesses. For a better understanding of this principle we give the following example:

If assets amount to E° 1,000,000, liabilities to E° 300,000 and profits for the year to E° 200,000, the net worth is E° 500,000 (E° 1,000,000 less E° 200,000 and E° 300,000). Assuming that the rate of inflation for the year is 20%, the tentative revaluation would be E° 100,000 (20% on E° 500,000). This revaluation would have to be distributed following a strict order determined by law:

a) fixed assets must be revalued at the same rate as current inflation—for example, 20% on E° 200,000, representing an added value to the assets of E° 40,000, which must be credited to a special reserve;

b) securities must be revalued at stock market-

prices and credited to the same special reserve. Assuming a revaluation for this item of E° 10,000;

c) the remainder could be charged against profits up to 20% of the net income already determined. In the example we have taken E° 50,000 of the potential revaluation of E° 100,000 and we therefore have a remainder of E° 50,000, but as the limit is 20% of E° 200,000, that is E° 40,000, the excess of E° 10,000 cannot be used and is lost.

Taxes payable on income in local currency must be readjusted to coincide with the rate of inflation during the reported year with the exception of taxes already withheld which are previously deducted as tax credits.

Real estate taxes paid during the year are also allowed as credits against the first category tax payable.

Generally accepted accounting practices applied consistently are accepted for tax purposes unless the law or special regulations issued by the Tax Bureau provide to the contrary. For instance, only an accrued method is allowed for tax purposes under this category. The use of LIFO (method of evaluation of inventories) is under discussion.

C) SECOND CATEGORY TAX

The remunerations earned by employees and workers are taxed under this category at a rate of 3.5%. Only a few allowances are not considered as remunerations, e.g., family allowances, travelling expenses and social security contributions made by employees. There are no deductions allowed for expenses actually incurred in production of income, not even in the form of standard or blanket deductions.

Pensions are also taxed at the rate of 3.5%.

Net income derived from independent professional activities (professionals who are not employees) are taxed at the rate of 7%.

Gross fees paid to directors of corporations are taxed at a rate of 20%.

Income under this category is always determined on a cash basis.

Taxes payable on income in local currency are also readjusted in accordance with the rate of inflation with the exception of taxes already withheld.

D) GLOBAL COMPLEMENTARY TAX (SURTAX)

This tax is applied to individuals with residence or domicile in Chile on their total income from any source.

For calculation of gross income it is necessary to add all income accrued and received under the two categories already mentioned. In addition, dividends not taxed in the categories must also be included. To arrive at net income, category income and real estate taxes must be deducted.

Applicable tax rates range from 10% for the first bracket to a maximum of 60%. Income brackets are expressed in minimum salaries which are readjusted yearly. Once the tentative surtax is calculated, tax credits for dependents are deducted (spouse, children, etc.) including a tax credit for the taxpayer himself. All these credits are expressed in terms of a percentage of the minimum annual salary.

This tax is also readjusted in accordance with the cost of living index for the year declared, on that part of the income earned in local currency.

E) ADDITIONAL TAX

This tax affects fundamentally, and at a rate of 37.5%*, nonresidents with an income

* Basic rate of 30% plus surcharge of 7.5%. The surcharge expired in December 1967, but an extension of it is pending in Congress.

derived from Chilean sources. Tax is levied on the following income:

i) Net taxable income from Chilean sources obtained by branches and any other type of permanent establishments of foreign concerns doing business in Chile.

ii) Dividends paid or credited to nonresidents. No deductions are allowed and the tax must be withheld by the payer.

iii) Royalties for the use of licenses, trademarks and similar property, fees for technical assistance, interest, remunerations for services rendered abroad, paid or credited to nonresidents. No deductions are permitted and the tax must be withheld. Taxation of remunerations for services rendered abroad obtained by nonresidents constitutes an exception to sound general principles. As nonresidents generally take exception to the payment of this tax, it has become common practice for the payer of the remuneration to agree to absorb the tax. The procedure followed is for the remuneration payable to be grossed up so that after withholding tax the net amount agreed upon may be remitted to the nonresident. For example, a remuneration of E° 100 would normally incur a tax of 37.5%, but should the tax be absorbed by the payer the remuneration payable must be increased to E° 160, representing a tax of 60 (37.5% × 160).
Interest remitted to foreign banks or foreign public financing agencies, etc., under certain conditions is tax exempt.

iv) Additional tax also applies to Chileans and individuals domiciled in Chile who leave the country for more than one year.

F) CAPITAL GAINS TAX

This tax is applied on gains derived from the transfer of real estate; mining properties; shares in partnerships; rights or quotas in a joint ownership; fixed assets; water rights; copyrights, patents and trademarks and goodwill. It is also levied on compensation received for damages suffered by fixed assets.
In order to determine the gain the original value must be increased in a percentage equal to the rate of inflation and decreased by the accumulated depreciation. The resulting figure is compared with the transfer value obtained. The actual difference constitutes a capital gain and is taxed as such; the negative difference is treated as a capital loss and may be applied against capital gains obtained in the same year or in the following two years as from the date of the transaction.
The applicable rate is 20%, nevertheless in the case of property acquired prior to February 14, 1964 and transferred afterwards, the rate is 8%.

G) HOUSING TAX

A special law imposes an income tax for housing purposes. Businesses classified under the First category of the Income Tax Law are subject to a tax of 5% on their net taxable income. However, taxpayers can avoid this burden by applying the amount of the tax to certain investments related to housing plans such as erection of low cost houses for their personnel, loans granted to personnel for the erection or acquisition of low cost housing, etc.

III PERSONAL CAPITAL TAX

A) TAX ON PRESUMED INCOME

This tax was introduced in Chile on a temporary basis for the years 1965, 1966 and 1967. Nevertheless it is summarized here as an extension of this tax is pending in Congress.
A fixed-base capital has been adopted for the years taxed. The tax assessment of each year was based on 1964 capital and underwent a yearly readjustment in accordance with the increase in the cost of living. For the determination of the 1964 capital, different goods and assets owned by the taxpayer, such as real estate, credits, shares, participation in partnerships and other enterprises, vehicles, etc., were considered after deducting the liabilities related to the assets declared. Domestic furniture, tools pertaining to the occupation of the taxpayer, cash, bank deposits, etc., and the liabilities related to these assets were excluded for the determination of capital.
Income on net personal capital is presumed to be 8% thereof, and this income is taxed in accordance with a graduated scale of rates ranging from 20% to 35%.
A credit equivalent to 50% of the surtax declared in the same year is applicable against the tax payable on presumed income.
Individuals not resident or domiciled in Chile are affected by this tax only on net capital owned in the country. Foreigners, domiciled or resident, who have remained in the country for less than three years are also taxed but only on their capital in Chile.
Net personal capital determined for 1965 has been readjusted for 1966 and 1967 in accordance with the increase in the cost of living index.

B) REAL ESTATE TAX

This tax, at a rate of 2% on official assessed valuations, is applicable to:
a) agrarian real property, only on the potential value of the land;
b) other real property, on the total value of the land, buildings and accretions except in the case of property devoted to industry, mining and commerce in which case buildings and machinery are excluded from the basis of assessment.
Official valuations are revised from time to time. In the meantime annual readjustments of the values are applied, in case a) consideration being given to the increase of the national agrarian income, and in case b) mainly to the increase in the cost of living.
The last general assessment was made in 1965 and should be effective until 1974. The agrarian assessment was based on the aerial photography method.

C) VEHICLES TAX

There is a license tax, the rates ranging from 0.75% to 6% of the official assessment. It may be classified as a personal capital tax.

IV SUNDRY TAXES

A) SALES AND SERVICES TAX

i) Sales tax is applicable to first and all successive sales, exchanges or transfers of tangible personal property or rights thereon. The general rate is 7% but there are a number of different rates applied to certain goods—e.g. Luxury goods pay 20%.

ii) Services tax is levied on remunerations received for the rendering of services or similar business activities. The general rate is 15%. This tax is not applicable to remunerations earned by individuals who are employees or professionals.

B) STAMP TAX

A special law lays down taxes applicable to a large number of written transactions and documents other than contracts taxed by the sales and services tax. There are fixed and ad valorem rates.
The main tax under this law is 4% applicable to real estate transfers.

V TAXES ON FOREIGN COMMERCE AND EXCHANGE

A) CUSTOMS DUTIES

Actually there are only taxes on imports.
Chile is a signatory of the General Agreement on Tariffs and Trade (GATT) and applies the Brussels Nomenclature (NAB).
Duties are in general assessed on an ad valorem basis; exceptionally there are duties assessed on a weight basis.

B) FOREIGN CURRENCY TRANSFER TAX

Generally a tax at the rate of 10% is applied on the transfer of foreign currency made in the broker's market. (There are two official exchange markets—bankers' and brokers').

VI SOCIAL SECURITY CONTRIBUTIONS

Within certain limitations imposed by law, total contributions payable by employers, employees and workers are as follows:

Payable by employer	42.98%
Payable by employee	12.75%
Payable by employer	39.25%
Payable by worker	8.85%

HERNANDO DE LAVALLE VARGAS:

PERU: TAXES AND INCENTIVES FOR DEVELOPMENT

The Peruvian Taxation System, coordinated and systematizated according to the terms of Law 7904, structured in the basis of affecting net income received by natural persons (individuals) or enterprises in the Country (being understood by net income the gross income after deductions specifically established by said Law) through: a) specified taxes commonly denominated basic ones instituted in function of the nature of the income; and b) of the taxes denominated complementary ones assessed on the net income after deduction of the basic taxes, fixed taking into consideration not the nature of the income subject to the basic tax but the domicile of the recipient, excepting the case of dividends on the bearer shares and of the interest including those paid by the bearer bonds. For those specified within the category of complementary tax, the corresponding specific rate has been developing through the very lengthy additional legislation always as a consequence of the pressure from the public sector to the legislature in order to obtain major fiscal income. This has gone to such an extreme that today it constitutes a complexity that can not properly be framed within the traditional taxation system.

With the purpose of accelerating the industrialization process of the Country, during the past 10 years laws have been passed, on the other hand, that constitute an evident incentive to the mining, agricultural and industrial expansion of the Country, permitting in some cases through the pertinent contracts, the development of such activities benefitted with total exemption of income tax, in others substantial reduction of said taxes and in all cases allowing the reinvestment of profits in percentages which vary regarding the geographical location of the industry, this with the special purpose of encouraging at the same time a decentralized development of the economical activities of the Country.

This work is a résumé of the most important dispositions prevailing today, in connection with the two above referred subjects. For a better guidance, this summary is divided in the three following Chapters:

CHAPTER I: Income Taxes

CHAPTER II: Other taxes

CHAPTER III: Laws to promote the economical and industrial development of the Country.

CHAPTER I

INCOME TAXES

Income taxes are governed by Law 7904, which is the basic law on taxation. Succeeding laws have altered rates and established new taxes. These include Nos. 9245, 9703, 10416, 10813, 13051, 13053, 13270, 13311, 13503, 13512, 13513, 13527, 13528, 14439, 14729, 15228 and 16900, among others. The right to collect the taxes referred to in these laws prescribes in five years, with the exception of the tax on income derived from capital, for which the prescription period is ten years. The prescription period for omissions in compliance with tax obligations is fifteen years.

Income payable in foreign currency and subject to income tax under these laws must pay the tax corresponding to the same currency of origin.

Account books must be legalized by the tax authorities if the volume of business is greater than $ 250,000.00 or the capital is over $ 100,000.00. Any claim must be submitted to the Superintendency of Taxes, which will settle it in due course. Appeal from the decision may be taken to the Superior Council on Taxes, which exhausts administrative action, but further recourse may be had to the courts.

The Industrial Promotion Law (No. 13270) granted the industries, subject to the same, the right to revaluate their industrial assets in the case a devaluation of the peruvian currency in excess of 5% per year. Similar provision was included in Law 16900 in favor of other industrial and commercial concerns not protected by Law 13270. Also new article 56 of the Mining Code contemplates the right of revaluation of the miners even in cases in which devaluation does not reach the minimum of 5% per year. In all of the above cases revaluation is voluntary and may take place within the limits established by the law against payment of the corresponding tax.

Income taxes in force today are the following:

Taxes on income derived from capital investment (capital movible).

Taxes on industrial and commercial profits.

Taxes on rural and urban real estate.

Progressive taxes on income.

TAXES ON INCOME FROM CAPITAL INVESTMENT

This tax affects income derived from credit operations received by any individual or collective person within Perú or elsewhere. The tax is levied on the full amount of the interest without deduction of any kind. Payment of this tax is not required from entities that keep their books according to law, for credit operations, provided such income is specifically included as part of the gross receipts in computing the tax on profits.

The present rates of this tax are contained in Law No. 10813:

interest	tax
Up to 9%	12%
From 9 to 12%	15%
Over 12%	19%

The tax of 1% for unemployment (prodesocupados) is payable together with this tax.

In accordance with Law 15228 corporations may issue bonds on which the interest is exempt from this tax and the supplementary tax, provided they are issued in soles, the period of amortization is more than five years, and the rate of interest is not higher than 9%.

Loans granted from abroad, directly or through local banks or financing institutions whose interest rate is not higher than 9% per annum and that are devoted to the economic expansion of the country and registered as such with Banco Central de Reserva del Perú are exempted from all Peruvian taxes in accordance with Law 16028.

TAX ON INDUSTRIAL AND COMMERCIAL PROFITS

This tax affects profits produced by the labor of man jointly with capital. The tax is payable on profits derived from banking, mining, agricultural, commercial and industrial activities within the country, whether by corporations, branches of foreign

companies, limited companies, or individual merchants.

Profits subject to tax are defined as the difference between the total gross receipts and the value of expenses, depreciation, and deductions, including the following:

a) Wages and salaries of agents, managers, employees, etc.;

b) Remuneration to members of boards of directors of companies, provided this does not exceed 6% of the net profits and also bonuses and gratifications;

c) Amounts invested in repair of the existing plant, but not amounts used for expansion;

d) Cost of raw materials used in the industry, materials used therein, and the cost of goods constituting the business;

e) Rents, freight charges, advertising expenses, lighting, telephone, judicial expenses, etc.;

f) Payments of fiscal, regional, municipal taxes, and others, but not foreign;

g) Commissions paid to collectors, agents, etc.;

h) Amounts expended for insurance or reinsurance of assets and against risks, and covering work accidents of personnel;

i) Amounts representing depreciation on buildings, machinery, furnishings, etc., owned by the business;

j) Losses incurred by the business during the two preceding fiscal years;

k) A reserve for duly accredited uncollectible debts.

Law 16900 established the following rates on commercial and industrial profits:

Up to			$ 10,000	5.5%
From $	10,001	to $	20,000	9.9%
From $	20,001	to $	30,000	13.2%
From $	30,001	to $	50,000	16.5%
From $	50,001	to $	70,000	19.8%
From $	70,001	to $	100,000	23.1%
From $	100,001	to $	200,000	26.4%
From $	200,001	to $	300,000	28.6%
From $	300,001	to $	500,000	30.8%
From $	500,001	to $	1,000,000	35.2%
From $	1,000,001	to $	5,000,000	37.4%
From $	5,000,001		and over	38.5%

The tax of 2% for unemployment (prodesocupados) is payable together with this tax.

Royalties paid by a Peruvian individual or collective person to a foreign individual or collective person are considered as profits in assessing the tax on industrial and commercial profits.

Pursuant to Law 16900 profits in the mining industry are taxed in accordance with the following scale:

From $	30,000	to $	200,000	11 %
From $	200,001	to $	500,000	16.5%
From $	500,001	to $	1,000,000	22 %
From $	1,000,001	to $	5,000,000	27.5%
From $	5,000,001		and over	38.5%

Mining profits which do not exceed $ 10,000.00 in a year are taxed at the reduced rate of 5%.

In the third chapter of this summary we will refer to certain incentive laws promulgated with the purpose of inducing the expansion of the industrial, agropecuarian and mining activities. Such laws have granted tax concessions in the case of industries devoted to manufacturing basic products and to activities related to mining and agropecuarian exploitation and also permit a reinvestment of the profits obtained in the expansion or diversification of the said activities and those ones performed by the industry in general.

TAX ON INCOME FROM REAL ESTATE

According to the law, rural real estate (predio rústico) is any property devoted to agricul-

tural, stock-raising, or forestry use; urban real estate (predio urbano) is property located in a town and used for housing or for commercial, industrial, or other purposes.

The tax imposed is 7% of the net annual income, net income being defined as the gross income for the preceding year less a deduction of 25% for urban property and of 10% for rural property, as well as the interest on mortgages payable by the owner, if not deducted from other income.

If the property is occupied or used by the owner an estimated annual value is placed thereon; in the case of urban property this is fixed at 4 to 8% of the value assigned to the property by the tax authorities, and for rural property it is 3 to 6%.

This tax in the case the real property belongs to a juridical person is considered as paid on account of the Industrial and Commercial Tax.

PROGRESSIVE SUPPLEMENTARY TAX ON INCOME

The tax is imposed on every resident, national or foreign, who receives income originated in Perú or abroad. A person is considered as residing in Perú if he remains therein for six consecutive months or more.

The tax is imposed on the total amount of the net annual income, for the preceding year, in excess of $ 30,000.00 received by an individual person. The net income is computed by totaling all forms of income of such person, with the following deductions permitted:

a) Family deductions:
- $ 30,000.00 a year for the spouse
- $ 18,000.00 a year for each child, descendant, or parent supported by the taxpayer
- $ 9,000.00 for each brother or sister supported by the taxpayer.

If there are more than two members of the family supported by the taxpayer, the deductions are increased by 50%, and doubled if there are more than four. The deduction for a child covers a male up to 21 years of age or while still a student, and females as long as they are unmarried, widowed or divorced. The same limitations apply to brothers and sisters.

b) Losses incurred by the individual person during the year that have not been taken into account in computing the tax on industrial and commercial profits and which are derived from the direct operations of a commercial, agricultural, industrial or mining enterprise.

c) Taxes paid under other categories, except stamp taxes, registration fees, capital gains tax, and property transfer tax.

d) Contributions made to public institutions engaged in welfare activities, in certain cases.

e) Payments for medical and hospital services.

The prevailing rates of the supplementary tax of the progressive tax are the following:

Up to			$ 30,000	exempt
From $ 30,001	to	$ 35,000		7%
From $ 35,001	to	$ 40,000		11%
From $ 40,001	to	$ 50,000		13%
From $ 50,001	to	$ 60,000		16%
From $ 60,001	to	$ 70,000		20%
From $ 70,001	to	$ 100,000		25%
From $ 100,001		and over		30%

FIXED RATE SUPPLEMENTARY TAX

This tax is applicable to individual and legal entities domiciled abroad, on income obtained in Perú and to dividends on shares and interest on bonds. Such nonresidents are defined as: (a) a person who, having a permanent residence abroad, has remained in Perú less

than six continuous months in the year and (b) a person who, being domiciled in Perú, has been continuously absent from the country for more than a year.

Dividends on nominative shares are taxed 26% if paid to nonresidents or to foreign or Peruvian corporations, and 21% if paid to individual residents; shares issued to bearer are taxed 36%. Bearer bonds are taxed at the rate of 16%. Interest paid to foreign residents or corporations is taxed 20%, but interest paid by a branch to its principal office outside the country is taxed at 25%, without prejudice to payment of the tax on interest from invested capital.

Yearly profits that are not distributed or capitalized within a 6-month period following the date of the closing of the fiscal year are subject to a 15% charge to be considered as an advance payment to the dividend tax. Capitalization of profits within the 6-month period following the date of closing of the fiscal year is subject to a 10% tax in lieu of the tax on dividends.

Net profits derived from business established in Perú by nonresidents are subject to a fixed rate of 20% for individuals and 21% for companies, in addition to the basic tax. Income of such persons and entities derived from noncommercial professions, from remuneration for services, and rentals from rural or urban property is subject to a fixed rate of 25%.

Branches of foreign companies pay the tax yearly, whether profits are remitted or not. The tax is assessed on the taxable profits of the branch, less the corresponding profits tax that is payable.

CHAPTER II

OTHER TAXES

Stamp Taxes

The stamp tax is essentially applicable to documents, the amount normally depending on the class of document. In general, all documents indicating payment of a sum of money or an obligation to pay such a sum or that are used to record cash entries in account books, are subject to this tax. Provisional documents as well as duplicates of documents are also subject to the tax.

The stamp tax rate for receipts for sales or services is 5%; for receipts for salaries and professional fees 1% and an additional 1% on amounts exceeding $ 10,000 monthly; on receipts for rent, 11% for housing with a rental of less than $ 3,000 a month and 2% in all other cases; certificates of stocks and bonds, 1%; bookkeeping receipts and all kinds of receipts or documents having no other specified rate, 1%.

The stamp tax is normally affixed to the documents themselves, but in the case of the sale of a commercial or industrial enterprise, a special register is maintained by the taxpayer on which must be affixed the voucher evidencing the payment of the tax.

Bills of exchange and promissory notes drawn in Perú to be paid in the same Country are subject to a quarterly tax of 9%. All fractions of a quarter will be considered as a full quarter for the purpose of the payment of the tax. Extension of maturity date by a notation on the same documents is subject to a $4.5^0/_{00}$ tax. If made on a different document the tax will be $6.75^0/_{00}$. These documents are also subject to an additional tax of $ 2.00 if the amount does not exceed $ 50,000 and of $ 10.00 if the same exceeds the aforementioned amount.

Bills of exchange drawn abroad to be paid in

the Country or drawn in the Country to be paid abroad and bills of exchange drawn abroad negociated in the Country to be paid abroad are subject to a 1% tax.

Letters ordering payment or credit issued or to be paid within the Country are also subject to a 1% tax. Traveler checks, transfer of funds, checks drawn abroad to be paid in Perú and checks drawn for payment abroad are subject to a 1% tax. Bankers checks are subject to a $ 0.36 tax and checks drawn against current accounts in the Banks of the Republic are subject to a $ 0.08 tax. Finally banking overdrafts are subject to a quarterly tax of 9‰ on the average of the overdraft during each particular quarterly period. Transfer of shares and bonds is subject to 1% tax. Shipping documents are subject to 1% tax. Documents reflecting the payment of an insurance premium except life insurance are subject to a 5% tax; documents evidencing payment of life insurance premiums are subject to a 1% tax; documents reflecting settlement of insurances against damages are subject to a 3% tax. Insurance premiums contracted directly or through Agents by the insured party with the insurance companies not established in the Country are subject to a 35% tax.

Social Welfare Taxes

Contribution to the Social Welfare Fund amounts to 3.5% of the payroll of the company.

Social Security in the case of employees: a contribution of 3.5% will be paid by the employer and 3% by the employee on any salary up to a maximum of $ 12,000.

In the case of the Pension Fund the contribution of the employer amounts to 2% and that of the insured employee to 1% computed on remuneration up to a maximum of $ 12,000 per month.

In the case of labourmen a contribution of 6% by the employer and 3% by the labourman is computed on the average salary in accordance with the different categories established by law.

The contribution to the National Service of Apprenticeship and Industrial Work (SENATI) amounts to 1% paid by the employer on salaries paid by the same. For this purpose contribution would be computed on a maximum salary of $ 6,000 and only labour centers with a yearly average of more than 15 daily labourers are subject to this contribution.

Labourmen Pension: Employer must contribute with 2% of the payroll, labourers in turn will contribute with 2%.

Idle Property Tax

Non-built plots of land are subject to a vacancy tax charged on the basis of a percentage on the value of the same. Properties have been qualified in four groups the fourth being exempted from this tax. The other groups are subject to the same with tax rates running from 0.25% to 3% per annum.

Business Licenses

The rates charged in Lima and Callao are based on the amount of capital of the business, with a minimum of $ 20 for those with a capital not in excess of $ 500, increasing to a maximum of $ 20,000 a year for business with a capital of $ 5,000,000 or more.

Professional licenses vary according to category, with a minimum of $ 80 and a maximum of $ 800. In the provinces the rates are 50% lower than those of Lima and Callao.

Registration Tax

This tax amounts to 2% of the amount involved and is levied on all contracts made by public instrument with the exception of sales of real property.

Organization of companies, increase of capital, mutual loans, recognition of indebtedness are examples of contracts subject to this tax.

Imports and Exports

Import duties are levied on almost all goods produced in a foreign country, the tariff being based on either the weight of an item or on its ad valorem value fixed by law according to prices on the international market. They are also subject to certain customs surcharges, all ad valorem.

Perú is party to the General Agreement on Tariffs and Trade (GATT) and to various bilateral agreements providing for most-favored-nation treatment on a reciprocal basis.

The Government is empowered to grant exemptions from duty under special circumstances and also to suspend temporarily the assessment of duties on given products.

The duties or taxes on exports are applicable to certain agricultural and mineral products, the tariff varying according to prices on the international market.

A recuperable payment on account of the tax on commercial and industrial tax amounting to 10% of the FOB value of the exported goods is now in force. It seems however, that this obligation will be soon replaced by a compulsory purchase of National Bonds for an even amount.

Unemployment Tax

The so-called unemployment tax created by Law 7103 is levied on various acts, contracts, and property at different rates.

Sources of income that are subject to this tax are as follows:

a) Profits of industry and commerce referred to in Chapter II of Law 7904, including royalties 2%

b) Interest on credit operations referred to in Chapter I of Law 7904 ..... 1%

c) Interest on bearer bonds and dividend on investments 1%

d) Profits obtained by foreign corporations from branch operations in Perú, including royalties (Law 9001)..... 1%

e) Rentals from properties 1%

f) Salaries and remunerations in excess of $ 200 per month including directors' fees 1%

g) Professional income 1%

Under section 1 (a) of Law 7103 an ad valorem tax of 1% is imposed on all exports from Perú, with the exception of minerals.. The profits obtained by the producers of such exports are not subject to the 2% tax on earnings, but if exports form only a part of a firm's business, the 1% tax thereon is considered as payment on account of the tax on earnings.

Real Property Transfer Tax

Transfer of real property is subject to a 12% tax payable in equal parts by deliverer and receiver. The expression "transfer" includes all legal ways to transmit property except inheritance. The contribution of real property in exchange for stock and the reception of property in payment of stock in the case of reduction of capital or dissolution of a company are also considered "Transfers" for the purposes of this tax.

Sales or transfers by the state, municipalities, universities, authorized cooperative societies and certain other institutions and transfers of title through inheritance or where inherited property is divided and partitioned are exempted from this tax.

CHAPTER III

LAWS TO PROMOTE THE ECONOMICAL AND INDUSTRIAL DEVELOPMENT OF THE COUNTRY

Industrial Promotion Law

The benefits granted by Law 13270 to established industries or those that may be established which manufacture basic articles or which are going to manufacture such articles, regardless of whether or not they are produced in the country at present, are substantially the following:

a) Exemption from import duties and additional duties with the exemption expressed in the law on the importation of machinery, equipment, raw materials or semi-finished products essentially necessary in the industrial process, provided they are not produced within the country, and in the case of machinery only if they are new.

b) The exemptions are 100 percent of the duties in the case of industries producing basic products, and may be fixed at from 50 to 100 percent on imports of machinery and raw materials for industries whose products are not basic.

c) The right of direct purchase or lease of public lands that are necessary for production purposes and for housing for workers.

d) Recourse to the benefits of the Expropriation Law with respect to an area strictly necessary for the industrial purposes.

Basic industries which are established before April 26, 1970 for the purpose of manufacturing articles which are not yet produced in the country may obtain the benefit of exemption from all general, special, and local taxes, with the exception of stamp taxes, during the first three years in the provinces of Lima and Callao, five years, in the remainder of the Coast, ten years, in the Sierra, and fifteen years if established in the Selva (eastern forest region). These periods are counted from the time the respective plant begins to operate.

Upon expiration of the periods indicated above, the enterprises concerned shall be entitled to the following tax benefits:

a) Exemption for fifteen years from all general, special, or local taxes which are directly applicable to production of or trade in their basic articles with the exception of the income tax, licenses, stamp taxes, consumption taxes, and municipal excise taxes.

b) The right to invest a part of their net profits for each fiscal period, free from any general, special, or local tax, in the expansion or diversification of their productive capacity; in the purchase of bonds or shares of the Industrial Bank of Perú; in the construction of housing for workers; or in the installation and maintenance of schools for training and developing the manpower necessary for their industry, as well as donations for educational or social welfare purposes.

The tax-free portion of the profits shall not exceed 30 percent for fifteen years in the provinces of Lima and Callao; 50 percent for twenty years in the remainder of the Coast; 80 percent for forty years in the Sierra, and 100 percent for fifty years in the Selva.

c) The right to write off depreciation for machinery, parts and installations, as governed by Law 7904, Article 19, sec. 11 and Article 8, sec. (f) of its Regulations, with respect to readjustment of values in relation to the dollar if the rate varies by more than 5 percent.

d) The right to apply an annual rate for depreciation or amortization reserve for machinery and equipment in case of prolonged working hours, or replacement or guarantee of replacement in the interest of development.

e) Reduction in rates of the profits tax for enterprises in the Sierra and the Selva as follows: in the Sierra, 40 percent during the first ten years, 30 percent during the next ten years, and 20 percent during the last ten years; in the Selva, 50 percent during the first ten years, 40 percent during the next ten years, and 30 percent during the last twenty years.

Non-basic industries may be granted free entry from 50 to 100 percent on machinery and equipment, raw materials, etc. An appendix to the Regulations lists these percentages in detail for specific industries and articles. In addition they will be entitled to the following tax benefits:

a) Exemption for fifteen years, from April 26, 1960; from all general, special or local taxes on production or trade in their articles, with the same exceptions as those applicable to basic industries;

b) The right to invest a part of their profits tax free for the same purposes as indicated for basic industries, amounting to 40 percent for ten years in the provinces of Lima and Callao; 60 percent for fifteen years in the remainder of the Coast; 80 percent for thirty years in the Sierra; and 100 percent for forty years in the Selva.

c) The right to write off depreciation of machinery, etc. as in the case of basic industries;

d) The same right to increase the rate of depreciation or amortization, for the same periods as indicated for basic industries;

e) For the Sierra and Selva, the same rights, for like periods, to a reduction in the rates of the profits tax.

For purposes of the law, manufacturing industries in general terms are those included as such in the "Uniform International Industrial Classification of All Economic Activities of the United Nations" (Regulations, Article 4).

An industrial establishment is considered to be one duly recorded in the Industrial Register (Padrón Industrial) operating on an industrial scale that meets the technical standards established by Instituto Nacional de Normas Técnicas e Industriales (INANTIC), in which there is some manufacturing process on an industrial scale in which the degree of transformation (elaboración) is equal to or greater than 5 percent of the manufacturing cost.

In computing the "degree of transformation" (grado de elaboración), the "cost of manufacture" is taken to be the sum of the following values:

a) Raw materials, semi-processed articles and accessories used in manufacture, after deducting import duties if any;

b) Remuneration of permanent technical personnel and workers necessary for production, including social benefits but excepting salaries of management, administrative, sales and distribution personnel;

c) Power, water supply and fuel, after deducting import duties if any;

d) Normal depreciation of machinery and equipment as specified in Law 7904 and its regulations;

e) 10 percent of the value of real property used for production purposes based on assessed valuation.

The degree of transformation is the ratio between the values computed for b) plus c) plus d) plus e), and the cost of manufacture, expressed as a percentage. The five percent required by definition may be altered in special cases, provided always there is an actual transformation process (Regulations, Articles 5-7).

The law also provides that the Industrial Bank of Perú shall not accept any application for credit from an enterprise that is not registered in the Padrón Industrial. Enterprises which do not comply with this obligation

may be fined up to 10,000 soles.

Revaluation against payment of the Revaluation Tax because of currency depreciation can be effected in the same proportion as such depreciation. To show the difference in exchange rates resulting from operations in foreign exchange in the balance sheet, the following rules are to be applied:

a) The exchange difference resulting from operations comprising investments of capital will be charged to the cost of the respective goods;

b) The annual readjustment at the close of a fiscal period for unpaid balances (debits and credits) in foreign currency shall be made at the rate of exchange corresponding to the average of buying and selling quotations for drafts on the date of closing the fiscal period, as supplied by the Superintendent of Banks;

c) Adjustments for exchange differences shall be effected after making the revaluation for depreciation of the foreign currency;

d) If at the close of the fiscal period there are stocks of finished products, semi-processed articles or raw materials purchased with foreign exchange but not yet paid for, the resulting exchange difference will be charged to their respective costs.

Enterprises to which the Industrial Promotion Law is applicable are required to keep their accounts in domestic currency, and they must show by separate books the results proper to the industry and those derived from activities to which that law does not apply.

Applications for free entry of machinery and equipment must be submitted separately from those requesting free entry of raw materials.

In the case of raw materials or semi-processed articles, the free entry will be granted for a volume that does not obviously exceed the needs of normal consumption of the applicant for a yearly period.

Foreign articles that compete with those manufactured by domestic industry, with the exception of medicinal products, may not be granted exemption from import duties, regardless of who is the importer or the special law or contract supporting the reduction or use for which they are intended.

Industrial Parks

Industrial Parks have been created in the following geographical circumscriptions: Arequipa, Cuzco, Huancayo, Puno, Sullana, Tacna and Trujillo.

Basically, industrial enterprises established in said places, enjoy the following additional benefits, granted by the Industrial Promotion Law (No. 13270):

A) Customs duties exemption.

B) Exoneration from Export Duties for manufactured products.

C) Exemption from the following taxes:
   1) Excise Tax
   2) Inheritance Tax and tax to the transfer of assets by title acquired gratuitously.
   3) Patent Tax
   4) Registry Tax to the establishment of corporations, stock issue, increase of capital, and transfer of shares.
   5) Stamp Tax on bills or any credit instruments or banking overdrafts.
   6) Stamp Tax on the sale of manufactured products.
   7) Tax to the bills on movable capital.

D) Faculty to reinvest profits, tax free, in the extension and diversification of its productive capacity, in the purchase of shares and/or bonds of the Industrial Bank of Perú, in the construction of houses for its employees, in the installation and maintenance of schools and apprenticeship centers for the development and perfectioning of the workmanship necessary for its industry.

E) Exemption of tax on capitalization on reinvested profits.

The benefits shall be granted by means of a contract entered into with the Government.

Benefits on the Reinvestment of Profits

All companies, corporations or partnerships, Peruvian or foreign whatever their object, are able to invest, tax free, part of its profits, in any industrial activity or in cooperative works or else, such as ports, industrial districts, general warehouses, power plants, silos and others of same nature, destinated to provide essential services for the establishment of new manufacturing plants, that may imply a reduction in the cost of production or of commercialization of industrial enterprises.

The part of the profit to be invested, tax free, is the following: if it refers to a basic industry established in the Province of Lima and/or Callao: 30%; in the rest of the Coast: 50%; in the Sierra: 80%; in the Selva: 100%. If it refers to a non-basic industry established in the province of Lima and/or Callao: 40%; in the rest of the Coast: 60%; in the Sierra: 80%; in the Selva 100%.

In case the reinvestment takes place in industrial enterprises which are producers of petroleum by-products through the transformation of hydrocarbons, or in the carbochemical industry, the part of the profits to be invested tax free will be 60% if the enterprise is established in the coast and 100% for the Sierra and the Selva.

These benefits are granted through a contract entered into with the Government.

Assembly Industries

Besides the benefits granted by the Industrial Promotion Law (No. 13270) the assembly of motor vehicles may enjoy the following advantages:

a) Importation free of duties of those parts necessary for the assembling of vehicles, as well as the equipment machinery, tools required for the process of assembling provided that they are new and do not compete with similar produced locally.

b) Exemption of stamp tax on the sale of vehicles assembled in the Country.

These benefits are granted by means of a contract entered into with the Government and have a renewable period of five more years by which purpose it shall be bound to use no less than 30% of local resources.

The assembly industries of all kinds of machinery and equipment for the industrial or commercial installations, etc. or of any use by the consumer, enjoy besides those benefits from the Industrial Promotion Law, of the liberation of import duties in the following percentages: 100% during the first three years of operation; 85% during the following two years; 70% during the following three years and 50% during the ninth and tenth year. In order to enjoy this benefit a minimum of 25 persons should be used out of the administrative personnel and a minimum of national resources should be used in the following proportion: 10% during the first three years of operation; 20% during the two years following; 40% during the following three years and a fluctuant percentage between 50% and 70% which shall be fixed in each case during the two following years.

This benefit is also granted through a contract with the Government.

Agropecuarian Activities

Taxation Incentives

The local production of foods, forages and raw material of agricultural origin, as well as its internal commercialization (trading) and its primary transformation, enjoy during 10 years, national, regional or local tax exemptions and also exemption from the following:

1) Stamp tax, in general;

2) Stamp tax on the transfer of cotton, sheep and alpaca wool, referred to in article 4 of Law 14729, modified by article 2 of Law 15223;
3) Stamp tax on credit transaction and documents, receipts, payrolls, cash vouchers and other similar documents;
4) The tax established by article 8 of Law 14729, assessed on payrolls, in the part to be paid by the Employer, according to what is stipulated by Law 16338;
5) The tax on overdrafts created by Law 13033, when deemed necessary for agropecuarian production.
Exemptions to the exonerations:
1) Income Taxes;
2) The taxes and liens that constitute municipal resources and of the Departmental Corporations for promotion and development.
3) Taxes levied in favour of Banco de Fomento Agropecuario del Perú;
4) Taxes and liens destined to the Centers of Superior Agricultural Instruction;
5) Those that favour the Cotton Chamber of Perú:
6) The liens which product serves for the maintenance and purposes of the Agricultural and Cattlemen Association, Chamber of Commerce and Agriculture of the Irrigation Committee; and,
7) The duties or taxes assessed on the export of forage and raw material of agricultural (farming) origin; excepting those cases taken into consideration in other articles of the law.
b) Customs release for farming machinery, tools and other agricultural equipment, pumps, for farming use, provided they are not produced or do not compete with those manufactured in the Country upon equal technical standards.
c) During ten years, exemption on profit tax, 50% for the Coast and 100% for the Sierra and Selva, for those that invest from any sector with the following purposes:
1) In works for improvement of irrigation or its distribution or drainage;
2) In works of infrastructure on agricultural and grazier development;
3) In the improvement of farming soil and of meadows, as well as its defense;
4) In works of enlargement of the cultivated area;
5) In the construction or improvement of transportation routes (roads) for agricultural products;
6) In works destined to the conservation or industrial transformation of farming products;
7) In works of re-foresting;
8) In works of rural electrification;
9) In the construction of rural lodgings for the labourers.
d) During 10 years, exemption of taxes to the interest of movable capital and of stamp tax to the financing, granted by private enterprises, for the investment specified in paragraph c).
e) During 10 years, natural persons (individuals) and/or corporations dedicated to the production or primary transformation of food products, shall deduct from its profits, further than its expenses, depreciation and detriments authorized by Law 7904, 10% of its cost of production, remaining subject to the payment of said tax and of the surtax, only for the excess of profits that may exist. In case an agricultural product is used not as nutriment but for another purpose, a proportion will be established regarding the unit of measure to be applied to its sale in order to fix the part considered as agricultural food product.
f) During two years, exemption of registration and stamp taxes in favour of agricultural enterprises that increase their capital stock.
g) Exemption of the excise and registration taxes in the buying and selling and mortgag-

ed loans on rustic partitions approved by the Institute of Agrarian Promotion and Reform provided it does not exceed the triple of the familiar unit.

h) The donations and economic contributions made by natural persons (individuals) or corporations to Experimental Stations or similar entities, destined to finance programs for investigation or technical normalization or products in the agricultural sector, are free of tax and will be deductible from profits for double of the amount contributed.

Mining Industry

Article 56 of the Mining Code as modified by Law 16892 authorizes the Executive Power within 10 years of the issuance of its ruling, or up to May 10th, 1978, to execute contracts with those concessionaires who apply, in order to obtain the following benefits:

A) Reduction of the profit tax in case of Peruvian enterprises and of the surtax in case of branches of foreign enterprises, to a sum which added to the amount of the profit tax is no less than 40% of the taxable profit. In the case of foreign enterprises, the sum of the profit tax and surtax, in no case, should be less than the global rate of the tax to be demanded in the Country where the inversion originates, if the same represents the payment of the tax in said Country.

B) Attribute to extend the annual rate of penalties or reserves for amortizations.

C) Attribute to apply the penalties on the readjusted value of the assets, when a fluctuation is produced in the rate of exchange in the local currency which is greater than 5% with relation to the currency of the country where the inversion originates.

D) Guarantee to the foreign enterprises on availability of foreign exchange for the payment of invested capitals, interests, and of justified services in the country and abroad.

E) Guarantee that there would be no discrimination in exchange policy for the mining investor.

F) Guarantee on the free disposition of the sale of its products and by-products.

G) Privilege to deduct from profits the losses suffered during the previous five years.

H) Attribute to invest, upon expiration of the contract term, for a period no greater than five years, the 50% of the profits of each exercise, tax free.

The term for exemptions will be ten years to be counted from the date the mining activities start operating to which the pertinent agreement refers and it can only be extended for 10 more years in case that due to the difficulties encountered by the concessionaires (difficult access to the mines, lack of workmanship, shortness of natural resources, decline of market prices, etc., etc.) they are unable, according to the Executive Power, to recover the inversion within the original term.

Benefits in favour of the Production of Petroleum By-Products.

I) The production of petroleum by-products through the transformation of hydrocarbides or by-products of the same, as principal raw material which traditionally is not considered petroleum refining, as well as the activities of the carbochemical industry that transforms petroleum into raw material of a different form, or its by-products, as their principal activity, enjoy the following benefits, without affecting those granted by the Industrial Promotion Law (NO. 13270):

A) Liberation of import duties to machinery, equipment, materials, tools and essential accessories the industry may require for its installation and production process.

B) Faculty to reinvest up to 100% of the annual profits, tax free, except the Unem-

ployment Tax, in the enlargement, diversification and maintenance of its productive capacity.

c) Exemption of the revenue stamp tax in the sale of manufactured products.

d) Exemption of the registration and revenue stamp taxes in the incorporation of the company and increases of capital, and issuance of shares and industrial bonds, and in the credit documents where it appears as acceptor, drawer or endorsee.

e) Exemption of the obligation to advance payments on income tax.

Said benefits are granted through contracts entered into with the Government and will be in effect up to March 19th, 1978.

II Those industries that dedicate mainly to the production of fertilizers equal or similar to those processed or commercialized by the Corporación Nacional de Fertilizantes may enjoy additionally, through contracts with the Government for a term recorded previously of the following benefits:

a) Exemption of the commercial and industrial profit tax including the additional Unemployment Tax, up to the annual limit of 8.5% of the paid-in capital.

b) Liberation of 100% of the import duties for machinery, equipment, tools and essential spare parts, the industry may require for its installation, enlargement, diversification or maintenance.

c) Exemption of the revenue stamp tax on documents, receipts and vouchers issued by the enterprise for operations of production, financing or commercialization of its products or its financial or administrative activities in general. This exemption comprehends invoices, purchase documents of containers for its products and of raw materials and materials required by the industry for its production.

d) Exemption of all income tax on interests or commisions received for credits granted for the purchase of fertilizers or the price payment facilities granted to the buyers provided the product is destined to the consumption of the local agriculture and which interest does not exceed 10% annually.

Since this article was prepared a substantial revision of Peruvian tax law has taken place as a result of Supreme Decree No 203-68-HC signed and delivered on June 26, 1968. Details of the resultant changes are not yet available, but will be discussed in a coming issue.

DR. ERWIN SPIRO:

SOUTH AFRICA - THE 1968 INCOME TAX LEGISLATION

STATUS QUO BUDGET

In view of the continuing prosperity of South Africa, the 1968 Legislature did not introduce new tax burdens. But it did also not relax the existing taxation, the policy being to reaffirm and continue the anti-inflationary measures of last year. There are, however, some further tax concessions in favour of the lower income tax groups and some other special taxpayers.

GROSS INCOME

A grant or subsidy in respect of soil erosion works received by or accrued to a lessor of a farm constitutes gross income in his hands if the costs of such works rank for deduction.

EXEMPTIONS

The provision that amounts credited as interest in respect of subscription shares were exempt, but not in respect of amounts paid or credited on paid-up shares in building societies has been changed to the effect that amounts credited as interest in respect of subscription shares in building societies are exempt. The following items are newly exempted: annual interest on 6% Treasury Bonds (limited in the case of any taxpayer to R 2,400); dividends on 6½% Special Tax-free Indefinite Period shares in building societies if they become payable on or before 31st March, 1971 (limited in the case of any taxpayer to R 400 in any year of assessment), these dividends also being exempt from the non-residents tax on interest; the receipts and accruals of the South African Gas Distribution Corporation Limited (with effect from the date of registration of the Corporation); amounts received by or accrued to companies in respect of an assisted gold mine under the provisions of the Gold Mines Assistance Act, 1968.

The Treasury is further empowered to declare retiring gratuities payable to members of the board of the South African Land and Agricultural Bank of South Africa to be free of tax. The exemption up to R 6,000 in respect of any bonus, gratuity and compensation upon the termination of services will generally be applicable where an employee receives a lump sum at or towards the end of his or her period of employment or as the result of the variation of the terms of his or her employment or in certain other circumstances, provided the employee has reached the age of 55 years, or 50 years in the case of a woman, or has reached the age of superannuation or has become entitled to the lump sum as a result of ill health or other infirmity, or, in the case of a woman, she has retired in order to be married.

DEDUCTIONS

To be deductible contributions to a retirement annuity fund must be made by a person who is a member of the fund and who has during the year of assessment carried on a trade (although persons who, in accordance with the prior practice of the Secretary for Inland Revenue, could deduct will continue to be allowed the deduction), but such deduction is in any case limited in any year of assessment to the lesser of (a) R 2,000 less any contributions to a pension fund allowed or (b) an amount equal to the taxpayer's trade income for the year of assessment less the de-

ductions admissible against such income (with certain exclusions); an amount disallowed under (b) will be carried forward to the succeeding year of assessment and be dealt with as a current contribution to the fund in question during that year.

The period within which expenditure in respect of employees' housing may be deducted is extended to 31st December, 1971.

The various exporters' allowances are increased from 37½% to 50%, from 50% to 62½% and from 62½% to 75% respectively.

Provision is now made for the deduction of expenditure incurred by a lessor of land let for farming purposes in respect of soil erosion works. The amount allowed to be deducted in any year of assessment is, however, limited to a sum sufficient to reduce the taxable income derived by the lessor from letting bona fide farming property to zero, the excess to be carried forward and deemed to be expenditure incurred by the taxpayer during the next succeeding year of assessment in respect of the construction of soil erosion works.

The maximum amount allowable as a deduction in respect of fees paid to dentists, medical practitioners, nursing homes or hospitals is increased to R 250 for the year of assessment (or if a child is born to R 350).

There are some special provisions in connection with assisted gold mines. When a gold mine becomes an assisted gold mine during a year of assessment, the unredeemed balance of capital expenditure at the beginning of that year plus the actual capital expenditure incurred during that year will be deducted in that year, and the actual capital expenditure incurred during any subsequent year of assessment will be deducted in such subsequent year. A gold mine which during a year of assessment is an assisted gold mine will not in respect of that year be entitled to the capital allowance as defined. Any assessed loss incurred during a year of assessment in respect of an assisted gold mine must be reduced by any mining loss during that year in respect of which a payment may be made by the State under the Gold Mines Assistance Act, 1968.

REBATES

The rebate for each of the first two children of a taxpayer is increased from R 34 to R 35 and for each child in excess of two from R 39 to R 45.

RATING AMOUNT IN THE CASE OF MARRIED COUPLES

The concession designed to help those families in the lower and middle income groups where the wife supplements the family income by taking employment or in any other way, which was introduced three years ago, has been improved to some extent. The effect of the improvement is the following. Where the combined taxable income does not exceed R 3,000, the rating amount is generally an amount equal to the greater of the husband's and wife's portions. Where the combined taxable income exceeds R 3,000, but not R 8,000, the rating amount is generally an amount equal to the greater of the husband's and wife's portions plus 2/5ths of the lesser of those portions. Where finally the combined taxable income exceeds R 8,000, the rating amount is increased by the amount by which the combined taxable income exceeds R 8,000; the rating amount must not, however, exceed an amount equal to the combined income (which would be the case if the combined income reaches R 11,400). It may be pointed out that the tax is still on the combined taxable income, but where the formula operates, the rate of tax will be that of a lower bracket.

O. P. CHAWLA*:

DEVELOPMENT OF THE CONCEPT OF INCOME UNDER THE INDIAN INCOME-TAX LAWS (1860-1967)[1]

I. THE IMPERFECTIONS OF TAXABLE INCOME

Equity is the first principle of taxation. Horizontal equity, viz., similar taxation of taxpayers in similar circumstances, is ensured through a properly constructed tax base. An income-tax is regarded as particularly equitable as its base-income—is considered a just base for taxation. For this to be so, the concept of taxable income ought to be amenable to a rigorous definition. This concept, in practice, is, however, very elusive and difficult to arrest within the four walls of a workable definition.

Haig's definition of income as "the money value of the net accretion to one's economic power between two points of time"[2] is most equitable; but the measurement of "the net accretion to economic power" is beset with many pitfalls. It necessitates adjustments for changes in prices, interest rates and purchasing power of the monetary unit—changes which are not easily measurable. But that is not all. The accountant, for reasons both of legal requirements as well as business discretion, does not wish to record business income until it is definite and permanent. For this purpose, accounting has developed a test of realization which is used to indicate that income has become sufficiently definite and objective to warrant recognition in the books of accounts. A gap is therefore created between the time income theoretically accrues and the time it is in practice realized and is recognized. The law broadly accepts this position. Another factor which widens the gap between economic income and taxable income in many countries is the heavy stress placed on the annual character of taxable income. Based on the agricultural principle of the "fruit and tree", the "fruit" is accepted to be taxable but not any accretions to the value of "tree", even when realized. Administrative considerations prevent all receipts-in-kind and Henry Simons' "earned income in kind" to be included in taxable income. The concept of taxable income is often watered down to make it manageable and practicable.

Thus the concept of income for tax purposes is not perfectly equitable; indeed, presently, perfect symmetry in this area is unimaginable. With this picture of the practical bounds of this concept to serve as a background, we may proceed to trace its evolution and development under the Indian income-tax laws.

II. THE CONCEPT OF TAXABLE INCOME IN INDIA

Income tax is a tax on income. But, as in the income tax laws of other countries, income is not defined in the Indian Income Tax Act. There is a definition of income in the Indian Act; but it is inclusive, not exhaustive. It

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1 Substantially based on a chapter in the thesis entitled "The Changing Pattern of Direct Tax Structure of India: 1947-1965" on which the author was awarded the Degree of Doctor of Philosophy in Commerce by the University of Rajasthan in January, 1967.

2 Haig, R.M., the Concept of Income, reproduced from his Federal Income Tax, New York, 1921, in Readings in the Economics of Taxation, American Economic Association, 1959, p. 59.

includes not only those receipts which it specifies but also such others which the word "income" signifies according to its natural import. For an understanding of the concept of taxable income in India, we have, therefore, not merely to understand the scope of the definition and other provisions in the law bearing on it; we have also to seek enlightenment from the multitude of case law on the subject. Based as the Indian income tax law was on its English counterpart and as until 1947, the Court of Last Appeal was also the British Privy Council, the English case law on income taxation is also our guide in unravelling the intricacies of this concept.[3] For comprehending the dimensions of this concept, therefore, we have to go back to the year 1860, and follow, rather hurriedly, its development through the legislature and the courts.

1. 1860-1947

When the income tax was levied in 1860, income was taxable under four schedules, viz., Income from landed property which included income from land (agricultural income) and from house property, Income from Professions and Trades, Income from Securities (annuities and dividends included), and Income from Salaries and Pensions.

The Act of 1886 which imposed "a tax on income derived from sources other than agriculture' defined income thus:

"Income means income and profits accruing and arising or received in British India, and includes, in the case of a British subject within the dominion of a Prince or State in India in alliance with Her Majesty, any salary, annuity, pension or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor-General-in-Council in that behalf".[4]

The Act divided all income into four schedules which were different from the earlier ones, viz., Salaries and Pensions including annuities, Profits of Companies, Interest on Securities, and other Sources of Income. The last schedule was very comprehensive and covered, among others, professional incomes, industrial and commercial incomes and incomes from property. Occupying owners of house property were taxable. Section 24 of the Act ran:

"Where a building is occupied by its owner, it shall be deemed a source of income within the meaning of this Act, and if liable to be assessed under this Act, shall be assessed at 5/6 of the gross annual rent at which it may reasonably be expected to let, and, in the case of dwelling house, may be expected to let unfurnished".

It would seem, thus, that the concept of taxable income was very broad even in the 19th century. But it was so merely on paper. Even the most equitable tax becomes unfair in its incidence if the machinery for its enforcement is inadequate. The administration of the income tax was, in fact, in a chaotic state. The administrative machinery was inoperative for large parts of the taxable territories.[5] Furthermore, the tax was a schedular tax; the tax was levied not on an individual's total income but on his different sources of income separately. It was thus a very inequitable levy. It remained so for more than a genera-

3 See for usefulness of references to English decisions on "Income", Kamakshya Narain Singh v. C.I.T. 1943 I.T.R. 513, 518 (P.C.).

4 Section 2 (5) of the Income Tax Act (Act No. II of 1886).

5 For details of operation of the administrative machinery, see J.P. Niyogi, The Evolution of the Indian Income Tax, P.S. King & Sons, London, 1929, p. 292 onwards, and V.K.R.V. Rao, The Taxation of Income in India, University of Bombay, Bombay, 1931, p. 239.

tion until the 1886 Act was replaced by a new income tax act in 1918.

The new enactment applied to "all income from whatever source it is derived". It did away with the original conception of income as separated into water-tight compartments and introduced the concept of total income. Taxable income was now divided into six heads, viz., salaries, interest on securities, property, business, professional earnings, and other sources. The extent of taxation of income in kind was evident from a provision that any perquisite or benefit which was neither money nor reasonably capable of being converted into money should not be liable to income tax.[6] The concept of taxable income was sought to be enforced through an overhaul of the methods, the basis and the machinery of assessment. But the methods of calculating taxable income prescribed in the Act gave rise to many inequities. "Taxable income" under the act meant income assessed directly on the assessee, that is, his income from sources other than the dividends from a company, or the share in the profits of a firm, so that an assessee who had income either from a firm or from the profits of a company and had in addition other income which was assessed to tax directly on him, paid no income tax on that other income, unless it was in excess of Rs. 2,000 (exemption limit). Also a Madras High Court ruling that the word "income" as used by the Income-tax Act, 1918, should mean "income actually or constructively received' placed the government and businessmen alike in difficulty. The judgment led to a restricted interpretation of those sections of the Act which specifically mentioned the different classes of income liable to tax. It meant that the legal concept of "realization" was as yet being interpreted very narrowly.

Meanwhile, as a result of constitutional reforms brought about by the Government of India Act, 1919, income tax which was till then a state source of revenue, became a federal source of revenue. In order, therefore, to centralize the administration of the tax and to remove the inequities caused by the definition of taxable income and the Madras High Court judgment, the new Income Tax Act was passed in 1922. It not only improved the concept of taxable income through the provision of set-off of loss under one head of income against the gain under another head, it also made it more effective in practice by providing for the streamlining of the administration. Although, perquisites which were neither money nor reasonably capable of being converted into money were not taxable, the problem whether rent-free accommodation provided to employees should be taxed or not continued to engage the attention of tax authorities during the period 1918-23. It was settled by the legislature[7] by providing that it was a "perquisite" liable to tax irrespective of whether it could be sublet or not. The judgment in re Jyoti Prasad Singh Deo[8] interpreted in Kanga and Palkhiwala[9] gives an idea of what taxable income was taken to be:

"Income has been generally described as the annual or periodical yield in money or reducible to a money value, arising from the use of real or personal property, or from labour or services rendered. Dividends, and rents derived from houses and lands are instances of income arising from the use of property, whilst salaries, wages and profes-

6 Section 3(2) (ix), Income Tax Act, 1918; it followed Tennant v. Smith 1892 A.C. 150, 156 (H.L.), 3 T.C. 158, 164.

7 Vide the Income Tax Amendment Act, 1923.

8 I.T.C. 103, 106, A.I.R. 1921 Pat. 103.

9. The Law and Practice of Income Tax, N.M. Tripathi, Bombay, 1959, vol. I, p. 80.

sional earnings (including pensions) are instances of income arising from labour or services rendered. Income derived from business may in certain cases be a combination of both the classes".

This seems to be very much akin to the definition of income given in U.S.A. in Stratton's Independence v. Howbert[10] in 1913: "the gain derived from capital, from labour, or from both combined".

In practice, taxable income at that time covered income from all sources with three exceptions: (i) capital gains; (ii) casual income (income which did not arise from profession, vocation or employment or from any adventure or concern in the nature of trade, commerce or manufacture and which was of a casual and non-recurring nature)[11]; and (iii) incomes in kind not convertible into money except rent-free accommodation. Also accretion to capital (not realized in money or in money's worth) was not taxable. Bonus shares (stock dividends) were, thus, tax-free[12].

Until the next amendment to "income" in 1939, a number of important court cases served to define the extent and nature of taxable income. Incidentally, all the four cases referred to below went up to the Privy Council. In the first case, C.I.T. v. Shaw Wallace & Co.,[13] Sir George Lowndes gave the following definition of "income":

"Income...in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding any thing in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field."

Thus, the important ingredients of this definition were that (i) income is a monetary return; (ii) income is a periodical return, coming in with some sort of regularity or expected regularity; (iii) income is derived from sources whose object is the production of a definite return, thus excluding windfalls. Income was, therefore, likened to the fruit of a tree or the crop of a field. It is clear that this definition was based on the agricultural principle of the fruit and tree and was also in consonance with the accounting concept of income which aims to present the results of the activities of a business during a specified period and, therefore, ignores windfalls including capital gains and casual gains. The definition of Sir George Lowndes was commented upon in two other cases of that period. Lord Russell of Kollowen in one of these cases[14], however, added the following important amplification: "Anything which can properly be described as income is taxable under the Act unless expressly exempted". In the other case[15], Lord Wright repeated what Sir George Lowndes had said and remarked: "Income, it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation... Sir George Lowndes speaks of "income" being likened pictorially to the fruit of a tree or the crop of

10 231 U.S. 399 at p. 415.

11 Sections 2(4) and 4(3) (vii), the Income Tax Act, 1922; unless otherwise stated, Sections quoted hereafter are Sections of the Income Tax Act, 1922.

12 In re Steel Bros. & Co., and C.I.T. v. Binny & Co.

13 59 I.A. 206, A.I.R. 1932 P.C. 138, 6 I.T.C. 178.

14 Gopal Saran Narain Singh v. C.I.T., 1935 I.T.R. 237, 242.

15 Kamakshya Narain Singh v. C.I.T., 1943, I.T.R. 513, 522, 523.

a field. But it is clear that such picturesque similies can not be used to limit the true character of income... Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which "income" may assume is beyond enumeration". In Van Din Berghs Ltd., v. Clark,[16] it was held that a lump sum paid in lieu of a series of recurrent and periodic income payments is itself income. The latter three pronouncements correctly expanded the narrow character which the first one had given to taxable income. This process was also undertaken by the legislature and the concept was sought to be widened by a number of amendments to the Income Tax Act in 1939.

The new definition of "income" incorporated in the Act[17] was an inclusive, not an exclusive definition, and merely stated that "income" included a number of different types of receipts. These receipts which were not otherwise taxable were:

(i) "Dividend" as defined in the Act[18]. The definition of "dividend' was expanded primarily to ensure that all distributions by corporations, by whatever name called, which entailed a release of assets were included in taxable income. Bonus shares were, thus, not taxable until actually paid off;

(ii) Payments made by an employer to an employee out of non-statutory, unrecognized provident funds at or in connection with the termination of his employment. It made inoperative the decision in C.I.T. v. Shaw Wallace & Co.[19]

(iii) Profit made on the disposal of a business asset to the extent of depreciation already allowed on it. (Any profit made over and above the amount of depreciation allowed is a capital gain which was not taxable);

(iv) Profits of any business of insurance carried on by a mutual insurance company. Normally, income of a mutual association is not taxable on the principle that one cannot make a profit out of one's own self.

Another extension of the concept of taxable income was that whereas "salary" was hitherto to taxable when received, it was thereafter to be taxed on "due" basis. It widened the legal concept of realisation. There were no more amendments in the Act affecting the concept but a number of court cases helped clear ambiguities on a number of issues. One such case deserves some attention here. It was held in Rani Amrit Kunwar v. C.I.T.[20] that income need not necessarily arise from any business activity, investment or outlay, or any enforceable obligation to pay—it may be voluntary or may be attributable to some custom, usage or traditional obligation; but mere casual payments or windfalls do not constitute income, and, therefore, voluntary payment, in order to be taxable in the hands of the recipient as income, must have an origin which a practical man would regard as a real source of income. It is well established in India that a voluntary payment or a gift may be taxable as income in the hands of the recipient.

This brings us to the close of the pre-Independence period. It is obvious that the concept of taxable Income in India had

16 935 I.T.R. Suppl. 17.
17 Section 2(60) vide the Indian Income Tax (Amendment) Act, 1939.
18 Section 2 (6 — A).
19 Op. cit.
20 1946 I.T.R. 561, 572, 573, 576, 582.

developed well enough by 1947 and excepting capital gains, casual incomes, and certain types of income-in-kind, most of the receipts, which could be termed as "economic income" (ignoring price level changes and changes in interest rates) had been brought within its orbit.

2. 1947-1967

A few months before India won Independence, the budget of the Government of India for the financial year 1947-48 had been presented by an Indian Finance Minister. This budget was made memorable by the break away from the traditional concept of "income", by including capital gains within its ambit and thus imposing a tax on them. Two years later, however, the narrower concept was restored with the withdrawal of the capital gains tax.

The Taxation Enquiry Commission (1953-54) reported that practical considerations prevented it from recommending taxation of casual incomes and capital gains. However, it recommended taxation of perquisites received by employees for the sake of equity. Consequently, the definition of "income" was changed and necessary amendments were also made in the provisions concerning taxation of salaries in 1955.

As noted earlier, although, in Tennant v. Smith, the House of Lords had held that a benefit which was not capable of being converted into money was not a perquisite, the right to occupy rent-free accommodation was being taxed as such since 1923. A further erosion of this 'principle' was caused by the following changes in 1955:

(i) The value of any concession in the matter of rent respecting any accommodation provided by the employer was included in the taxable perquisites;

(ii) Any benefit or amenity granted by a company to a director or a person who had a "substantial interest" in the company or by any employer to any employee whose salary (exclusive of non-monetary benefits) exceeded Rs. 18,000 was made taxable. Under this provision, even the value of free lunch and free transport came to be taxed;[21]

(iii) Any sum paid by a company or any other employer in respect of any obligation which but for such payment would have been payable by a director or a person substantially interested or an employee (no monetary limit here) was to be taken to be the income of the director/employee;

(iv) Any amount paid by an employer for assurance or annuity on the life of his employee was also to be included in "perquisites" and taxed.

Thus, many fringe benefits receivable by employees and others hither-to excluded from the tax base were now included.

The general principle accepted in the Indian Income Tax law until 1955 had been that compensation for wrongful repudiation of a service agreement, or for loss of office or employment or cessation of business was a capital receipt, though the payment mightbe entirely voluntary and the recipient might have no legal right to any compensation at all[22]. In such cases, the compensation was deemed to be a capital receipt because it was in replacement of the source of in-

21 In a case where the majority shareholders of a company were entitled to rent-free residence and the Income Tax Officer had taxed it as constructive income, it has been held that as the benefit was not convertible into money by the assessee, it could not be assessed in his hands. (C.I.T. v. S.P.Jain, (1967) 65 I.T.R. 416). This case related to assessment years 1951-52 and 1952-53. Consequent upon the 1955 amendment, such a benefit is liable to tax.

22 C.I.T. v. Shaw Wallace & Co., op. cit.

come. The Income Tax Act[23] also made it clear that a payment which was made solely as compensation for loss of employment was not assessable[24], while a payment which was made as remuneration for past services was taxable as income[25].

These principles were to a large extent superseded by the amendment introduced by the Finance Act, 1955[26]. The position after the amendments may be summed up as follows: –

(i) Compensation for loss of office received by a managing agent or any other person managing a company, and compensation for cessation of agency received by a person holding an agency in India relating to the business of any other person, was made taxable as business income;

(ii) Compensation received solely for loss of employment in all other cases became taxable as salary;

(iii) All other cases of compensation for loss of office not involving the relationship of employer and employee and for cessation of business—not covered by Section 10 (5-A) continued to be governed by general principles (to be treated as capital receipts not subject to tax).

The third change which enlarged the concept of taxable income was made by the insertion of a new provision in the Act (Sub-section (2A) of Section 10 and sub-section (5) of section 12). It provided that where an allowance was granted in any year in respect of any loss, expenditure or trading liability and subsequently the assessee recovered any amount in respect of such loss or expenditure or the assessee was benefitted by the remission or cessation of the trading liability, the amount received or the amount of the liability which was extinguished, would be chargeable to tax as income.

Capital gains were again included in "income" in 1956 by an amendment which revived the 1947 provisions regarding such gains. But capital gains were not fully assimilated in "income" and were accorded a favourable tax treatment.

When the Income Tax Act, 1961 replaced the Income Tax Act, 1922, with effect from 1st April, 1962, compensation received on the occasion of modification of the terms and conditions relating to employment/office was made taxable. Moreover, the new Act incorporated a definition of income[27] which was wider in scope than the corresponding definition in the 1922 Act. Clause (iv) of this section hit additional classes of persons including relations of directors and persons substantially interested in a company.

The Finance (No. 2) Act, 1962 classified capital gains into short-term capital gains (gains from capital assets held for a period of 12 months or less) and long-term capital gains. Short-term capital gains were to be treated like other income (although the method of taxing them left the tax-payer in a favourable position) while long-term capital gains were to be taxed at lower rates.

In 1964 another change in the category of "income-in-kind" was made[28]. A provision was made to the effect that the value of any benefit or perquisite (whether convertible into money or not) received by a person in exercise of his business or profession from any person shall be assessable in the hands of the recipient as his income.

23 Section 7(1), Explanation 2.
24 In re Khosla 1945, I.T.R. 436.
25 Datar v. C.I.T. (1952) 21 I.T.R. 558.
26 Section 7 (1), Explanation 2, and section 10 (5A).
27 Section 2 (24).
28 The Finance Act, 1964, inserting clause (iv) in Section 28 of the Income Tax Act, 1961.

The Finance (No. 2) Act, 1967 improved the tax base by providing (with effect from assessment year 1968-69) for complete assimilation of short-term capital gains (and losses) in "income". The provision in the Finance Bill, 1968 to treat all gains made within a period of 24 months or less as short-term capital gains shall make the tax position of such gains vis-a-vis other income unfavourable and inequitable—a complete reversal of its pre-1967 position.

Whether or not bonus shares should be taxed has often been debated in India. Until 1939, the Indian Income-tax law did not contain any definition of "dividend". The Indian Income-Tax (Amendment) Bill, 1939 sought to incorporate such a definition. Its scope and objects were explained, inter alia, thus:

"To prevent the avoidance of super tax which would otherwise be payable by the shareholders by the device of distributing the profits in the form of bonus shares, bonus debentures or some other form which, as the law stands at present, are capital receipts and not income in the hands of the shareholders, dividend is defined in such a way that whenever the shareholder receives profits in any of such forms it can be treated as income for tax purposes".

The Select Committee on the Amending Act recast the definition "primarily in order to ensure that no distributions falling under this head shall be taxed unless there is a release of assets. Under the amended definition, a debenture will, when issued, be treated as dividend but an ordinary bonus share will not be liable to taxation until it is actually paid off.".

This is the nearest bonus shares came to being incorporated in the definition of "dividend" and, therefore, "income" until the year 1961. When the new Income Tax Act replaced the old in 1961, it included a new definition of dividend according to which bonus shares to preference shareholders were to be treated as dividend and thus taxable. Bonus shares to equity shareholders were still left out.

The Finance Act, 1964, by amending Section 45 of the Income Tax Act, 1961, provided for taxation of bonus shares to equity shareholders as (notional, accrued) long-term capital gains at a comparatively low rate of 12.5 percent. Taxation of this accretion before its realization in the accounting as well as the legal sense brought the concept of taxable income in India nearer to the concept of economic income. This measure seemed to have been particularly meant for people in the high-income brackets who use the device of bonus shares (in closely-held companies, especially) to avoid tax liability. The tax was, however, withdrawn in 1966.

III. CONCLUSIONS

The salient features of the concept of income under the Income Tax Act may now be stated briefly:

(1) Equity being the principal pre-requisite of a tax base, the development of the concept of taxable income towards the goal of equal treatment of equals over a century and more must be appreciated; particularly, since Independence, the Indian law has broken away from the tradition of follwoing the British law (and, therefore, the "fruit and tree" concept) and has moved faster towards the desirable goal of fairness in taxation. It has moved away from the concepts of realization in accounting and law and has come closer to the concept of economic income. The directions in which the income concept has developed are: –

(a) Treatment of "capital receipts" in substitution of a source of income as income;

(b) Taxation of capital gains, and later changes therein from a favourable treatment to an equal treatment with other income;
(c) Extensive inclusion of income-in-kind for tax purposes; and,
(d) Extension of the principle of constructive realization (taxation of bonus shares, unfortunately withdrawn in 1966, taxation of salary on due basis, definition of dividend etc.)

(2) As all income under the Income Tax Act has been classified under six heads, we have come to label income as business income, professional income, income from employment, investment income, property income, etc. The concept of employment income (if it can be termed as a concept at all) has perhaps been extended most in that the net of income-in-kind has been spread wide, almost all allowances received in cash by an employee are taxed, and compensation etc. received on termination of employment is also taxed.

(3) Exemptions of numerous items of income "warranted" on social (e.g., income of co-operative societies, share of income received by a member from Hindu Undivided Family), economic (returns from different categories of approved savings, for example) and constitutional (agricultural income) grounds seriously delimit the "income net".

(4) The development of income concept has been erratic in many respects. Capital gains were included in income in 1947, withdrawn in 1949, included again in 1956; since then, numerous changes in its definition have been made and continue to be made. Taxation of bonus shares and its withdrawal is another case in point.

(5) Administrative feasibility has not always been given due thought in widening the tax base. Thus, it is vain to hope that the administration will be able to track down all the small perquisites a businessman or a man in profession might receive but may not care to report (section 28 (iv)).

We might conclude by saying that while equity is the prime goal in delineating the concept of income for tax purposes, excessive pre-occupation with its minutiae may neither be practical nor beneficial. Therefore, we have to stop short of perfect symmetry in this area in the context of the environment in which the income tax must live; which means that:

(1) administrative considerations must be given due weight especially in underdeveloped countries like India;

(2) the concept of constructive realization (and taxation of income on accrual basis) cannot be taken too far; and,

(3) incomes such as notional and imputed incomes of all categories, windfalls, and those due to price level changes can not be incorporated in the tax base.

In further developing the concept of income under the Indian Income Tax Act, these considerations must get primary attention. Furthermore, a review of various exemptions granted under the Act is urgently called for. Exemptions such as those of agricultural income and share of income from Hindu Undivided Family received by its members, make the income concept narrow and inequitable and contribute to tax avoidance. Also, while changes in income definition to improve its coverage are welcome, these must be introduced after due thought and discussion. Erratic development of the tax base (and consequent instability in the tax structure) is bad for economic development.

K. C. KHANNA:

THE BHOOTHALINGAM REPORT SUMMARY OF RECOMMENDATIONS

Mr. Bhoothalingam is a Former Secretary of the Ministry of Finance of the Government of India and was entrusted with the task of making a report containing suggestions for rationalization and simplification of the Tax Structure in India. A copy of the complete report is in the library of the International Bureau of Fiscal Documentation. Mr. K.C. Khanna made a short summary of the recommendations which we now have pleasure in publishing.

Editor's note

DIRECT TAXATION

1. CORPORATE TAXATION

a) Classification of companies

i) distinction between a public (widely-held) or private (closely-held) company should be abolished,

ii) distinction between companies with income below Rs. 50,000 and those with income above Rs. 50,000 is unnecessary,

iii) industrial and non-industrial companies should continue to be distinguished,

iv) domestic and foreign companies should continue to be classified separately.

b) Types of taxation

i) "dividend tax" i.e. tax on dividends in excess of 10% of equity capital should be abolished, *

ii) surtax on company profits should be abolished, *

iii) a tax should be charged on all corporate capital (owned and borrowed) of all companies at a flat rate of 1%, irrespective of whether profits are made or not.

c) Rates of taxation

i) domestic companies big or small, industrial or non-industrial, public or private, should be charged tax on profits at a standard rate of 45%,

ii) foreign companies should be charged tax on profits at the rate of 60%, on income from royalties and technical service fees at 50%,

iii) intercorporate dividends should be fully exempt from tax if the dividend receiving company holds 25% or more of the equity capital of the dividend paying company.

d) Tax Base

i) provision should be made for deduction of expenses incurred before setting up of a business such as

* Indicates recommendations already accepted in full or in part.

expenses for capital issue, for market surveys before launching a new business, for processing a foreign collaboration agreement, for shifting a factory, payment of goodwill etcetera. Amortisation over a period of 5 or 10 years would be desirable;

ii) "terminal allowance" should be replaced by a system of continuing depreciation when an asset is sold, discarded, demolished or destroyed,

iii) development rebate should be withdrawn after three years,

iv) original cost of an asset should be increased by 20% initially at the time of its inclusion in the depreciation schedule,

v) only four rates of depreciation viz. 5%, 10%, 15% and 20% should be prescribed.

2. PERSONAL TAXATION

i) existing structure of progressive tax rates is generally satisfactory and may be continued,

ii) surcharge on unearned income should be abolished, *

iii) surcharge on earned income over Rs. 100,000 should be replaced by an appropriate increase in the tax rates for incomes over Rs. 100,000,*

iv) exemption limit should be fixed at Rs. 7,500 for individuals and Rs. 10,000 to Rs. 11,000 for Hindu undivided families.

v) personal or family allowances should be discontinued,

vi) conveyance expenses should be allowed as a standard deduction from salary income, expressed as so many rupees for a particular type of conveyance e.g. motor cars, motor scooters, bicycles, etc. *

vii) arrears of salary received at a particular time should be spread over the same number of future years and not of past years as at present.

3. GENERAL

i) basic rates of tax should be incorporated in the Income Tax Act itself, changes, up to 20% either way, may be made by a surcharge, plus or minus, through annual Finance Acts,

ii) advance rulings should be given by revenue authorities particularly in the case of foreign investment; these rulings need not be legally binding,

iii) periods for completion of assessments, disposal of appeals and issue of refunds should be reduced, *

iv) a uniform tax year, commencing from 1st July and ending on 30th June should be adopted,

v) tax liability should be related to the income of the tax year,

vi) tax payments should be made by the taxpayers in four instalments during the uniform tax year – 20% before October, 20% before February, 35% before May and 15% before September. Balance 10% should be paid along with the return before end of December.

vii) tax payments should be based on income of the current year and not on income of the latest completed assessment,

viii) returns up to Rs. 15,000 of income should be accepted, with a check once in three years only,

ix) appeals involving tax over Rs. 50,000 and penalty over Rs. 5,000 may be made direct to the Tribunal; special continuous benches of High

* Indicates recommendations already accepted in full or in part.

Courts should be constituted for tax cases.

x) appellate authorities should give definite decisions and not merely decisions on principles leaving it to the tax authorities to settle the assessments,

xi) assessments quashed in appeal should be completed within one year of the appellate order,

xii) a valuation department should be set up for valuing the property of taxpayers when necessary.

INDIRECT TAXATION

1. EXCISE DUTIES

A "General Excise Duty" should be levied on all production on which the Central Government is competent to levy such a duty under the Constitution. The duty will apply to the value of the whole production and there will be no need to specify or define commodities. The tax base should be the value of production minus the value of all materials bought for the purpose of production but not the value of equipment or services. The duty will be ad valorem.

The existing system of excise duties may be continued, on a more or less long term basis, on 14 listed commodities including unmanufactured tobacco, cigarettes, matches, paper, tea, coffee, sugar, cement, mineral oils, cotton textiles and motor vehicles.

The existing system may also be continued in the case of another 12 listed commodities including paints and varnishes, refrigerators and air-conditioners, soaps, cosmetics etc. It should, however, be possible to do away with the existing system within a period of five years.

2. CUSTOMS DUTIES

The process of rationalizing and simplifying the schedules of import duty started in 1965 should be carried to its logical conclusion. Except for a few "luxury" items like watches, jewellery, alcoholic beverages and perfumes, there need be only three or four rates of duty.

JOHN CRYSTAL:

THE LAW OF CORPORATE RESIDENCY IN CANADA

INTRODUCTION

The Law of Corporate Residency is perhaps the most important aspect of International Tax Planning. All tax liability is based on residence or carrying on business in a taxing jurisdiction. Corporations world income is subject to tax based on residence and hence the tax planner astutely guides his clients' corporations in and out of favorable tax jurisdictions and jurisdictions having favorable treaties.

The law of residency in most taxation jurisdictions (such as U.S.A. and Switzerland) appears quite simple, in that residence for tax purposes is created by the mere fact of incorporation therein, irrespective of any other factor such as nationality of shareholders, place of residence of the De Facto management and control or De Jure management and control by the Board of Directors, Head Office, Registration Office or actual place of business.

In Canada the matter is not so simple as corporate residence is created by statute or by common law. This characteristic may be extremely useful to an international tax planner.

CANADA

STATUTORY LAW

The Statutory Law of the Canadian Income Tax Act is Section 139 (4a). This Section was amended in 1965 and is applicable to the 1965 and subsequent taxation years but has a very important bearing on corporations incorporated in Canada before 1965, and after 1965 under certain conditions.

Section 139 (4a)

(4a) Corporation deemed resident. For the purposes of this Act, a corporation shall be deemed to have been resident in Canada throughout a taxation year if

(a) in the case of a corporation incorporated after April 26, 1965, it was incorporated in Canada; and

(b) in the case of a corporation incorporated before April 27, 1965, it was incorporated in Canada and, at any time in the taxation year or at any time in any preceding taxation year of the corporation ending after April 26, 1965, it was resident in Canada or carried on business in Canada.

The words "shall be deemed" in this Section have been judicially decided to raise an irrebutable and conclusive presumption in The Income Tax Act. (No. 25 and the M.N.R. (1951) 5 T.A.B.C. 19 (Before the full Board).)

The purpose behind this Section is to fix residence on a permanent and irrevocable basis by the mere fact of incorporation in Canada. The following is an analysis of Sub-Sections (a) and (b):

s.s. (a) Once a company is incorporated in Canada after 1965 then it is permanently and irrevocably resident in Canada and no application of common law rules can be used to alter this permanently fixed Canadian residency;

s.s. (b) A corporation incorporated in Ca-

nada on or before April 26th, 1965 but after that date it became a resident by common law or carried on business in Canada then it will be permanently and irrevocably deemed to be resident in Canada. This means that the common law can not be applied to change nor would the ceasing to continue to carry on business in Canada change the irrevocable residence of a company as far as The Canadian Income Tax Act is concerned. The corollary to s.s. (b) is that a corporation incorporated on or before April 26th, 1965 but after that date it was non-resident by common law and did not carry on business in Canada, then it will not be deemed to be resident in Canada, however; if in any taxation year thereafter it becomes a resident by common law in Canada or carried on business in Canada, then it will be deemed to be permanently and irrevocably resident in Canada.

COMMON LAW

A Corporation incorporated outside of Canada at any time before or after 1965 whose business affairs are in fact managed and controlled in Canada would by virtue of the common law (Unit Construction Co. Ltd. vs. Bullock 1959 (House of Lords) 3 all E.R. 831) be considered to be a resident in Canada and its world income (pursuant to Section 2 (1) of the Canadian Income Tax Act) would be subject to Canadian tax laws, irrespective of any other factor. The country of incorporation may also consider the corporation to be resident therein. The problem that this creates could be and usually is resolved by either existing treaties or the tax paid to the country of incorporation would be a tax credit deductible from the tax imposed by the Canadian Government.

The foregoing has been a brief study of the Canadian law of corporate residency without any discussion relating to the much troubled area of tax law, being that of the problem of dual corporate residency and the famous Obiter Dicta remarks of Lord Radcliff in the Unit Construction case cited above.

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JULY 1, 1968, AN IMPORTANT DATE IN THE EEC

On July 1, 1968, the customs union between the six European Common Market countries has been completed one-and-a-half year ahead of the time limit laid down by the Treaty of Rome.

The completion of the customs union on July 1, 1968, means:

(i) the complete abolition of custom duties between the Six by the suppression of the residual duties, which on June 30, 1968, are only 15% of those in force in 1958;

(ii) the implementation of the Common Customs Tariff (external tariff) by means of the final approximation of the national tariff to the Common Customs Tariff and the application to the Common Customs Tariff of 40% of the tariff cuts agreed upon in the Kennedy Round.

The external tariff has been established as a general rule on the basis of the arithmetical average of the duties of each of the Six in force on January 1, 1957. Taken as a whole, the duties which have been introduced on July 1, 1968, are lower than the French and Italian national tariffs. On the other hand, they are roughly comparable with the German tariff and rather higher than the present Benelux duties.

The implementation of the Common Customs Tariff makes it necessary to harmonize the customs legislation of the Six. The point is to ensure that all goods entering the Community receive identical overall customs irrespective of the point on the customs territory at which they enter. If this were not the case, products of non-member countries would enter through the country where customs treatment was most favourable and from there be distributed throughout the Community. The EEC Commission has submitted to the Council a number of proposals on this point; some of them have been adopted before July 1, 1968. In this Bulletin issue we are publishing the Ordinance on the customs value, adopted by the Council on June 27, 1968.

DR. J.C.L. HUISKAMP

THE FISCAL TREATMENT OF MINERAL OPERATIONS

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H.W.T. PEPPER:

THE FISCAL TREATMENT OF MINERAL OPERATIONS

I

INTRODUCTION

1. Where minerals are vested in the State and have not been alienated to private owners a material part of Government revenue will come from royalties, rents and other levies representing payment for the minerals extracted, in effect a sort of turnover taxation on production or sales, apart from income taxation of the entrepreneur's profits. Full treatment of the subject therefore must cover the subject of royalties as well as that of profits taxation.

TAXATION ANALOGY WITH OTHER TRADES

2. The simplest method of taxing the results of operations to extract minerals from their surroundings is to treat the work of extraction in the same way as the operations of a factory. The raw ores are thus equivalent to the raw material acquired by the manufacturer, the sinking of shafts, drilling, removal of overburden and other work necessary to gain access to the minerals are equivalent to the building of a factory. The erection of plant and machinery for extraction, crushing or processing is broadly similar to the installation of machinery in a factory.

3. The computation of profits from minerals using the factory analogy would involve deductions for the depreciation of plant and machinery, wages of employees and materials used in mining or processing. Where the mineral deposits have been purchased outright a deduction for the part of the deposits that are exhausted during the accounting year is usually allowed. Where the entrepreneur does not own the deposits the amount paid in royalties will represent the "cost of raw materials" and qualify for deduction.

4. Where the mineral resources have been discovered by the concern which is proceeding to extract them, the "cost" of the deposits, apart from any royalty that may be payable, constitutes the expenditure on finding, testing and gaining access to them. This expenditure should be written off over the life of the deposits in the same way that the cost of patents, factory and machinery would be written off during their life-span.

EQUALITY OF TAX INCIDENCE

5. In fact the above outline does represent broadly the manner in which mineral operations are taxed in most countries. In view of the need for equity of incidence of direct taxation upon different types of economic activity the rate of company income tax, for example, would ordinarily be the same for a mineral venture as for any other kind of venture (but see paragraphs on Level of Taxation).

GENERAL REVENUE CONSIDERATIONS

INTRODUCTION

6. A Government's revenue policy should be such as will tend to produce the maximum revenue consistent with allowing sufficient incentives, and adequate after-tax profits, to entrepreneurs to ensure steady growth both

of mineral prospecting and the rate of extraction from established deposits.

7. In its simplest terms all taxation is limited by "what the traffic can bear". Too onerous taxation will soon arrest development, too generous treatment of entrepreneurs means that an inadequate share of the profits will reach the State creating both an economic imbalance, and the danger of subsequent political repercussions. A review of mineral taxation in different parts of the world indicates a number of common features such that a consensus or pattern of general application is beginning to evolve along the lines indicated below.

8. The search for minerals is usually encouraged by the granting of large areas over which exploration and prospecting may take place and by giving the prospector the option to take up mining leases if his efforts are successful. A general exploration licence is usually for a strictly limited time (commonly not more than 2 years) and neglect of an area leased for prospecting is discouraged by prescribing minimum expenditure quotas, sharply ascending rent charges, and provisions for land to be relinquished after a reasonable time lapse.

9. Where income tax is charged on mining profits there are usually generous capital allowances or other reliefs in the early years of development in respect of pre-commencement and current capital expenditure so that little or no income tax may then be payable. Accordingly, the entrepreneur will be assured of a reasonable cash flow in the commencement years when development expenditure is likely to be heaviest.

10. When the development of the mineral resources reaches a mature stage the State's share of the total earnings will be increased. This may occur either "automatically", because capital allowances or other special reliefs have been allocated mainly to the early years of operation so that little remains to be deducted for tax purposes from the income of later years, or by deliberate scaling of the rates of tax so that higher rates apply when the venture has developed and grown more profitable.

11. The comparative merits of different forms of levy on mineral operations in securing a reasonably stable revenue to Government are considered below under the heading of "Level of Taxation".

LONG-TERM ARRANGEMENTS

12. Entrepreneurs engaged in mineral extraction usually seek, and ought to be given, some assurance regarding royalty and tax levels, and other operational conditions during the period they expect to be working the deposits. This assurance may be given either by including provisions about the quantum of royalties, rents and export duties in the mineral lease itself, which might also stipulate that the venture will not be subjected to discriminatory income taxation but only to the rates of tax which apply to taxpayers in general.

13. As an additional safeguard the entrepreneur may request some assurance regarding local taxes which may not be under the direct control of the central government, and regarding import duties on machinery and materials used in processing the minerals extracted. If these dues are raised substantially and discriminatingly the effect might be to vitiate the effect of the assurance given regarding the levels of royalty and income taxation. Accordingly, it is fairly common to find agreements which deal with royalties and income taxes making provision for the offset of minor local taxes and customs duties on mining requisites against the total sums due under the agreement.

14. An alternative to the arrangements referred to above is the making of a single

comprehensive agreement covering all aspects of taxation and over-riding the general laws governing the various duties, dues and taxes which would otherwise apply. Provided the levels of taxation stipulated in the agreement are adequate and provide sufficient flexibility in the event of unexpected economic changes there is no reason why such arrangements should not be mutually beneficial.

15. The entrepreneur wants to know exactly how he stands for the period of working the minerals and even if the rate of taxation is fairly high, complete certainty about this may be preferable to uncertainty about what rates may be charged in the future.

CASE FOR CHARGING ROYALTIES ETC.

16. To charge a royalty as well as income taxation on the entrepreneur's profits is logical since the deposits obviously have a value which ought to be paid for. The royalty or other "purchase price" (e.g. mineral rent, export duty) for the minerals also more logically forms a deduction from the entrepreneur's profits before tax than an offset against his income tax bill. Most minerals are in fact taxed in the way described and although there are still a number of "50:50" or pure "profit-sharing" agreements in existence, some of which are in the oil industry (the main feature being that all royalties, taxes etc. are offsett against the income or profit taxation on the profits of the venture) the present tendency is for a separate charge for royalty which is "expensed" and not offset. (See however paragraphs 51 and 137).

APPROPRIATE LEVEL OF ROYALTY ETC.

17. It is not always easy to decide what the level of a royalty should be. Only in the case of petroleum is there an internationally adopted custom of charging 12½%. This rate is exceeded, e.g. in Iran, Kuwait, and Venezuela where petroleum royalties range up to 20%, while in some countries royalties at less than 12½% are charged for offshore oil. In the old-style, pure "profit-sharing" agreements the impact of the royalty is, of course, considerably modified by its being offset against the tax charged on profits (see also paragraphs 35-36).

18. In the case of oil there is obviously no scope for charging rates higher than 12½% for new ventures in a country where oil has not so far been developed, but this happy position may be realised in respect of discoveries in a country which has already proved itself as a rich producer. Elsewhere rates lower than 12½% have been charged where exploration is strictly on a "wildcat" basis.

19. The appropriate level really depends upon the richness of the mineral deposits. If there is any doubt about the value of these the government may make its own assays or call in an independent organisation to do on its behalf.

WHERE MINERAL PRICE FALLS

20. Where the level of royalties initially charged subsequently proves onerous, perhaps because of rising costs or falling mineral prices and there is no scale which automatically reduces the rate when prices fall, the rate might be modified by permitting use of an option to use the "yield basis" (see paragraphs on Royalties and Other Levies) although this should be regarded as a remedy only in exceptional circumstances. In the case of an exceptional rise in the mineral price a graduated scale of royalties or export duties which imposes a higher *rate* at higher price levels is usually employed to cream off the consequent exceptional profits.

EXCEPTIONAL RISE IN MINERAL PRICE: PROFIT TAX IN MALAYSIA

21. Where the price of the mineral rises steeply and the existing charge for royalty or export duty is made on a flat percentage basis or in fixed terms of currency per unit, an alternative to raising the rate of royalty or export duty may be used in the form of an additional tax related to the higher profit resulting from the higher prices. In Malaysia at a time when there was danger of external war and price of tin was booming, a tin profit tax was introduced which levied a tax of 10% on the excess over a basic profit rate per unit of mineral produced. This basis also relates the revenue derived to the "yield" or profit of the entrepreneur but is the obverse to the yield basis referred to above which is granted as a means of *reducing* the royalty payable.

22. The advantage of the method adopted in Malaysia was that where only marginal deposits were being worked at a low profit rate, no extra tax was payable whereas higher export duty might have priced the deposits into the uneconomic-to-work category. As the tax is computed by reference to accounting years, price, and therefore profit, fluctuations are averaged out. As the tin industry included a very large number of small marginal producers who might have been put out of business by a higher export duty the profit tax was particularly appropriate to the economics of the industry.

23. In Malaysia the main turnover revenue from tin of the federal government came from export duty (broadly equivalent to a federal royalty) levied at a fixed rate per cent. The "royalty" element was generally in the form of a mineral rent of a small fixed amount per acre payable to the state governments. Such rents were not graded according to the richness of the deposits so that there remained some scope for the introduction of a tax which fell more heavily on the profits from working the richer mineral lands.

MARGINAL MINERAL DEPOSITS

24. It may be noted that the tin profits tax introduced into Malaysia could be avoided if the tin miner working rich lands were to re-direct his operations (if this were technically possible) in order to include some poorer land along with the better deposits. This would obviously not necessarily be a bad thing economically for the country even though the effect would be to reduce the average profit per unit produced and thus reduce or avoid the profits tax liability. The obverse result would be that the total mineral production and hence employment, and the yield from export duty would increase. This is obviously a subject too large for full treatment in a paragraph or two but it is reasonably clear that a tax of this type may well have a role to play in certain countries where there is a need to encourage the even development of minerals of varying quality and at the same time a case for levying somewhat higher taxes on the richer grades.

25. The above paragraphs summarise the main revenue considerations relevant to the extraction of minerals. Some of the points are dealt with more fully in the paragraphs which follow.

EXPLORATION

GENERAL

26. The search for minerals has been a pursuit of man since, or even before, civilisation began. Gold deposits in the Middle East, now mostly exhausted, were exploited in the time of the great civilisations of Egypt, Assyria,

Persia, Greece and Rome, tin in Cornwall was mined for the Phoenicians and is still being mined today.

27. Until comparatively recent times exploration was by examination of surface indications where, through defaulting of rocks or erosion, mineral-bearing strata broke the surface of the earth or the sloping side of a hill or valley.

28. Modern techniques of geological mapping have made it easier to forecast where particular minerals may be found so that minerals may now be located by prospectors who know what they expect to find and roughly where to look for it, instead of by chance or random discoveries.

29. A geological picture of a country may have been built up slowly over a lengthy period of civilised occupation, or may, in the case of "newer" territories with wide expanses of wilderness or jungle and small populations, have been prepared by the more "instant" methods of aero-geophysical or aero-magnetic surveys.

30. Apart from surveys done from aeroplanes carrying special equipment, other "short-cut" methods of geological mapping include seismic exploration, recording the pattern disclosed by recording earth tremors artificially set up by explosives. Geochemical methods have recently been used by a U.N. exploratory team which has discovered vast copper deposits in Panama by making chemical analyses of alluvium in river beds and then following the mineral traces thus discovered back up river to the source of origin.

31. In other instances, where deposits which were originally entirely land-based have been eroded by rivers and swept into the sea, offshore prospecting has sometimes led to the extractions of the minerals in the sea bed, e.g. tin ore off the coasts of Thailand and Malaysia and diamonds off the coast of Southern Africa. Offshore explorations have also discovered oil and natural gas deposits on the continental shelves and the mining of coal has also been undertaken offshore, in the latter case usually where seams of coal worked from land-based mines have been followed into submarine strata.

FISCAL ARRANGEMENTS: EXPLORATION AND PROSPECTING

32. Where mineral deposits have already been found by surveys sponsored and paid for by the Government, possibly in conjunction with the U.N. or other international organisations, or with the help of bi-lateral aid from a more developed country, development of the minerals may be put out to tender or be negotiated with one of the relatively few large international groups engaged in mineral extractation. In such circumstances it is likely to be most appropriate to formulate an agreement governing the long-term development of the deposits and the level of the royalties and tax payable during that period.

33. Where on the other hand there are merely reasonable expectations of minerals in certain areas but the deposits have not been pin-pointed it is usual to issue exploration and prospecting licences to those wishing to look for workable deposits.

34. Broadly speaking areas for exploration may be allocated for short periods usually in fairly large blocks on a non-exclusive basis (in which case other interested parties might also be licensed later to explore the same area) and for prospecting in somewhat smaller areas on an exclusive basis. In the latter case it is common to impose conditions such as minimum expenditure requirements for each year of the licence (with some flexibility e.g. where the minimum is exceeded in one year but not attained in another) or stipulate that half of the area be given up after not

more than 5 years, and half of the remainder after a further period. The rent or other charge is usually on an ascending scale so that it is on the interests of the prospecting company to complete its work as soon as possible.

PREMIUM PAYMENTS

35. Where a number of entrepreneurs are competing for the right to prospect in a promising area the Government may invite them to offer a premium or initial payment (which may be in addition to, or an advance payment of, future royalties). A total reputed to be in the region of U.S. $650 million was collected from various operators for the right to prospect for oil off the Santa Barbara coast in California, payments of as much as $10,000 to $12,000 per acre for areas 10 miles offshore being bid.

36. There was keen competition for the right to prospect for North Sea natural gas deposits which were let out in rather large blocks substantial distances off the East Coast of Britain. Iran has also obtained considerable revenue ($231 million from 5 large companies in 1964) from cash bonus payments collected from operators granted concessions for offshore oil in an area where preliminary seismic surveys indicated that the area had promising prospects for petroleum discoveries.

EXTRACTION OF MINERALS

37. Prospecting licences or agreements should normally carry the right to develop and extract any minerals found as the results of the prospecting operations and the rates of royalty, rent and tax are usually outlined in the documents so that the entrepreneur knows exactly how he stands from the outset.

ROYALTIES AND OTHER LEVIES

GENERAL

38. Where the mineral resources are vested in the State, or in a private owner other than the entrepreneur extracting the minerals, it is usual for a royalty or mineral duty to be paid, calculated either as so much per unit of production or as a percentage of realised price, or as a percentage of profits.

EXPORT DUTY AS ALTERNATIVE

39. When the whole of the mineral production is exported and the minerals are state-owned an export duty computed in a similar way to a royalty may be levied instead of or as well as the latter. The results will be broadly similar except that an incentive is then provided for using or processing the mineral within the borders of the producing country (see paragraphs below under heading "Export Duty").

VALUE ON WHICH LEVY COMPUTED

40. Practice in the manner of charging royalties/mineral duties varies from country to country. Where minerals are privately owned Government is not directly concerned with the bargain struck between the owner and the extractor of the minerals. Government is indirectly concerned in that royalty payments are deductible in computing the payer's income tax, and chargeable in computing the recipient's tax bill.

41. Historically, royalties were usually imposed as a charge in terms of money per unit of quantity produced. Modern tendencies are towards charging a percentage on realised prices but practical difficulties arise where metal prices fluctuate from day to day and from the fact that there are no world prices for mineral ores. Further difficulty arises where ores are sold by the extracting comp-

any to a processing or handling company within the same corporate group so that the price paid is not at arm's length.

CENTRAL AND PROVINCIAL GOVERNMENTS

42. Where there is a federal or central form of government, the individual states or provinces retaining some degree of interest in mineral rights, there may be a combination of royalties and export duties, the former providing local and the latter the federal or national revenue. In such cases the country's Constitution usually delimits the taxing powers of the state or province and of the federal or central Government. The happiest administrative arrangement in such circumstances is where a single joint charge is levied upon the entrepreneur and the yield shared between the local and central authorities in agreed proportions.

LONG-TERM MINERAL AGREEMENTS

43. Long-term agreements are often sought by the entrepreneur proposing to develop the mineral resources as the extraction operations can be planned more economically if a long period rather than a short one is assigned for the operations. Where a lengthy period is assured it becomes worthwhile to bring in large and costly plant and machinery which might not have been justified in terms of a brief period of operations.

44 On the other hand the Government benefits from a long-term assurance of revenue from the mineral operations which make it easier for planning economic development of the country in general.

QUANTUM OF ROYALTY UNDER LONG-TERM ARRANGEMENTS

45. Where royalty payments are to be offset against income tax on the Government share of profit under a profit-sharing agreement, the quantum of the royalty is of comparative insignificance except in cases where there is a possibility that there may be no profits after payment of royalty. This is only likely to occur in the early development of a mine—when in any event special concessions are likely to be made, or in the closing stages when the deposits are becoming exhausted or when the mine is becoming un-economic to run. The "offset" type of agreement is now becoming rarer and the "expensed" royalty agreement is now more commonly adopted.

46. Where the royalties are expensed so that the quantum is a factor in the total yield to Government from the mineral workings, the level of charge is of some importance. In the case of oil, royalties are usually charged on a percentage basis, the "standard rate" adopted in the U.S.A. and in most other countries is 12½%, which in some countries is abated by references to the distance from the shoreline in the case of offshore deposits, but there are examples of higher and lower rates (paragraphs 17-19 and 137).

ESCALATION CLAUSES IN AGREEMENTS: CURRENCY DEPRECIATION

47. Some mineral agreements provide for the escalation of royalty rates at certain intervals during the term of the agreement. Such provision is essential when royalties are expressed in terms of money per unit of output in view of the tendency for the value of minerals to rise in relation to the value of world currencies. Moreover, in the case of a country whose currency is not sufficiently stable to rule out the possibility of devaluation it is desirable to provide for the possibility of currency depreciation in terms of other currencies by a clause stipulating that the royalty per unit be payable in terms of the local currency or some internationally accepted currency whichever gives a higher figure.

ROYALTY VARYING WITH OUTPUT OR PROFITS

48. Arrangements to vary the rate of royalty charged with the quantum of output or profits are comparatively rare. Generally speaking the greater the output the more profitable the operation should be and therefore the more tax and royalty that can be borne. In New South Wales (see paragraph 54) and Queensland see (paragraph 53 and its footnote) the rate of royalty increases with profit after a certain stage of development. By contrast in Jamaica bauxite royalties and in Guyana manganese royalties decrease (the object, of course, is to stimulate greater production) when output goes beyond a certain level. On general principles it is not sound to link the rate of a levy to output or profit because scope for manipulation is thus offered. For example, output could be increased not by greater productive efforts but by the amalgamation of several producers, or reduced by fragmenting an enterprise into several separate mines. On the whole it is better to make the ascension of rates depend on the effluxion of time—e.g. some countries apply attractively low rates when the mining industry is in its infancy and higher rates after sufficient time has elapsed for the industry to have reached maturity.

ABATEMENT OF ROYALTIES

49. Provisions for abating offshore oil royalties by references to the distance from the coastline have already been referred to. This treatment may be necessary to encourage exploration in countries where substantial mineral wealth is hoped for but has not yet been discovered. In general, however, it is sounder to grant any abatement from the standard level of royalty by reference to the quality and extent of the mineral deposits. For example, in the case of oil, a richer deposit may be discovered offshore than is being worked onshore so that there would be no good reason for abating the royalty for the former as against the latter. In some cases mineral deposits may be exceptionally valuable such that it would not be unreasonable to charge a premium above the standard rates (see paragraphs 35-36). In the case where mineral deposits are exceptionally valuable but involve unusually heavy capital expenditure to gain access to them the appropriate treatment would appear to be to give generous relief in respect of the capital expenditure involved rather than to charge royalties at a lower rate.

50. However desirable it may be for the State to draw a substantial revenue from royalties or export duty circumstances may arise when the industry can no longer afford to pay and will become insolvent if the levy is maintained. This sort of position has arisen where the price of the mineral has dropped sharply (e.g. manganese the price for which has fallen by 50% in recent years) or where costs have steadily risen while the metal price remained unchanged (e.g. gold the price of which has remained unchanged for 38 years). Whatever the fiscal laws, or whatever long-term agreement has been made with the entrepreneur, the revenue simply cannot be maintained. One country faced with a crisis in its manganese industry made a sharp reduction in the royalty payable. Other countries have allowed the "yield basis" (see paragraph 53) to apply, for example, to high cost goldmines so that the royalty payable has declined as the mine has become less profitable. Where royalties have from the outset been based on a percentage of profits they have the same impact as on additional income tax but are payable only when a profit is made.

DOUBLE TAXATION RELIEF

51. Where minerals in a country are worked

by an enterprise that is based in a foreign country, the entreprise will in general prefer that its total tax bill should contain as high a proportion as possible of income tax or equivalent levies on profits and the minimum amount of royalty or other levies on turnover. This is because double taxation relief is normally given by the base country in respect of overseas profits which have been subjected to overseas income tax. In contrast, relief in respect of levies such as royalties or export duties is extremely rare. The country where the minerals are being produced may accept a taxing formula which produces a higher proportion of income taxation provided the total revenue yield is not reduced. In some cases it may be possible to obtain a slightly higher total yield by a switch from royalty to income taxation because of the relief obtainable by the entrepreneur in his home country which reduces his world tax bill. The only other consideration to bear in mind is that referred to below on the subject of stability of Government revenue (paragraph 78).

Example

52. The example below will demonstrate the point regarding the switch in tax "structure". Assume that royalty is payable at 25% of realised price, that income tax is charged at 35% of net profits and that mining expenses, depletion, depreciation etc. amount to 50% of turnover—the position is—

Position A			*Govt. Revenue*	*"World" tax of Entrepreneur*
	Turnover	100		
Royalty	25		25	25
Expenses	50	75		
Profit		25		
Income Tax at 35%		8.75	8.75	8.75
Net Profit		16.25		
Tax of entrepreneur in base country at 50%		3.75		3.75*
		12.50	33.75	37.50

* tax at 50% on Profit = 12.50
less double tax relief for tax in mineral country 8.75

3.75

If royalty is charged at 20% and income tax or the equivalent share of profit (accruing to Government) is increased to 50% the position becomes—

Position B			*Govt. Revenue*	*"World" tax of Entrepreneur*
	Turnover	100		
Royalty	20		20	20
Expenses	50	70		
		30		
Income Tax at 50%		15	15	15
Net Profit		15		
Tax on entrepreneur in his base country, at 50%		Nil		Nil*
		15	35	35

* tax at 50% on profit 30 = 15.00
less double tax relief: tax in mineral country 15.00
Nil

Comparison

In Position A the entrepreneur's total profit is 12.50 and the total government revenue to the mineral country is 33.75. In Position B the entrepreneur is better off because his net profit after tax has increased to 15.00 while government revenue has also increased to 35.00.

YIELD BASIS

53. In some countries (including West Africa, Australia, Fiji) a formula for abating royalties is incorporated in the law or in mineral-working agreements. A mechanism is provided whereby the entrepreneur may opt*, instead of paying royalties on gross turnover, to pay a higher percentage of the actual profits realised. When profits are falling, the net amount payable at the higher percentage on profits will eventually be less than the smaller percentage charged on the gross output. An example of yield basis is provided by the Mining Ordinance in Fiji which provides that where the "yield" (i.e. profit) of the undertaking does not exceed 20% of turnover, the royalty is to be 10% of yield. Where yield exceeds 20% the royalty payable is to be increased by 0.2% for every 1% by which the yield exceeds 20%. It may be noted that in any year when the entrepreneur makes a loss, no royalty is payable as 10% of a Nil yield is Nil. When profits amount to 50% of turnover royalty would be payable at 16% of profits (8% of realised sales).

54. A somewhat different type of profit-linked royalty operates in New South Wales, Australia in respect of the Broken-Hill lead-zinc mines. For the first 40 years of a mine's life the royalty is payable at a flat rate. On the second renewal however

* or may be compelled. For example Queensland in Australia charges royalties on a sliding scale of 2% to 5% on profits. 5% applies when profits after tax exceed A$10,000,000 and 2% applies when profit exceeds $10,000.— below that figure. There is no royalty.

(41st to 60th year of tenure), the royalty is—
3% on the first $200,000 (or part thereof) of net profits the rate increasing by 1% on each additional $200,000 of net profit,
and on subsequent renewals (61st year of tenure and thereafter) the royalty is—
4% on the first $400,000 (or part thereof) of net profits thereafter increasing by 2% on each $400,000 of net profit.

Although in practice this system presumably operates in a broadly similar way to the "ascending liability" schemes referred to in paragraph 127 below it is curious in that it is in a form which offers a disincentive to higher production in contrast to the contrary device employed in some countries, referred to in paragraph 48 above. The provision would also appear to favour small enterprises and deter amalgamations. Although the scale has been described as an ascending one it would of course also work in reverse to afford relief by charging a lower rate of royalty when production declines.

PRICE ON WHICH ROYALTIES ARE COMPUTED

55. Where there is no world price for the minerals exported from a country or where minerals are passed between a subsidiary company and a parent company or between associated companies there may be some difficulty in ascertaining an arm's length selling price. This difficulty is sometimes overcome by a system of "posted prices" i.e. prices which are published and which, at least in theory, are those at which the entrepreneur will be willing to sell the mineral product exported to an independent buyer. Posted prices in the Middle East in respect of oil were last fixed in August-September 1960 and as the price of oil has since decreased the producing companies normally discount from the posted prices in selling oil to independent buyers. Royalties are however still often calculated on the posted prices so that the effective rate of royalty charged exceeds the "standard" 12½% on the realised price.

56. There are no world prices for mineral ores but some metals have a world price (see however paragraphs 140 and 141 regarding the "unreal" free market price of copper and nickel) and a formula may be devised for computing an ore price from the metal price. This applies to some extent to petroleum prices since the prices of petroleum products are recorded daily in a publication known as Platt's Oilgram and are thus readily available (see also paragraph 63).

57. Sometimes provision for variation of royalties (when levied in specific money terms) is included in the mineral-working agreement and is based on a formula linked to changes in the metal price. Such a provision is certainly desirable especially in the case of a long-term agreement. Where however there is a very large increase in the metal price, this may alter substantially the whole outlook under the mineral agreement such that the entrepreneur may be enjoying profits on a scale not originally envisaged. It would thus be more appropriate to provide in the agreement an opportunity for reconsidering the level of royalties in the event of exceptional changes in the realisation price. This is all the more reasonable when it is considered that whatever the minimum royalty under the Agreement, the levy would inevitably have to be reduced in the event of a catastrophic price fall. This paragraph should however be read in conjunction with paragraphs 80-81 under the heading "Level of Taxation".

(to be continued)

THE ROLE OF PRIVATE ENTERPRISE IN INVESTMENT AND PROMOTION OF EXPORTS IN DEVELOPING COUNTRIES

A REPORT BY D.U. STIKKER, PREPARED AT THE REQUEST OF THE UNCTAD SECRETARIAT, 17-11-1967.

CHAPTER IV
TAXATION ASPECTS

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INTRODUCTION

179. One of the assumptions on which the 1965 OECD report[105] on fiscal incentives for private investment in DCs is based reads as follows: "... the revenues of developing countries generally fall short of their needs. There is a great need among developing countries for public investment or social capital formation. Therefore it is incumbent on industrialized countries to search out those incentives which will impose a minimum pressure on the financial resources of developing countries". The introduction to that report concludes with the words:

"... the investor will seek a rate of return on investment in a developing country, net of all taxes, which will at least be equal to the return from alternative investment opportunities, adjusted for differences in risk. If the returns from alternative opportunities are all taxed by an investor's home country, while a tax reduction is given to investment in a developing country, the latter obviously would become more attractive than before and induce capital flows that might otherwise not occur".

180. In the preparation of this chapter, it has not been overlooked that proposals which aim at improving the after-tax earnings yields from operations in DCs must involve some immediate sacrifice of revenue from existing enterprises. In most DCs, however, the yield of tax from the private corporate sector as a whole is relatively low by reason of the modest degree of industrial development so far achieved. Accordingly, the marginal tax restraints suggested ought not to be regarded as involving major budgetary problems or as threatening wage and price structures in the DCs. Subject to general conditions in both the DCs and MECs being suitable for the expansion of investment in the former, marginal revenue losses should quickly be recouped from the increase in both profit-earning sources and employment.

181. In a paper prepared by the Commission on Taxation of ICC[106] emphasis is laid on the following among other points:

"(a) The promotion of economic growth in

105. "Fiscal Incentives for Private Investment in Developing Countries", OECD, 1965.
106. ICC document No. 180/100 of 29 March 1966.

the developing countries by fiscal means requires complementary action in both the capital-exporting and capital-importing countries. Unilateral action by one and not the other is likely to be ineffective if taken by capital-exporting countries alone and both wasteful and ineffective if taken by developing countries alone.

(b) To the extent that the primary right to tax is claimed by the developing countries, the onus of providing tax reliefs designed to encourage economic growth rests primarily on the developing countries themselves.

(c) The duty of the capital-exporting countries is to match the reliefs granted at the source, whether such reliefs arise from general restraint such as low rates of tax, or special measures such as pioneer exemptions, investment allowances or accelerated depreciation."

182. It is against the background of those principles, described by OECD and ICC and to which the author fully subscribes, that the attitudes of governments of DCs and MECs and their consequences for private enterprise should be studied. It is not possible within the limited space available for this chapter to go deeper into all the fiscal and economic consequences of these principles. Therefore I would deal with only two questions raised by the influence of taxation on the ways in which private enterprise can participate in the economic development of the DCs. The questions are:

(a) Is taxation in itself an obstacle to participation by private enterprise in the DCs?

(b) Can taxation reliefs be used to overcome other impediments of a non-fiscal character?

These important questions are examined in the following paragraphs from the point of view of large-scale foreign private enterprise.

TAXATION OBSTACLES TO PRIVATE ENTERPRISE

183. Local capital formation in the DCs is hampered by steeply progressive personal income tax and high levels of taxation on corporate profits. The pattern of taxation does little to encourage people to break with the traditional habit of investing savings in real property, gold, foreign currencies or, at best, readily realizable interest-bearing securities. The result is a shortage of local capital for medium to large industrial undertakings.

184. The flow of foreign private capital and skills is also discouraged by such inhibiting tax systems. In most cases it is considered contrary to public policy to operate a tax system which differentiates in favour of foreign private investment. Indeed, in those DCs where industrial development begins with the aid of foreign private capital there is a danger that this will appear to dominate the economy, giving rise to political reactions which may take the form of a taxation system which discriminates against the foreigner. It is unfortunate that the need for additional revenue has frequently led to the introduction of taxation systems which bear most heavily on large-scale foreign undertakings, potentially the most promising sources of new capital and know-how. Another difficulty is that frequent variations in the tax system create a situation in which long-term company planning is difficult, if not impossible, and the choice of capital structure and form of organization for a new project becomes a highly speculative matter.

BASIC FISCAL REQUIREMENTS

185. Although established industrial companies in Europe and North America are the source from which most foreign private capital comes, few DCs pay much attention to the fiscal conditions appropriate to busi-

ness operations undertaken by such companies outside their own countries.

186. Fiscal systems must deal with three main types of earnings:

(a) Corporate profits and dividends.
(b) Interest.
(c) Royalties and service fees.

CORPORATE PROFITS AND DIVIDENDS

137. There is double taxation of corporate profits and dividends, and therefore discrimination against corporate enterprise, if the shareholders are not entitled eventually to treat taxes on profits as a credit against their personal liability to tax when the profits are distributed. Such double taxation has been obviated in the Commonwealth tax systems which are based on the pre-1939 United Kingdom Income Tax Act. Malaysia, Zambia, Nigeria and Jamaica are examples. Discrimination against corporate enterprise has also been averted in countries which have two-tier personal tax systems involving a schedular proportional tax on each class of income and a graduated tax on total income. Tax on company profits is compensated by exempting dividends from the proportional tax. This is the case in Italy and many Latin American countries. Since the Second World War, the United States, the Netherlands and, more recently, the United Kingdom have adopted corporate taxes that are wholly discriminatory against corporate enterprise. The precedent set by those countries has been followed closely by a number of DCs including India, Pakistan, Ceylon, the Philippines, Thailand, Indonesia, Mexico, Chile and some former French-African Countries. It is a strange phenomenon that countries most in need of the development which private enterprise joint-stock companies can bring should adopt tax systems which discriminate in particular against that one form of organization.

188. In a number of MECs a tendency in recent years has been to abate the wholly discriminatory character of corporation profits taxes. This has happened in the Federal Republic of Germany, Belgium, France, Austria, Canada and Japan, where the cumulative effects of corporate tax on profits and personal tax on dividends have been mitigated either by the introduction of differential rates in favour of distributed profits, or by special credits being recorded against personal income tax payable on dividend income. The DCs have not emulated the MECs in this respect.

189. In the DCs the consequences of imposing wholly discriminatory corporation taxes have been aggravated by the adoption of another tax practice prevalent in the MECs, namely the imposition of heavy withholding taxes on dividends payable to non-residents. In the case of individual persons, it may be that some form of relief from the effect of the withholding taxes is obtained in the shareholder's country of residence. If so, no serious increase in the total tax burden will be borne by his income. However, governments in the DCs must be aware that little capital investment can be anticipated directly from individual persons, and companies will be the only effective source of funds. In their case, dividend withholding taxes are simply an addition to the corporate tax rate payable on income arising from their overseas investments. The effect of a high aggregate level of tax on corporate profits and dividends in the DCs is to raise the level of earnings required to pay the shareholders in a foreign parent company dividends giving a yield comparable to the yield investments at home or in other MECs. The combination of taxation and the other factors affecting profitability in DCs makes so high a level of earnings rarely capable of achievement. The position is illustrated in Table 9.

TABLE 9

Earnings rate to yield 10 per cent on capital of parent company

	India	*Ceylon*	*Ghana*	*Congo Dem. Rep. of*	*Trinidad*
	%	%	%	%	%
Company profits tax (mean)	55	50	50	40	44
Effective rate of tax on dividends	25	39⅓	40	25	30
Over-all rate of "company tax"	66¼	70	70	55	61
Earnings rate on capital required to yield 10% on capital to the foreign parent company	30	33⅓	33⅓	22	25⅔

This compares with earnings rate required to yield 10% distributed profit in the following countries:

	%
United States	19¼
United Kingdom	16⅔
France	13⅓
Federal Republic of Germany	11¼

190. Under the present conditions of political and exchange risks in the DCs, it is not realistic for investments to be made in those countries on the basis of the same net yield to shareholders as domestic investments provide. In consequence, the prospective earnings yields (before tax) in the DCs must frequently reach 40 per cent to 50 per cent of capital for an investment project to be viable. This formidable obstacle is the result of the fiscal policies of some DCs.

191. In relation to inter-company investment between MECs the difficulty has been resolved to a large extent by the conclusion of bilateral double-taxation agreements providing reciprocal exemption from dividend withholding taxes, or limiting the rate to a maximum of 5 per cent, as recommended by the OECD Fiscal Committee. The need to maintain revenue and an insistence on the absence of effective reciprocity of revenue sacrifice appear to have deterred DCs from entering into similar arrangements. Every double-taxation agreement involves some immediate sacrifice of revenue if it is to be of any value, but each party must look to the broader economic advantages of an effective agreement rather than the marginal effects on revenue collections.

INTEREST

192. Private enterprise depends for profitable operations on a proper gearing of capital structures so that (a) full use is made of bank facilities and the relatively lower yields required by investors in loan stocks, and (b) venture capital supplied by ordinary shareholders is not wastefully employed in finan-

cing fluctuating working capital requirements. In many DCs, adequate bank overdraft facilities are not easily secured or maintained, while the funds available from institutional and private investors are too restricted to support substantial issues of loan stocks. As a result, the foreign parent company, making an equity investment, finds that it must supply virtually all the financial requirements of a new venture. The employment of ordinary shareholders' funds is not appropriate for this purpose. But if the investing company uses its credit to raise loan finance in its domestic money market or in other foreign markets, a further tax obstacle arises. The DCs retain the right to tax interest accruing in or derived from sources in their territories. Interest paid by the lender in order to obtain the required funds for investment is not deductible for tax purposes. In consequence, a form of double taxation arises from the fact that the lender's income from the DC is taxed and he also sustains an interest charge elsewhere which cannot be offset against taxable income anywhere. An increase in the rate of interest charged against the project in the DC to compensate for this fact merely serves to diminish the viability of the project as a whole.

193. The problem of taxation on interest has been accentuated by the widespread tendency to consider that the rate payable should be consistent with that on profits and dividends paid cumulatively by an investor in ordinary shares. Thus tax rates of 65 per cent or more have been charged on the interest accruing in India, Pakistan, Ceylon and Ghana. In orther DCs, although the rate directly payable on interest may be reasonable, the system may disallow interest as a charge to the paying company so that indirectly the interest has to bear the corporate profits tax rate as well. This is the case in Ethiopia and Trinidad.

194. The high rates of taxation on interest and the withholding taxes on dividends payable to non-residents have the effect of denying to DCs the possibility of access to the investment funds of institutions such as insurance companies, retirement benefit funds and charitable trusts, and unit trusts and mutual funds in the MECs. These institutions and trusts account for a very high proportion of new capital formation in MECs, and their ability to operate at all depends in practice on fiscal neutrality, i.e., their intervention between the individual investor and the user of the capital must not attract additional taxation.

195. Between MECs the interest problem has been largely solved by double-taxation arrangements providing for the reciprocal exemption of interest from tax at source. It is unfortunate that the pressure of revenue needs and insistence on reciprocity of revenue sacrifice have prevented DCs entering into similar arrangements.

ILLUSTRATION

196. At this stage it may be interesting to compare the impact of the taxation systems respectively in MECs and DCs on the earnings needed to yield a return of 10 per cent on the capital invested, when equal amounts of loan and equity capital are employed. As a hypothetical case, it is assumed that a company has invested $10 million in a MEC and a subsidiary $10 million in a DC, in each case $5 million being equity capital and $5 million loan raised in the MEC at 8 per cent. It is further assumed that all other costs entering into turnover in the two companies will be the same and amount to $50 million (including the interest at 8 per cent). The calculation that follows shows that the profit margin on cost needed to cover the taxation levied in the DC would have to be 48 per cent against 70 per cent in the MEC.

(a) Company in MEC. Capital invested, $10 million, of which $5 million in equity and $5 million raised as a loan in MEC at 8%.

		$
Cost of turnover		49 600 000
do - interest at 8%		400 000
		50 000 000
Pre-tax profits		1 000 000
Turnover		51 000 000
	$	
Tax say 50%	500 000	
Dividend 10%	500 000	
Costs	50 000 000	51 000 000

Profit margin on costs = $1 million = 20% on equity capital.

(b) Subsidiary in DC. Capital invested, $10 million, of which $5 million in equity and $5 million raised as a loan in MEC at 8%.

		$
Cost of turnover		49 600 000
Net interest at 8%		400 000
		50 000 000
Add: additional cost to cover (say)		
65% tax on interest		740 000
plus tax on profits say	50%	
plus rate on dividend		
say 40% on profit of 50%	20%	
	70%	
This would leave 30%		
of profits for dividend	30%	
of $500,000	100%	
This brings earnings needed		
to $1,660,000		
of which tax		1 160 000
and dividend		500 000
		52 400 000

Extra cost	$	
on interest	740 000	
tax on profits and		
dividends	1 160 000	
dividend	500 000	
costs	50 000 000	52 400 000

Profit margin on costs = 48% on equity capital.

In this hypothetical case it is assumed that either by a system of tax exemption or by a system of tax credits there will be no further taxation in the MEC on the $500 000 net dividend declared by the subsidiary in the DC.

ROYALTIES AND SERVICE FEES

197. Difficulties also arise in the tax treatment of royalties for the use of patents and know-how, and fees payable for technical and advisory services. Claims for such payments are in the main cost recovery charges, but DCs tends to tax all royalties paid to non-residents as pure income, while an increasing number of such countries are adopting the same attitude to service fees, whether or not the services are rendered at the site of the development project. Failure to secure deduction of expenses from the income to which they relate is a serious factor in cutting down the final net profit yield from operations in DCs.

198. The problem is a general one for all large-scale organizations which economically (and often under pressure from the taxing authorities in their home countries) must recover an appropriate proportion of normal central research, advisory and administrative costs from each individual business operation.

199. The weakness of the economic and social infractructure in many DCs aggravates the problem by involving companies in additional central costs. For example, undertakings must often provide for themselves the power, water, roads, transport, communications, housing, training and medical services needed for the efficient conduct of the operations. This involves the employment of specialist personnel of a different kind from, and on a larger scale than,

that usually called for in domestic operations.

200. In a small number of DCs, not only are the royalties and service fees accruing to a foreign parent company taxed directly, but there is a tendency to disallow the payments as a deduction from the local company's profits for tax purposes. This has been the case in Brazil, Trinidad, Ethiopia, Nigeria and other countries.

201. In the matter of the taxation of royalties and service fees the primary responsibility for ensuring that only net income (if any) is taxed clearly rests with the governments of the DCs.

TAX ADMINISTRATION IN DCS

202. One reason for the apparent hostility shown by DCs towards foreign capital and enterprise lies in the weakness of their own tax administrations. In many cases the tax officers are so intent on preventing tax evasion that they find it difficult to distinguish between valid and invalid transactions and dispositions. Tax laws tend to be drawn in a form which affords the maximum protection to the national revenue without requiring any distinction to be made between different types of transactions. This, to some extent, explains the tax treatment of interest, royalties and service fees described above. It is also the reason for the practice of refusing or restricting relief against profits for previous operating losses, and imposing tax on a minimum income (e.g., a percentage of turnover) when the ordinary statutory measure of the results falls below the minimum. The foreign private enterprise company faced with such conditions cannot overcome the tax obstacles save by restricting its investments to situations in which the potential profit margin is wide enough to compensate for the exceptional tax burdens that will arise. This means that the anticipated return must contain an additional amount to meet the added tax burden, over and above the higher level of commercial and non-commercial risk attached to operations in DCs.

203. In these circumstances the question arises whether the governments of the capital-exporting countries can, and should, adjust their tax systems to compensate private investors for excessive and anomalous tax claims put forward at times by governments of DCs. Proposals for adjustments of this kind represent requests for indirect aid. MECs could, for example, allow expenses related to operations in DCs to be deducted from domestic taxable profits. Alternatively, they could allow provisions for operating losses in overseas subsidiaries to be deducted from the domestic profits of the parent organization. It would be unreasonable, however, to expect indirect aid of this kind to be given save under strictly controlled conditions.

TAX INCENTIVES FOR INDUSTRIAL INVESTMENT

204. Most DCs have attempted to encourage both local and foreign investment in industrial projects by tax incentives of various kinds. The general method has been to forgo potential revenues in order to assist the initial process of setting up new plants or expanding existing ones. The effectiveness of any such schemes depends on whether they enable profit margins to be increased or maintained for a long enough period to overcome the impediments to investment inherent in the normal fiscal system as well as the higher level of commercial and non-commercial risk involved.

205. In general, the tax incentives currently employed by DCs are unlikely to have a decisive influence on investment by foreign private enterprise for three reasons:

(a) They are profit-oriented, which means

that they are of least benefit to companies in their earliest years. The timing and duration of the incentives are such that the greatest benefit accrues to the enterprise which is able to earn a high rate of profit from the beginning, and which therefore least needs assistance;

(b) They are not geared closely enough to the obstacles to be overcome, for example, they cannot be effective at all when the problem is one of high operating costs in a restricted market;

(c) Some governments tend to be too narrowly selective in offering tax reliefs for the establishment of specific large-scale industries.

206. Total or partial exemption from taxation on profits for a number of years provides no assurance of compensation. It operates at a time when an infant industry is least likely to be profitable, and is in any case of limited benefit when the basic tax system which applies after the end of the "tax holiday" is adverse to the earning of reasonable profit margins by foreign investors. In countries such as Nigeria, Ghana, Sierra Leone and Malaysia, where the basic form of pioneer relief is exemption from taxation on profits and dividends for fives years, a technical peculiarity of the tax system requires the sixth year's profits to be assessed twice. This means that the normal growth of the enterprise tends to produce a situation in which much, sometimes all, of the benefit of five years' tax exemption may be lost in the sixth year. India, Pakistan and Ceylon have limited the application of their five-year tax-exemption periods to profits not exceeding 5-6 per cent of capital employed p.a. As accelerated depreciation is also afforded by the taxation systems in those countries, the level of profits and capital employed for tax purposes is further reduced, so that the likelihood of material benefits from the tax-exemption provisions is small.

207. The most useful incentives have undoubtedly been those which are cost-oriented—for example, investment allowances, development rebates and similar provisions. These provide for a deduction from profits which is related to the amount of approved capital expenditure without prejudice to the subsequent depreciation of the assets for tax purposes. If these deductions can be carried forward indefinitely, there is a reasonable possibility that some benefit will finally accrue. Even so, cost-oriented schemes, in common with accelerated depreciation deductions, have no immediate value unless adequate profits arise at the very inception of the business.

208. So far as the foreign investor is concerned, incentive schemes are of little value unless they help towards a rapid recovery of the initial investment. Unfortunately, two circumstances militate against this happening even when adequate tax-free profits are earned.

(a) Severe restrictions are often imposed on the repatriation of profits and capital either through the tax system or by exchange or other controls;

(b) In some capital-exporting countries (e.g., the United States and the United Kingdom) dividends received are subject to tax with a compensating credit for the tax actually paid at source. This means that tax reliefs on profits and dividends at the source are nullified in the investor's own country, i.e. the MEC picks up the revenue which the DC has forgone. Similar difficulties arise when exemption in the capital-exporting country is dependent on the income being subject to taxation at source (e.g., in the Netherlands).

209. The United Kingdom has entered into

tax-sparing arrangements with a few countries (Pakistan, Israel, Malta and Singapore), but no similar arrangements between the DCs and the United States have yet secured the approval of the United States Senate. This failure to take adequate steps to avoid frustrating the fiscal policies of the DCs has in some cases adversely affected relationships between governments and individual foreign enterprises.

210. The increasing tendency of DCs to place severe restrictions on the repatriation of profits or to impose penal taxes which virtually compel their retention in the company is one of the greatest deterrents to new investment. The demand for a reasonable dividend yield on capital is not a question of exploitation or greed on the part of the foreign investor but arises from the fact that dividends have to be paid to shareholders of the parent company. A continuous ploughing back of the total earnings in DCs places the whole burden of servicing capital on the centre of an international company, with the result that its growth may be stunted and the whole organization thereby weakened.

211. Much can be learnt from studying the reasons why particular projects fail or why, though contemplated, they are not actually undertaken. Apart from political and exchange risks, the answers are frequently to be found in the unusual cost structure of infant industries in what are largely agricultural economies. The main features of this situation, not all of which, of course, are present in all DCs, are:

(a) The market is too small and is sometimes further restricted by heavy and unduly selective excise duties or turnover taxes;
(b) High import duties are imposed on capital equipment, components and raw materials;
(c) There is a shortage of skilled labour and the cost of training nationals and employing expatriates is high;
(d) Private companies may be called upon to provide parts of the infrastructure—power, communications, housing and medical services;
(e) There is an absence of ancillary industries and services;
(f) Companies need to undertake special research into the use of local materials and the adaptation of techniques to the climatic and other conditions.

In view of these factors, it is clear that if government revenues are to be employed to improve the prospects for private enterprise, it would be more realistic for tax reliefs or subsidies to be cost-oriented rather than profit-oriented.

212. The notion of subsidies for capital expenditure on new projects, usually in the form of investment allowances deductible from taxable profits, has already been adopted by many DCs, including India, Pakistan, Ceylon, Brazil (in relation to the development of the North), Zambia, Malawi, the West Indies and many of the Former French African territories. The idea might be further developed to include subsidies for current, as distinct from capital, expenditure connected with the improvement and maintenance of the economic infrastructure in DCs. A percentage additional allowance might be granted for current expenditure on research, training, expert promotion, maintenance of power supplies, communications, housing, medical services and schools. Examples of this type of incentive have been afforded recently by Australia, which permits a double deduction for expenditure on export promotion and Canada which has authorized a 150 per cent deduction for increased current expenditure on research.

213. The method of granting subsidies of that kind merits study in relation to the DCs. It may be found more appropriate to grant

the subsidy in the form of tax-credit certificates rather than as deductions from profits. The tax-credit certificates would be available immediately for settling any outstanding tax liabilities, or alternatively could be redeemed in cash after a period of, say, two years. Such arrangements would offer the added incentive that it would be less easy for the governments of capital-exporting countries to nullify the reliefs when profits or dividends were repatriated.

214. One specific means by which costs might be reduced is through the tax treatment of expatriate employees of enterprises based on foreign capital and know-how. It is essential that the normal tax system should be so modified as to provide tax-free allowances compensating expatriates for such special factors as maintenance of homes and education of children in their home countries, pension entitlement, leave passages and so on. The employer is compelled to provide such benefits if he is to secure suitable management and staff, but if the cost is to be charged to gross payments subject to tax, it may well be prohibitive. It is not, however, sufficient, to afford a tax relief to a limited class of expatriates for a limited period of time, as has been done in certain countries—for example, for technicians in India. General management and marketing skills are also scarce in DCs, and they are no less necessary and costly.

215. The proceeds of the taxing practices described in this chapter are of marginal significance in relation to the total revenue collections of most DCs. Change is therefore a question of marginal emphasis: some loss of revenue at one point may be expected to produce higher yields at another, as well as considerably higher tax yields in the future through an acceleration of the pace of economic development.

RECOMMENDATIONS

216. The following recommendations indicate the lines along which improvements in the taxation systems of the DCs might be made in order to make investment more attractive to foreign private enterprise, and increase its effectiveness.

(a) Tax rates on corporate profits and dividends should be reduced to levels at which the earnings rate (before tax) required by the foreign investor is consistent with the net yield on capital available to the investor from alternative activities of his own or other MECs;

(b) It should be recognized that interest, royalties and management or advisory fees are cost-recovery charges, and that the imposition of tax either increases their cost to the DC or denies the DC access to essential capital and know-how;

(c) Training in the operation of tax systems is necessary for personnel in DCs. A high level of competence is necessary not only in the supervision of tax administration at the ministerial and senior official level, but also at the level of the first appellate authority;

(d) A new approach is needed to fiscal incentives for new ventures in agricultural, extractive and industrial enterprises, in the form of contributions to costs rather than an abatement of tax on profits. Relief of this kind has been given in the past, and should continue to be given, primarily for capital expenditure on operating plant and machinery, but its application should be extended. Cost-oriented incentives can be used to match expenditure incurred by enterprises in creating and maintaining an economic infrastructure which the DCs are unable to provide on an extensive scale from their own public resources. These incentives might take

the form of grants or deductions from taxable profits. They should be related not only to capital expenditure but also to revenue expenditure on the provision and maintenance of worthwhile public services. Perhaps the most effective method is the award of tax-credit certificates which can be used immediately to settle tax liabilities, or where not so used, may be surrendered for cash after a period of, say, two years;

(e) MECs should at the same time recognize the importance of not frustrating the policies of DCs by their own tax treatment of overseas investment. France has provided an example of co-ordination of this kind in its arrangements for the tax treatment of income arising from investment in former French African territories;

(f) The negotiation or renegotiation of bilateral tax arrangements and, where possible, multilateral agreements on a regional basis should be proceeded with as a matter of urgency. Such arrangements are also required between DCs, where this would encourage the development of regional trade and industrial specialization.

217. The degree of fiscal discipline required by the capital-exporting countries and DCs is well illustrated in the articles of the "Model Double Taxation Agreement" published in 1964 by the Federation of Commonwealth Chambers of Commerce.

218. The major problem for the DCs is to accept that proposals such as these offer a reasonable prospect of success. It will require considerable confidence and courage to sacrifice revenue, however small, derived from existing levels of taxation of foreign investment and enterprise for the uncertain prospect of securing increased revenue through the adoption of new methods. Finally, it must be emphasized that taxation is not a factor operating in isolation from all other elements in the political, economic and commercial situation of a country. However favourable a tax system may be for the foreign investor, it can only operate effectively in a climate where the essentials for economic development are understood and taken into account.

RÉSOLUTIONS DE LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE

LE 3 MAI 1968

HARMONISATION DES LEGISLATIONS DOUANIERES DES PAYS MEMBRES DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE

LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE,

Se référant aux travaux de la Commission européenne concernant l'harmonisation des législations douanières entre les pays de la Communauté, et en particulier à:
- la proposition d'un règlement du Conseil relatif à la valeur en douane des marchandises (COM (67) 683 final – 22 novembre 1967);
- la proposition de règlement du Conseil sur le transit communautaire (COM (68) 161 final – 27 mars 1968);
- la proposition de directive du Conseil concernant l'harmonisation des dispositions législatives, réglementaires et administratives relatives au régime des entrepôts douaniers (COM (67) 684 final – 22 novembre 1967);

Rappelant ses résolutions antérieures sur les questions d'harmonisation des législations douanières, en particulier:
- la réglementation uniforme du transit communautaire (Liège, 17 juin 1966);
- la définition communautaire de l'origine des marchandises (Liège, 17 juin 1966);
- l'application uniforme de la nomenclature tarifaire (Liège, 17 juin 1966);
- la réglementation communautaire du trafic de perfectionnement (Bruxelles, 22 novembre 1966);
- l'unification des conditions d'application de la définition de la valeur en douane (Düsseldorf, 28 avril 1967);
- et la lettre sur l'harmonisation des législations et réglementations douanières au sein de la Communauté économique européenne adressée à MM. les Présidents du Conseil des ministres, de la Commission des Communautés européennes et du Comité économique et social (Bruxelles, 1er décembre 1967);

DECLARE:

- qu'elle approuve totalement l'objectif de l'harmonisation douanière, à savoir la mise en pratique dans les pays de la Communauté européenne d'un régime identique pour toutes les opérations douanières;
- qu'il est souhaitable que cette harmonisation soit effectuée dans un esprit libéral et qu'elle n'aboutisse en aucun cas à augmenter les charges financières ou les formalités administratives actuellement imposées aux déclarants;

FAIT OBSERVER:

- A titre général:
- On devrait prévoir la suppression des taxes accessoires qui, tels les droits de permis ou de timbre, les taxes de statistique ou de formalités douanières et les remises perçues à l'occasion du paiement des droits, augmentent les frais de passage en douane des marchandises.
- Il serait également indispensable de prévoir l'harmonisation des horaires dans les bureaux

de douane – sur la base des horaires les plus larges –, cette mesure comprenant la mise en concordance de ces horaires avec ceux des bureaux étrangers correspondants et aussi souvent que possible leur permanence d'ouverture ainsi que l'unification du régime des travaux extra-légaux.

– A titre particulier:
– En ce qui concerne la proposition de règlement sur la valeur en douane, les observations suivantes doivent être faites:
– Il convient de rappeler les principes retenus par le Conseil de coopération douanière pour l'évaluation des marchandises, et en particulier ceux qui visent la simplicité nécessaire de la procédure, son caractère équitable, sa compatibilité avec la pratique commerciale et la faculté pour le redevable de déterminer d'avance le montant de l'imposition.
– En précisant dans l'article 2 § 1 a de la proposition que le terme «la seule prestation effective de l'acheteur» doit s'entendre «non seulement de l'acquit d'une obligation légale ou contractuelle mais également de toute autre contrepartie», on interprète le texte de la convention de Bruxelles de la façon la plus stricte et l'on contredit au principe IV (possibilité de détermination d'avance de la valeur en douane avec suffisamment de certitude) énoncé pour son application. Il serait donc préférable d'en rester à la formule de la convention de Bruxelles.
– L'adoption de l'article 3, § 3 à 6, dont l'énoncé est en contradiction avec le texte français de la définition internationale de la valeur, devrait être suspendue en attendant les résultats des délibérations du comité de la valeur du Conseil de coopération douanière de Bruxelles.
– Il paraît probable que l'article 13 servira de base à l'exigence d'un nouveau formulaire de déclaration des éléments à fournir au service des douanes pour la détermination de la valeur en douane. Un tel formulaire peut se révéler fort utile, mais il ne devrait pas constituer par son emploi systématique une complication pour le déclarant. Il est donc souhaitable que l'utilisation d'un tel formulaire soit réservée au cas complexe où le prix normal diffère du prix de facture. En outre, on devrait prévoir la possibilité d'une déclaration qui serait par exemple de périodicité annuelle pour les courants d'échanges habituels s'effectuant dans les mêmes conditions et entre les mêmes partenaires. En tout état de cause, un document de cette nature ne devrait formuler que des questions dont les réponses sont indispensables à l'évaluation et ne pas faire double emploi avec les demandes de renseignements figurant déjà sur d'autres documents douaniers tels que les déclarations.
– En ce qui concerne la proposition de directive sur les *entrepôts:*
– Il est souhaitable que les dispositions de la proposition de directive conservant les formes, l'organisation et la désignation des entrepôts dans les différents pays soient maintenues.
– Il serait utile de prévoir l'harmonisation au niveau le plus bas des charges supportées par les marchandises: frais de surveillance douanière, taxe de magasinage, détermination des sommes à cautionner lorsqu'un cautionnement est exigé, etc.
– En ce qui concerne la proposition de règlement sur le *transit:*
– Cette proposition ne mentionne pas le régime des carnets de passage en douane ATA qui sont des titres internationaux de transit.
– Il doit être clairement entendu que la production d'un titre ATA dispense de la présentation d'une déclaration T 1 (transit externe) ou d'une déclaration T 2 (transit

interne) et de la constitution correspondante d'une caution qui ferait alors double emploi avec celle du carnet ATA.
Enfin, la Conférence permanente se réserve, le moment venu, de formuler des observations complémentaires sur d'autres problèmes particuliers.

L'HARMONISATION DE L'IMPOSITION DES MOUVEMENTS DE CAPITAUX DANS LA COMMUNAUTE ECONOMIQUE EUROPEENNE

LA CONFERENCE PERMANENTE DES CHAMBRES DE COMMERCE ET D'INDUSTRIE DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE,

Rappelant ses résolutions antérieures, et notamment sa résolution sur l'harmonisation des impositions indirectes sur les mouvements de capitaux adoptée dans sa réunion du 13 novembre 1964 à Bruxelles;

Considérant:
– que, malgré les progrès enregistrés dans la libération des changes, la réalisation d'un marché européen des capitaux se heurte encore à de nombreux obstacles qui gênent la libre circulation des capitaux entre les six pays de la Communauté économique européenne et l'intégration de leurs marchés financiers nationaux;
– qu'entre autres, les disparités des charges fiscales et notamment celles qui frappent les mouvements de capitaux peuvent constituer des entraves susceptibles d'avoir une incidence non négligeable sur le choix des lieux de placement et par suite perturber les courants financiers;
– qu'il en est ainsi en particulier du fait des possibilités de doubles impositions et des différences de taxation dans un même pays en fonction de la nationalité des entreprises et des épargnants;

ENREGISTRE AVEC SATISFACTION:

– la mise à l'étude par la Commission et le Conseil des ministres des Communautés européennes de l'harmonisation de la charge fiscale globale supportée par les revenus mobiliers;
– les négociations engagées entre certains Etats membres en vue d'assouplir le régime fiscal des non-résidents;

EMET LE VOEU:

– que les travaux des Communautés européennes sur l'harmonisation des législations fiscales nationales en matière de mouvements des capitaux soient poursuivis en tenant compte notamment des conventions fiscales bilatérales déjà en vigueur avec des pays tiers;
– que le souci d'encourager l'épargne et de faciliter le financement des investissements productifs demeure en tout état de cause prioritaire et l'emporte sur des considérations purement fiscales ou budgétaires.

RÈGLEMENT (CEE) No 803/68 DU CONSEIL
DU 27 JUIN 1968
RELATIF A LA VALEUR EN DOUANE DES MARCHANDISES

LE CONSEIL DES COMMUNAUTÉS EUROPÉENNES,

vu le traité instituant la Communauté économique européenne, et notamment son article 235,
vu la proposition de la Commission,
vu l'avis de l'Assemblée[1],
vu l'avis du Comité économique et social[2],
considérant que la Communauté est fondée sur une union douanière;
considérant que la mise en place de l'union douanière est réglée pour l'essentiel par les dispositions du titre I chapitre 1 du traité; que ce chapitre du traité comporte un ensemble de prescriptions précises, en ce qui concerne notamment l'élimination des droits de douane entre les États membres, l'établissement et la mise en place progressive du tarif douanier commun ainsi que les modifications ou les suspensions autonomes des droits de celui-ci; que les termes «modifications ou suspensions autonomes des droits du tarif douanier commun» retenus par l'article 28 ne permettent pas defonder les dispositions relatives à la valeur en douane sur ledit article; que, si l'article 27 prévoit que les États membres procèdent, avant la fin de la première étape et dans la mesure nécessaire, au rapprochement de leurs dispositions législatives, réglementaires et administratives en matière douanière, ledit article ne confère toutefois pas aux institutions de la Communauté le pouvoir d'arrêter des dispositions obligatoires en la matière; qu'un examen approfondi, auquel il a été procédé avec les États membres, a cependant mis en lumière la nécessité de déterminer en certaines matières, par de actes communautaires obligatoires, les mesures indispensables à la mise en place d'une législation douanière garantissant une application uniforme du tarif douanier commun;
considérant qu'en vertu de la décision du Conseil, du 26 juillet 1966[3], les États membres appliqueront, à partir du 1er juillet 1968 le tarif douanier commun à l'importation en provenance des pays tiers des produits autres que ceux énumérés à l'annexe II du traité;
considérant que le tarif douanier commun sera également appliqué, à partir du 1er juillet 1968, à l'importation en provenance des pays tiers d'un certain nombre de produits énumérés à l'annexe II du traité pour lesquels des droits de douane *ad valorem* seront applicables;
considérant que le tarif douanier commun comprend presque exclusivement des droits *ad valorem;*
considérant qu'il importe que la valeur en douane soit déterminée d'une manière uniforme dans les États membres, de sorte que le niveau de la protection matérialisée par le tarif douanier commun soit le même dans toute la Communauté, et que soient ainsi empêchés tous détournements de trafic et d'activités et toutes distorsions de concurrence qui pourraient naître de l'existence de dispositions nationales divergentes;
considérant qu'il importe également d'éviter et, le cas échéant, d'éliminer tout détournement de recettes douanières;
considérant qu'il importe d'assurer aux importateurs un traitement égal au regard de la

1. JO no. C 55 du 5. 6. 1968, p. 34.
2. JO no. C 58 du 13. 6. 1968, p. 1.
3. JO no. 165 du 21.9. 1966, p. 2971/66.

perception des droits du tarif douanier commun;
considérant que les États membres sont Parties contractantes à la Convention sur la valeur en douane des marchandises, signée à Bruxelles le 15 décembre 1950 et mise en vigueur le 28 juillet 1953; que cette convention tient compte des principes sur l'évaluation repris dans l'accord général sur les tarifs douaniers et le commerce (G.A.T.T.); que sont annexées à la convention sur la valeur en douane des marchandises une définition de la valeur en douane et des notes interprétatives, et que ces annexes font partie intégrante de la convention;
considérant qu'aux termes de l'article II de la convention sur la valeur en douane des marchandises, les Parties contractantes ont l'obligation d'insérer cette définition dans leur législation nationale; que, toutefois, aux termes de l'article IV, toute Partie contractante peut adapter le texte de la définition en y insérant telles dispositions des notes interprétatives qu'elle juge nécessaires et en donnant à ce texte la forme juridique indispensable pour qu'il puisse prendre effet au regard de sa législation nationale, par l'addition, le cas échéant, de dispositions explicatives complémentaires précisant la portée de la définition;
considérant que les possibilités d'adaptation offertes par cet article on conduit à des transpositions différentes de la définition et de ses notes interprétatives dans les législations des États membres; qu'en outre, les notes interprétatives contiennent des dispositions de nature facultative qui n'on pas été retenues par tous les États membres ou qui sont appliquées de façon différente;
considérant, dès lors, que la diversité des dispositions législatives, réglementaires et administratives, établies par les États membres sur la base de la définition et de ses notes interprétatives, ne permet pas d'assurer l'uniformité requise pour l'application du tarif douanier commun;
considérant par ailleurs que l'établissement d'une union douanière entre les États membres exige l'adaptation de certaines dispositions de la définition et de ses notes interprétatives aux besoins de cette union douanière;
considérant que seule l'adoption d'un règlement communautaire permet d'atteindre ces buts;
considérant qu'il importe de garantir l'application uniforme des dispositions du présent règlement aux importations de toutes marchandises et de prévoir à cette fin une procédure communautaire permettant d'en arrêter les modalités d'application dans des délais appropriés; qu'il est nécessaire d'instituer un comité afin d'organiser une collaboration étroite et efficace entre les États membres et la Commission en ce domaine;
considérant que le traité n'a pas prévu les pouvoirs d'action requis à cet effet,

A ARRÊTÉ LE PRÉSENT RÈGLEMENT:

TITRE I

Article premier

1. Pour l'application du tarif douanier commun, la valeur en douane des marchandises importées est le prix normal, c'est-à-dire le prix réputé pouvoir être fait pour ces marchandises, au moment visé à l'article 5, lors d'une vente effectuée dans des conditions de pleine concurrence entre un acheteur et un vendeur indépendants l'un de l'autre.
2. Le prix normal des marchandises importées est déterminé en supposant que:
a) les marchandises sont livrées à l'acheteur au lieu d'introduction dans le territoire douanier de la Communauté;
b) le vendeur supporte tous les frais se rapportant à la vente et à la livraison des

marchandises au lieu d'introduction, ces frais étant, dès lors, compris dans le prix normal;

c) l'acheteur supporte les droits et taxes exigibles dans le territoire douanier de la Communauté, ces droits et taxes étant, dès lors, exclus du prix normal.

Article 2

1. Une vente effectuée dans des conditions de pleine concurrence entre un acheteur et un vendeur indépendants l'un de l'autre est une vente dans laquelle notamment:

a) le paiement du prix des marchandises constitue la seule prestation effective de l'acheteur; par prestation effective, il y a lieu d'entendre non seulement l'acquit d'une obligation légale ou contractuelle, mais également toute autre contrepartie;

b) le prix convenu n'est pas influencé par des relations commerciales, financières ou autres, contractuelles ou non, qui pourraient exister en dehors de celles créées par la vente elle-même entre, d'une part, le vendeur ou une personne physique ou morale associée en affaires au vendeur et, d'autre part, l'acheteur ou une personne physique ou morale associée en affaires à l'acheteur;

c) aucune partie du produit provenant des reventes ou d'autres actes de disposition ou encore de l'utilisation dont les marchandises feraient ultérieurement l'objet, ne reviendra, directement ou indirectement, au vendeur ou à toute autre personne physique ou morale associée en affaires au vendeur.

2. Deux personnes sont considérées comme associées en affaires si l'une d'elles possède un intérêt quelconque dans les affaires ou les biens de l'autre ou si elles possèdent toutes les deux un intérêt commun dans des affaires ou des biens ou si encore une tierce personne possède un intérêt dans les affaires ou les biens de chacune d'elles, que ces intérêts soient directs ou indirects.

Article 3

1. Lorsque les marchandises à évaluer:

a) sont fabriquées d'après un brevet d'invention ou font l'objet d'un dessin ou d'un modèle protégé,

b) ou sont importées sous une marque de fabrique ou de commerce,

c) ou sont importées pour faire l'objet soit d'une vente ou d'un autre acte de disposition sous une marque de fabrique ou de commerce étrangère, soit d'une utilisation sous une telle marque,

la détermination du prix normal se fera en considérant que celui-ci comprend la valeur du droit d'utiliser, pour lesdites marchandises, le brevet, le dessin ou le modèle, ou la marque de fabrique ou de commerce. Cette disposition est également applicable lorsqu'il s'agit d'un droit d'auteur ou de tout autre droit dérivant de la propriété intellectuelle ou industrielle.

2. Des exceptions aux dispositions du paragraphe 1 peuvent être déterminées selon la procédure prévue à l'article 17 lorsque les droits énumérés audit paragraphe appartiennent à une personne établie dans un État membre.

3. Lorsque les marchandises sont importées pour faire l'objet après ouvraison ou transformation ultérieure, soit d'une vente ou d'un autre acte de disposition sous une marque de fabrique ou de commerce étrangère, soit d'une utilisation sous une telle marque, les dispositions des paragraphes 4 à 6 sont applicables.

4. La valeur du droit d'utiliser une marque de fabrique ou de commerce étrangère sera comprise en totalité dans le prix normal des marchandises à évaluer lorsque lesdites marchandises doivent subir, après leur importation, une ou plusieurs des opérations suivantes:

a) opérations simples, telles que l'apposition de la marque, le fractionnement, le tirage ou l'emballage;
b) opérations qui ne contribuent en rien ou ne contribuent que faiblement à donner aux marchandises auxquelles s'appliquera la marque leurs caractéristiques ou propriétés essentielles.

5. La valeur du droit d'utiliser une marque de fabrique ou de commerce étrangère sera exclue en totalité du prix normal des marchandises à évaluer, à condition que les dispositions du paragraphe 4 sous a) ne soient pas applicables:
a) lorsque ces marchandises sont des produits courants qui peuvent être obtenus dans des conditions de pleine concurrence,
b) ou lorsque le droit d'utiliser la marque pour les produits finis dépend des opérations effectuées après l'importation et n'est pas subordonné à l'utilisation des marchandises à évaluer,
c) ou lorsque, selon la procédure prévue à l'article 17, des critères sont établis pour les marchandises dont la valeur est relativement faible par rapport à celle des produits finis.

6. Lorsque les dispositions des paragraphes 4 et 5 ne sont pas applicables, une partie de la valeur du droit d'utiliser la marque de fabrique ou de commerce étrangère sera comprise dans le prix normal des marchandises à évaluer, la partie de cette valeur imputable aux ouvraisons ou transformations effectuées après l'importation étant exclue du prix normal des marchandises à évaluer.

7. Une marque de fabrique ou de commerce est considérée comme une marque étrangère au sens du présent article, si elle est la marque:
a) d'une personne quelconque qui, en dehors du territoire douanier de la Communauté, aurait cultivé, produit, fabriqué ou mis en vente les marchandises à évaluer, ou serait autrement intervenue à leur sujet,
b) ou d'une personne quelconque associée en affaires avec toute personne désignée sous a),
c) ou d'une personne quelconque dont les droits sur la marque sont limités par un accord avec toute personne désignée sous a) ou b).

Article 4

1. Le prix normal est déterminé en supposant que le vente porte sur la quantité des marchandises à évaluer.

2. Des exceptions aux dispositions du paragraphe 1 peuvent être déterminées selon la procédure prévue à l'article 17 pour les marchandises faisant l'objet d'importations par livraisons échelonnées.

Article 5

Le moment à retenir pour la détermination de la valeur en douane est:
a) en ce qui concerne les marchandises déclarées pour la mise à la consommation directe, la date à laquelle le service des douanes accepte, l'acte par lequel le déclarant manifeste sa volonté de procéder à la mise à la consommation desdites marchandises;
b) en ce qui concerne les marchandises mises à la consommation en suite d'un autre régime douanier, le moment fixé par les actes du Conseil ou de la Commission relatifs à cet autre régime ou fixé par les États membres en conformité avec ces actes.

Article 6

1. Pour l'application des dispositions de l'article 1er paragraphe 2 sous b), on entend par lieu d'introduction dans le territoire douanier de la Communauté:

a) pour les marchandises acheminées par voie maritime, le port de débarquement ou le port de transbordement, pour autant que le transbordement ait été certifié par le service des douanes de ce port;
b) pour les marchandises acheminées sans transbordement par voie maritime, puis par voie navigable, le premier port – situé à l'embouchure ou en amont du fleuve ou du canal – où le déchargement des marchandises peut être effectué, pour autant qu'il soit justifié auprès du service des douanes que le fret dû jusqu'au port de débarquement des marchandises est plus élevé que celui dû jusqu'au premier port considéré;
c) pour les marchandises acheminées par voie ferrée, par voie navigable ou par voie routière, le lieu du premier bureau de douane;
d) pour les marchandises acheminées par d'autres voies, le lieu de franchissement de la frontière du territoire douanier de la Communauté.

2. Pour les marchandises introduites dans le territoire d'un État membre et acheminées jusqu'au lieu de destination dans un autre État membre avec emprunt du territoire d'un pays tiers, le lieu d'introduction dans la Communauté à prendre en considération est fixé selon la procédure prévue à l'article 17.

3. Pour les marchandises introduites dans le territoire douanier de la Communauté et acheminées directement d'un des départements français d'outre-mer vers une autre partie du territoire douanier de la Communauté ou vice-versa, le lieu d'introduction à prendre en considération est le lieu prévu aux paragraphes 1 et 2 et situé dans la partie du territoire douanier de la Communauté d'où proviennent ces marchandises, dès lors que celles-ci ont fait l'objet d'un déchargement ou d'un transbordement certifié par le service des douanes.

Lorsque les conditions prévues à l'alinéa précédent ne sont pas remplies, le lieu d'introduction à prendre en considération est le lieu prévu aux paragraphes 1 et 2 et situé dans la partie de destination du territoire douanier de la Communauté.

Article 7

Les frais visés à l'article 1er paragraphe 2 sous b) comprennent notamment:
- les frais de transport,
- les frais d'assurance,
- les frais de chargement,
- les frais de déchargement, dans le mesure où ceux-ci sont compris dans le fret, des marchandises livrées au lieu d'introduction,
- les commissions,
- les courtages,
- les frais d'établissement, en dehors du territoire douanier de la Communauté, des documents relatifs à l'introduction des marchandises dans ce territoire, y compris les droits de chancellerie,
- les droits et taxes exigibles en dehors du territoire douanier de la Communauté, à l'exclusion de ceux dont les marchandises auraient été exonérées ou dont le montant aurait été remboursé ou devrait être remboursé,
- le coût des emballages, à l'exclusion du coût des emballages qui suivent leur régime propre,
- les frais d'emballage (main-d'oeuvre, matériel ou autres frais).

Article 8

1. Lorsque des marchandises sont acheminées par le même mode de transport jusqu'à un point situé au-delà du lieu d'introduction dans le territoire douanier de la Communauté, les frais de transport sont répartis proportionnellement à la distance parcourue en dehors et à l'intérieur du territoire doua-

nier de la Communauté, à moins que ne soit fournie au service des douanes la justification des frais qui auraient été engagés, en vertu d'un tarif obligatoire et général, pour le transport des marchandises jusqu'au lieu d'introduction dans le territoire douanier de la Communauté.

Les dispositions prévues à l'alinéa précédent ne s'appliquent pas aux marchandises acheminées par la voie postale. Pour ces marchandises, des dispositions spéciales pourront être fixées selon la procédure prévue à l'article 17, en raison de la nature particulière des taxes frappant les services postaux internationaux.

2. Lorsque des marchandises sont facturées à un prix unique franco destination qui correspond au prix au lieu d'introduction, les frais afférents au transport dans la Communauté ne sont pas à déduire de ce prix. Toutefois, une telle déduction est admise s'il est justifié auprès du service des douanes que le prix franco frontière serait moins élevé que le prix unique franco destination.

3. Lorsque le transport est assuré gratuitement ou par les moyens de l'acheteur, les frais de transport jusqu'au lieu d'introduction, calculés suivant le tarif habituellement pratiqué pour les mêmes modes de transport, sont à incorporer dans la valeur en douane.

4. Lorsque des marchandises en provenance de pays tiers sont introduites dans le territoire douanier de la Communauté avec emprunt des territoires allemands où la loi fondamentale de la république fédérale d'Allemagne n'est pas d'application et qui relèvent de la réglementation du commerce intérieur allemand, les frais de livraison relatifs à ce transit ne sont pas à incorporer dans la valeur en douane desdites marchandises.

Article 9

1. Le prix payé ou à payer pourra être admis comme valeur en douane pour autant:

a) que le contrat de vente soit exécuté dans les délais prévus à l'article 10,

b) que le prix corresponde, au moment où il est convenu, aux prix faits lors d'une vente effectuée dans des conditions de pleine concurrence entre un acheteur et un vendeur indépendants l'un de l'autre, et

c) que ce prix soit ajusté, si nécessaire, pour tenir compte des éléments qui, dans la vente considérée, différeraient des éléments constitutifs du prix normal.

2. Les ajustements visés au paragraphe 1 sous c) concernent notamment:

a) les frais visés à l'article 1er paragraphe 2,

b) les réductions de prix qui ne sont consenties qu'aux représentants exclusifs ou aux concessionnaires uniques ou encore à toute autre personne physique ou morale opérant dans des conditions comparables,

c) les rabais anormaux, ainsi que toute autre réduction sur le prix usuel de concurrence.

Article 10

1. Pour l'application des dispositions de l'article 9 le prix payé ou à payer pourra être admis lorsque la date du contrat est antérieure de six mois au plus, au moment visé à l'article 5 sous a) ou b).

2. Lorsque les marchandises sont vendues habituellement avec des délais de livraison excédant six mois et ne dépassant pas douze mois, la tolérance de six mois visée au paragraphe 1 peut être portée à douze mois.

3. Lorsque les marchandises sont vendues habituellement avec des délais de livraison supérieure à douze mois, la durée de la tolérance peut être augmentée en conséquence, sans toutefois pouvoir excéder vingt-quatre mois.

4. Les marchandises bénéficiant des tolérances visées aux paragraphes 2 et 3 sont désignées et la durée de la tolérance à admettre en vertu du paragraphe 3 est fixée selon la

procédure prévue à l'article 17.

5. Lorsque des marchandises sont fabriquées sur commande spéciale, le prix payé ou à payer pourra être admis, pour l'application des dispositions de l'article 9, dès lors que la livraison a été effectuée dans les délais convenus.

6. Lorsque, en cas de force majeure ou par suite de circonstances exceptionnelles dûment justifiées, le délai de livraison dépasse la durée de la tolérance admise en vertu des dispositions des paragraphes 1 à 5, celle-ci peut être augmentée en conséquence.

7. L'application des tolérances visées aux paragraphes 1 à 5 peut être suspendue en période de fluctuations anormales des prix, selon la procédure prévue à l'article 17.

Article 11

1. Le prix à prendre en considération pour la détermination de la valeur en douane des marchandises déclarées pour la mise à la consommation directe est un prix au comptant dont le paiement doit intervenir au moment visé à l'article 5 sous a).

2. Toutefois, sont réputés prix au comptant:

a) le prix dont le paiement, compte tenu des conditions stipulées sur la facture ou dans le contrat, doit intervenir entre la date d'expédition des marchandises et le moment visé à l'article 5 sous a);

b) le prix dont le paiement doit intervenir postérieurement au moment visé à l'article 5 sous a), si aucun escompte pour paiement au comptant n'a été prévu ou si la justification de l'existence d'un prix différent pour paiement au comptant n'a pas été apportée au service des douanes.

3. Le montant de l'escompte accordé pour paiement au comptant n'est pas à incorporer dans la valeur en douane si le taux de cet escompte n'est pas supérieur à celui habituellement pratiqué dans la branche du commerce en cause. Lorsque le taux accordé est plus élevé, seul le montant correspondant au taux usuel n'est pas à incorporer dans la valeur en douane.

4. Sous réserve des dispositions du paragraphe 2 sous a), le montant de l'escompte accordé pour paiement anticipé est à incorporer dans la valeur en douane.

5. Sous réserve des dispositions du paragraphe 2 sous a) et lorsque aucun escompte pour paiement anticipé n'a été prévu, le prix payé par anticipation doit être ajusté pour établir le prix au comptant, le paiement anticipé étant considéré comme ayant fait bénéficier l'acheteur d'une diminution de prix au moins égale aux intérêts qu'il aurait dû supporter pour l'emprunt de la somme versée par anticipation. Toutefois, un tel ajustement n'est pas à effectuer lorsqu'il est justifié auprès du service des douanes que le prix payé correspond au prix au comptant.

6. Lorsque des marchandises sont mises à la consommation en suite d'un régime douanier autre que celui de la mise à la consommation directe, les dispositions des paragraphes 1 à 5 peuvent être adaptées en conséquence, selon la procédure prévue à l'article 17.

Article 12

1. Lorsque des éléments servant à déterminer la valeur en douane d'une marchandise sont exprimés dans une monnaie autre que celle de l'État membre où s'effectue l'évaluation, le taux de change à appliquer est celui qui correspond à la parité déclarée auprès du Fonds monétaire international et reconnue par celui-ci, à moins que les variations de la valeur de cette monnaie ne dépassent les limites fixées par les règles de cette institution.

2. En ce qui concerne la monnaie des pays qui n'ont pas déclaré une parité auprès du Fonds monétaire international ou dont la

parité déclarée n'est pas reconnue par celui-ci, mais dont la monnaie est cotée sur les marchés officiels de change de l'État membre où s'effectue l'évaluation, le taux de change à appliquer est le dernier cours de vente constaté sur le ou les marchés de change les plus représentatifs de l'État membre.

3. Pour les monnaies qui ne sont pas visées par les dispositions des paragraphes 1 ou 2 et pour la monnaie d'un pays qui a recours à des techniques de change anormales telles que taux fluctuants ou taux de change multiples, le taux de change à appliquer est constaté selon la procédure prévue à l'article 17.

Article 13

1. Des valeurs moyennes forfaitaires peuvent être établies pour la détermination de la valeur en douane de certaines marchandises.

2. La désignation de ces marchandises et la fixation des règles et critères relatifs à l'établissement des valeurs moyennes forfaitaires ainsi qu'à leur application sont effectuées selon la procédure prévue à l'article 17.

Article 14

Les éléments et les documents à fournir au service des douanes pour l'application du présent règlement sont fixés, en tant que de besoin, selon la procédure prévue à l'article 17.

TITRE II

Article 15

1. Il est institué un comité de la valeur en douane, ci-après dénommé le «Comité», composé de représentants des États membres et présidé par un représentant de la Commission.

2. Le Comité établit son règlement intérieur.

Article 16

Le Comité peut examiner toute question relative à l'application du présent règlement qui est évoquée par son président, soit à l'initiative de celui-ci, soit à la demande du représentant d'un État membre.

Article 17

1. Les dispositions nécessaires pour l'application des articles 1er à 3 et 6 à 11 sont arrêtées selon la procédure définie aux paragraphes 2 et 3.

2. Le représentant de la Commission soumet au Comité un projet des dispositions à prendre. Le Comité émet son avis sur ce projet dans un délai que le président peut fixer en fonction de l'urgence de la question en cause. Il se prononce à la majorité de douze voix, les voix des États membres étant affectées de la pondération prévue à l'article 148 paragraphe 2 du traité. Le président ne prend pas part au vote.

3. a) La Commission arrête les dispositions envisagées lorsqu'elles sont conformes à l'avis du Comité.

b) Lorsque les dispositions envisagées ne sont pas conformes à l'avis du Comité ou en l'absence d'avis, la Commission soumet sans tarder au Conseil une proposition relative aux dispositions à prendre. Le Conseil statue à la majorité qualifiée.

c) Si à l'expiration d'un délai de trois mois à compter de la saisine du Conseil, celui-ci n'a pas statué, les dispositions proposées sont arrêtées par la Commission.

TITRE III

Article 18

Les États membres se consultent au sein du Comité en vue de concerter leur position à l'égard des travaux du Conseil de coopération douanière et de son Comité de la valeur,

relatifs à la Convention sur la valeur en douane des marchandises.

Article 19
Les dispositions du présent règlement n'affectent pas les dispositions contenues dans des actes du Conseil ou de la Commission, ou fixées par les États membres en conformité avec ces actes, relatives à la détermination de la valeur en douane des marchandises mises à la consommation en suite d'un régime douanier autre que celui de la mise à la consommation directe.

Article 20
Pour autant que les dispositions à arrêter en vertu des articles 3 paragraphes 2 et 5 sous c), 4 paragraphe 2, 6 paragraphe 2, 8 paragraphe 1, 10 paragraphe 4, 11 paragraphe 6, 12 paragraphe 3, 13 paragraphe 2, et 14 ne sont pas encore entrées en vigueur, les dispositions législatives, réglementaires ou administratives correspondantes des États membres demeurent applicables à moins que ceux-ci ne les abrogent.

Article 21
Chaque État membre informe la Commission des dispositions qu'il prend en vue de l'application du présent règlement. La Commission communique ces informations aux autres États membres.

Article 22
Le présent règlement entre en vigueur le 1er juillet 1968.

Le présent règlement est obligatoire dans tous ses éléments et directement applicable dans tout État membre.

Fait à Luxembourg, le 27 juin 1968.

Par le Conseil
Le président
E. FAURE

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These thirteen articles, written by professors and jurists, interpret present Israeli law in the light of its causal historical concepts. Diverse points of view are represented. Only one—Trends in the Income Tax Legislation of Israel—directly relates to tax law.

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A compilation of speeches on the Dutch value added tax, given at special "information days" in December 1967 and January 1968 which have been organized by the abovementioned publishers. Seventy-one questions and answers are appended.

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- ☐ Payroll taxes
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- ☐ Personnel relations
- ☐ Profit sharing
- ☐ Property taxes
- ☐ Public utilities taxes
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EDITORIAL

In this issue an extensive survey on taxation in Brazil is published.

The need for more information on tax matters in South American countries is increasing rapidly and the Bulletin is making every effort to meet this demand. The numerous modifications in tax laws of these countries do not simplify circulation of this information, but Tax News Service, a publication of the Bureau, will be reporting latest developments. South America is concluding tax treaties with a number of European and non-European countries. The Bulletin has been reporting these events and publishing full texts and commentaries on these treaties. Reference can be especially made to the indexes of the 1967 and 1968 issues. Anyone who wishes to contribute to a better knowledge of international tax problems, arising in or in relation to South American countries is invited to send his contribution to the Bulletin for consideration for publication.

DR. J. C. L. HUISKAMP

* * * * ARTICLES * * * *

RUBENS GOMES DE SOUSA*:

TAXATION IN BRAZIL

1. GENERAL INTRODUCTION

1/1. POLITICAL ORGANIZATION

1/1.1 Brazil is a federal republic consisting of 22 States, four Federal Territories, and one Federal District which is the capital of the nation. All the States but one (Guanabara) are divided by State law (subject to certain standards established in the Constitution) into Municipalities, of which there are about 4,000 altogether.

1/1.2 At the Federal and State levels, the government comprises the traditional three branches, Executive, Legislative and Judiciary; at the Municipal level there is no Judiciary. The Territories are administered by the Federal government until they attain statehood as provided in the Constitution. The Federal District (Brasilia) is politically equivalent to a State, except that its Governor is appointed by the President with the consent of the Senate.

1/1.3 The Federal Executive is exercised by a President elected for four years by an electoral college consisting of the Chamber of Deputies and the Senate in joint session plus three delegates of each State, elected by their respective Legislative Assemblies. The President is assisted by a Cabinet of Ministers, appointed by and responsible to him, but who may be called by Congress to report on matters pertaining to their respective departments.

1/1.4 The Federal Legislative is bicameral. The Chamber of Deputies is composed of members elected every four years in each State according to population (one deputy for every 300,000 inhabitants up to 25 deputies, afterwards one for every million). The Senate is composed of three members for each State, elected for eight years but renewed by one-third and two-thirds alternately every four years.

1/1.5 State and Municipal governments are organized by State law, within certain standards established in the Constitution. State Governors are elected by the State's Legislative Assembly, composed of deputies elected by popular vote. Mayors and Municipal Councils are elected by popular vote, except in cities declared by Federal law to be of interest to the national security, which are administered by Mayors appointed by the State Governor with the consent of the President.

1/1.6 Elective mandates can not exceed four years. Re-election of the President, State Governors and Mayors for the next following term is prohibited. Popular elections are by the direct and secret vote of all literate citizens of both sexes, aged 18 or over.

1/1.7 The Judiciary, both Federal and State, is organized as a career, entrance to which is by competitive examination. However,

* LL.B., University of São Paulo, 1934, LL.D., University of São Paulo, 1949. Professor of Taxation, University of São Paulo, 1949-1963. Member of Special Committees of the Ministry of Finance for the study of tax reform, 1953-1954 and 1964-1966. Senior partner and tax counsel, Pinheiro Neto & Gomes de Sousa, Attorneys-at-Law, São Paulo.

one-fifth of the seats in every Federal or State Appellate Court is reserved for non-judges, appointed by the President or the State Governor from a panel of lawyers meeting certain standards of professional experience or legal scholarship, whose names are submitted by the Federal or State court of highest jurisdiction in consultation with the Bar Association. All judicial posts are open equally to men and women.

1/1.8 The State Judiciary consists at lower level of one or more one-judge courts in each State Judicial District, which may include one or more towns. At higher level, it consists of one or more Appellate Courts in each State, the number of judges in each depending on the requirements of the service: not less than five, but as many as 36 in the São Paulo State Court of Appeals. The State Judiciary has jurisdiction in all cases involving either Federal, State or Municipal law, except as noted below.

1/1.9 The Federal Judiciary has jurisdiction in all cases to which the Federal Government or a Federal agency is a party, about 60% of this jurisdiction consisting of Federal tax cases. It is composed at lower level of one or more one-judge courts in each Federal Judicial District, which may include one or more States. At higher level there is at present only one Federal Court of Appeals composed of 13 judges sitting at Brasilia, but it is proposed to create two more by dividing the country into three Appellate Circuits.

1/1.10 An exception to the career system is the Supreme Court, sitting at Brasilia and composed of 16 Justices appointed by the President with the consent of the Senate. The Supreme Court has jurisdiction to review final decisions of State and Federal Courts of Appeal which (a) involve the construction of a provision of the Constitution or of a Federal statute or treaty, (b) declare a provision of a Federal statute or treaty to be unconstitutional, (c) affirm the validity of a State or Municipal statute challenged as unconstitutional, (d) conflict with a previous decision of the Supreme Court itself or of a different Court of Appeals.

1/1.11 In order for the jurisdiction of the various courts to be clearly understood, it must be pointed out that civil law, commercial law and criminal law in Brazil are Federal and uniform throughout the country; State and Municipal law, therefore, deal with matters of local interest and specifically, of course, with State and Municipal taxes.

1/1.12 All members of the Judiciary are appointed for life, there being no elective judges, and can not be removed except by judicial decision. Their salaries can not be reduced, but are subject to taxation. Trial by jury exists only in criminal cases.

1/2. FUNDAMENTALS OF THE TAX SYSTEM

1/2.1 Chiefly due to political and historical reasons, the first republican Constitution (1891) and its successors (1934, 1937, 1946 and 1967) have regulated taxing powers much more in detail than is usual in similar documents in Europe or America. Prior to 1965, Brazilian constitutional law traditionally adhered to the method of apportioning taxing powers among the three levels of government by allocating to each certain specific taxes defined in the Constitution itself, all unspecified taxes being reserved to the Federal Government under the so-called "residuary" power of taxation.

1/2.2 The constitutional tax structure was therefore based on the theoretical premise of three separate and non-interfering tax systems, Federal, State, and Municipal. In practice, however, this was not the case, and

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taxes allocated to different governments actually overlapped or even duplicated each other.

1/2.3 The 18th Amendment to the Constitution of 1946[1] replaced this method by another based on the economic nature of the taxable activities. The Amendment defined three fields of taxable economic activity: (a) foreign trade, (b) property and income, (c) production and distribution. Within each field, it then selected the types of activity best suited to be taxed and allocated these to the government best indicated in each case by economic, political, legal, or administrative reasons.[2]

1/2.4 The 18th Amendment is implemented by a National Code of Taxation,[3] based on a constitutional provision which empowers the Federal Congress to enact "basic rules of taxation" and "rules to prevent or solve conflicts of taxing powers", which rules must be observed by all Federal, State, or Municipal tax statutes. The Constitution of 1967, though not repeating the definitions of the three fields of taxable economic activity, nevertheless preserved the same system, as it retained, with certain changes of detail, the same allocations of taxes to the three levels of government.

1/2.5 A major source of constitutional tax problems under the former systems was the fact that, although the Constitution stipulated that three types of fiscal charges (taxes, fees, and improvement contributions) could be imposed by the Federal, State, or Municipal governments under their respective powers of taxation, no clear and cogent statutory definition existed of either taxes or fees. Thus a charge described as a fee could be, and often was, imposed by a government, which was in effect a tax allocated by the Constitution to another government. These cases led to costly and protracted litigation, the outcome of which was not always altogether adequate.

1/2.6 The National Code of Taxation attacked this problem frontally by providing the following definitions of each type of fiscal charges (collectively called *tributos*):

(a) a tax *(impôsto)* is a charge imposed by a government regardless of any activity of that government which specifically concerns the taxpayer;

(b) a fee *(taxa)* is a charge imposed by a government (i) in respect of a specific public service rendered or made available by that government to the taxpayer, or (ii) as a means for that government to exercise its police power;[4] as a further safeguard against encroachment, the Code stipulates that no fee can be computed on the same basis as a tax;

(c) an improvement contribution *(contribuição de melhoria)* is a charge imposed by a government to obtain or recover the cost of public works which increase the value of private real-estate property, provided that (i) the total revenue collected shall not exceed the cost of the work, (ii) the amount assessed on each taxpayer shall not exceed

1. Approved by Congress on 1st December 1965.
2. See Gomes de Sousa: "Tax Reform in Brazil", Bulletin for International Fiscal Documentation, vol. 20 pp. 353-368 (1966).
3. Law No. 5172 of 25 October 1966.
4. Police power was defined for this purpose in the Code (Sect. 78) as the power to regulate or limit private liberties, rights, or interests in the public interest on matters of safety, health, order, morality, public peace, or preservation of property and of individual or collective rights. A later statute added (matters of) regulation of production and trade and of the exercise of economic activities subject to government concession or permission (Ato Complementar (Constitutional Amendment) No. 31 of 29 December 1966, Sect. 7).

the increase in the value of that taxpayer's property.[5]

1/2.7 The main object of the tax reform of 1965 was to reorganize the tax system along national lines as opposed to the former concept of three simultaneous and theoretically independent systems. Complete integration of the tax system, however, is difficult to achieve in Brazil, which with an an area of nearly 3,300,000 square miles and a population rapidly approaching 100 million, still presents marked regional differences in economic development and density of population. These differences translate themselves in practice by unequal distribution of production elements as compared with consumer needs, leading to what has been called an opposition between "producer" and "consumer" areas. On the other hand, so-called "indirect" taxes on transactions surpass taxes on income and property as the major sources of revenue: this must be accepted as logical in a country still in the process of creating a sound structure of private capitalization and developing basic industrial investment.

1/2.8 These economic factors, combined with the constitutional provision that Federal taxes must be uniform throughout the country, naturally render more difficult the distribution of taxing powers in a manner capable of adequately combining three basic requirements, namely (a) the need for a centralized conduct of the national economic policy, (b) the preservation of the legal, political, and financial autonomies of State and local governments, (c) attention to the immediate needs of the less developed areas while creating conditions suitable to their development without impairing that of the more developed ones.

1/2.9 Besides the previously indicated measures of basing the constitutional allocation of taxing powers upon economic premises, and of tightening the definition of the legal instruments of taxation, the tax system faces those difficulties chiefly in two ways. Firstly, the constitutional allocation of taxing powers is complemented by a system of redistribution of the revenue from certain taxes, devised to strengthen the financial position of the State and local governments without imposing additional burdens on their citizens. Secondly, the constitutional requirement of uniformity in Federal taxation is tempered by a system of tax benefits intended to attract private capital to certain selected investments in designated areas of the country, particularly in the Northern and Northeastern regions. These complementary aspects of the tax system will be discussed in the chapter on tax policy.

1/3. CONSTITUTIONAL LIMITATIONS

1/3.1 The tax reform of 1965 brought little change to certain constitutional principles which are traditional in Brazilian law. Foremost among these is the rule that "no one shall be forced to do, or abstain from doing, anything except as provided by law", stated in all Constitutions since 1891. Specifically on matters of taxation, this rule is further implemented by another stating that "no fiscal charge shall be created or increased otherwise than by law", law in this context meaning an act of the legislature sanctioned by the Executive. Prior to 1967, still another rule stated that none of the three branches of government (Executive, Legislative, and

5. This definition was reproduced by the Code from the Constitution of 1946. The Constitution of 1967 omitted the limitation on the amount assessable on each taxpayer. In the writer's opinion, this may lead to an unfair distribution of the financial burden among the taxpayers concerned. This in turn could affect the economic and legal character of the charge by making it similar to a tax on presumptive and unrealized capital gains.

Judiciary) could delegate its powers to any of the other two.

1/3.2 A certain flexibility was introduced by the 18th Amendment in respect of the increase (but not the creation) of certain taxes. This was preserved by the Constitution of 1967. Thus, the Executive now has powers, in such cases as may be provided by law, to increase (or decrease) the rates of the Federal import and export taxes and of the Federal tax on financial transactions. This is justified by the fact that those taxes are regarded not so much as sources of revenue than as instruments for the implementation of the government's economic policy on foreign trade and on matters of exchange, currency, and credit regulation.

1/3.3 The Constitution also provides that the Senate shall issue Resolutions establishing a maximum rate for the State circulation tax on interstate transactions, and for the State real property transfer tax. These limitations are, in the case of the circulation tax, concerned with avoiding interference by the States with the Federal regulation of interstate commerce; and, in the case of the real property transfer tax, they are part of a long-range policy in respect of capital gains taxation, which will be discussed in the appropriate place.[6] It is felt that, in matters of interest to more than one State, the Senate, rather than a Federal statute, should be entrusted with the powers of resolution and implementation, in view of the fact that in the Senate all the States are equally represented.[7]

1/3.4 The Constitution of 1967 also recognizes to the Federal Executive the power of delegated legislation on matters of (a) national security, (b) public finance, this latter expression obviously including the creation, repeal, increase and decrease of Federal taxes. This, however, is not a limitation of the principle that a law requires the collaboration of the Legislative and the Executive. The power of delegated legislation is exercised by the Executive by means of acts called "decree-laws" *(decretos-leis)* which are subject to ratification by the Federal Congress within 60 days. However, in voting a decree-law, Congress has no powers to amend, but only to approve or reject the text as issued by the Executive. Moreover, should Congress fail to act within the prescribed term, a decree-law becomes final and has the same force as a law. Therefore, apart from the absence of congressional powers to amend, a decree-law is the equivalent of a bill submitted by the Executive, with the further difference that a decree-law is immediately applicable pending ratification.

1/3.5 The Constitution of 1946 further provided that a new fiscal charge, or an increase in an existing charge, could be assessed and collected in any fiscal year only if authorized by the Budget Act for that year. The 18th Amendment restricted this limitation only to taxes on property and income which are assessed and collected on the basis of annual returns, in order to avoid that the taxpayer's personal budget could be affected by the immediate and unexpected demand of new or increased taxes. On the other hand, it was felt at the time that the limitation was not justified in respect of taxes on transactions, assessed and collected on a case by case basis, and even less in respect of fees and improvement contributions. The original draft of the Constitution of 1967 preserved this understanding, but in Congress the provision was reinstated as it appeared in the Constitution of 1946. Therefore, the limitation now applies again to all fiscal charges, hence including taxes of whatever nature as well as fees and improvement contributions.

6. See 3/4 below.
7. See 1/1.4 above.

1/3.6 Other constitutional limitations are concerned with uniformity of taxation and equality of treatment. Thus, (a) no discrimination (in tax or other matters) shall be made between Brazilians and resident foreigners, because of race, sex, profession, political ideology, or religious faith, (b) no tax shall be imposed specifically on the interstate or intermunicipal circulation of persons or goods,[8] (c) no State or Municipal tax shall discriminate by reason of the origin or destination of goods purchased or sold.

1/3.7 Still other constitutional limitations refer to the legal, political, or economic status of the Federal, State, and Municipal governments and their agencies, or of certain private institutions or activities. Thus, no tax shall be imposed (a) by one government on the property, income, or services of another or of its agencies, (b) on the property, income, or activities of political parties and educational or charitable institutions, (c) on the importation, manufacture, or sale of books, newspapers, periodicals and printing paper. The limitation described in (a) does not extend to public service concessions, which are, as a rule, exempted by the government granting the concession; but Federal law may exempt Federal concessions from State and Municipal taxes if this is required by the public interest. The Federal government is permitted to tax the income from State and Municipal bonds and the salaries of State and Municipal employees, but the rates must not be higher than in the case of Federal bonds and salaries of Federal employees; moreover, the revenue from those taxes is returned in full to the States or Municipalities respectively.

1/3.8 An important limitation introduced by the 18th Amendment and retained by the Constitution of 1967 concerns charges imposed by law but refunded after a stipulated term, called "compulsory loans" or "refundible taxes", the former designation applying more appropriately to the case where the refund is increased by interest. In view of the somewhat indiscriminate recourse to these practices in recent years, especially by State and Municipal governments, the need was felt for a stricter regulation of their use, which is now confined to the Federal government as a temporary measure in such cases as provided by law. The National Code of Taxation defines such cases as (a) actual or imminent foreign war, (b) a public calamity requiring federal aid impossible to provide with existing resources, (c) a (general or local) economic situation which recommends the temporary absorption of private purchasing power. The Code stipulates further that the rules of law applicable to taxes shall apply also to compulsory loans.

1/3.9 The constitutional rules on the allocation of tax revenues are, in a sense, limitations of taxing powers, inasmuch as the constitutional allocation of a given tax to one government prevents the other two governments from imposing the same tax. This was not the case under the Constitution of 1946, which permitted the Federal and State (but not the Municipal) governments, under the so-called "residuary" power of taxation,[9] to impose other taxes besides those specifically allocated to each. Inasmuch as it defined three areas of taxable economic activity and enumerated the taxes which could be imposed in each area, the 18th Amendment abolished the "residuary" power of taxation

8. Toll charges are excluded from this limitation, provided that their revenue is used for the building and maintenance of roads and other transportation facilities.

9. To which a passing reference was made in 1/2.1 above.

altogether. The Constitution of 1967, however, restored that power, but only in favour of the Federal government, adding the provision that Federal law may create such a tax and delegate its administration and revenue (though not the power to create it) to the States. It is to be expected that such wide and indiscriminate powers will be used wisely by the Federal government, and (in this writer's opinion) preferably as a means of temporary aid to States whose economic situation would justify this departure from the basic structure of the constitutional tax system.

1/4. SYNOPSIS OF THE TAX SYSTEM

1/4.1 Apart from what was said in the preceding paragraph, no tax other than those specifically mentioned in the Constitution may be created by any of the three governments. Moreover, each one of the taxes so mentioned may be created only by the government to which it is specifically allocated by the Constitution. One exception, however, applies to both rules just stated. This exception concerns actual or imminent foreign war, in which cases the Federal government is permitted to create special taxes which may be either the same taxes allocated to the States or Municipalities, or unspecified taxes different from all others mentioned in the Constitution. But these special taxes are temporary by their nature, and must be abolished gradually within five years from the cessation of the motive for their creation.

1/4.2 In order to afford a first-glance understanding of the structure of the tax system, the following chart reproduces the classification of all taxes recognized by the Constitution within three areas of economic activity:[10]

A. TAXES ON FOREIGN TRADE

Name and description of tax	*Government to which allocated*	*Government entitled to revenue*
A.1 Import tax on the importation, with or without passing of title, of foreign products of whatever nature, whether manufactured or natural, except fuels and lubricants as noted in C.6	Federal	Federal
A.2 Export tax on the exportation to foreign countries, with or without passing of title, of domestic products of whatever nature, whether manufactured or natural, except fuels, lubricants and mineral products as noted in C.6 and C.8	Federal	Federal

B. TAXES ON PROPERTY AND INCOME

B.1 Land tax on the ownership of non-urban land	Federal	Municipal

10. On which see 1/2.3 above.

Name and description of tax	*Government to which allocated*	*Government entitled to revenue*
B.2 Real estate tax on the ownership of urban land whether improved or non improved	Municipal	Municipal
B.3 Real property transfer tax on the passing of title to real estate property, either "inter-vivos" or by death	State	State
B.4 Income tax on income and certain capital gains from Brazilian or (in certain cases) foreign sources, realized in Brazil by resident or non-resident individuals or legal entities, except as noted in B.5 and B.6	Federal	80% Federal 10% State 10% Municipal
B.5 Income tax on interest from State bonds and salaries of State employees	Federal	State
B.6 Income tax on interest from Municipal bonds and salaries of Municipal employees	Federal	Municipal
C. TAXES ON PRODUCTION AND DISTRIBUTION		
C.1 Production tax on the importation, with or without passing of title, of foreign industrial products and on the manufacture of domestic industrial products	Federal	80% Federal 10% State 10% Municipal
C.2 Circulation tax on the circulation, with or without passing of title, of domestic or foreign products, either manufactured or natural, except the circulation of fuels, lubricants and domestic mineral products as noted in C.6 and C.8, and except the exportation of domestic industrial products	State	80% State 20% Municipal
C.3 Financial transactions tax on credit, exchange, and insurance transactions, and transactions relating to stocks and bonds	Federal	Federal
C.4 Service tax on international, interstate, and inter-municipal transportation and communication services	Federal	Federal
C.5 Service tax on commercial, industrial, or		

Name and description of tax	*Government to which allocated*	*Government entitled to revenue*
professional services (except as noted in C.4)	Municipal	Municipal
C.6 "Single tax" on the importation, production, exportation, circulation, or consumption of liquid or gaseous fuels, and of lubricants	Federal	40% Federal 60% pro-rated among States and Municipalities
C.7 "Single tax" on the production, distribution, or consumption of electric power	Federal	40% Federal 60% pro-rated among States and Municipalities
C.8 "Single tax" on the extraction, circulation, or consumption of domestic mineral products other than those noted in C.6	Federal	10% Federal 90% pro-rated among States and Municipalities

1/4.3 In the following analysis of the individual taxes, the economic classification of taxes is not strictly observed in view of the pre-eminence given to income tax to conform with the method of this publication.[11] Thus, the next chapter is devoted to income tax alone, inasmuch as, after the abolition of the excess profits tax (which was charged as a wartime measure in 1944-1947 and again, as an anti-inflationary measure, in 1957-1964), that tax is now the only tax assessed specifically on income. There follow chapters on, respectively, "property taxes" and "taxes on transactions", the latter including the taxes economically classified as "on foreign trade" and "on production and circulation".

2. THE INCOME TAX

2/1. GENERAL INTRODUCTION

2/1.1 A general income tax was first introduced in Brasil by the Federal government in 1924, consolidating a number of isolated Federal taxes on certain types of income (interest, salaries, dividends, etc). Under the Constitution of 1891 then in force, both the Federal and the State governments had the

11. This is also justified by the greater economic and legal interest of the income tax, though as a source of revenue it is not yet the major Brazilian tax. In the Federal budget for 1968 (Law No. 5373 of 6 December 1967), the revenue from the income tax is estimated at NCr$ 3 billion as compared with an estimated NCr$ 4.380 billion for the tax on industrial products. At the current official rate of exchange, NCr$ 3.20 equals US$ 1.00.

power to impose taxes on income, but no State ever used that power and since the Constitution of 1934 it is recognized exclusively to the Federal government.[12] The Income Tax Act of 1924 was closely based on the French law of the time and its pattern was preserved for some 30 years; during this time, the law was frequently revised to incorporate a certain number of ideas based on foreign (especially United States) experience.[13] Income tax legislation now consists of more than 20 different statutes, the provisions of which are consolidated and systematically arranged in Regulations issued from time to time by Presidential decree. The Regulations currently in force were issued by Decree No 58,400 of 10 May 1966.[14]

2/1.2 Income tax is payable in two ways: (a) by assessment based on a return submitted annually in April by the taxpayer and reporting his income and deductions for (i) in the case of individuals, the preceding calendar year, (ii) in the case of legal entities, a 12-month business year ending within the preceding calendar year; (b) by withholding incumbent on the individuals or legal entities which pay certain types of income to the taxpayer. In principle, the assessment method applies when the beneficiary of the income is identified and has a residence in Brazil, whilst the withholding method applies when the beneficiary is unknown (as in the case of bearer income) or outside the jurisdiction of the Brazilian authorities (as in the case of nonresident individuals or legal entities).

2/1.3 In recent years, however, the withholding method is increasingly adopted in respect of identified resident taxpayers, sometimes for the full tax due, sometimes as a prepayment on account of the tax due on the return: this tendency of the law is based, of course, in the interest of accelerating the collection of the tax and simplifying its administration. In respect of resident taxpayers, the withholding method is also used as a mechanism of tax policy: thus, in certain types of bearer income, the law provides an alternative lower rate of withholding if the recipient of the income elects to identify himself. This identification is for tax purposes only and does not affect the nature of the source of the income (e.g., a bearer share or security) for all other legal purposes.

2/1.4 Taxable income is defined by statute as "the product of capital, of labour, or of a combination of both, besides such other gains defined (as taxable) by law". This definition is construed by the courts as including only such gains as correspond to the "classical" concept of income, i.e.,

(a) derived from a permanent source owned by the taxpayer (in the case of income from capital) or identified with the taxpayer (in the case of income from labour or a combination thereof with capital),

(b) realized and separated, i.e., capable of expenditure without impairing the nature and amount of the capital source from which they derive,

(c) resulting from the economic exploitation of their capital, or capital-labour, source organized and conducted by the taxpayer[15].

12. Except for a ten-year interlude (1937-1946) in which an attempt was made to divide the power to tax income between the Federal and Municipal governments, the latter in respect of rent from urban real property; this experiment failed to yield significant results.

13. See Gomes de Sousa: "L'Evolution de la notion de revenu imposable", in "Archivio Finanziario", vol. 2 p. 119 (Padova, Cedam, 1951).

14. The practice of consolidated Regulations is also used for other major Federal taxes, such as the tax on industrial products. In some States and larger Municipalities, legislation relating to all taxes is often consolidated in one body of Regulations, sometimes called State (or Municipal) Tax Code.

15. See Gomes de Sousa, op. cit. footnote 13.

2/1.5 On the other hand, the part of the statutory definition of taxable income which refers to "other gains defined by law" is construed by the courts to apply to all gains not includible in the "classical" concept of income. These are sometimes called "capital gains" *(ganhos de capital)*, defined as gains from the sale or other disposition of capital assets not currently and professionally acquired or held for economic exploitation. Capital gains so defined are taxable only when specifically provided by law. No such provision exists at present in the case of individuals, and therefore gains from the sale of real property (such as land and buildings) or personal property (including shares, stocks, bonds, and other securities) by individuals are not subject to income tax[16], except if the property is bought and sold by way of trade, in which case the individual will be treated for tax purposes as a legal entity[17].

2/1.6 For the purposes of the following analysis, the subject will be divided in this way: (a) the assessed tax: (i) individuals, (ii) legal entities; (b) the withholding tax: (i) resident taxpayers, (ii) nonresident taxpayers, the identity of the taxpayer as an individual or a legal entity being of course irrelevant to the withholding tax.

2/2. THE ASSESSED TAX: INDIVIDUALS

2/2.1 All individuals domiciled or having a residence in Brazil for twelve consecutive calendar months and having a net total income[18] in excess of the basic personal exemption of NCr$ 2,599[19] are subject to the tax regardless of nationality, sex, age, marital status, or profession. Individuals who do not meet the time element of this definition are treated for tax purposes as nonresidents. In the case of separate-property marriage, husband and wife are treated as separate taxpayers. In the case (much more frequent in Brazil) of joint-property marriage, husband and wife are treated as one taxpayer, but the wife is permitted to file a separate return in respect of income from salaries or professional services. The personal income of persons claimed as dependents is added to the income of the taxpayer.

2/2.2 Taxable income is classified into eight schedules designated by letters A to H. This schedular income was formerly subject to flat percentage taxes different for each schedule[20], in addition to the tax at graduated rates on net total income discussed below. Since these schedular taxes were abolished in 1965, the purpose of the schedular classification is to define taxable income according to the nature of its source and to determine the applicable schedular deductions, as follows:

(a) *Schedule A:* Interest and other income from Federal, State or Municipal bonds, when nominative (or bearer if the taxpayer elects to identify himself). Deduction: commissions paid on the purchase or sale of the income-producing bonds.

(b) *Schedule B:* Interest from private sources of whatever nature, including bank deposits and debentures, when nominative (or bearer

16. A specific capital gains tax on the sale of real estate property by individuals, created in 1946, was repealed as from 1st January 1967 (Decree-law No 94 of 30 December 1966).

17. See 2/3.2 below.

18. Defined in 2/2.3 below.

19. The basic personal exemption, and all other tax limits or bases expressed in the law in fixed amounts of money (including the income brackets for the purposes of the graduated tax discussed below at 2/2.4) are self-adjusting by means of a "monetary correction index" (i.e., a multiplicating factor) issued for each year by the Ministry for Economic Planning and applied to the statutory figures for 1965 (Law No 4506 of 30 November 1964, Sect. 3). The figures given in the text are those applicable to fiscal year 1968.

20. The schedular tax rates were: A, 3%; B, 10%; C, 1%; D, 2%; E, 3%; H, 5%. There was no schedular tax in schedules F and G.

if the taxpayer elects to identify himself); gains from the redemption price of (nominative) corporate shares in excess of the par value or the cost thereof, whichever is higher; the difference between the par value and the (lower) cost of acquisition of debentures and other private securities, when nominative (or bearer if the taxpayer elects to identify himself). Deductions: commissions paid on the purchase or sale of the income-producing securities, and the increase in the par value thereof, when resulting from monetary correction of such value.[21]

(c) *Schedule C:* Salaries and pensions of active or retired private employees and civil or military government personnel, including fringe benefits (free housing, use of automobiles, personal expenses paid by employer, etc). Deductions: social security charges, cost of books and other working equipment, and traveling and entertaining expenses up to 15% of gross schedular income.

(d) *Schedule D:* Income from professional services of doctors, lawyers, engineers, accountants, commercial agents, notaries and other public officials not remunerated by the government, and author's royalties. Deductions: at the taxpayer's option (a) 40% of gross schedular income, or (b) such professional expenses as may be substantiated by the taxpayer and accepted by the assessing authority.

(e) *Schedule E:* Income from the leasing or renting of real or personal property. Deductions: taxes and other fiscal charges assessed, and insurance premiums paid on the income-producing property; cost of maintenance and administration of such property, up to 10% and 5% of gross schedular income respectively.

(f) *Schedule F:* Cash or stock dividends and other distributions from corporations or other legal entities, and income of whatever nature from sources outside of Brazil. No deductions are allowed in this schedule, but see 2/2.4 below.

(g) *Schedule G:* Income from agriculture, cattle-raising, animal husbandry, and extraction of natural resources. Taxable income in this schedule is, at the taxpayer's option, (a) 3% of the land value of the property exploited, as registered for the purposes of the land tax,[22] increased by 30% thereof in concept of the value of buildings and machinery; or (b) the actual net profit as demonstrated by the taxpayer's accounts and accepted by the assessing authority.

(h) *Schedule H:* Income from occasional commercial or industrial transactions not exploited in a professional manner; gains from the assignment of rights of whatever nature, including patent, trademark, and author's rights owned by the taxpayer; and presumptive income resulting from a discrepancy between reported income or assets and the taxpayer's "apparent wealth".[23] Deductions provided for other schedules may be allowed in this schedule as and when applicable and accepted by the assessing authority.

2/2.3 The aggregate net schedular income from all schedules (i.e., gross schedular income less applicable deductions) is called "gross total income". From gross total income the following further deductions are allowed to arrive at net total income:

(a) The basic personal exemption of NCr$ 2,599;

(b) Family charges at NCr$ 1,299 for each dependent, namely (i) the wife, including the common-law wife of unmarried, widowed or divorced taxpayers, (ii) sons and daughters under 21 (24 if university students) or in-

21. See 5/3 below.
22. See 3/2 below.
23. See 2/2.5 below.

valid, (iii) unmarried, widowed or divorced daughters without independent income, (iv) destitute persons under 21 raised and educated by the taxpayer;
(c) Alimony to divorced spouses, as established in the divorce decree;
(d) Financial aid to invalid or old parents, brothers, or sisters, at the discretion of the assessing authority;
(e) Medical, dental, or hospital expenses of the taxpayer or his dependents, unless covered by insurance;
(f) Interest and other bank or financial charges paid on personal debts, except if deductible in the schedules;
(g) Life and accident insurance premiums up to NCr$ 794;
(h) Capital losses from the destruction or damage of property by fire, flood, shipwreck, or similar accidents or acts of God, unless covered by insurance;
(i) Donations to recognized charitable, educational, or artistic institutions, and scholarships for study in Brazil or abroad if open to all candidates and sponsored by a university or recognized learned institution;
(j) Prospection expenses of mineral deposits personally exploited by the taxpayer;
(k) Educational expenses incurred by the taxpayer or his dependents, not exceeding 20% of gross total income;
(l) Certain specified investments made by the taxpayer during the taxable year, namely (i) up to 30% of investments in Federal, State, or Municipal bonds, (ii) up to 15% of investments in housing projects managed or approved by the Federal Government, (iii) the full amount invested in nominative shares of private industrial or agricultural corporations recognized by the Federal Government as of interest to the development of the Northern and Northeastern regions of Brazil, (iv) up to 30% of investments in nominative shares of "open" corporations,[24] (v) up to 15% of investments in mutual funds or nominative shares of financial corporations, (vi) up to 30% of investments in real-estate development; if the investments described herein are liquidated before two years, the amount of the deduction taken is taxable as income in the year of liquidation.[25] *(see note on page 428)*

2/2.4 Net total income is subject to a graduated tax calculated as follows:

Income bracket	*Tax rate*	*Tax on bracket*	*Total tax*
NCr$ 2,599 or less	Exempt	—	—
2,600 to 3,118	3%	NCr$ 15.57	NCr$ 15.57
3,119 to 4,158	5%	52.00	67.57
4,159 to 5,717	8%	124.72	192.29
5,718 to 8,316	12%	311.88	504.17
8,317 to 11,434	16%	498.88	1,003.05
11,435 to 15,592	20%	831.60	1,834.65
15,593 to 20,789	25%	1,299.25	3,133.90
20,790 to 31,183	30%	3,118.20	6,252.10
31,184 to 41,578	35%	3,638.25	9,890.35
41,579 to 62,366	40%	8,315.20	18,205.55
62,367 to 83,155	45%	9,355.05	27,560.60
83,156 or over	50%	—	—

24. Defined as corporations whose shares are held by the general public in the proportions and according to the requirements established and periodically revised by a Resolution of the

From the tax due in accordance with the above chart, the taxpayer deducts: (a) in the case of Schedule F income from foreign sources, the income tax paid thereon to the country of origin, provided that country allows a similar credit in respect of income from Brazilian sources, (b) all amounts paid in concept of withholding taxes defined as prepayments of the tax due on the return: these withholding taxes will be discussed in chapter 2/4 below.

2/2.5 The tax is assessed on the basis of the annual return filed by the taxpayer in April, and payable in eight monthly instalments (May to December). The taxpayer is permitted to anticipate the filing of the return and the payment of the tax, in which case he is entitled to a rebate of 2% per month of anticipation. In addition to his income, the taxpayer must report his capital assets held in Brazil or abroad, whether in the nature of real or personal property (except furniture and objects of personal use unless they are works of art). In respect of each asset there shall be stated its origin and cost of acquisition, or current or estimated market value in the absence of cost. Mortgages and other liens attached to each asset shall also be stated. The purpose of this reporting of assets is to assist the authorities in their analysis of the income report. Thus, unreported assets discovered by the tax authorities are deemed to have been acquired with unreported income, and their cost (or current or estimated market value) is taxable as schedule H income plus a 30% fine for failure to report. The same applies to reported or unreported assets (such as country houses, yachts, luxury automobiles, and the like), which, at the discretion of the assessing authority, are regarded as "apparent wealth" in excess of the taxpayer's financial status as evidenced by his reported income.[26] In either case, however, the taxpayer has the opportunity to show that the incriminated assets were acquired with the proceeds of a non-taxable transaction (such as the sale of another capital asset previously reported) or with a non-taxable income or gain (such as a donation or legacy, or by inheritance).

Central Bank of Brazil (Law No 4728 of 14 July 1965, Sect. 59). Under Central Bank Resolution No 16 of 16 February 1966 now in force, an "open" corporation is a corporation (a) whose shares are listed for transaction at the Stock Exchange and are actually transacted at least once in a week or five times in a month for a value in excess of NCr$ 8,000 in a week or NCr$ 40,000 in a month and in a quantity in excess of 0.25% of the issued capital of the corporation; or, alternatively, (b) whose shares corresponding to at least 15% of its issued capital are held by at least 500 individuals or legal entities each of which holding at least 100 but not more than 20,000 shares.

25. The deductions described in (f) to (l) of this paragraph shall not in the aggregate exceed 50% of gross total income.

26. See 2/2.2(h) above.

27. A legal entity is Brazilian when it is organized under the laws of Brazil and has in Brazil the principal seat of its administration (Corporation Act (Decree-Law No 2627 of 26 September 1940) Sect. 60). Conversely, a foreign legal entity is (by court construction) a legal entity organized under the laws of a foreign country and having the principal seat of its administration outside of Brazil. In order to operate in Brazil a foreign legal entity must be authorized by a charter issued by Presidential decree (Corporation Act, Sect. 64).

2/3. THE ASSESSED TAX: LEGAL ENTITIES

(a) Definition of taxpayers

2/3.1 For income tax purposes a legal entity *(pessoa jurídica)* is a corporate or non-incorporated body having a legal personality distinct from its members, shareholders, or partners. This definition equally applies to Brazilian legal entities and to branches of foreign legal entities authorized to operate in Brazil.[27] However, the fact that a Brazilian or foreign legal entity is not duly organized,

registered, or authorized to operate is immaterial for income tax purposes: in other words, domestic or foreign legal entities operating illegally or irregularly in Brazil are subject to income tax, indeed under a penalizing method of assessment.[28]

2/3.2 Individuals are assimilated for tax purposes to legal entities (a) if they are registered as merchants in the Commercial Registry *(Junta Comercial);* (b) if they exploit in a continued and professional manner the sale of real or personal property, or of services (except professional services taxable as schedule D income). For this purpose the sale of real property is defined as exploited in a continued and professional manner if the individual (i) sells or contracts to sell in one year more than 15 buildings or plots acquired within the three preceding years, (ii) undertakes in one year the cooperative construction for sale of more than three buildings, (iii) undertakes in one year the partition into plots and sale of more than three areas owned by him. Property acquired by donation, legacy, inheritance, or in repayment of debts, is not counted for the purposes described above.

2/3.3 The following are exempt from the tax: (a) legal entities whose annual gross receipts are less than a stipulated amount revised for each fiscal year[29], (b) educational institutions applying their total income for that object in Brazil, (c) on the basis of international reciprocity, foreign maritime or air transportation companies, (d) cooperative societies which do not distribute dividends in excess of 12%, (e) charitable, religious, scientific, cultural, recreational and sporting institutions, foundations, or clubs, (f) labour unions and professional associations, (g) investment companies and mutual funds registered with the Central Bank of Brazil, provided they distribute their total net income every year, (h) certain public utility corporations of which the Federal or a State government is a shareholder.

(b) Methods of assessment

2/3.4 Legal entities are assessed under three alternative methods:

(a) The normal method of assessment is on "actual profits" *(lucro real)* demonstrated by a balance-sheet and profit-and-loss account covering twelve consecutive calendar months of operations and substantiated by books of account kept in accordance with applicable laws and regulations.

(b) Assessment on "presumed profits" *(lucro presumido)* applies, at the option of the taxpayer, to legal entities (except corporations, limited liability companies, and branches of foreign entities authorized to operate in Brazil) whose capital and annual gross receipts do not exceed stipulated amounts revised for each fiscal year[30]. Presumed profits are equal to 12% of gross annual receipts, no deductions being allowed.

(c) Assessment on "arbitrated profits" *(lucro arbitrado)* is a penalty method applicable, at the discretion of the assessing authority, to legal entities which fail to meet the requirements described in (a) above and whose accounts are therefore not acceptable for tax purposes. The arbitrated profit is (i) 30% of the aggregate value of fixed and current (short and long term) assets, or (ii) 15% to 75% of capital or of gross receipts, no deductions being allowed in either case[31].

28. 2/3.4(c) below.

29. As explained in footnote 19 (NCr$ 7,690 in 1968).

30. As explained in footnote 19, the limits for 1968 being: capital NCr$ 650, gross receipts NCr$ 3,875.

31. Domestic or foreign corporations operating irregularly or illegally in Brazil (see 2/3.1 above) will, in principle, be subject to this method of assessment. Assessment is usually made at 15% of gross receipts originally, and

(c) Taxable income

2/3.5 In the normal method of assessment[32], the taxable income or "actual profit" *(lucro real)* of legal entities is defined as gross operational income less allowable operational expenses or costs, adjusted by (a) the addition or subtraction, as the case may be, of the actual financial results (gains or losses) from occasional transactions, (b) the addition or deduction of certain stipulated items. Gross operational receipts are receipts from transactions carried on by the legal entity in a continued and professional manner in the conduct of its business. When these transactions occur partly in and partly outside Brazil, such as commercial transactions initiated in Brazil and concluded abroad, extraction of raw materials in Brazil for sale or industrialization abroad, and international transportation or communications, only the portion of income from Brazilian sources is included in gross operational income; when that portion is not determined, it is arbitrated at 29% of the total proceeds from the transaction.

2/3.6 Allowable operational expenses or costs are, at the discretion of the assessing authority, all disbursements or allocations necessary to the production of income or the preservation of invested capital, with the following limitations:

(a) Taxes and fees are allowed only if paid during the business year, except (i) the income tax itself, which is not allowable and (ii) improvement contributions, which accrue to the book value of the assets benefited by the public work.

(b) Reserves for accounts receivable are allowed if not in excess of 3% of the total receivables not guaranteed by mortgage, liens or other security, outstanding on the initial day of each business year.

(c) Reserves for employee liability are allowable: these are mandatory at 8% of monthly payroll and must be deposited in a blocked special account at a Government bank.

(d) Exchange losses in the liquidation of foreign currency obligations are allowable if not related to the acquisition of fixed assets, in which case they accrue to the book value of the assets acquired.

(e) Expenses with scientific or technological research for the development or improvement of industrial products are allowable, except the acquisition of land, buildings and equipment for that purpose.

(f) Royalties for the use of patents or trademarks, and technical assistance fees, are allowable except if paid to partners or directors of the taxpayer entity, or to a nonresident individual or entity which directly or indirectly controls more than 50% of its voting stock. In the case of technical assistance the allowance is limited to five years from the introduction of the industrial process to which it refers. Moreover, in that case and also in the case of royalties, the allowance may not exceed a percentage, not higher than 5% of the gross receipts from the sale of the industrial product, established and revised from time to time by the tax authorities for each type of product.

(g) Salaries of managing partners or directors of the taxpayer entity are allowable within limits established and revised every year by the tax authorities and based on the amount of that entity's paid-in capital and the number of partners or directors.

(h) Capital losses from destruction or damage of fixed assets due to accident or act of God, or to the replacement of such assets due to technical obsolescence, are allowable in respect of the unamortized portion thereof, except if covered by insurance.

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increased every year by 20% of the preceding year figure if the irregularity persists.

32. Described in 2/3.4(a) above

(i) Charitable or other donations similar to those deductible by individuals[33] are allowable if not in excess of 5% of gross operational income.

(j) Advertising expenses are allowable in the following cases: (i) salaries paid to employees or independent professionals engaged in advertising, (ii) payments to registered advertising agencies, newspapers, radio and television networks, (iii) acquisition of author's rights or royalties paid to authors or artists, (iv) distribution of free samples or specimens not in excess of 5% of the gross income from the sale of the product.

(k) Amortization of fixed assets and depreciation of industrial machinery and equipment are allowable at an annual percentage of their book value established and revised from time to time by the tax authorities for each type of asset on the basis of its "useful life" in normal use in one 8-hour shift. Depreciation rates are increased by one-half, or doubled, in the cases of machinery and equipment working two or three 8-hour shifts respectively. Accelerated rates of depreciation may be obtained on application to the tax authorities in respect of certain types of industry, the establishment or renovation of which is of interest to the national economy. In the absence of a specific rate in respect of a given type of asset, a standard "straight-line" depreciation of 10% per annum is allowed.

2/3.7 Net operational income (i.e. gross operational income less deductions described in the preceding paragraph) is adjusted by the addition or subtraction of the actual financial results (gains or losses) of occasional transactions. These are all transactions other than transactions defined as the source of gross operational receipts[34]. When such occasional transactions are in the nature of purchases or sales of shares of stock or participations in other legal entities, or of public or private bonds or other securities, the following limitations apply:

(a) The asset value (cost) of the stocks, bonds or securities purchased may not exceed for tax purposes by more than 10% their current market value or in its absence the value resulting from the net worth of the issuing corporation or other legal entity per last approved balance-sheet.

(b) No loss from the sale of stocks, bonds or securities is recognized for tax purposes if in excess of 10% of their cost as defined in (a) above; unless (i) the sale is made at arm's-length on the stock exchange or (ii) the sales price is substantiated by the current market value of the stocks, bonds, or securities sold, or in its absence by the value resulting from the net worth of the issuing corporation or other legal entity per last approved balance-sheet.

2/3.8 Net operational income plus or less the actual financial results of occasional transactions is further adjusted by the addition of certain stipulated items, to wit: (a) salaries of managing partners or directors in excess of the applicable limits described at 2/3.6 (g) above; (b) reserves and surplus of whatever nature, except those described at 2/3.6 (b) and (c) above and depreciation reserves described 2/3.6 (k) above; (c) the increase in net worth resulting from (i) the sale of fixed assets for a price in excess of book value or (ii) the revaluation of the book value of fixed assets;[35] (d) the cost of acquisition of fixed assets out of current or accumulated surplus.

2/3.9 Conversely, net operational income plus or less the actual financial results of occasional transactions is further adjusted by the subtraction of certain stipulated items, to wit: (a) participations in the legal entity's profits, paid to (i) the Federal, State or Muni-

33. See 2/2.3(i) above.
34. See 2/3.5 above.
35. See 2/3.14 below.

cipal Governments, (ii) the entity's employees; (b) cash or stock-dividends and other nominative distributions received from a corporation or other legal entity of which the taxpayer entity is a shareholder or partner; (c) dividends (cash or stock), interest and other income from bearer shares, bonds, or other securities owned by the taxpayer entity; (d) losses carried forward from the three preceding business years, if in excess of current reserves or surplus; (e) cash premiums charged on new shareholders in capital increases issued above par, if kept as a surplus reserve for subsequent capitalization.[36]

(d) Tax rates

2/3.10 Income tax on legal entities is assessed on either "actual", "presumed" or "arbitrated" profits[37] at the following rates:[38]

(a) Professional and other non-commercial entities whose only activity is to render legal, medical, engineering, accounting, or similar services, and whose capital is not in excess of (in 1968) NCr$ 1,375 ..... 11%

(b) Entities whose only activity is to exploit Federal, State, or Municipal public services concessions, provided their taxable income does not exceed 12% of capital 15%

(c) All others 30%

2/3.11 Legal entities are further subject to a tax of 5% on the portion of their profits which is distributed to their partners or shareholders[39], except: (a) distributions to partners of entities described at 2/3.10(a) above, (b) distributions of stock dividends from the capitalization of (i) reserves or surplus[40], (ii) the net result of the monetary correction of fixed assets[41], (c) distributions by "open" corporations[42], (d) distributions by entities whose declared capital plus reserves or surplus do not exceed in the aggregate (in 1968) NCr$ 174,625.

2/3.12 Disguised distributions by legal entities are subject to a tax of 50%. A disguised distribution is deemed to exist (apart from other cases of lesser significance) if the entity: (a) sells or buys assets or rights to or from its partners, shareholders, or directors (or their relatives or dependents) for a price notoriously lower or higher than the current market value of such assets or rights: (b) consents a loan to the persons described in (a) above, except if the loan is repaid within 3 years with interest and other financial conditions at least equal to those of the most onerous loan contracted by the entity; this provision does not apply to banks and other financial institutions; (c) reduces its declared capital by redeeming shares less than two years after the payment of a stock dividend from the capitalization of reserves or surplus.

2/3.13 Corporations are further subject to a tax of 15% on the aggregate amount of their reserves or surplus in excess of declared paid-in capital,[43] except (a) the compulsory reserve of 5% of annual net profits up to 20% of declared capital[44], (b) surplus arising from the monetary correction of fixed

36. See 2/3.13(c) below.
37. Defined at 2/3.4 above, "actual" profits being further described in 2/3.5 to 2/3.9 above.
38. Decree-law No 62 of 21 November 1966.
39. Decree-law No 94 of 30 December 1966.
40. See 2/3.18 below.
41. See 2/3.17 below.
42. See footnote 24.
43. This tax (formerly of 30%) is based on provisions of the Corporation Act (Decree-law No 2627 of 26 September 1940) intended to discourage the accumulation of surplus by corporations. It is severely criticized by Brazilian economists, who point out the interest of permitting corporations to be self-financing. It is now proposed to allow corporations to retain surplus in excess of capital for three years, at the expiration of which the tax described in this paragraph would be charged unless the accumulated surplus is then distributed or capitalized.
44. Corporation Act (Decree-law No 2627 of 26 September 1940) Sect. 130(2).

assets[45], if in excess of three times the amount of declared capital or in special cases recognized by a specific Resolution of the Minister of Finance, (c) surplus arising from premiums charged on new shareholders in capital increases issued above par[46].

2/3.14 This tax is charged only once in the year when existing reserves or surplus are increased by the addition of current profits. Moreover, cash or stock dividends from the subsequent distribution or capitalization of excess reserves or surplus having paid this tax are exempt from further taxation as income of the shareholder, except if payable to unidentified bearer shareholders. In this case, the distribution is subject to the withholding tax at the rate of 25% to complete the difference between the 15% tax paid by the corporation and the withholding tax rate applicable to bearer dividends[47].

(e) Revaluation and monetary correction of fixed assets

2/3.15 The revaluation (i.e., the write-up of book values) of fixed assets, if voluntarily decided and carried on by the entity at its own judgment, is added to net operational income and taxable as an adjustment thereof[48]. However, as an incentive to such revaluations in order to revise book asset values in accordance with the reduced actual purchasing power of the currency as a result of inflation, temporary tax benefits were granted in 1944, 1951, and 1956 to revaluations undertaken within certain prescribed limits.

2/3.16 In 1958 a permanent distinction was made between voluntary and unlimited revaluations[49] and so-called "monetary corrections", i.e., revaluations undertaken (at first also voluntarily every two years) in accordance with official lists of index numbers intended to rectify the original cost of acquisition of fixed assets according to the fluctuations of the actual purchasing power of the currency between the year of their original acquisition and the year of revaluation. The resulting increase in book asset values was compensated by the deduction of (a) the correction, by application of the same index numbers, of amortization or depreciation reserves relating to the revalued assets, (b) the correction, at the ruling rate of exchange, of outstanding accounts payable in foreign currency, in order to absorb potentially deductible exchange losses in the liquidation thereof.[50] The net result of this monetary correction of assets and certain liabilities was subject to a special tax payable by the legal entity[51] and mandatorily capitalized, the resulting stock dividend being exempt from taxation as income of the entity's shareholders or partners[52].

2/3.17 In 1964 the monetary correction described in the preceding paragraph was made obligatory every year (instead of voluntary every two years) and its net result may either be kept as a surplus reserve[53] or capitalized, the special tax thereon being abolished as from 1st January 1967. Stock dividends from the capitalization of monetary correction surplus are exempt from taxation as income of the partners or shareholders. Moreover, if the latter are also legal entities, they are permitted to capitalize

45. See 2/3.17 below.
46. See 2/3.9(e) above.
47. See 2/4.3(c)(ii) below.
48. See 2/3.8(c)(ii) above.
49. Which continue to be taxable as described in the preceding paragraph.
50. See 2/3.6(d) above.
51. Originally of 15%, later reduced to 5% or, in certain cases, 2%. This tax was abolished in 1967 (see text at 2/3.16).
52. Law No 3470 of 28 November 1958.
53. Exempt from the limitation on accumulations of surplus by corporations and the tax on reserves in excess of capital, as described at 2/3.13 above.

the par value of the bonus shares received and their own stock dividend arising therefrom is also exempt from taxation as income of their own partners or shareholders.[54] The following are exempt from the compulsory monetary correction described in this paragraph: (a) entities described at 2/3.10 (a) and (b) above, (b) entities, 51% or more of whose capital is held by the Federal, State, or Municipal governments.[55]

(f) Capitalization of reserves or surplus

2/3.18 As noted before, stock dividends are taxable as income of the shareholder.[56] As an incentive to the capitalization of reserves or surplus, however, this taxation has been replaced since 1958 by a tax of 15% on the amount of the capitalization, payable in instalments by the legal entity in lieu of all taxation otherwise applicable to the stock dividend. This tax, however, does not apply if the legal entity (a) reduced its declared capital at any time after 1st January 1958, except if the reduction was motivated by losses, (b) is not up to date in its payment of income tax or attendant fines. On the other hand, the capitalization of surplus arising from cash premiums charged on new shareholders in capital increases issued above par is exempt from this tax.

2/3.19 This tax is not an alternative; in other words, the law does not allow the legal entity the option between paying this tax or letting its shareholders pay the tax on their own income from the stock dividend. However, this latter tax will be assessed on the shareholders if the legal entity (a) defaults in the payment of the 15% tax, or (b) is liquidated, or reduces its declared capital, within 5 years from the capitalization of its reserves or surplus.

2/3.20 Since the payment of this tax by the legal entity stands in lieu of all taxation of the stock dividend, the shareholder, if a legal entity, is permitted to capitalize the par value of the bonus shares received, and its own stock dividend arising therefrom is also exempt from taxation as income of its own partners or shareholders.

2/4. THE WITHHOLDING TAX: RESIDENT TAXPAYERS

2/4.1 Salaries (schedule C income)[57] are taxable by withholding as a prepayment on account of the tax to be assessed on the return. This tax is computed on a monthly basis on salaries in excess of (in 1968) NCr$ 488 in accordance with the following chart, on which column 3 is a standard deduction in lieu of the applicable deductions from gross total income:[58]

54. Law No 4357 of 16 July 1964, as amended by Law No 4506 of 30 November 1964, Law No 4728 of 14 July 1965, Law No 4863 of 29 November 1965, and Decree-law No 62 of 21 November 1966.

55. As an alternative to the monetary correction method described in this paragraph, Decree-law No 62 of 21 November 1966 provides for a method of monetary adjustment of the balance-sheet and profit-and-loss account, intended to distinguish for tax purposes between actual profits (translating themselves into an accretion of intrinsic value of assets and realized surplus) and "paper" profits resulting from a disagreement between accounting and intrinsic values. This alternative method is still subject to further study and will eventually be put into effect by a Resolution of the Minister of Finance.

56. See 2/2.2(f) above.

57. See 2/2.2(c) above.

58. See 2/2.3 above.

Monthly salary		*Tax rate*	*Standard deduction*
NCr$ 489 to NCr$	610	3%	NCr$ 14.64
611 to	732	5%	26.84
733 to	976	8%	48.80
977 to	1,220	10%	68.32
1,221 or over		12%	92.72

2/4.2 The following types of income are taxable by withholding as a prepayment on account of the tax to be assessed on the return:[59]

(a) Payments of interest (schedule B income)[60] in excess of (in 1968) NCr$ 268 in any semester, made by legal entities to individuals 10%

(b) Payments of schedule D income[61] in excess of (in 1968) NCr$ 190 in any month:

(i) to commercial agents 7%

(ii) professional fees and author's royalties 8%

(c) Payments of schedule F income from Brazilian sources[62] in excess of (in 1968) NCr$ 225 to nominative shareholders or partners, except stock dividends from the capitalization of (i) monetary correction surplus,[63] (ii) reserves or surplus having paid the 15% tax due by the entity[64], (iii) distributions (cash or stock) by "open corporations[65] 10%

2/4.3 The following types of income are taxable by withholding as the total tax due by the recipient of the income:

(a) Income from Federal, State, or Municipal bonds, if payable to bearer, unless the recipient elects to identify himself, in which case no withholding tax applies and the income is taxable in schedule A (if the recipient is an individual)[66] or as gross operational receipts (if the recipient is a legal entity)[67] 6%

(b) Cash or stock dividends[68] and income from debentures or convertible bonds issued by corporations, if payable to bearer and the recipient elects to identify himself for tax purposes 15%

(c) Cash or stock dividends as described in (b) above, if the recipient elects not to identify himself for tax purposes:

(i) if the source of the income is an "open" corporation[69] 25%

(ii) otherwise 40%

(d) Income from debentures or convertible bonds issued by corporations, as described in (b) above, if the recipient elects not to identify himself for tax purposes 60%

(e) Cash dividends and income from debentures or convertible bonds issued by corporations, if nominative and payable to a Brazilian legal entity 15%

(f) Cash prizes from lotteries and race bettings 30%

2/4.4 The sale or issue below par, by legal entities to individuals, of securities of whatever nature[70] is subject to a withholding tax of 15% payable by the purchaser or subscriber and computed on the difference *(deságio)* between par and (lower) cost of acquisition. This tax is obviously intended as a prepayment in anticipation of the gain to be

59. See 2/2.4 above.
60. See 2/2.2(b) above.
61. See 2/2.2(d) above.
62. See 2/2.2(f) above.
63. See 2/3.17 above.
64. See 2/3.20 above.
65. See footnote 24.
66. See 2/2.2(a) above.
67. See 2/3.5 above.
68. Except stock dividends in the cases described at 2/3.17 and 2/3.20 above.
69. See footnote 24.
70. Except shares of corporations, which may not be issued below par.

realized by the taxpayer on the redemption of the acquired securities upon their maturity.

2/4.5 Payments by corporations, described as commissions, bonuses, or gratuities, are subject to a withholding tax of 60% payable by the corporation, if the origin of the payment is not stated and the recipient thereof is not identified. This is obviously a penalty tax based on the assumption that the payment is a form of disguised dividend or distribution[71].

2/5. THE WITHHOLDING TAX: NONRESIDENT TAXPAYERS

2/5.1 Gross income of whatever nature[72] from Brazilian sources, payable to a nonresident individual or legal entity,[73] is subject to the withholding tax of 25%. Are exempt from this tax: (a) payments of (i) the price of imported goods, (ii) interest on the financing of that price,[74] (b) commissions paid by Brazilian exporters to their agents abroad, (c) stock dividends in the cases described at 2/3.13 and 2/3.20 above. On the other hand, the tax computed as indicated above may be increased by 20% thereof in the case of dividends or other distributions to nonresident partners or shareholders by Brazilian legal entities engaging in activities regarded as of lesser interest to the Brazilian economy, as defined and revised from time to time by Presidential decree. No decree has been issued to date defining types of activities for this purpose.

2/5.2 Exceptions to what was said in the preceding paragraph are:

(a) Income of nonresident distributors of foreign motion pictures, in which case the tax is 40% of 30% of the gross payments made to the distributor; the latter being further permitted to reduce the tax due by investing up to 40% thereof in a Government-sponsored programme for the local production of motion pictures.

(b) The portion of profits realized by branches of nonresident legal entities authorized to operate in Brazil, which is reinvested in Brazil in the expansion of industrial plant, in which case the withholding tax on such reinvested profits is 15%.

2/5.3 In all cases described at 2/5.1 and 2/5.2 above, if the income has already been subject to the withholding tax, only the difference between that tax and the applicable nonresident tax is payable when the income is paid to a nonresident individual or legal entity.

2/5.4 If the nonresident income is in the nature of dividends or other distributions by Brazilian legal entities to nonresident shareholders or partners, an addition to the tax described at 2/5.1 above is charged if the average amount of the dividends or other distributions paid in any three-year period after 1963 exceeds 12% of the registered capital of the Brazilian entity held by nonresidents. This additional tax is charged at the following rates:

Between 12% and 15%	40%
Between 15% and 25%	50%
Over 25%	60%

2/5.5 Since the legal provisions (described at 2/5.1 above) relating to the nonresident withholding tax refer to "income of

71. On which see 2/3.12 above.

72. Except in the case of income from the renting of real property, in which case the tax is computed on net income after deductions allowabel in schedule E (see 2/2.2(e) above).

73. See 2/2.1 and 2/3.1 above.

74. The exemptions described at (a)(i) and (ii) of this paragraph result from court decisions holding that the income in question is not from Brazilian sources, a conclusion which this writer regards as questionable at least in the case of interest. Some decisions also hold (or intimate) that although the law imposes the tax on gross income, the price of an import sale is a gross receipt (rather than gross income) to the seller. Also in this writer's opinion, this distinction is not adequately established.

whatever nature", it has been held by the courts that that reference does not include capital gains[75]. Therefore, gains from sales of real or personal property by non-resident individuals or legal entities have been held to be non-taxable. This court construction, though correct in this writer's opinion, is frequently contested by the tax authorities and therefore cannot be regarded as finally established.

2/5.6 Foreign legal entities authorized to operate in Brazil through branches[76] are taxable on their profits from Brazilian sources in the same manner as Brazilian legal entities[77]. However, by court construction, the total amount of those profits, whether distributed or held as reserves or surplus, is subject, in addition to the assessed tax described at 2/3.10 (c) above, also to the withholding tax described at 2/5.1 above or (if applicable at 2/5.2 (b) above.

2/5.7 Thus, branches of authorized foreign entities are subject to an income tax charge of, in the aggregate, 55% or 45%, and therefore penalized as compared with Brazilian entities. The construction from which this penalization results rests on the court's holding that, as (foreign) headquarters and (domestic) branch are one and the same entity, the profits of the latter belong to the former irrespective of distribution, and therefore automatically incur the withholding tax[78]. For this reason, it is generally considered as more convenient for foreign legal entities to operate in Brazil through a wholly-owned subsidiary organized and with its headquarters in Brazil. In this way, the withholding tax described at 2/5.1 above will only apply to the portion of profits realized in Brazil which is actually distributed to the entity's nonresident shareholders[79].

2/5.8 A highly controversial provision[80] was introduced in 1958 allegedly to combat tax evasion by foreign entities accused of operating illegally or irregularly in Brazil. This provision stipulates, in effect, that when foreign entities make export sales directly to Brazilian purchasers on orders secured by commercial agents established in Brazil, the agent must report (besides his ow commission income as an agent), also the net profit from the sale realized by his foreign principal, and pay thereon the tax described at 2/3.10 (c) above on behalf of his principal. In the case of the agent's failure or inability to report his principal's net profit from the export sale, that profit is arbitrated for tax purposes at 20% of the gross sales price.

2/5.9 It seems obvious that the provision described is intended to counteract the court construction which holds that the payment of the price of imported goods to nonresident sellers is not taxable as not deriving from Brazilian sources[81]. When submitting that provision to Congress in 1958, the Government argued that if the nonresident seller is represented in Brazil by an agent, the sale is concluded in Brazil and therefore the nonresident seller actually is operating ille-

75. See discussion in 2/5.5 above.

76. See 2/3.1 above and especially footnote 27.

77. Described at 2/3.4 to 2/3.20 above, except that allowable operational expenses or costs (described at 2/3.6) include only expenses or costs incurred in Brazil.

78. In this writer's opinion, this construction is illogical since it results in a tax treatment of authorized foreign entities which amounts to defining them as simultaneously Brazilian and foreign. Nevertheless, this construction is finally established and has been sustained by the Supreme Court.

79. But may be further subject to the 20% increase or to the graduated surtax described at 2/5.1 and 2/5.4 above as and when applicable.

80. Law No 3470 of 28 November 1958, Sect. 76, reproduced in the current Income Tax Regulations as Sect. 199.

81. See 2/5.1(a) (i) above and footnote 74.

gally or irregularly in Brazil through the agent. The courts have based themselves on this argument to hold that the provision in question applies only when the agent in Brazil has formal powers to close sales in a manner binding to his nonresident principal, but not when the agent only has powers to solicit and forward purchase orders on which the nonresident seller reserves final judgment. However, this court construction is frequently contested by the tax authorities, and therefore special care should be exercised by nonresident exporters and their local agents in all cases capable of falling within the scope of the provision in question.

2/6. WITHHOLDING TAXES RETURNED TO THE STATES AND MUNICIPALITIES

2/6.1 The withholding taxes on salaries of State or Municipal employees[82] and on income from State or Municipal bonds payable to bearer[83] are collected by the Federal government but the full amount of their proceeds is turned over to the State or Municipal governments respectively.[84]

2/6.2 This is a provision introduced by the tax reform of 1965, with the object of allocating to the States and Municipalities the taxation of income from typically local sources, while at the same time preserving the integrity of the income tax as a Federal tax.

3. PROPERTY TAXES

3/1. INTRODUCTORY NOTE

3/1.1 Under this heading two types of taxes will be discussed:

(a) Taxes on the beneficial ownership of real estate property, whether urban or non-urban, improved or non-improved;[85] by "beneficial ownership" it is meant that legal title to the real estate property is immaterial for the purposes of the taxes discussed, which are assessed on the person (individual or legal entity) which physically occupies, or derives an economic benefit from, the taxable property.

(b) Taxes on the passing, whether "inter vivos" or by death, of legal title to real estate property; the economic or legal nature of these taxes as property taxes is debatable, but in Brazil they are so considered by the established opinion of tax economists and jurists.[86]

3/1.2 Taxes of the first type are: (a) the Federal land tax *(impôsto territorial rural)* on the ownership of non-urban land,[87] (b) the Municipal real estate taxes on the ownership of urban non-improved land *(impôsto territorial urbano)* or of urban improved property (land and buildings) *(impôsto predial)*.[88]

82. See 2/4.1 above.
83. See 2/4.3(a) above.
84. See chart in 1/4.2 above (B.5 and B.6).
85. Brazil has no general property tax, and therefore no tax on the ownership of personal property. The latter is indirectly taken into account for the purposes of assessment of the income tax on individuals, as described above at 2/2.2(b) and 2/2.5.
86. This opinion may be regarded as founded on uncritically accepted tradition. Sometimes an attempt is made to justify it by saying that the passing of title is an opportunity to collect a tax to compensate for the taxes escaped, avoided, or incorrectly assessed on the property during the life or the ownership of the former proprietor. The absence of adequate economic or legal foundation for this argument is obvious; yet the argument is somewhat justified by local circumstances, especially the absence of a general property tax (noted in the preceding footnote) and the relative inadequacy (chiefly in the rural areas) of real property records and valuations for tax purposes.
87. See chart in 1/4.2 (B.1) above.
88. See chart in 1/4.2(B.2) above.

3/1.3 Taxes of the second type are the State taxes on the passing of title to real estate property, whether rural or urban, improved or non-improved.[89]

3/2. THE LAND TAX

3/2.1 Taxation of rural land had considerable importance in the history of Brazil. From Brazil's independence from Portugal in 1822 to the proclamation of the republic in 1889, when the economy of the country was almost entirely agricultural and the States (then called Provinces) had no autonomous powers of taxation, the Crown had ample opportunity to manipulate the land tax to secure the support of the landowner aristocracy. With the development of trade and incipient industrialization, the rise in political importance of the urban bourgeoisie, combined with the discontent generated by excessive political and financial centralization, led the first republican Constitution of 1891 to allocate the land tax to the States.

3/2.2 From about 1950 onwards, a political movement favouring greater municipal autonomy gained force and succeeded briefly in 1961 to transfer the land tax to the Municipalities by constitutional amendment. But a new factor to be considered was the increasing demand for a land reform capable of assuring the economic exploitation of vast areas of the hinterland. A programme of land reform was approved by the Land Act *(Estatuto da Terra)* of 1964,[90] which obviously could not be implemented as long as some 4,000 Municipalities retained the power to impose and administer the land tax under widely diverging methods and criteria. On the other hand, it was felt that the Municipalities should not be deprived of this source of revenue, especially since the Municipal business tax created in 1946 had proved inconvenient.[91]

3/2.3 Therefore, the tax reform of 1965 allocated to the Federal government the power to impose the land tax in order to ensure uniform legislation throughout the country, but provided that the total revenue therefrom shall be returned within 30 days of collection to the Municipalities where the taxable land is situated. The tax is administered by the Brazilian Agrarian Reform Institute (IBRA)[92] according to Regulations[93] which, in effect, define the tax as an instrument for agrarian reform rather than a means for the raising of tax revenue.[94]

3/2.4 Prior to the Land Act, the land tax was traditionally regarded as a tax on the owner-

89. See chart in 1/4.2 (B.3) above.

90. Law No 4504 of 30 November 1964.

91. This tax *(impôsto de indústrias e profissões)* superimposed itself on existing Federal and state taxes on transactions and on the Federal income tax and was abolished for this reason in 1965. See Gomes de Sousa: introductory chapter of "Tax Reform in Brazil" quoted in footnote 2.

92. An agency of the Federal Government, directly subordinate to the President and administered by a committee of five members appointed by the President with the consent of the Senate.

93. Issued by Decree No. 56,792 of 26 August 1965 to implement the land tax provisions of the Land Act.

94. The Brazilian agrarian reform should not be confused with similarly named programmes instituted by socialist governments or advocated by leftist groups. Its objects as defined in the Land Act are (a) to provide for the well-being of land owners and workers and their families, (b) to ensure satisfactory levels of productivity and the conservation of natural resources, (c) to promote an equitable working relationship between landowners and labourers. Expropriation is permitted when necessary to further these purposes, but only after payment to the owner of the indemnity appraised by a court of law, such payment to be made in cash or, only in the case of *latifundios* (i.e. areas exceeding sixty times the size defined as adequate for economic exploitation in the region and underdeveloped or held for speculative purposes) in Federal bonds.

ship of (rather than on the income from) rural land, and assessed on the appraised value of such land without taking into account the value of (a) improvements (buildings, fences, bridges, roads, dams, irrigation projects, etc), (b) farm machinery and equipment, and work animals, (c) crops or cattle. This definition is essentially preserved, but the concept of "rural land" has been changed from the merely geographical sense of "non-urban" to the economic sense of "land, wherever situated, exploited for the purposes of agriculture, cattle-raising, or the industrialization of natural products", as defined in the Land Act (Sect. 4).

3/2.5 The tax is assessed annually at the basic rate of 0.2% of the appraised value of the land.[95] The amount obtained in this way is then adjusted by means of "progressive factors", i.e. multiplicator indexes depending on the ratio of the area of the taxable land to the standard units of area established by IBRA for each region of the country,[96] as follows:

Ratio of area to standard unit	*Multiplicator index*
1	1.0
Over 1 to 10	1.5
Over 10 to 30	2.0
Over 30 to 80	2.5
Over 80 to 150	3.0
Over 150 to 300	3.5
Over 300 to 600	4.0
Over 600	4.5

3/2.6 After the adjustment described in the preceding paragraph, the assessed tax is further increased or reduced by 1.1% to 1.6% depending on: (a) the distance between the taxable land and the nearest consumption center, considering the nature and condition of roads and other communication facilities, (b) the degree of personal participation of the owner in the management and exploitation of the land, (c) the nature and extent of housing, educational and sanitary facilities available to employees and labourers, (d) the inverse ratio of the income from the exploitation of the land as compared with standard levels of income-producing capacity, established by IBRA for each region of the country considering the nature, the actual conditions, and the technological level of that exploitation.

3/2.7 As will be clear from the foregoing, the land tax as presently regulated is a highly complex mechanism, especially if compared to the relatively crude methods of assessment used prior to the tax reform of 1965. That mechanism is not yet fully operative, but well-founded hopes may be placed upon it as an instrument for the economic development of the country and the amelioration of social conditions in the hinterland.

3/3 THE REAL-ESTATE TAXES:

3/3.1. Of lesser importance are the Municipal real-estate taxes on improved or non-improved urban property, except geographically "urban" property defined economically as "rural" for the purposes of the land tax.[97] These taxes are used not only for their normal purpose of raising revenue but also as indirect means of enforcing city regulations on matter of construction, housing, landscaping, zoning, and the like. For the purposes of these taxes, the urban areas of a city or town are those having at least two of the following public works, services, or facilities: (a) pavement, (b) water mains, (c) sewage, (d) street lights, (e) public school within 1.5 miles of the property.

95. As described in the preceding paragraph.
96. A standard unit of area is the minimum size area regarded as capable of economic exploitation.
97. See 3/2.4 above.

3/3.2 The taxes are assessed annually on the appraised value of the property. Tax rates naturally vary considerably from one city or town to another.[98] The appraisal procedure is regulated by law with variable degrees of sophistication, but the most consistently used appraisal factors are (a) location, (b) area, (c) size, age, condition and destination of buildings, (d) available public works, services, or facilities, and means of transportation. Because of Federal rent regulation (as an anti-inflationary measure), rent is not generally used as a factor in appraisal, except sometimes as an alternative to the appraised value, the tax being charged on whichever is higher.

3/3.3 The taxes on improved and non-improved property are, as a rule, independent, i.e., the same property cannot be subject to both. As an exception, however, both taxes may be assessed together as a penalty measure to enforce city regulations. This applies to untended open areas and to buildings which are inadequate to the city zone, or in a state of disrepair, or below an established rate of construction area to the area of the ground on which they stand. Conversely, private buildings open to the public (such as art collections), or private open areas occupied by gardens or parks usually are taxes at nominal rates or exempt.

3/4. THE REAL-PROPERTY TRANSFER TAXES

3/4.1 Taxes on the passing of title to real property (or, in the case of death duties, also to personal property) were charged by the States prior to 1965. The committee which drafted the tax reform of that year proposed their abolition.[99] The reason for this proposal was the argument that the transfer of title offers no actual economic basis for taxation other than the gain to the party who disposes of the property by sale, or to the party who acquires the property by gift or inheritance. Hence these taxes are on capital gains, and therefore should be included within the structure of the Federal income tax, rather than left to the judgment of the individual States. The main object of this proposition being to obtain a systematic treatment of taxes according to their economic nature rather than to secure further sources of revenue for the Federal government, it was also proposed that the proceeds of the suggested federal taxation of "inter vivos" or "causa mortis" capital gains should be returned in full to the States.

3/4.2 For economic as well as political reasons this proposition was not adopted,[100] but a compromise was reached instead, by which the property transfer taxes were retained by the states but their scope and impact were considerably reduced. Thus, the tax on "inter vivos" transfers of real property was excluded when the property is acquired by a legal entity (a) in payment for shares subscribed, (b) through a merger or consolidation.[101] This, however, does not apply if the predominant activity of the acquiring

98. Latest available data would indicate the extreme limits of this variation to be 0.5% and 10%.

99. See Gomes de Sousa: "Tax Reform in Brazil" (quoted in footnote 2) at pp. 357-358. For further critical comments on these taxes, see 3/1.1(b) above and footnote 86.

100. The main reason being the feeling that the introduction of a general capital gains tax would be premature in the present stage of Brazil's economic development.

101. This exclusion was justified by the recognized fact that the incidence of this tax (at rates of from 5% to 10% depending on the State) was a hindrance to corporate reorganization. In some cases (namely of banks) reorganizations were regarded as desirable by the Federal government, which had, however, no powers to remove this impediment since the tax is a State tax.

legal entity is to deal in real estate, as evidenced by the fact that over 50% of that entity's operational income is derived from that source. Moreover, in all cases the State tax rate cannot exceed a ceiling established by a Resolution of the (Federal) Senate.[102]

3/4.3 The reduction in scope and impact was even more drastic in the case of death duties. These were retained only in respect of the acquisition of real property by legacy or inheritance.[103] Moreover, the heavy taxation imposed on legacies and inheritances by the States[104] was replaced by a flat percentage rate which cannot exceed a ceiling established by a Resolution of the (Federal) Senate.[105]

4. TAXES ON TRANSACTIONS

4/1. IMPORT AND EXPORT TAXES

(a) General remarks

4/1.1 In all Federal countries, the taxation of imports and exports is normally reserved to the Federal government as an instrument for the regulation of foreign trade and of the country's balance of payments, with its reflected effects on the national currency both external and internal. Brazil was an exception in two respects: the fact that the import tax was not adequately used for these purposes, and the fact that the export tax was a State tax.

4/1.2 Prior to 1957, the import tax (Customs duties), though Federal, was charged at "specific" (i.e., not ad valorem) rates expressed in fixed amounts of money by unit of measure of goods imported. Having therefore no relation to international prices, this tax was not adequate as an instrument of currency regulation and protection of domestic industry, which had to be attained indirectly through exchange surcharges or overprices, variable according to the nature and volume of imports.[106] One additional reason to condemn this method was that revenue from the monopoly of exchange transactions, though at least in part in the nature of a tax, was regarded as commercial income of the Bank of Brazil, and therefore escaped constitutional limitations applicable to taxes.[107]

4/1.3 On the other hand, from 1934 to 1965 the export tax was allocated to the States. This deviation from a recognized rule of Federal fiscal policy was probably due to the fact that the main source of State tax revenue was at the time a tax on sales. The export tax being at the same time conceived as a tax on the legal concept of an export sale (rather than as a tax on the economic fact of international circulation of goods), it was logical to conceive of it as a form of sales taxation, hence an appendix to the State sales tax. The tax reform of 1965 was

102. Presently 2% in the case of donations, 1% in the case of sales, and 0.5% in the case of sales of residential buildings included in the Federal housing programme (Ato Complementar No 27 of 8 December 1966, Sect. 8).

103. Due to the absence of a general property tax (see footnote 85), the imposition of death duties on personal property (which was theoretically possible to the States prior to 1965) was in fact easily evaded.

104. At graduated (progressive) rates of up to 60% depending on the value of the property and the degree of family relationship (or the absence thereof) between the deceased and the beneficiary.

105. Presently 2% (Ato Complementar No 27 of 8 December 1966, Sect. 8).

106. See Henry J. Gumpel and Rubens Gomes de Sousa: "Taxation in Brazil", Harvard Law School International Program in Taxation (Boston: Little, Brown & Co., 1957), p. 19.

107. See 1/3 above.

able to correct this inadequacy and make the export tax federal, first by classifying it together with the import tax in the economic category of "taxes on foreign trade", secondly by changing the nature of the sales tax to that of a circulation tax.[108]

(b) Customs duties

4/1.4 The Federal import tax was thoroughly revised by the Tariff Act of 1957,[109] which replaced the former specific duties by ad valorem duties which may be combined in each case with their specific equivalent. In other words, all imported products, whether natural or industrial, are subject to ad valorem percentage duties combined with the specific equivalent of a stipulated amount of money per unit of measure, the duty payable being whichever is higher. Ad valorem duties are computed on invoice (or declared) value, or, if this is contested by the assessing authority, on the current market value of the product, or the nearest similar product, in an arm's-length sale at the date and place of import. Goods confiscated, or abandoned by their importers, are taxable on the price of their sale at auction conducted by the local Customs authority.

4/1.5 The duty rates vary between 2% and 100% but are flexible to a considerable extent according to economic circumstances at the judgment of the Tariff Policy Council.[110] Besides being responsible for the general policy of the government on matters of foreign trade, the Council submits specific recommendations on a certain number of questions. Among these are: (a) the establishment and revision of "specific equivalents" to ad valorem rates, (b) the grant of general or specific exemptions, and (c) the increase or decrease, as and when necessary at its judgment, of the rate applicable to any given product, between the highest and lowest rates provided in the same Section of the Tariff Act in which the product in question is classified.[111]

(c) The Export Tax

4/1.6 This tax was defined by the tax reform of 1965, together with the tax on imports analysed above, as a mechanism for the implementation of the Federal regulations on matters of foreign trade and of monetary and exchange control, rather than a source of fiscal revenue. In accordance with this definition, the proceeds of this tax (but not those of the import tax) are not classified for budgetary purposes as general tax revenues but are destinated instead to a special reserve defined as "for monetary purposes". The Federal government utilizes this reserve, as and when circumstances may indicate, to promote the stability of the national currency and of the international price of Brazilian exports.

4/1.7 As proposed by the special committee of experts which drafted the tax reform of

108. See 4/2(b) below.

109. Law No 3244 of 14 August 1957, as amended in accordance with the tax reform of 1965 by Decree-law No 37 of 18 November 1966 and by Decree-Law No 63 of 28 November 1966, itself amended by later statutes in matters of detail. Brazil is a member of the General Agreement on Tariffs and Trade (GATT), but Decree-law No 63 Sect. 1(2) stipulates that the rates of the chart attached thereto, which replaced those of the chart attached to Law No 3244, shall prevail over GATT's conventional rates and directs the Government to promote negotiations to that effect.

110. This is a consultative body subordinate to the Minister of Finance and composed of officials of high rank in the Federal civil service specializing on economic, financial, and tax matters, and of members designated by the National Associations of Industry, Commerce, and Agriculture.

111. The recommendations of the Council are implemented by Executive Resolutions based on the delegation of powers provided by the Constitution, on which see 1/3.2 above.

1965,[112] the export tax rests on the concept of a "basic export price", defined as the average export price of Brazilian products in the periods established from time to time by the Central Bank of Brazil. The tax is charged only on products defined in a Resolution of the National Monetary Council and at the rates established therein.[113] The tax is computed only on the portion of the actual export price in each case which exceeds by more than 5% the basic export price, and its rate shall not in any case exceed 40% of such excess.[114]

4/3. TAXES ON PRODUCTION AND CIRCULATION

(a) The Federal production tax

4/2.1 Prior to 1965, the Federal government imposed an excise or "consumption" tax *(impôsto de consumo)* on imported or domestic manufactured products. The designation of this tax as being "on consumption" was based on the fact that it was mandatorily recovered from the buyer on each successive sale of the product down to its ultimate consumer. However, the fact that it was imposed on the importer or manufacturer clearly defined this tax as a tax on production, and for this reason the tax reform of 1965, while retaining the essential structure of the tax, changed its name to "tax on (industrial) manufactured products" *(impôsto sôbre produtos industrializados*, popularly known as IPI).[115] This tax remains the chief source of Federal tax revenue.[116]

4/2.2 This tax is obviously of the same economic nature as the State circulation tax discussed below. The tax reform co-ordinated these two taxes in such a way that the Federal tax is charged on all steps of the economic circulation of a product which correspond to the production phase of that circulation; whilst the State tax, besides being also charged concurrently on those same steps of the production phase, then continues alone on each step of the subsequent phase of the marketing of the product down to its ultimate consumer. Under the current legislation, the Federal tax[117] is charged on each of the following operations of production: (a) importation; (b) transformation, defined as the industrial treatment of a raw material or intermediate product which results in the creation of a new product; (c) improvement, defined as the restoration or modification of a product which results in giving it a new function or utility or in ameliorating its finishing or appearance; (d) assembly, defined as the putting together of separate parts to create a new product or an individual unit; (e) renovation, defined as the treatment of a used or deteriorated product to make it again serviceable; (f) packing, defined as the preparation of a finished product for the market by placing it in sales containers not destined merely for transportation.

4/2.3 The tax base is (a) in the case of importation, the same base adopted for the purposes of the customs duties,[118] (b) in all other cases, the cost of material and labour and all charges incidental thereto except

112. See Gomes de Sousa: "Tax Reform in Brazil" (quoted in footnote 2) at p. 357.
113. The National Monetary Council is an executive body of ministerial level charged with directing the Federal government policy on matters of currency and credit. Its resolutions on matters of export taxation are based on recommendations issued by the National Foreign Trade Council, composed of representatives of the Ministries of Finance, Industry and Commerce, Foreign Affaires, Economic Planning, and Agriculture, and of the Central Bank, the Bank of Brazil, and the Tariff Policy Council. (Law No 5025 of 10 June 1966).
114. Law No 5072 of 12 August 1966.
115. See chart in 1/4.2 (C.1) above.
116. See footnote 11.
117. Regulations issued by Decree No 61,514 of 12 October 1967.
118. See 4/1.4 above.

freight and insurance. The tax computed in this way is payable every two weeks on the so-called "value-added" method, i.e., less a tax credit equal to the amount of the tax paid by the same taxpayer on purchases of finished or semi-manufactured products, and raw materials acquired within the same period. For the purposes of this credit, the amount of the tax must be shown separately from the price on each bill of sale in each taxable transaction. When the last taxable operation occurs in respect of a given product,[119] the amount of the tax is then added to the price, of which it becomes a part in all subsequent transactions.

4/2.4 The industrial goods whose production is taxable, and the tax rates applicable in each case[120] are listed in a Table of 24 Sections, of which only the headings may be briefly summarized here: (1) Animal products, (2) Vegetable products, (3) Animal and vegetable fats, oils, and waxes, (4) Processed foods, (5) Beverages, (6) Animal foods, (7) Tobacco, (8) Mineral products, (9) Chemical products, (10) Plastic and rubber products, (11) Leather goods, (12) Wood and cock products, (13) Paper and its products, (14) Textiles and their products, (15) Shoes, hats, and other articles of clothing, (16) Glass, ceramics, cement, and their products, (17) Jewelry and articles of precious stones, metals, or pearls, (18) Metallurgical products, (19) Mechanical and electrical machinery and equipment, (20) Vehicles and transportation equipment, (21) Optical, photographic, medical, musical, and precision instruments, (22) Weapons and ammunition, (23) Sundry products not otherwise classified, (24) Works of art and antiques.

(b) The State Circulation Tax

4/2.5 A Federal stamp tax on bills of sale, introduced in 1922, was replaced in 1934 by a State sales tax. This was of the "cascade" type and soon became the State's major source of tax revenue. However, due to regional differences in economic development,[121] this tax created difficulties in interstate sales, and indeed proved detrimental to the national character of the tax system, as the source of (and to some extent the justification for) measures taken by some States to evade, if not openly violate, the constitutional prohibition of tax discrimination in interstate transactions.[122] The tax reform of 1965, therefore, replaced the "cascade" sales tax by a "tax on the circulation of goods" (impôsto sôbre a circulação de mercadorias, popularly known as ICM), inspired on the French TVA.[123]

4/2.6 The ICM is a value-added tax in which the taxable event is the fact that goods (i.e., merchandise or stock-in-trade) leave the establishment of a merchant, manufacturer, or non-commercial (i.e., agricultural or cattle) producer. Legal passage of title to goods is immaterial for the purposes of the tax, and therefore (a) the taxable event as described above includes consignments and transfers of stock-in-trade as well as sales, (b) the establishment referred to above means a factory, a shop, or a warehouse, (c) the fact that the destination of the goods is another establishment of the same or of a different taxpayer, or the domicile of the final consumer, is irrelevant.

119. I.e., that of the productions operations described in 4/2.2, which last occurs in respect of a given product.

120. The rates vary between 4% (chemical products in general) and 243% (cigarettes), the vast majority of the rates being between 4% and 10%.

121. Noted above in 1/2.7.

122. See 1/3.6 above. This prohibition existed prior to the Constitutional Amendment which introduced the tax reform of 1965. See Gomes de Sousa, "Tax Reform in Brazil" (quoted in footnote 2), at p. 359.

123. See chart in 1/4.2 (C.2) above.

4/2.7 It is essential, however, that the value of the goods (as stock-in-trade or as the object of a sale) is increased by their transfer in order for the latter to be taxable. This increase in, or accretion to, value may result from (a) the cashing of a sales price including a profit, or (b) the addition of new costs, such as labour, services, freight, or insurance, to be recovered from the buyer in a subsequent sale, or (c) the fact that the market value of the goods is higher at destination than at origin. In each taxable transaction, the tax is computed only on this additional value; in practice, the tax is payable at stipulated intervals (usually 15 days, according to one or the other of the two methods usual for this type of tax, namely, "tax on base" (rate computed on value of all goods leaving, less value of all goods entering, the establishment within taxable period), or "tax on tax" (tax due being tax computed on value of all goods leaving the establishment, less tax credit equal to tax paid on value of all goods entering it within taxable period).[124]

4/2.8 The tax reform of 1965 had to face the legal problem that in a Federal country no uniform rate could be established for a State tax. The adverse economic effects of this problem were counteracted in two ways: (a) on interstate transactions the maximum tax rate is established by a resolution of the (Federal) Senate,[125] (b) on all other cases, the States comprised in the same geo-economic region of Brazil are required to adopt a uniform rate by covenant.[126] Another problem was raised in the case of export sales by the fact that the export tax was defined as a Federal tax.[127] The proposition that all export sales should be exempt from the ICM was rejected due to opposition by certain States in the Federal Congress,[128] but the Constitution of 1967 adopted a compromise whereby export sales of natural products are subject to the ICM at maximum rates established by a resolution of the (federal) Senate, whilst export sales of industrial products are exempt.

(c) Federal Tax on Financial Transactions

4/2.9 Prior to the tax reform of 1965, a Federal stamp tax of 1% was charged on a great number of private contracts, deeds, or legal instruments. This was replaced by a tax on financial transactions, intended as a mechanism for the regulation of the monetary, stock, and credit markets. Under the legislation now in force,[129] the Federal government delegates the administration of this

124. It should be noted that the tax base is the value of the merchandise to the ultimate consumer. The object of the two alternative methods of collection described in the text is that the full tax due on that base should be reached by adding together the tax instalments paid on the value added in each successive step of the circulation process from original producer to ultimate consumer. The ICM therefore is a tax on the economic fact of circulation, rather than a general turnover tax (*"impôt sur le chiffre d'affaires"* or *"imposta generale sull'entrata"*), and for this reason the tax credit makes no allowance for the value of the taxpayer's capital assets.

125. See 1/3.3 above. The ICM rate on interstate transactions is at present 15% throughout the country.

126. According to covenants presently in force, the ICM rate in intrastate transactions is 17% in all States of the Central and Southern geo-economic regions (States of Espirito Santo, Goiás, Guanabara, Mato Grosso, Minas Gerais, Paraná, Rio Grande do Sul, Santa Catarina, São Paulo, and the Federal District of Brasília), and 18% in all other States.

127. See 4/1(c) above.

128. The States in the Northern and Northeastern regions of Brazil are exporters of natural or semi-manufactured products (cocoa, cotton, other vegetable seeds, staples, oils, fats and waxes), the production of exportable industrial goods being mostly in the Center and Southern regions, which also export natural products (coffee, timber).

129. Law No 5143 of 20 October 1966.

tax to the Central Bank of Brazil, which instructs banks to charge it monthly at the rate of 0.3% on the amount of loans outstanding, and insurance companies to charge it on premiums received every month, at the rates of 1% in the case of life and personal accident insurance, and of 2% in the case of personal property insurance. This tax may also be charged on exchange transactions, but is not presently assessed in this case.[130]

(d) Taxes on Services

4/2.10 Municipalities have the power to impose a tax on industrial, commercial, or professional services of whatever nature,[131] except services subject to Federal tax. Under this exception are listed international, interstate, and inter-municipal transportation and communication (telephone, telegraph, radio and television) services: the object is to exclude these services from local taxation in the interest of preserving Federal regulation, but no Federal tax is accually charged on them.[132] A special case in respect of services subject to Municipal taxation is that of services combined with a sale of goods (such as building construction, repair shops, and the operation of hotels and restaurants). In this case, the service tax alone is charged if the cost of the service is 75% or more of the total price charged on the customer; otherwise, the State circulation tax is also charged on the value of the goods, but its rate is reduced by 50%. The rental of movable (or personal) property, of space in warehouses, or of hotel rooms, are defined as services for the purposes of this tax.[133]

(e) Federal "Single Tax" on Fuels, Lubricants, Electric Power, and Minerals

4/2.11 With the object of assuring a uniform consumer price throughout the country, a Federal "single tax" was created in 1940 on the production, distribution and consumption of fuels and other petroleum derivatives. This was later extended to electric power for the same reason, and later still to the extraction of domestic minerals as an incentive to their exploitation. The "single tax" applies to importation, production, distribution, or consumption, and replaces all taxes, whether Federal, State, or local, otherwise capable of falling on those activities; moreover, the tax is assessed only once on each product, on whichever of the foregoing activities as may be selected by the regulations in each case. Depending on the nature of the taxable transaction, the "single tax" is assessed as an import, export, production, or circulation tax, according to the rules applicable to these taxes as described above. The proceeds of the "single tax" are pro-rated among the Federal, State, and Municipal governments, in lieu of their respective taxes replaced by it.[134]

5. FUNDAMENTALS OF TAX POLICY

5/1. INTRODUCTORY NOTE

5/1.1 In this last chapter, three main aspects of tax policy will be briefly discussed: (a) the redistribution of tax revenues, (b) tax measures to combat inflation, (c) tax incentives to promote development.

130. See chart at 1/4.2 (C.3) above.
131. See chart at 1/4.2 (C.5) above.
132. See chart at 1/4.2 (C.4) above.
133. The rates of this tax are naturally variable from one city to another and according to the nature of the taxable service, the general average being 5% on cost of service.
134. See chart at 1/4.2 (C.6 to C.8) above.

5/2. THE REDISTRIBUTION OF TAX REVENUES

5/2.1 Prior to 1965, the tax system relied heavily on the method of "grant-in-aid" from the Federal to the State and Municipal governments, and from the States to the Municipalities. This was generally criticized on three grounds: (a) political, as it made the lower levels of government financially dependent on the higher ones, although all three levels have politically the same status, (b) legal, as it tended to obscure and confuse the constitutional allocation of taxing powers, (c) economic, as the methods adopted to compute the grants were sometimes inspired by reasons of expediency rather than based on scientific premises, and sometimes had adverse economic effects, such as to lead the beneficiary of the grants to lose interest in the administration of their own taxes and other sources of revenue.

5/2.2 The tax reform of 1965 replaced all former grants-in-aid by a system whereby the proceeds from the collection of certain taxes are defined as revenue of the government exercising the power of taxation only up to a stipulated percentage. The remainder is defined as revenue of the government which formerly was the beneficiary of a grant-in-aid. The two percentages which add up to 100% of the total proceeds are calculated to reproduce the net amount of the former grant. In this way, the government which formerly received a grant is now entitled in its own right to a corresponding stipulated amount of revenue. This restores the political equality of the three levels of government, and eliminates political and bureaucratic factors which used to interfere in the payment of the grants.

5/2.3 From the actual proceeds of the collection of the Federal taxes on income and on production, 80% is Federal revenue, 10% is revenue of the States, and 10% of the Municipalities.[135] These latter percentages are deposited, as and when the taxes are collected, at the Bank of Brazil in a State Participation Fund and a Municipal Participation Fund respectively, the amounts of which are then prorated according to the following rules:

5/2.4 The share of each State in the State Participation Fund is computed in two ways:

(a) 5% proportionately to the area of each State;

(b) 95% according to the combination of two factors, namely, (i) a multiplicating factor of 2 to 10 depending on the direct ratio of the State's population to the total population of Brazil, (ii) a multiplicating factor of 0.4 to 2.5 depending on the inverse ratio of the State's per capita income to the average per capita income of Brazil.[136]

5/2.5 The share of each Municipality in the Municipal Participation Fund is computed in two ways:[137]

(a) 10% is distributed to the cities which are State capitals according to a combination of two factors, namely (i) a multiplicating factor of either 2, 2.5 or 4, depending on the ratio of the city's population to the total population of all State capitals, (ii) the multiplicating factor described at 5/2.4 (b) (ii) above, applicable to the State of which the city is the capital;

(b) 90% is distributed among all other Municipalities according to multiplicating factors of 0.2 to 4 depending on the population of each Municipality.

5/2.6 As originally enacted, the tax reform of 1965 provided that the circulation tax (ICM) could be imposed simultaneously by

135. See chart at 1/4.2 (B.4 and C.1) above.
136. Law No 5172 of 25 October 1966, Sect. 88.
137. Law No 5172 of 25 October 1966, Sect. 91, as amended by Ato Complementar No 35 of 1 March 1967, Sect. 1.

the States and the Municipalities.[138] This provision was changed before becoming effective, and replaced by another providing that of the proceeds of the State circulation tax, 80% is revenue of the State and 20% is revenue of that State's Municipalities. The latter percentage is delivered within three days of collection by the State to the Municipality in which the taxable transaction took place, or within 30 days of collection if according to State law and regulations the tax is collected in a different Municipality.[139]

5/2.7 Other taxes whose revenue is redistributed are the Federal land tax and the Federal "single tax" on fuels, lubricants, electric power, and domestic minerals. In the case of the land tax, the full amount collected is automatically delivered to the Municipality in which the taxable land is situated: rather than a redistribution, therefore, this is a consequence of the fact, noted above, that the land tax actually is a Municipal tax whose legislation and collection are attributed to the Federal government for the purpose of ensuring a uniform tax policy throughout the country.[140]

In the case of the "single tax", which replaces all taxes, whether Federal, State, or Municipal, capable of falling on the taxable transaction, the redistribution rates were computed on the bases of former collection statistics which indicated that those rates should be 40% to the Federal government and 60% to the States and Municipalities together in the case of fuels, lubricants, and electric power, and 10% and 90% respectively in the case of domestic minerals. The further redistribution of their common percentages among the States and Municipalities is based in each case on a combination of four factors, namely, the area and population of each State and Municipality where the collection took place, and the production and consumption of the taxable commodities in their respective territories.[141]

5/2.8 In addition to the redistributions of revenue described above, and in the interest of promotion a uniform tax policy, it is provided that States and Municipalities which enter with the Federal Government into covenants or agreements to coordinate their respective investment and tax administration programmes may be granted a participation of up to 10% of the Federal revenue from the income tax and the tax on industrial manufactured products (except, in the case of the latter, the tax collected on the production of beverages and tobacco).[142]

5/3. TAX MEASURES TO COMBAT INFLATION

5/3.1 The effects of inflation on private contracts have been recognized by Brazilian law at least since 1943, when the so-called "minimum wage" was introduced.[143] Apart

138. Constitutional Amendment No 18 of 1st December 1965, Sect. 13. According to this provision, the Municipalities could impose the ICM on taxable transactions occurring within their respective territories, at a rate not exceeding 30% of the rate charged by the State, and applying the legislation enacted by the State, except in respect of exemptions. The object was that the Municipalities could impose the tax on their own right, and especially that they should not be bound by exemptions granted by the State, but should be free to grant either those same exemptions or different ones at their judgment. The abrogation of this provision was based on the idea that under it the Municipalities might interfere with the tax policy of the State.

139. Ato Complementar (Constitutional Amendment) No 31 of 28 December 1966; Constitution of 1967, Sect. 24(7).

140. See 3/2.1 above.

141. See 4/2.11 above.

142. Constitutional Amendment No 18 of 1st December 1965, Sect. 22; Constitution of 1967, Sect. 27.

143. The "minimum wage" is the amount established and periodically revised (in principle once a year) by a special committee of the

from this, the usual correcting devices, such as 'sliding scales" or "escalator clauses" are permitted by law or recognized by the courts in most contractual matters under the principles of "*rebus sic stantibus*", "*théorie de l'imprévision*", or similar theoretical foundations. In certain cases, either contractual (such as rent regulation or alimony) or delictual (such as civil liability), the introduction of a monetary correction factor is mandatory to stabilize the effective value of payments extending in the future over a period of time, or to determine the current equivalent of monetary values contractually established in the past. This applies equally to matters of public law, such as indemnity for expropriation or the appraisal of public concessions to determine their redemption value or to revise rates payable by the public.

5/3.2 Matters of taxation, however, remained an exception to this general recognition of the need for counteracting the debasement of the currency. This anomaly was probably due to the fact that, tax liabilities being unilaterally imposed by the government, it was felt that mandatory correction of their monetary expression would be an unjustified aggravation of a public charge. Indeed, a systematic approach to the matter was first introduced in 1958 as a voluntary incentive for the benefit of taxpayers to revise asset values for the purposes of amortization or depreciation deductible from the income tax on legal entities.[144] On the other hand, the rise of the inflation rate, which attained its peak around 1964, made the need for monetary correction acutely felt also on the matter of delinquent taxes. Fines and interest for late payment or other tax violations, expressed either in fixed amounts or as percentages of the tax due, obviously became meaningless as soon as their effective significance fell below the current market cost of money for commercial or industrial purposes. Even in the absence of tax delinquency, the same was true of tax rates and bases, in the sense that depending on the velocity in the rise of the inflation rate, in terms of actual purchasing power the amount of revenue collected ceased to have a relationship to the monetary value of assessments or of budget estimates.

5/3.3 A theoretical legal problem still remained, however, in the sense that, the power to legislate on matters of currency being reserved to the Federal government, the question posed itself whether the States and Municipalities could validly provide for monetary correction in respect of their own fiscal charges. Even if the matter were confined to Federal fiscal charges, the question could still be raised as to whether their mandatory monetary correction would not be the equivalent of a devaluation of the national currency in respect of a given type of debts only, and therefore unconstitutional as involving unequal or discriminatory treatment under law. This problem was never frontally attacked in the courts, but since the establishment by Federal law of monetary correction for Federal taxes in 1964, the States and Municipalities adopted similar measures and their laws were never seriously challenged. It seems safe to assume that by the common consensus of Brazilian courts and jurists alike, it is now accepted

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Ministry of Labour, below which it is illegal to hire the personal services of an employee. It is variable for each region of Brazil and its amount is based on the ruling price of four essential commodities: housing, food, clothing, and transportation. Prior to the establishment (in 1958) of monetary correction indexes for tax purposes, the minimum wage was often used as a device to make tax bases or rates self-adjusting.

144. Law No 3470 of 30 November 1958, which succeeded former temporary measures to the same effect. See 2/3.15 above.

that a law providing for monetary correction of tax debts, rates, and bases is part of the law of taxation and not a law on money. Moreover, it seems also established that the monetary correction of a tax liability is not an *ex post facto* increase of that liability, which could be attached as retroactive and therefore unconstitutional.

5/3.4 Monetary correction in Federal tax matters was introduced by statute in 1964 as a permanent measure.[145] It applies not alone to delinquent taxes and attendant fines and interest, but also to tax rates and bases when these are expressed in fixed amounts of money. The correction is effected by means of a table of index numbers (or multiplicators) issued every year and providing a multiplicator figure for each year after 1938, intended to express the fluctuation in the actual purchasing power of the national currency between that year and the current year. The index figures are established[146] by analyzing the average current market prices in each year of certain staple commodities, in combination with other pertinent economic factors. States and Municipalities refer to this same basis in their own monetary correction laws, and it seems logical to suppose that this reference to the Federal standard is essential to the acceptance of State and Municipal laws on the subject, whereas the adoption of a different standard could conceivably be challenged as representing a "law on money" which would be outside the State or Municipal powers to legislate.

5/3.5 Besides being used as described above to bring tax debts to the current level of the currency's actual purchasing power, monetary correction under the same standards is also used as a self-adjusting method to rectify the capital or redemption value of certain public bonds or securities issued by the Federal, State, or Municipal governments. Moreover, its use is also permitted for the same purpose in respect of certain private securities. As a tax policy measure designed to promote and direct private investment, the increase in the capital or redemption value of public or private securities subject to monetary correction is defined in the income tax laws as not constituting taxable income or gain.[147]

5/4. TAX INCENTIVES TO PROMOTE DEVELOPMENT*

5/4.1 Since about 1964, extensive use is made in Brazil, especially by the Federal government,[148] of tax incentives to promote the economic development of certain areas of the country or to direct private capital to certain selected types of investment. In the following brief analysis, existing tax incentives are classified as of two kinds: (a) tax incentives relating to regional development, (b) tax incentives relating to specific economic activities (usually called "sectorial" in the sense of applying to a given sector of the national economy).

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* The author is indebted to his law partner Mr. J.E. Monteiro de Barros for assistance with respect to this chapter.

145. Law No 4357 of 16 July 1964.

146. Formerly by the Getulio Vargas Foundation, a semi-public institution defined by law as economic adviser to the Federal Government, and at present by the Ministry for Economic Planning.

147. As noted in the appropriate places in chapter 2 above.

148. In fact, the incentive tax policy of the Federal Government has recently been criticized by economic observers, who point out that nearly 50% of the Federal tax revenue is earmarked for, or to some extent affected by, one or another of the various incentive programmes. On the other hand, the Government has recently announced that its economic incentive policy as a whole is being studied in view of actual results which is being interpreted as an indication of possible changes.

(a) Regional development

5/4.2 The first programme of this type was introduced in 1963 and refers to the development of the States of the Northeastern Region of Brazil.[149] It is administered by a Federal agency called Superintendency of the Development of the Northeast ("*Superintendência do Desenvolvimento do Nordeste*", popularly known as SUDENE), which determines what types of activity are eligible, approves the private investment projects, and supervises, but does not interfere with, their administration. The tax benefit provided in the SUDENE programme is the possibility for any private legal entity[150] to invest up to 50% of the amount of its assessed income tax payable in each year in a SUDENE approved project. The investment can be in the taxpayer entity's own project or in shares (not negotiable before 5 years) of another entity, but in either case the income therefrom is subject to normal taxation.

5/4.3 A similar programme was afterwards introduced for the Amazon Region.[151] It is administered by a Federal agency called Superintendency of the Development of the Amazon ("*Superintendência do Desenvolvimento da Amazônia*", popularly known as SUDAM), and the tax benefit it provides is the same as in the case of SUDENE. The same taxpayer entity may invest under both programmes, but the combined benefit may not exceed 50% of the assessed income tax payable by the entity in each year.

5/4.4 These are the regional tax incentives of general application. It should also be noted that some States and Municipalities grant temporary exemptions from their own taxes to new industries establishing themselves on their respective territories. These exemptions are usually subordinate to minimum limits of capacity of production and employment of local labour, and sometimes to a reduced price for the sale of the product to the government.

(b) Sectorial development

5/4.5 Of tax incentives to selected types of economic activity, the most significant are those designed to promote the exportation of Brazilian industrial products, namely:[152]

(a) In fiscal years up to 1971, gross receipts from export sales are excluded from operational income for the purposes of the income tax;[153]

(b) The "single tax" on fuels, lubricants, and electric power, paid as an element of the cost of production of exported goods is refunded to the exporter;[154]

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149. Law No 3995 of 14 December 1961. This law lays down the general bases and is implemented every period by a Master Plan approved by Congress (Decree No 1166 of 8 June 1962, Law No 4239 of 27 June 1963 and Law No 4869 of 1st December 1965), Plan IV (for 1969) being now pending approval. The Northeastern Region of Brazil includes the States of Alagoas, Bahia, Ceará, Paraiba, Pernambuco, Piauí, Rio Grande do Norte and Sergipe and part of the States of Maranhão and Minas Gerais.

150. Either Brazilian or foreign authorized to operate in Brazil, but in the latter case under the same restrictions applicable to certain types of activity (e.g. mining, publishing, and radio or TV communications).

151. Law No 5174 of 27 October 1966. The Amazon Region includes the States of Acre, Amazonas and Para, part of the States of Goiás, Maranhão and Mato Grosso, and the Federal Territories of Amapá, Rondônia and Roraima.

152. The tax benefits described in the text apply to the exportation of industrial products included in lists established and revised from time to time by a Federal agency, of ministerial level called Foreign Trade Council ("*Conselho do Comercio Exterior*", popularly known as CONCEX).

153. Law No 4663 of 3 June 1965, as amended by Law No 5025 of 10 June 1966 (Sect. 57).

154. Law No 5025 of 10 June 1966 (Sect. 59).

(c) All taxes, fees, and other fiscal charges, including emoluments in connection with Customs clearance, assessed specifically on exported natural or industrial products, are remitted, with the only exception of the Federal export tax as and when applicable;[155]
(d) Gross receipts from the sale or assignment of export warrants are excluded from operational income for the purposes of the income tax;[156]
(e) Manufacturers of exported industrial products are granted a tax credit equal to the Federal production tax which would be payable on their export (and from which exported products are exempt), to be applied against the same tax payable on domestic sales.[157]

5/4.6 The Capital Market Act,[158] among other objectives relating to the regulation of the issue and trading of private corporation's shares and other securities and of Stock Market operations, is concerned to promote and develop in such securities on the part of small and medium investors. With this purpose in view, legal entities are permitted to invest up to 5%, and individuals up to 10% of their assessed income tax payable in each fiscal year in share certificates issued by authorized investment banks. The shares thus acquired are non-negotiable before two years.[159]

5/4.7 The fishing industry, besides being included in the SUDENE or SUDAM programmes if established in those areas,[160] is also benefited if established in other areas. In this case, the tax benefit consists in the possibility for any private legal entity to invest up to 25% of the amount of its assessed income tax payable in each year in a fishery project approved and supervised by a Federal agency,[161] provided that the taxpayer entity complements this investment by at least on-third as much from its own funds.[162]

5/4.8 The forest preservation programme of the Ministry of Agriculture provides for a tax credit, against the income tax payable in each year by legal entities, of the actual cost expended in forestation or reforestation projects, provided (a) that such costs are booked as capital investment and not taken as an operational expense, (b) that the tax credit may not exceed 50% of the tax due.[163]

5/4.9 The exploitation and development of tourism is supervised by a Federal agency subordinate to the Ministry of Industry and Commerce, called Brazilian Tourist Agency ("*Emprêsa Brasileira de Turismo*", popularly known as EMBRATUR). Investment in an EMBRATUR approved project for the construction, renovation or expansion of hotels and related tourist facilities enjoys the following tax benefits:[164]
(a) If the investor is a legal entity engaging in the hotel business, it may take the amount of the investment as a tax credit of up to 50% of its assessed income tax payable in each year, provided that the investor comple-

155. Law No 5025 of 10 June 1966 (Sect. 54); although this provision reads "all" taxes, fees, and other fiscal charges including emoluments, it should be understood as applying to Federal charges only.
156. Law No 5025 of 10 June 1966 (Sect. 49).
157. Law No 5444 of 30 May 1968.
158. Law No 4728 of 14 July 1965.
159. Decree-Law No 157 of 10 February 1967, as amended by Decree-Law No 238 of 28 February 1967 and by Decree-law No 341 of 22 December 1967.
160. See 5/4.2 and 5/4.3 above.
161. Called Superintendency of the Development of Fisheries ("*Superintendência do Desenvolvimento da Pesca*", popularly known as SUDEPE).
162. Decree-law No 221 of 28 February 1967.
163. Law No 5106 of 2 September 1966.
164. Decree-law No 55 of 18 November 1966, as amended by Decree-law No 157 of 10 February 1967; Regulations issued by Decree No 62,006 of 29 December 1967.

ments the investment with its own funds in an amount equal to the credit taken;
(b) if the investor is a legal entity not engaging in the hotel business, the tax credit described in (a) above is up to 8% of the tax due, provided that the investment is complemented by twice the amount of the credit with the taxpayer's own funds.

5/5. TAX INCENTIVES AND PRICE STABILIZATION*

5/5.1 A somewhat special use of tax incentives has been made since 1965, when the Federal government, rather than taking prohibitive or regulatory price control measures, offered certain benefits to legal entities submitting voluntarily to price limits established by a Federal agency called National Superintendency of Supply (*Superintendência Nacional do Abastecimento*, popularly known as SUNAB). This programme was originally regulated by joint Resolutions of the Ministers of Finance and of Economic Planning, and the voluntary undertaking of the taxpayer entities called for price stabilization combined (in the case of industries) with an increase in productivity, in return for certain advantages in respect of financing by Government banks and extended terms for the payment of Federal taxes. Furthermore, the programme was at first restricted to manufacturers and merchants of certain staple consumer commodities, such as foodstuffs and pharmaceuticals, but later extended to all legal entities which are taxpayers of the Federal Production Tax.

5/5.2 After an experimental period as described above, the programme was approved and regulated by law[165] as a requisite for the concession of tax rebates. These have been changed from time to time, and until 31 December 1967 consisted only of a reduction of 20% in the assessed income tax payable by the legal entity. In order to qualify, the entity had to keep the sales price of its product at a level of at least 30% below the national average price for each type of commodity, as established by a Federal agency called National Committee to Stimulate Price Stabilization (*Conselho Nacional de Estímulo à Estabilização de Preços*, popularly known as CONEP). Price variations were admitted by CONEP (a) in respect of sales to the general public as compared with sales to distributors, and (b) in view of a petition by the legal entity, showing the adverse influence on its industrial costs of events beyond the entity's control, including tax increases. On the other hand, the former combined requirement of an increase in productivity was abandoned.

5/5.3 As from 1st January 1968, the system described above has been provisionally replaced by another[166] providing for tentative transitional measures until a definitive system is established by Act of Congress. The measures presently in force, besides affirming the Government's intention to enact such a definitive system of price control, do not provide for any specific tax incentives or benefits but give CONEP wide advisory powers to be exercised according to the results of a combined study of (a) the evolution of ruling market prices, (b) the fluctuation of production and marketing costs, (c) the Government's economic policy,

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* The author is indebted to his law partner J.E. Monteiro de Barros for assistance with respect to this chapter.

165. Presently Decree-law No 38 of 18 November 1966, as amended by Decree-law No 156 of 10 February 1967.

166. Decree No 61,993 of 28 December 1967. Regulations under this Decree shall be issued by joint Resolutions of the Ministers of Finance, Economic Planning, Agriculture and Industry and Commerce, but none have been issued to date. Moreover, no bill providing for a definitive system has been so far submitted to Congress.

and (d) economic or other peculiarities of a given type of production or of a given region of Brazil. On the basis of such widely defined premises, CONEP is to recommend to the appropriate Government departments, as and when necessary, administrative measures referring to the regulation of taxation and public or private financing, extending, as the case may be, to Government intervention in a given sector or production, industry, or commerce.

5/5.4 Such recommendations as have been issued to date are too specific to be described in detail here. They have been implemented by Resolutions of the appropriate Ministries, and refer to criteria to compute the permissible effects on sales prices of increases in taxes and fluctuations of exchange rates. Violation of such directives is punishable by fines ranging from 1.3 to 100 times the highest ruling minimum wage.[167]

167. See footnote 143.

H. W. T. PEPPER:

THE FISCAL TREATMENT OF MINERAL OPERATIONS

II*

EXPORT DUTY

GENERAL

58. Export duties on minerals exported were developed as an administratively convenient form of taxation at a time when, and in countries where, the mineral production was wholly or almost wholly exported.

59. When the minerals produced were transported to tide-water and put aboard ship at perhaps only one port, or at most only two or three ports, in the country the possibility of tight administrative control of the levying of duties on the quantities exported is obvious. The duties would be levied by the Customs and Excise Department which already controlled the same port or ports for the purpose of levying duties on imports. Minerals would sometimes be exported in ships specially adapted for the carrying of ores, sometimes in the same ships that brought in imports.

60. When minerals produced are wholly exported the impact of an export duty is exactly similar to that of a royalty. Where there are possibilities of using or processing the minerals locally, an export duty charged only on ores favours this development because it applies only to exports. Where it would be an economic proposition to instal a smelter in the producing country, or plant to "sophisticate" the product (e.g. by converting bauxite into aluminium oxide (alumina)), this development may be encouraged especially in the formative or "infant" stages, by differential export duties favouring the products which contain more added value. In the longer run however there is no reason why the old rate of duty should not apply since the levy will be a much lighter one in ad valorem terms on the much more valuable export.

61. Similar results can however be achieved by having variable rates of royalty on mineral production, (preferably for limited periods) and where minerals (e.g. oil) are produced by a few large scale operators where there can be good administrative control by the taxing authority there is little to choose between the two ways of gathering revenue. Export duty is preferable when there are numerous small producers (as in the case of tin mining in the far east) whom it would be administrably expensive to control, but where the mineral after mining finds its way to a central smelter, or to one port or a limited number of ports, for export when duty can be readily collected by the Customs and Excise Department.

62. The same problem of calculating an "arm's length" realised price in the case of intra-group sales arises for export duty where it is calculated as a percentage of price as for royalty and is capable of the same treatment (see paragraphs 55-57).

63. Realised price may be calculated on the basis of posted prices, agreed with the industry as those at which they would be willing to make sales to independent buyers (including the Government itself). Alternatively when there is no world price for the

* The first part has been published in the September 1968 issue.

raw ore, or for semi-processed minerals but there is a world price for the pure metal a formula may be devised for converting the metal price to a fair price for the mineral exported taking into account the metal content, the amount and nature of the impurities (and hence smelting and refining costs), freight and marketing costs. All these factors are variables and the cost of marketing may be particularly difficult to assess where marketing arrangements are made within the structure of a world-wide group—hence in the case of oil the agreement of many producers to a small fixed charge of U.S. ½ cent per barrel of oil, to cover marketing costs in that industry, in the formula for computing royalties and taxation.

PRICE FLUCTUATIONS—VARIABLE RATES OF DUTY

64. Export duty may be expressed as a percentage of value or in specific currency terms per unit of weight or volume, exported. The pricing problem already referred to is avoided by the latter system.

65. Specific royalties are more simply administered, since it is easier to measure quantity than value, but are vulnerable as a revenue source to erosion in the value of the currency in which they are expressed.

66. Levies on the realised price, or value, of exports are often expressed in a scale which provides a higher *rate* of levy when the mineral price is higher. This may be achieved in the case of a percentage levy, by making the percentage vary with the price level, and can also readily be done where the levy is in terms of so much money per unit of quantity. On the whole percentage levies are to be preferred—

(a) because the duty thus levied is sensitive to any change in realised price, however small whereas a system of fixed levies in terms of cash per unit of quantity inevitably produces rigidity between the points on the scale where changes occur; and

(b) because a percentage levy on realised price automatically provides more revenue when mineral prices rise quite apart from the effects of having higher rates of levy at higher prices.

67. It is in any event desirable to have some means of duty escalation to protect the revenue in real terms against the continual erosion in the value of money by establishing a higher scale of duties to apply when the prices of the mineral are higher than those prevailing at the outset and higher than are expected in the foreseeable future. Should the metal price rise sharply and unexpectedly because of war or of strikes or internal disorders in other producing countries the appropriate duty will already be in the statute book ready for immediate application.

DEVALUATION

68. Where there is no automatic escalation of duty rates provided for in the existing rates schedule it is important that swift action should be taken to impose higher rates of duty in the event of a country deciding to devalue its currency in terms of other currencies. Such action was taken by India (though the commodity mainly concerned was tea, not a mineral) when that country devalued in 1966. As a result the revenue in rupee terms was improved while the tea-exporters gained a smaller benefit from the higher export prices after devaluation than they would otherwise have obtained.

LEVEL OF TAXATION

PARITY WITH OTHER TRADES

69. It has already been noted that in the simplest concept of taxing mineral operations, i.e. by analogy with other trades, the cost of acquiring the deposits and of working them would form deductions in arriving at the profits, and the profits would be charged at the rates applicable to trading and manufacturing operations in general.

WHERE MINING ENTREPRENEURS FAVOURED

70. As indicated in the paragraphs under the heading of Incentives, the ordinary taxation concepts are modified in favour of the mining extrepreneur in various ways in a number of countries, e.g. by giving tax holidays or partial exemptions or abatements of the full rate of tax, by allowing accelerated depreciation of plant and buildings, including housing and welfare structures, or initial or investment allowances in respect of capital expenditure, or even cash development grants towards such expenditure. Some countries charge a lower rate of tax, Jamaica, for example, which effectively taxes ordinary company profits at 42½% (including profits tax and additional profits tax) taxes corporate profits from mining and quarrying (and from certain other types of business) at only 40%. Australia, the U.S.A. and Trinidad are examples of countries which effectively charge lower rates of tax by allowing non-accountable rebates or "depletion" deductions in computing mineral profits.

WHERE HIGHER TAX RATES APPLIED

71. On the other hand some countries charge taxes at a higher rate on mineral extraction than on other trades particularly where the minerals are especially valuable. South Africa, for example, taxes diamond mining at a higher rate of tax than other types of mining, and than the profits of other trades in general. This position may be reached in a country with great mineral wealth after there has been a lengthy period of mineral working by pioneering entrepreneurs during which infra-structural and technical difficulties have been overcome and the economic potential of newer deposits clearly established, the pioneers having had relatively favourable tax treatment.

72. In some cases, moreover, the imposition of higher taxation may be phased gradually over the term of a lengthy agreement in the early stages of which the operations may receive very favourable treatment indeed. An example is the mining of nickel in Bougainville where the entrepreneur has in effect 8 years without income taxation (5 years of which are attributable to accelerated depreciation allowances) followed by a 4-year rise to a tax rate of 50% which endures for 17 years and is then increased in 1% stages over a period of 15 years to 65% (see paragraphs on Incentives).

OIL

73. In some oil-producing countries, oil production began before corporate income taxation had been introduced and in others it began while corporate tax rates were quite low so that arrangements with the oil companies, including those on the 50:50 or "profit-sharing" basis, at the time they were first made, in effect levied "taxation" at a higher rate than that applicable to other traders. Events, including rising general tax rates, and the "proving" of mineral reserves have in some cases overtaken some of these early agreements so that lease renewals, when the original lease period expires or when revisions become due under escalation

clauses, are sometimes made with higher rates of levy on the producing company.

74. Now that information about the terms under which minerals, and especially oil, are extracted in different parts of the world is swiftly disseminated from country to country, there is a tendency for similarity of treatment to emerge or at least to be sought where conditions are similar. This tendency has been encouraged by O.P.E.C.* but is limited to some extent by the existence of long-term agreements between entrepreneurs and governments, sometimes dating back to the early days of mineral exploration in the particular country. Another limiting factor is the difference between the bargaining position of a country where minerals have yet to be discovered, and that of a country already proved to possess great mineral riches. This difference is usually matched by differences in the eagerness of entrepreneurs to sink large quantities of capital into exploration (which, if abortive, may not qualify for allowance against taxable income of the entrepreneur in other countries) and hence by differences in the terms which have to be offered to stimulate enterprise in mineral extraction.

75. As an example of the different rates applicable in different circumstances, the oil royalty payable in Tasmania (where no oil has yet been found) is 10% compared with the "universal" 12½% royalty rate. In the Gulf of Iran and the areas off-shore from Santa Barbara, California, the Governments of Iran and of the State of California collect not only the usual royalty but also substantial premium payments for exploration and development in areas close to those where rich petroleum deposits have already been established. (See paras. 35–36).

"EXPENSING" OF ROYALTIES

76. Entrepreneurs undertaking new mineral ventures usually prefer "profit-sharing" agreements, or royalties based on a percentage of profits which is broadly similar in effect—see paras. 53–54—with small or nominal royalties or else with royalties offset against income tax, or the state's share of profits, rather than arrangements under which substantial royalties are merely "expensed" i.e. allowed as deductions in computing profits. Oil-rich countries, many of which earlier entered into profit-sharing agreements, now by contrast demand the "expensed royalty" type of agreement.

RELATIVE MERITS OF ROYALTIES AND "PROFIT-SHARING"

77. From the aspect of the entrepreneur the profit-sharing agreement protects him against the consequences of a fall in the world price of the mineral he is extracting or of rises in production costs which cannot be recovered by price increases. Such movements could wipe out any profit from mineral operations when a substantial royalty continues to be payable to the State.

78. From the governmental standpoint royalties are useful because they produce a steadier revenue. Although royalties (or export duties) fluctuate with production and price they do so only pro rata, whereas profits and therefore income tax yield may disappear altogether if production falls below, or production costs rise above, a certain figure. On the other hand profits increase faster than production figures once the break-even point has been passed.

* O.P.E.C., the Organisation of Petroleum Exporting Countries (comprising Indonesia, Iran, Iraq, Kuwait, Libya, Quatar, Saudi Arabia, and Venezuela) has for some years pursued a common policy with regard to tax arrangements on oil entrepreneurs, a fairly recent achievement having been to have oil royalties expensed, instead of offset against tax, in most cases.

QUANTUM OF PRODUCTION

79. Some kind of middle position may therefore be reached in making an agreement between entrepreneur and Government and a fairly recent development is for countries, particularly when dealing with some large international combine, to try to obtain some assurance, or to impose some stipulation regarding the maintenance of reasonable output so that revenue in turn may be maintained at a reasonably stable level. This kind of pressure which has a sensible objective may not, however, always be effective, e.g., where general overproduction of the mineral leads to a fall in the world price.

PROSPECTING—"LUCKY" AND ABORTIVE OPERATIONS

80. Reference has been made elsewhere to the very large sums of money which may be completely lost if prospecting produces blank results, as it has in many instances.

81. Where the results of prospecting are above average, for example, in a case where oil is struck more or less at the first exploratory drilling it is tempting to assume it would be reasonable to levy heavier than usual royalties and taxation since all that the entrepreneur has to do having found the deposit is to sink pipes into it and pump it away. As was pointed out, however, by the professional consultants who advised in connection with North Sea gas discoveries, if the work of mineral prospecting and extraction is to continue on an adequate scale it is not reasonable to tax it on the basis of the luckiest discoveries but rather by reference to average results. Even if some early prospecting is unusually successful (as was the case with North Sea gas) the proper development of the whole field will entail a great deal more drilling and investigation which will not all be uniformly successful. If the industry as a whole is not permitted some benefit from exceptional good fortune there will be nothing in hand to meet the cost of exceptionally bad fortune and there is at least as much of the latter as of the former (see also paragraph 57).

TAX TREATMENT OF ROYALTIES AND OTHER PAYMENTS FOR MINERALS

ALLOWANCE TO PAYER

ROYALTIES/EXPORT DUTIES

82. As already noted the most usual treatment of royalty payments for minerals or mineral rights is to allow the full amount as a deduction when computing the taxable income of the payer. The analogy with other types of trading is the deduction of the cost of goods or raw materials purchased by a manufacturer or other businessman in computing business profits.

83. Where the payment made is by way of royalty per unit of ore or mineral actually extracted the amount of royalty *incurred* during the accounting period is allowable. Incidentally, the deduction will normally accurately reflect the mineral *production* of that period.

84. Where export duty rather than royalty is charged the amount payable for the accounting period will depend on exports rather than production and there may well be divergence owing to stock-piling or differences in the timing of shipments. No problem arises in computing profits for income tax however as the appropriate deduction for the accounting period is the duty which became payable in that period.

85. In the case of royalties payable to a private owner some countries provide for income tax to be deducted at a flat rate from the payments by the payer who must then hand the tax deducted to the tax department. This procedure may not be strictly necessary in terms of tax compliance but is often useful in securing an earlier and "automatic" inflow of revenue comparable to the "P.A.Y.E." principle which is widely applied to emoluments of employees.

CAPITAL PAYMENTS FOR MINERALS

86. Where mineral deposits or mineral rights are purchased outright it is usual to allow a deduction to the payer who is extracting the minerals, on the basis of spreading the cost over the period of the working of the deposits. The allowance is generally calculated for each year by reference to a fraction with the numerator = 1 and the denominator = the approximate number of years it is estimated the deposits will last. Sometimes the fraction is the slightly more sophisticated concept of:

$$\frac{\text{output during year of operation}}{\text{total reserves at commencement of year of operation}}$$

In both cases the allowance depends on estimates of workable reserves, such estimates being liable to fluctuation as more work is done on exploration and testing (see paragraphs under the heading "Reserves").

87. No particular practical difficulty arises from the annual or periodical revision of estimated reserves because the new fraction will apply only to the residue of unallowed expenditure at the beginning of each accounting period.

REVISION OF COMPUTATIONS

88. A provision is usually inserted in the law, however, to enable the taxpayer to recalculate past years' tax liability if material differences in the extent of reserves subsequently come to light. For example a miner may have been proceeding on the basis of a 25 year working life and then find because of unforeseen technical difficulties, price falls, or other reasons, only 10 years will suffice to extract the economically workable deposits so that the mine has to be closed "prematurely". It is usual to allow a recalculation of the tax liability in the event that the final year's operation does not produce enough profit to absorb all the allowances which would otherwise be due. It will usually suffice if the taxpayer is permitted to reopen the computations for the previous 5 or 6 years to substitute revised capital deductions, on the basis of the now precisely known life of the extraction operations for the deductions previously computed.

89. It is not usual for the Tax Department to take powers to reopen past years assessments where estimates of working-life subsequently prove to have been too pessimistic. (Except of course that the tax authorities usually have the right to reopen where past assessments have been too low because of some fraudulent practices of the taxpayer).

90. If estimates of reserves are initially too low in the light of later developments the effect is to give somewhat higher deductions in the early stages than subsequently proves to be justified. The result is a lower initial tax liability enabling the entrepreneur to husband his liquid capital while the tax yield is greater in subsequent years when the revised reserve figures diminish the deductions due. Both the taxpayer and the tax department (from the aspect of administrative simplicity) have an interest in letting assessments, which were determined accurately on the basis of the best information then available, stand unaltered and the tax impact

of this practice is encouraging to the mineral extraction industry.

MINIMUM DEDUCTION

91. Administrative simplicity is also well served by the provision of a minimum deduction, say of 1/20th per annum instead of the smaller fraction which would apply in the case of longer-lived mines. This provision, of course, is advantageous to the entrepreneur who is developing deposits expected to last 40 or 50 years but it also avoids the practical difficulty that the longer the life is expected to be, the more troublesome it will be to estimate it accurately. Moreover, the longer the life the less significant will be the original price paid for the minerals or mineral rights. Greater significance will eventually accrue to subsequent development expenditure which may also be eligible for the minimum deduction.

TAILINGS ETC.

92. Where, because of advances in extractive techniques, it becomes economic to rework the abandoned tailings or the spoil-heaps or slag-heaps of earlier mineral operations, the rights in such "secondary" mineral wastes may be disposed of by royalty or outright sale. In some cases slag-heaps have been bought, not for further extraction of minerals but for use as road-making material. If the "waste" material is bought outright by the entrepreneur it will usually be convenient to regard the transaction as a purchase of trading stock of raw materials and to bring the cost (or value) of the diminishing quantity of such resource into the profit computation by means of yearly calculation of the quantity remaining.

PAYMENTS TO PROSPECTORS

93. Where the entrepreneur buys mineral rights from a prospector who has established the existence of economically workable deposits and his own title to them—usually over state land—the treatment of the payments in the income tax computation of the entrepreneur should follow that accorded to payments made to the private owner of mineral deposits where no separate prospector is involved.

POSITION OF RECIPIENT

ROYALTIES

94. Where payment for minerals takes the form of royalties the amount received by the owner forms income to him which is equal in total to the deductions which will be due to the payer. The owner should however be granted an allowance based on the cost to him of the minerals.

ALLOWANCE FOR EXHAUSTION OF MINERALS

95. Where the mineral-bearing land continues to be owned by the owner of the minerals the cost of the minerals would be represented by the cost of the land less the value of the land after extraction has ceased, the residual value being that of the land after all surface and other damage from mineral workings has been restored, less any cost borne by the owner for the restoration.

96. The loss of value by the gradual exhaustion of the minerals would be allowed as a deduction from the owner's income in similar manner to the allowances given to the entrepreneur who is working mineral deposits which he has acquired outright.

OUTRIGHT SALE OF MINERALS

97. Where the owner has sold the minerals outright the treatment of the capital sum received will vary according to the circumstances. If it has been established already that the owner is in the business of buying and

selling property he would be taxable on the difference between the proceeds from selling, and the cost of acquiring the minerals. If the owner has no such business but the country concerned has capital gains or betterment taxation the profit may be taxable under that law. In the absence of either a property-dealing business or capital gains taxes, tax will only arise if there is specific legislation charging to tax capital receipts from disposal of minerals or mineral rights, allowing suitable deductions for the loss of capital by the exhaustion of the minerals.

PROSPECTORS

98. A person carrying on the business of prospecting would normally be taxable on the earnings from that business which would include the sale of mineral rights which he has acquired as the result of his efforts. In some countries, however, (e.g. Africa, Australia, Fiji, Solomon Islands) the receipts by a prospector from the sale of such rights have been specifically exempted from tax. In other countries it is usual to grant allowances for depreciation to prospectors on a generous scale and in general to encourage their endeavours (see also the paragraphs on Exploration and Incentives.)

RESERVES

99. It is natural for a country in which mineral resources have been discovered to wish to know as soon and as accurately as possible the extent of the economically workable mineral reserves.

100. Companies engaged in mining generally publish in their accounts data regarding the proven reserves of minerals in the area leased to them. It is common knowledge that the figures change from year to year, almost invariably in an upward direction, as more information about the worth and extent of the reserves is gathered. This process of slow evaluation of reserves is sometimes subject to criticism but is an inevitable feature of large-scale mining operations. The company is in duty-bound to give its shareholders only information about future prospects which can be fully substantiated and in any event is constrained by company law to take a conservative view.

101. The work of surveying, exploring, drilling, testing and the sinking of trial shafts or bores over a large area is expensive. It is normal to do only as much of this work in the first instance as is necessary to prove there are enough workable resources to make mining operations worthwhile. The extent of additional reserves will initially only be mapped out in a general way without the full testing and evaluation procedures being applied.

102. The practice mentioned follows from the fact that huge capital outlays and a lengthy preparatory period are necessary to set up a mining operation and the sooner that some return on the outlay can be obtained the better for the shareholders and the more likely is it that fresh capital can be raised for new ventures. Once the mine is producing a reasonable return on initial capital and generating a healthy cash flow the work of more detailed evaluation of reserves can be expanded, the updated results being published year by year in the accounts.

TAX POSITION OF ENTREPRENEUR

103. Over the whole period during which minerals are extracted the total profit of the entrepreneur consists of the following:—

Total sales of minerals		S
mining expenditure on current account	a	
royalties and other levies	b	
expenditure on capital account	c	
less any realisations of capital	d	
net capital expenditure consumed	e	e a+b+e
Net Profit		S−a−b−e

and the income tax code should ensure that precisely this amount of profit should be taxed.

The scope for variation within this formula consists mainly of how rapidly the entrepreneur is permitted to deduct his capital expenditure. If the write-off allowed is rapid more income taxation will be collected in the later part of the working-life of the deposit than in the early part.

104. Variations outside the formula would include tax holidays which by forgoing income tax altogether for one or more years would produce a figure for the total assessments on mining profits which fell short of the figure arrived at by the formula. Such variations and also the treatment of depreciation are dealt with in more detail in the paragraphs under the heading of INCENTIVES.

105. The treatment of Royalties and other payments for minerals has been dealt with above in the paragraphs under that heading and the impact of Customs duties and Export duty is similarly dealt with under those headings.

106. The question of the relative weight of taxation on the trade of mineral extraction compared with other trades is dealt with in the section on "Level of Taxation".

CUSTOMS DUTIES

MACHINERY

107. Customs and Excise Codes in developing countries sometimes exempt from duty imported manufacturing machinery as a standing incentive to industrialisation. Where such machinery is subjected to duty it is usual to grant exemption in respect of the machinery requirements of new secondary industries and often of new mineral extraction ventures.

108. Exemption of machinery from import duties is a simple incentive to the setting up of new industry. Where the product of the industry is exported, and this is particularly likely to be the case with mineral extraction industries, there is a case in principle for the exemption because the machinery costs are in effect embedded in the exports whereas Customs and Excise duties are intended to be a levy on consumption within the country.

PREFERENTIAL TARIFFS

109. Where duties do exist and vary between a lighter preferential duty on imports from within a special trading area, for example, the British Commonwealth, or a common market, free trade area, or customs union, with a higher duty on imports from outside that area, complete exemption of imports would destroy the effect of the duty preference. In such cases it is preferable to give an

incentive in the form of a cash grant equal to duty at the lower level leaving the actual duties unchanged and allowing the entrepreneur to import from whichever country he prefers, the net position being that only the duty differential remains.

110. In some cases, however, where there is no present and little future prospect that the required machinery can possibly be obtained from within the preferential tariff area, an outright exemption may be justified.

MATERIALS

111. On the same general principle, that exemption from, or drawback of customs duty is allowed in respect of imports that are subsequently re-exported, chemicals and other substances imported for the purpose of processing mineral ores, which are subsequently exported, are usually exempted from customs duties where the duty involved is material and would affect substantially the export price of the mineral. Where the duty on the chemicals or other substances used is insignificant it is more usual to apply de minimis principles and allow the duty to stand rather than introduce the administrative complication of policing a drawback system for trivial amounts.

FUEL

112. Where a small revenue duty has been imposed on fuel oil in a country which in general pursues a policy of industrial incentives it is not usually desirable to give up the duty even though fuel oil is used in the extracting or processing of the mineral. If too many duty sources are given up it means that higher and higher duties have to be imposed on a narrowing tax base while agitation for extending the scope of exemption grows with each exemption that is granted.

50:50 AGREEMENTS ETC. CUSTOMS DUTY OFFSET

113. It should be mentioned that although nowadays 50:50 agreements regarding the extraction of minerals are usually framed so that royalties are expensed it is still common for customs and excise duty on imports of materials and machinery used in the operations to be offset against royalty and tax payable. In those cases the entrepreneur is then not concerned with future changes in customs and excise duties because such changes do not affect the total royalties/tax that he has to pay. It was indicated above that there is a good case in principle for forgoing customs and excise duties where the minerals produced are exported.

INCENTIVES

MINERAL EXTRACTION

114. Mining is not usually regarded as a "pioneer" industry for the purpose of granting tax holidays or other special reliefs or abatements, which in developing countries are normally reserved for new secondary industries. Other incentives are however widely encountered and are referred to in the following paragraphs.

SECONDARY PROCESSES: SMELTING, REFINING

115. Where special incentives are granted to mining concerns these are often directed to encourage the setting up of refineries, smelters and other processing plant so that what is eventually exported is a more sophisticated product than the crude mineral or ore. Where the installation of such plant is only

marginally economic because of the limited, or non-existent local demand for processed minerals, or because of the relatively small scale of the practicable processing plant complex, the saving in freights secured by shipping a more concentrated product plus low local wage rates may barely be enough to make the enterprise worthwhile.

In such circumstances some special tax relief may turn the scale in favour of setting up the installation, especially where it may reasonably be projected that after the lapse of a few years, which may coincide with the end of the relief period, conditions of demand or other factors will have changed so as to make the project completely viable.

116. In some cases the incentive provided to encourage smelting or processing in the country of origin is a differential in the rate of royalty or export duty in favour of the processed commodity. For example, Jamaica's royalty differential of 1/6th in favour of bauxite used to produce alumina as compared with bauxite directly exported was commented on favourably by Sir John and Lady Hicks who in their economic survey of 1955 suggested that an even wider differential might be justified. Guyana, another major bauxite and alumina producer has modest royalty and export duty on bauxite but none on alumina. Libya allows offset of royalties against tax for oil refined in Libya but "expenses" royalties on exports. There is a better case for such incentives in the short-term. In the long term it should be possible for the entrepreneur to pay at least as much royalty on the higher—as on the lower—value product.

TYPES OF INCENTIVES

117. Special reliefs or incentives of this kind need not necessarily be in the nature of tax exemptions or tax holidays. The capital expenditure in a mineral venture is usually so immense that liberal depreciation treatment during the first few years of operations will often result in there being no net taxable profit. The entrepreneur benefits by the increased cash flow in the early years of production and the country benefits in due course because heavy allowances for depreciation at the outset result in smaller allowances being available later so that the net taxable profits will increase rapidly in the middle and later stages of development. The question of depreciation and depletion allowances is discussed in more detail in the paragraphs under that heading (paras 121 and 129-130).

118. Two forms of relief which go rather beyond ordinary depreciation are—

(a) "investment allowances" i.e. percentage allowances on the cost of plant or building which are additional to normal depreciation and not reckonable when computing depreciation allowances to a total of 100% of the difference between cost and scrap value when the asset is disposed of; and

(b) "investment grants", or cash subsidies, towards the cost of plant and structures which are given in the U.K. and a number of other countries.

EXEMPTION FROM, OR ABATEMENT OF INCOME TAX

119. South Africa which produces a large part of the world's gold and diamond output has special provisions covering the early years of a mine's development such that no income tax, or only an abated figure, is payable until the development stage is over. Uganda taxes mining companies at 20% and other companies at 37½%. Zambia taxes certain mining companies at reduced rates of tax where they are working new or difficult mines. The rates range from 35% upwards compared with a 45% (maximum) rate of

tax on other companies. Guyana taxes gold and diamond profits at 20%: the usual company rate is 45%. The abatement is for 5 years in approved cases.

120. Australia exempts gold mines from income tax and provided similar exemption for uranium up to 1967/68. A unique relief, to the extent of one-third of the sum payable by a shareholder in a mining concern when a call is made upon his partly paid up shares is allowed by Australia and also New Zealand. In addition to these reliefs an abatement of 20% of the net taxable income is allowed in Australia in respect of the mining of most metals, including uranium mined after 1967/68. Australia also has "follow through" provisions so that a full or partial exemption of the company profits is also applicable to dividends paid out of the exempted profits including those from prospecting and the 20% of profits subject to abatement.

NON-ACCOUNTABLE "DEPLETION" AND SIMILAR ALLOWANCES

121. The U.S.A. provides non-accountable "depletion" allowances (which present an automatic abatement not linked to the actual depletion of mineral deposits or the depreciation of fixed capital) in varying percentages of gross income from mineral extracting operations, 23% being allowed in the case of uranium and 27½% for petroleum. There is a ceiling on all these depletion allowances, of 50% of net income, which means in effect that the rate of corporation tax may be abated by up to 50% for all concerns engaged in extracting minerals.

122. Some other countries, including South Africa, Eire and Trinidad, have depletion allowances on the U.S. model and the Australian 20% abatement is closely akin to it. New Zealand effectively allows a depletion deduction of $33^1/_3$% from mining profits. Canada allows a 40% deduction from the profits of gold mines and $33^1/_3$% in the case of other mines and of oil and gas wells.

PROSPECTING

123. Prospecting is encouraged, for example, in Australia, Canada, Fiji, and the Solomon Islands by a provision that where a prospector sells out his mining rights, which he has established by successful prospecting, to a mining concern with which he is at arm's length (as distinct e.g. from a parent-subsidiary relationship) no tax is payable on the profit derived from selling the rights. This last incentive may have comparatively little application in the present age of vast international mining groups which tend to be vertically integrated as far as prospecting, mining, ore-processing and marketing are concerned.

ABORTIVE PROSPECTING

124. Where prospecting operations have proved abortive it is usual to allow the entrepreneur to offset the whole cost of the operations as revenue expenditure against his other income from the extraction of minerals. This treatment is logical because where minerals are discovered the expenditure incurred in finding them is spread over the period of their working life. Where nothing is discovered the working life is zero and it follows that the expenditure should be written off immediately.

DRY WELLS

125. In the case of oil wells it is a matter of common and sensible practice that where in the course of developing a field dry "wells" are encountered the cost of drilling them is allowed to be deducted immediately and no attempt is made to argue that the cost of drilling dry holes is part of the capital cost of developing the field as a whole.

TAX HOLIDAYS

126. Even outright tax holidays for mineral

extraction are not completely unknown, for example, Eire has recently introduced a 20-year tax holiday for ventures started before 1986, after having experimented with a 4-year tax holiday followed by a 4-year 50% abatement. Sierra Leone gives a 5 years' tax holiday in respect of titanium mining. New Zealand allows a mining company to write off its whole issued capital before applying income tax. Canada allows a 3-year exemption from the time the mine comes into commercial production.

ASCENDING TAX INCIDENCE

127. On Bougainville Island a company which is mining copper has been granted terms by the Government under which it is accorded mining rights for a lengthy period. The arrangements include a 3-year tax holiday at the outset followed by a 5-year period when capital may be written off to cover the profits. In the subsequent period corporation tax will commence at the general rate then prevailing but the rate will be increased until it reaches 50% in the 4th year of tax liability. After a total period of 25 years from commencement the 50% rate will be increased by 1% annual instalments to a maximum of 65% (which will thus be reached after 40 years). As the royalty rate payable is only 1¼% the arrangement virtually amounts to a 50:50 profit sharing agreement with generous treatment in the early years for the company but with a handsome yield for the Government ultimately on a 65:35 basis. The ascending liability principle is implicit in the South African system of taxation (see para. 119) and all other systems where generous or accelerated allowances for capital expenditure are made in the early years of working. It may be noted that the ascending principle is applied to royalties in Australia (see para. 54). and to oil profits in Algeria (see Appendix).

128. It may be noted that in cases where this type of ascending tax contribution structure is applied the extracting company has an incentive to develop the mineral deposits at the most rapid rate economically possible so as to take full advantage of the moderate taxation in the early and middle periods. Where the deposits are extensive (and this is a pre-requisite of a really long-term agreement) it is usually in a country's best interests that initial development should be rapid, but well-ordered, so that revenues are available at a reasonably early stage for development in other parts of the country's economy.

DEPRECIATION

INITIAL ALLOWANCES

129. The acceleration of depreciation allowances as a form of incentive may be achieved either by increasing the annual rate beyond that at which actual physical depreciation is expected to occur,* or by granting "initial" allowances. The latter originated in the 1945 legislation to the United Kingdom and have since been applied in countries in all parts of the world. An initial allowance, usually from 10% to 40% of cost, is in addition to normal depreciation and used as a straightforward incentive to encourage mechanisation or re-equipment of industry. It is an incidental recognition—

(a) of the fact that the largest proportion of depreciation by value of capital equipment takes place in the first year of use

* The "ultimate" in this technique is the rule in some countries allowing a miner to opt to write off his capital expenditure either in one year or over the life of the mine.

and

(b) that to allow 100% depreciation allowances in respect of equipment proportionately over the period of its working life is adequate "cash" recognition of the original capital outlay but makes no allowance for the interest factor where the whole purchase price is paid immediately but the tax allowances are deferred over a period of years.

Initial allowances are fairly commonly allowed (e.g. in Ghana, Guyana, Malaysia Nigeria) to industries in general and where no other form of incentive is allowed to mining enterprise there is a good case at least for granting initial allowances on the capital equipment employed in mining and the processing of ores.

CAPITAL EXPENDITURE WITHIN MINING CONCESSION

130. It is usual to give special capital allowances on virtually all capital expenditure within the area of the mining concession including "works" such as shafts, sheds, workers housing, and welfare buildings. As already indicated this may be spread over the life of the mine or be allowed at a minimum rate of 5% or 10% per year where the mining operations will take place over a longer period. In some cases the initial capital expenditure before mining commences may be allowed at a faster rate than expenditure incurred subsequently.

"EXTERNAL" EXPENDITURE

131. Where capital expenditure is incurred outside the concession area which is unlikely to have any residual value when mining ceases allowances should be extended to cover this also. For example, it may be necessary to build a railway or road to connect the mineral area to the main railway or road system or to a port, or to build a new quay or jetty because there is no existing port near the deposits. Such expenditure should be permitted to qualify for relief even though it is incurred neither in extracting the minerals nor on works within the mining concession.

EXPLORATION EXPENDITURE

132. It is well-known that exploration for minerals, and particularly for oil, is an expensive and hazardous business. If a company prospects for oil in three countries A, B, and C and finds it in B and in C but not in A, there will be no mineral income in A against which the loss or abortive expenditure may be set. It is hardly likely that the tax authorities in B or C will permit the offset of expenditure in another country. The result is that the company will be taxed in total on more than the profits it has obtained from A, B, and C taken together. If the company is resident neither in A, B or C but in another country, D, it may well be that D will tax the world-wide operations on the basis of allowing losses against profits on a global basis, and also give double tax relief for the income tax paid in all the countries where a profit is made.

133. Where the taxes in the mineral-producing countries are heavy, however, it may not be possible to offset them altogether because the sum of the taxed profits made outside D will be greater than the world total of profits as reduced by losses and abortive expenditure in non-producing countries.

134. It is worth mentioning that in the case of oil the world-wide success ratio of "wildcat" wells, i.e. drilling operations in areas where no oil has previously been found, is 1:27. The North Sea natural gas exploration on the British section of the Continental Shelf proved remarkably successful at the outset (3 out of the first 4 found gas) a factor which incidentally improved the chances of subsequent drilling proving fruitful. Nevertheless the later exploration results were less

exceptional and the score reached by June, 1968 was 56 "dry" holes out of 76.

135. Exploration is increasingly being done by large international companies because of the huge expenditure involved, and no solution, as far as relief for unrequited losses in exploration in non-producing countries is concerned, can readily be devised*. The anomaly referred to however is at least a reason for avoiding immoderate taxation in the countries where mineral wealth has fortunately been swiftly found.

OTHER MATTERS

DISCLOSURE OF EXPLORATION RESULTS

136. It is usual to stipulate in the exploration/prospecting licence that where land has been given up after abortive exploration or prospecting work has been carried out upon it the results of the geological surveys etc. should be made available to the Government. The information is usually regarded as confidential for two years and then made available to any other parties interested in exploring the same land.

ABSOLUTE LEVEL OF ROYALTIES: MINIMUM PRODUCTION REQUIREMENTS: "DEAD RENT"

137. It remains to be said that since entrepreneurs prefer levies based on profits, which automatically protect them from onerous charges in times of depressed or non-existent profits, a royalty/tax climate where royalties are low or even virtually nominal is in itself an incentive to mineral operators. Examples of such a climate are afforded by Australia, fast becoming one of the greatest producers of minerals in the world where royalty rates in general are around 1¼% of realisations, and Jamaica, the largest exporter of bauxite, which has a royalty rate of 36 cents (U.S. 18 cents) per ton of bauxite when the quantity produced exceeds a million tons. It may be noted also that Australia has a sub-standard rate of royalty on petroleum i.e. 10%, instead of the almost universal 12½%. In Tasmania the 10% rate is abated further by a provision that the first 50,000 gallons are to be free of royalty. The 10% was scheduled during the long period of abortive oil exploration in Australia. It remains to be seen whether the rate will be increased now that various oil strikes have been made. The mining lease may stipulate what quantities are to be produced or establish a minimum quantity by providing for a minimum mineral rent or royalty (sometimes known as "dead rent") or for minimum income tax payments, thus serving as a sort of "incentive" to at least a certain level of output (see also para. 149).

MARKETING

GENERAL

138. One advantage which a country gains when its minerals are developed by one of the large international mineral companies is that the company is able to deploy its

* Because of the immense amounts involved, to give allowances in an "unlucky" country where exploration had been wholly abortive would be ruinous to its revenue — the cost has somehow to be borne by mineral profits in other parts of the world.

considerable know-how in securing that the minerals are extracted in the most efficient way over a lengthy period. Another advantage is that the marketing experience of the company can be used to good effect especially in respect of minerals which are in danger of being overproduced. In the case of minerals, developing countries are among the main producers and have a common interest with the producing companies in securing optimum prices and output for the minerals produced.

PRICE VOLATILITY AND SUBSTITUTION

139. All countries, and all producers, have an interest in long-term stability of mineral prices. Where the price of a particular mineral is volatile this factor alone, even as much as a continued high price, will tend to encourage substitution by other metals or materials of which the price is either lower, or more predictable and reasonably competitive.

COPPER

140. A well-known example of a metal with a rather fluid price is copper for which, in some of its uses, aluminium forms a possible substitute. In attempts to stabilise selling prices some of the bigger producers have until recently usually supplied copper at fixed prices on contracts to major consumers. The result was to facilitate forward planning by the producers and these consumers but a side-effect was to make the free market price on the London Metal Exchange even more volatile by restricting substantially the amount of metal passing into the free market.* The position has since changed because of a shift in policy of the large producers (a substantial part of production comes from developing countries) who now sell their output on the market so that a more realistic price has since developed on the London Metal Exchange.

NICKEL

141. The supply position of nickel has some similarity to that of copper except that the main producers are the more developed countries, including Canada (40% of world production) and Australia. 85% of the world's supplies come from a few large international companies (Russia and Cuba being the most prominent among the sources of the remaining 15%), which however sell their production at a pegged price (£902 a ton as at June 1968).)

142. In 1966 a series of strikes in Canada, combined with a sharp increase in demand for stainless steel, and hence for nickel, led to the free market price soaring to £1700 a ton and this price was still as high as £1400 in June, 1968.

143. In addition to pegging the contract price of nickel the big producers also rationed supplies to limit the scope for re-sales by their customers at the free market price. The object of the pegging exercise was to stabilise the price to the main users and thus avoid the incentive to switch to substitute materials which a higher nickel price, or a rapidly fluctuating price, would bring. The ultimate objective was, of course, to preserve the long-term prospects of the industry.

TIN

144. In the case of tin the major use is for tinplate largely used in the canning industry, and there are many alternative methods of packaging which could be substituted for canning in the event of tin prices getting out of hand. On the other hand too sharp a fall

* For example, in May 1965, 90% of Zambia's copper was being supplied at £288 per ton under contracts to large consumers while the price on the London Metal Exchange was £475 and royalties were payable on the latter figure.

in price may cause hardship to producers, especially those working marginal deposits, and in the end reduce total production of a metal the known supplies of which appear to be in sight of exhaustion within a few decades.

145. A tin restriction scheme was entered into by the tin producing countries in 1957 (another will start in October 1968) to limit production by restrictions applied evenly to producers in each country on a quota basis. Since then there have been two buffer stock operations (the second of which is still in progress) to stabilise prices. Apart from building up an initial stock of metal, financed by compulsory proportionate contributions by producers, the Buffer Stock Manager has to buy tin in the market when the price falls below a certain prescribed figure and sell tin when the price rises above a specified higher figure. Between these two extreme price figures the manager has some discretion to buy or sell according to market trends. The workings of the tin buffer stock arrangements have been tacitly supported in recent years by the disposal policy of the United States tin stockpile which is, in effect, only to sell tin when there appears to be a physical shortage of the metal, and not to sell when to do so would weaken the market.

DIAMONDS

146. In the case of diamonds orderly disposal of most of the world's stones has been secured by de Beers' Central Selling Agency with demonstrably beneficial effects on the revenue of producer countries. Since the sale of diamond gem stones is one of the purest forms of luxury trade little of the usual objection to a monopoly or quasi-monopoly position vis-a-vis the consumer is apposite. Producing countries include some developing countries in Africa, and the Soviet Union (which has entrusted the marketing of some of its gems to de Beers) and they clearly benefit from monopolistic efforts to maximise revenue by suitable pricing policies.

OIL

147. Other minerals are not in general subject to such overt efforts to control prices or output but the operations of the major international oil companies probably result in some kind of order being maintained from

(a) the cumulative effect of the various long-term agreements with governments which govern the working of the minerals;
(b) long-term tanker charters and arrangements regarding the "feeding" of refineries in different parts of the world from the most conveniently situated oil fields and oil pipe-lines;
(c) vertically integrated ownership of distribution and retailing outlets, storage tanks and bunkering outlets;
(d) the regular publication of oil prices e.g. in the Gulf (Iran) and Aruba (Caribbean) regions; and
(e) agreements between major companies competing in the same consumer markets to hold common price levels and compete only in services.

148. It may be noted in considering the revenue position of mineral producing countries that restrictive or price-maintenance practices by companies engaged in production will usually be to the benefit of those countries provided such policies are not taken to such extremes as to encourage substitution.

INTERESTS OF PRODUCING COUNTRIES: LEVEL OF PRODUCTION ETC.

149. On the other hand producing countries, especially those newly in the field, sometimes endeavour to bring pressure on entrepreneurs to maximise production and hence the revenue to the particular country. Obviously, if all countries adopted this policy, over-pro-

duction would swiftly follow with a disproportionate fall in selling price ensuing so that the total proceeds to the producing country would at some stage fall short of the proceeds of a smaller production sold at higher prices. (See also para. 137).

150. As far as the world as a whole is concerned the maximum wealth is secured if the richest and most accessible mineral deposits are exploited first and if attention is then turned successively to less and less rich deposits. This general principle is tempered by considerations such as that where a "second class" deposit is already being actively and profitably worked, the whole extractive apparatus, labour force and infrastructure having been assembled and operating smoothly, it would not be sensible to abandon summarily the deposit to start exploiting a richer virgin deposit in a new and perhaps uninhabited area. In practice deposits of varying value are likely to be worked simultaneously because mineral discoveries are not made in order of richness, and social considerations alone would ensure that less profitable operations would not be abandoned when more profitable deposits were found.

151. Where a single large international company has concessions over minerals in different parts of the world it may be expected to work these by reference to the greatest economic advantage, subject of course to any special conditions in its leases. Where a mineral "strike" is made by an operator who is new to the international scene it may be expected that, even if the deposits are not so rich as some of those being developed by larger operators, development will be rapid. This does not necessarily mean that the country concerned will benefit more than had the strike been made by a larger operator. The newcomer may be a less efficient operator, having less experience and know-how than the "majors", and if the mineral is oil, he may not be able to dispose of it so advantageously as a large company with vertically-integrated international operations and hence easy access to markets. Nevertheless the entry of newcomers to the industry creates desirable competition in the bidding for mineral rights and helps to ensure that the share of mineral profits accruing to governments is the optimum obtainable.

152. As argued earlier, the interests of producing countries are probably best served by quasi-monopoly or cartell-like operations to secure orderly marketing of minerals and obtain optimum returns. Efforts to stabilise the metal price by market operations and to restrict production in time of falling prices have in fact been made with considerable succes by developing countries in the case of tin which is almost wholly produced in the developing world.

153. As far as the consumer is concerned his best protection is the existence of substitutes —even oil can now be substituted in one of its major uses—thermal electric power stations—by nuclear power (as well as the older or hydro-electric stations), and the eternal progress in the scientific development of new substitutes for the scarcer resources of the earth. The development of aluminium keeps the copper price in check and the introduction of Special Drawing Rights by the International Monetary Fund has damped down the monetary demand for new gold.

154. The appendix to these notes contains up-to-date information on certain special features in the treatment of particular minerals.

APPENDIX

NOTES ON THE FISCAL TREATMENT OF SPECIFIC MINERALS

URANIUM

The fiscal treatment of uranium has been influenced by the facts that it is a fairly "new" mineral—owing its importance to the rapid development of nuclear physics during and after the 2nd World War—and one which has has both peaceful and military uses.

For militarily strategic reasons some countries regard uranium as a national asset subject to control by the government which may however, permit private sector entrepreneurs to do the mining operations. This is the position in parts of Latin America and in Japan where however there is a ban on the export of fissionable materials mainly because Japan, which has a paucity of coal and other fuel supplies, is interested in uranium as a source of nuclear power. Canada has set an Atomic Energy Control Board to control exploration and mining.

The U.S.A. prohibits imports of uranium in order to protect its own uranium mining industry and grants a depletion allowance of 23% (subject to a maximum of 50% of net income) to uranium miners. South Africa allows relief for gold and uranium mines established after 28 February, 1946 (the two metals are often mined together) on the basis that the whole of the capital expenditure incurred up to the commencement of mining may be allowed as at that date and that subsequent capital expenditure may be allowed when incurred. In the case of deep level mines the actual capital expenditure may be increased for tax relief purposes by adding 5% per annum at monthly rests up to the end of the year preceding the first year of taxable profits. "Depletion" is also allowed. Australia exempted uranium profits from income tax up to 30th June, 1968 but withdrew the exemption from that date on the grounds of equality of treatment between different sectors of the economy as nuclear power, based on uranium, would be competing with coal and oil as the raw material for electricity generating stations. Uranium mining is however now on the same footing as other mining in Australia and hence entitled to the "depletion" allowance or abatement of 20% of profits. Rhodesia also provides a depletion allowance of 10% in respect of gold and uranium mining.

Where mineral royalty rates are specified in countries' mineral legislation, uranium does not usually appear in the schedule. Instead it is usual for royalty and tax arrangements to be made between government and entrepreneur an ad hoc method becoming increasingly prevalent for dealing with large-scale or strategically important mineral extraction operations.

OIL: RECENT DEVELOPMENTS

It has already been mentioned that oil royalties vary from 10% to 20% with 12½% as the widely adopted "standard" rate. A 20% rate has only so far been applied in a few countries with well established and rich deposits—the 10% rate applies in one or two places where oil has not yet been discovered or where it has only just been discovered.

Abated rates for offshore oil are provided in several countries e.g. Ghana, Guyana, and until recently Sarawak, the usual pattern being:

Land based oil wells	12½%
Inner Submarine area	10 %
Outer Submarine area	8 %

(See however the comments in paragraph 49 above.)

The difference in "standard" rates of royalty usually reflect the difference in the prospects of finding oil.

IRAN

The "contractual" arrangements made fairly recently in Iran (a country of proven and considerable oil riches) between the state-owned N.I.O.C. (National Iranian Oil Company) and E.R.A.P. (Entreprise Française des Recherches et d'Activités Petrolière) are of great interest. Before this agreement there had been various examples in the Middle East of variations of the old 50:50 ratio; in favour of the government, in certain instances the ratio had reached 60:40 and beyond. In 1965 N.I.O.C. had made 50:50 participation agreements for offshore operations with various foreign oil companies which, however, also involved substantial cash bonuses (amortisable against later profits) being paid by the foreign participants.

The N.I.O.C.-E.R.A.P. agreement, (published August, 1966) appears favourable to the government company because E.R.A.P. in effect acts as contractor for the finding of offshore oil but also finances the prospecting. If no oil is found E.R.A.P. pays all expenses. If oil is found E.R.A.P. is entitled to buy from N.I.O.C. 35% to 45% of the oil production at a price equal to operating cost plus 2% fee, plus tax on realised prices, and also to have the exploration cost treated as a loan to N.I.O.C. repayable over 15 years out of the proceeds of the oil produced.

The unusual nature of the arrangements has been explained in the financial press partly by the reasonable prospects of finding oil in the area, partly by the eagerness of E.R.A.P. to obtain a foothold in an area previously dominated by American and British oil companies.

ALGERIA

Algeria which is a fairly "new" country as far as oil production is concerned originally had a guarantee of 25 years tax stability plus depletion allowances in respect of sums re-invested in exploration. An agreement was made in July 1965 between the government and the French oil companies operating in Algeria whereby the rates of taxation of profits was to be increased from 50% in stages to 55% by 1969, an example of an "ascending scale" applied to tax on oil profits. Royalties, charged at 12½% on prices which are posted by the Government are offset against income tax so that the arrangements have something in common with agreements currently being made in various countries to govern the fiscal treatment of minerals other than oil.

VENEZUELA

The Venezuela Government has invited proposals for exploring and exploiting petroleum in an area of 250,000 hectares in the southern half of Lake Maracaibo—to be submitted by 3 July, 1968 to the State-owned Venezuelan Petroleum Corporation (C.V.P.). The designated area is believed to be rich in light crude oils and there is understood to have been keen competition by oil companies.

What has been offered, however, is not oil concessions but a form of partnership with C.V.P. by way of a service contract. It is intended to have 5 contractors each working initially on a 50,000 hectare block. After 3 years work the contractor must return 80% of the area to the C.V.P. and may then develop the remaining 20%.

GOLD: RECENT DEVELOPMENTS

Gold is unusual in being a metal the world supplies of which are running out the price having nevertheless remained unchanged for 38 years. The reason for this state of affairs is the large proportion of gold output which is

normally purchased as a backing for currency. As changes in the official price of gold would correspondingly affect the value of currency in terms of gold, countries with gold-backed currencies have been reluctant to agree a change in the gold price.

Since gold mining has become progressively more expensive as mining costs have increased, by wage and cost inflation, faster than technological advances have been able to reduce them, gold mines in a number of countries have faced difficulties and have had varying degrees of support from Government. Gold mines are exempt from tax in Australia, and are taxed at lower than standard rates in some other countries.

Canada has also given financial encouragement to its gold mines by a series of enactments commencing with the Emergency Gold Mining Assistance Act 1948, which avowedly set out to help the industry which was depressed after the 2nd World War because of rising costs and a selling price which had been fixed in the 1930's and not subsequently changed. Assistance is given to the tune of $^2/_3$ds of the amount by which production costs exceed $26.50 but do not exceed $45.00 per oz. This figure is then increased by 25% but is paid only in respect of $^2/_3$ds of production.

SHORT-LIFE, HIGH-COST MINES

An interesting recent development has occurred in South Africa*, which is the world's largest gold producer. The Government has designed a scheme of support for mines where the remaining working life of the mine was less than 8 years on 1st April, 1968 as far as could be foreseen on working cost projections and on the basis of an unchanged selling price for gold.

If the mine could also show that its working life would be significantly increased if assisted in its gold or uranium production it would qualify under the scheme.

It appears that 14 of South Africa's 49 major gold fields are within the category which might qualify for assistance. The method adopted for recomputing the working life of the mine was to lower the figure taken as the minimum worthwhile ("payable") metal : ore ratio by 16% which effectively increases the estimated "payable" (i.e. economically workable) reserve tonnage.

The scheme comes at a time when there appears to be at least some possibility of an increase in the selling price for gold. Although the scheme would not necessarily bar assistance if the selling price of gold rose, it seems likely that such a contingency might alter the situation materially in favour of the mine and in many cases reduce or eliminate the financial support required. When a decision to phase out the operations of a mine is made and acted on it may be difficult, or unduly expensive, to reverse the process** if later developments make it otherwise economic to resume or expand mining. Apparently the South African scheme is intended to provide a sort of financial holding operation to keep mines going in the expec-

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* Canada has also given financial encouragement to its gold mines, by a series of enactments commencing with the Emergency Gold Mining Assistance Act 1948, which avowedly set out to help the industry which was depressed after the Second World War because of rising costs and a selling price fixed in the 1930's and not subsequently changed. Assistance is given to the tune of $^2/_3$ rds of the amount by which production costs exceed $ 26.50 but do not exceed $ 45.00 per ounce. This figure is then increased by 25% but is only paid in respect of $^2/_3$ rds of production.

** For example, when a mine is in its last few years it may be decided to use all the waste material mined from new workings to fill in the shafts etc. sunk earlier and now to be abandoned.

tation or hope that subsequent movements of the gold price will justify the support now to be given. If events do turn out as expected the result will vindicate the finance provided as a sound investment which prevented the economic waste resulting from prematurely closed mines.

In general, however, it must be said that subsidising a mine when it has reached an only marginally productive stage is a policy not to be entered into lightly. Unless there are some reasonable prospects of the future position improving such a course cannot usually be recommended.

NATURAL GAS

The royalty payable on natural gas, which may be found in conjunction with oil, or as a major mineral in its own right as in the Groningen fields in Holland or the British North Sea deposits, is usually at the 12½% rate basically applied to oil deposits. The arrangements between the entrepreneurs working the North Sea gas deposits and the (quasi-government) Gas Council in Britain are somewhat akin to the partnership/contractual arrangements now being adopted in some other countries for the development of oil resources. The entrepreneurs, apart from paying royalties on the gas produced are bound to sell their total production to the Gas Council if required to do so and the Gas Council is so far understood to have intimated that it will take up all the gas produced. The Council has negotiated prices for certain of the production areas which appear to ensure that a fair proportion of the profit from the gas production will accrue to the Council.

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EDITORIAL:

TAXATION INQUIRY COMMISSION

It is always interesting to read the reports of official taxation committees and to see what practical results arise from them. In most cases they are very thorough studies, but frequently the results are negative. However, in some cases they are positive, as was the case with the Indian Bhoothalingam Report. Generally, in the long run, the results are better; fiscal thinking is influenced by the reports and new practical ideas find their basis in them.

The Taxation Inquiry Commission in Ceylon has published its report. (Sessional Paper X – 1968, Government Publications Bureau, P.O.B. 500, Colombo). The Commission was instructed to examine and inquire into the present system of taxation and tax administration, to recommend such modifications as are considered necessary and to suggest ways and means of promoting and developing fresh sources of revenue. Naturally the proposals are based on the existing tax structure in Ceylon and influenced by the specific difficulties in this country. It is noteworthy that a heavy stress is laid on the need for a centralised policy-making body responsible for taxation. As is stated in the report the basic fault giving rise to the current difficulties lies in a lack of co-ordination of the various aspects of taxation. The first recommendation of the Commission is the formation of a single authority responsible for all matters relating to taxation, including policy, legislation and administration. Among others, the head of this Directorate would be chairman of a permanent Taxation Commission charged with advising the Minister on matters of tax-policy.

The Commission recommends that tax treaties be concluded with several countries. One of the problems is that foreign investment in Ceylon is much greater than Ceylon's investment abroad; this is especially the case with the United Kingdom. The Commission feels that a treaty with the United Kingdom and an agreement with Malaysia are imperative because a considerable double taxation of income is currently taking place. It is a fact that agreements have already been concluded with India, West Germany, Sweden, Norway and Denmark, and agreements with Pakistan and Japan are awaiting ratification.

It is remarkable that the existing 'cascade' turnover tax, which was not intended to be shifted to the consumer, is in the view of the Commission a tax on domestic consumption. The Commission proposes that there should be provision for a refund of tax with regard to exports. The Commission adds: 'business should be free to pass on the burden of the turnover tax to consumers, and their ability to do so should depend on the market conditions for their products, without being influenced by governmental directives'. Was it not Trotabas, who long ago said 'shifting is the most mysterious phenomenon in taxation'.

DR. J.C.L. HUISKAMP

* * * * ARTICLES * * * *

M.K. MATHAI:*

TAX CHANGES IN MALAYSIA

1. The years 1965 to 1967 have been years of very intense activity in the field of tax proposals and legislation. They may be described as years of innovation, change and harmonisation.

PROPOSALS FOR 1965

2. H.W.T. Pepper in his paper on "Tax Harmonisation in a Federation — the 1965 budget in Malaysia"[1] gave an outline of the proposals of the Federal Finance Minister in his 1965 Budget. These included—

(a) the harmonisation of the rates of income tax throughout Malaysia, except for a discount of 40% on the first M$50,000 of taxable income in Sabah and Sarawak;
(b) a turnover tax at ½% on the turnover of businesses generally;
(c) a 2% payroll tax payable by employers on their total payroll for every month that their total payroll for that month in respect of employees rendering services in Malaysia exceeded M$500;
(d) a capital gains tax at a maximum rate of 20% in respect of gains on assets acquired and disposed of after Budget Day; and
(e) a cinematograph film hire duty.

In addition, the Finance Minister ventured into the field of imposing special taxation on an industry basis. For the 1965 Budget, he singled out the tin industry and proposed a Tin Profits Tax (which is in the nature of an Excess Profits Levy) at the rate of 10% on profits from tin mining operations in Malaysia where the profits exceed M$100 per picul[2] of tin ore sold.

3. While the 1965 Budget may be "worth study as an exercise in harmonisation requiring both fiscal soundness and political courage" subsequent events also show that the 1965 Budget should serve as a good lesson to advisors to Finance Ministers of developing nations operating within a democratic framework of the very great dangers of innovation based on purely theoretical foundations and without regard to practical realities or detailed considerations of the scope and consequences of the tax.

TURNOVER TAX

4. The turnover tax which came into force on 1st January, 1965 was a multi-stage tax. The cumulative effects of a ½% rate were equivalent, according to numerous representations made to the Finance Minister, to an effective rate of around 4%. This increase was passed on to the final consumer who therefore effectively bore the tax. "In order to secure a more equitable distribution of the incidence of the tax and make it work efficiently"[3] the Federal Finance Minister announced in his 1966 Budget speech that the Government had decided to convert the multi-stage tax into a single stage tax from 1st January, 1966. The turnover tax as modified was chargeable at the rate of 2% on the actual sale proceeds of imported goods or where the import-

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1. Bulletin: Vol. XIX June 1965.
2. 16.8 piculs = 1 ton.
3. The 1966 Budget Speech of the Federal Finance Minister.

ed goods were subject to processing or used in manufacture by the importer, on that part of the sale proceeds which related to the import content of the processed or manufactured goods. The tax was payable only by importers.

5. In his 1967 Budget speech, the Finance Minister announced that "for a variety of reasons, we now propose to repeal the turnover tax"[4], the repeal being effective from 1st January, 1967. In the course of his speech, the Finance Minister said, "Honourable Members will note that since the introduction of the original form of turnover tax, chambers of commerce in many parts of the country have asked for a straight levy on imports as one which was simple, easy to collect and did not involve extra and complicated accounting on the part of taxpayers,"[5] and in substitution for the ill-fated and ill-conceived turnover tax, the Finance Minister introduced a surtax at the rate of 2% on the value of imported goods on which import duties are payable.

CAPITAL GAINS TAX

6. The Capital Gains Tax which in Mr. Pepper's opinion "Government was virtually compelled to introduce . . . because of the public spectacle of untaxed capital gains"[6] never, in fact, got on to the Statute Books. The Finance Minister showed considerable courage when he said,

"In the course of drafting the required legislation this year, it was found that translating the principles outlined in the White Paper in question into legal language was more complex than originally anticipated. For example, it was agreed last year to give an annual exemption of the first $5,000 of the aggregated capital gains of the taxpayer and his wife, such exemption to be available only to individuals and to Hindu joint families. It has since been found that adherence to this principle would result in loopholes which would facilitate avoidance if not evasion as well. On the other hand, the withdrawal of such exemption would catch the smaller gains whom it is not our intention to include within the scope of this tax. It has also been found that it would be necessary, in order not to make the tax more complicated than it already is, to depart materially from the original scheme. In view of this, the Government has decided to postpone the imposition of this tax to a more opportune time when the performance of this tax in other countries has been fully investigated."[7]

One could hazard the guess, without much fear of criticism, that had capital gains tax been in fact introduced, it would not have brought into the government coffers more than a pittance since the values of real property and securities fell very severely during 1965 and were further depressed in 1966 as compared with their values in 1963. There would, in consequence, have been created a rather unique position in which substantial capital losses would have become available for set off against capital gains for many years in the future. The timing of capital gains tax legislation was, to say the least, most inopportune.

TAX CHANGES — 1967

7. The 1967 Budget saw, apart from the repeal of the turnover tax and the introduction of the surtax on imported goods, an extension of special taxation of specific

4. The 1967 Budget Speech of the Federal Finance Minister.
5. Ibid.
6. "Tax Harmonisation in a Federation—the 1965 Budget in Malaysia" (Bulletin: Vol. XIX June 1965).
7. The 1966 Budget Speech of the Federal Finance Minister.

industries as well as an exercise in broadening the base of the tax pyramid.

8. The timber industry of Malaysia was selected for special taxation and this took the form of amendments to the income tax legislation under which one-half of the amount of any royalties paid to any State Government for the extraction of timber from a forest and the whole of any sum paid for the use of a licence or permit to extract timber from a forest were not to be allowed as deductions in computing the income, for income tax purposes, of the persons making the payments.

9. Almost every person carrying on a business or having income from the letting of any property situated in Malaysia becomes chargeable to a tax called "Development Tax." Development tax at the rate of 5% is payable on the income from businesses and from the letting of property. Individuals (other than a partner in a partnership) whose income from such sources (called Development sources) did not exceed M$500 (altered with retrospective effect in the 1968 Budget to M$2,000) in a year are exempt from the tax. A company and any person (other than an individual who is not a partner in a partnership) who has a development source is liable to a development tax of M$500 and M$100 respectively each year. Apart from broadening the base of the tax paying public, a minimum levy of M$100 on partners was intended to encourage partnership enterprises with many partners to convert to limited liability corporations.

THE INCOME TAX ACT, 1967

10. The process of harmonising the income tax legislation throughout Malaysia which commenced in 1964 was completed in 1967 by the introduction of the Income Tax Act, 1967 which replaced with effect from 1st January, 1968, the Income Tax Ordinance, 1947 of the States of Malaya, the Income Tax Ordinance, 1956 of Sabah and the Inland Revenue Ordinance, 1960 of Sarawak. The Act, however, not only brought into being one law for the whole of Malaysia but also introduced some fundamental and far reaching changes in the scope of charge to tax and the application of the Income Tax legislation.

11. Under the repealed Ordinances, a person was chargeable to tax on income accruing in or derived from the territories in which the respective Ordinance had effect irrespective of whether or not that person was resident in the territory concerned. Residents of the respective territories were also chargeable to tax on income received in those territories from outside the respective territories.

SCOPE OF CHARGE

12. The Income Tax Act, 1967 charges to tax—

(a) in the case of a person ordinarily resident in Malaysia, his income from wherever derived whether or not such income is received in Malaysia and

(b) in the case of any other person, his income derived from Malaysia—in such cases, there is no liability in respect of income derived from outside Malaysia and received in Malaysia.

RESIDENCE

13. A physical presence test has been introduced to determine the residence of individuals in Malaysia instead of the test by reference to the quality of one's residence. Where the control and management of any business carried on by a company or body of persons are exercised in Malaysia or where a business is not carried on the management and control of its affairs are exercised in Malaysia, the company, or body of persons, as the

case may be, falls to be treated as resident in Malaysia. Residence is considered in the context of the facts prevailing in the basis year for (i.e. the calendar year preceding) a year of assessment.

14. Except in the case of certain categories of individuals, any person who falls to be treated as resident in Malaysia for the basis year for a year of assessment is also ordinarily resident for that basis year in Malaysia. An individual is resident in Malaysia for the basis year for a particular year of assessment if –

(a) he is in Malaysia for that basis year for an aggregate of 182 days or more; or
(b) he is in Malaysia for that basis year for a period of less than 182 days but the period during which he is in Malaysia forms part of a continuous period of 182 days or more throughout which he is in Malaysia; or
(c) he is in Malaysia for that basis year for an aggregate of 30 days or more having been with respect to each of any 3 of the basis years for the 4 years of assessment immediately preceding that particular year of assessment either –
  (i) resident in Malaysia or
  (ii) in Malaysia for 30 days or more; or
(d) having been resident for the basis years for the 3 immediately preceding years of assessment, he is resident for the basis year for the year of assessment following that particular year of assessment.

15. An individual, who –

(a) has not been resident in Malaysia for the basis year for any of the 5 years of assessment preceding the basis year for a year of assessment for which he falls to be treated as resident in Malaysia, will be treated as not ordinarily resident for that basis year and the next following basis year; and if that individual is not present in Malaysia for more than 4 calendar years from the first year for which he is resident in Malaysia, he will be treated as not ordinarily resident for each of those 4 years.
(b) has not been resident in the basis year for any of the 3 years of assessment preceding the basis year for a year of assessment for which he falls to be treated as resident in Malaysia, is not ordinarily resident for that basis year;
(c) leaves Malaysia in the basis year for a year of assessment and is not resident in Malaysia for the basis year for any of the 5 immediately following years of assessment, is not ordinarily resident for the basis year in which he departs from Malaysia.

SCHEME OF ACT

16. The broad scheme of the Income Tax Act, 1967 is to ascertain –

(a) first, the basis period for each source of a person; generally this is the calendar year preceding the year of assessment except in the case of a business or a company when the accounting year or the financial year, as the case may be, ending in the calendar year preceding the year of assessment will be taken to be the basis period.
(b) secondly, the gross income from each source for the basis period – broadly, the amount receivable for that basis period.
(c) thirdly, the adjusted income from each source or, in the case of a business, the adjusted income or adjusted loss, for the basis period i.e. the amount arrived at after deducting from the gross income expenses wholly and exclusively incurred in the production of that gross income.
(d) fourthly, the statutory income from each source for the year of assessment i.e. after deducting depreciation allowances from the adjusted income.

(e) fifthly, the aggregate income for that year which is the aggregate of the statutory income from each source; losses brought forward from previous years are deducted from any statutory income from business sources in making the aggregation.

(f) sixthly, the total income for that year i.e. the aggregate income after deducting:
(i) adjusted losses from business sources for the basis period for that year of assessment;
(ii) abortive mining expenses incurred in respect of prospecting activities abandoned in the basis year for the year of assessment; and
(iii) donations made in cash to the Government, any State Government or approved charitable institutions.

(g) seventhly, the chargeable income which is the amount remaining from the total income after deducting certain reliefs available to resident individuals.

(h) eighthly, the tax chargeable on the chargeable income by reference to the rates applicable to the particular person.

FEATURES OF ACT

17. Special points of interest which may be noted are –

(a) with respect to employment income –
(i) the value of benefits provided by an employer to his employee (whether or not convertible into money) is treated as income of the employee except where the benefit consists of medical or dental treatment or passages between Malaysia and a place outside Malaysia.
(ii) amounts representing an employer's contributions in respect of the employee to an unapproved provident fund are deemed to be income from the employment when paid to the employee.
(iii) any amount received by an employee by way of compensation for loss of employment or in respect of a convenant entered into by the employee restraining his right to engage in similar employment after he leaves that particular employment is assessable.

(b) dividends paid, credited or distributed by a resident company in the basis year for a year of assessment are deemed to be derived from Malaysia.

(c) interest paid by a person resident for the basis year for a year of assessment on any money borrowed by that person and employed by him in the production of gross income derived from Malaysia is deemed to be derived from Malaysia.

(d) losses suffered in a business during the basis period for a year of assessment are deductible from income from any source for the basis period for that year of assessment. Such losses to the extent to which they have not been deducted from income from other sources may be carried forward but the amounts so carried forward may be deducted in subsequent years only from income from business sources;

(e) the total income of an individual and that of his wife are to be aggregated and charged to tax in the name of the husband in the following circumstances –
(i) where both were resident for the basis year for a year of assessment;
(ii) where both were not resident for the basis year and both were citizens of Malaysia at some time in that basis year;
(iii) where both were not resident for the basis year and neither was a citizen of Malaysia at any time in that basis year;
(iv) where the individual was resident for the basis year, his wife was not resident for that basis year but was a citizen of Malaysia at some time in that basis year;

(v) where the wife was resident for the basis year, the husband was not resident for that basis year but was a citizen of Malaysia at some time during that basis year.

(f) persons not resident in Malaysia engaged in sea and air transport undertakings are chargeable to tax in Malaysia on 5% of the gross freights derived from the carriage of passengers or cargoes embarked or loaded from any port or airport in Malaysia.

Where the country of which the person carrying on such a business is a resident, assesses the income of that person on a basis not materially different from that provided for under the Act as regards a person resident in Malaysia then his income chargeable to Malaysian tax will be taken to be a proportion of his world income calculated by reference to the ratio that the gross income derived from Malaysia bears to his world gross income.

(g) partnerships are not assessable as such; the individual partners are chargeable on the share of income from the partnership.

(h) the income of a person carrying on an insurance business is to be ascertained in accordance with separate formulae dependent on whether the insurer is a resident or non-resident carrying on life business, or a resident or non-resident carrying on general business. In every case the proceeds on disposal of assets held in connection with the business is taken into account in calculating the income under the appropriate formula. A company carrying on general business is only allowed a deduction of 95% of any re-insurance premiums paid to a re-insurer who does not carry on business of re-insuring risks in Malaysia. A non-resident general insurer may elect not to have a deduction for re-insurance premiums paid in which case recoveries on re-insurance contracts will be excluded for the purposes of the formula.

The reserves for unexpired risks have been fixed at 25% of gross premiums receivable in respect of aviation, marine or transit policies and 40% of gross premiums receivable in respect of other general policies.

(i) where any trustee of a trust is ordinarily resident in Malaysia, the trust is treated as ordinarily resident and the income of the trustees wherever derived from is chargeable to tax in Malaysia. A beneficiary of the trust is chargeable to tax on his entitlement in the income of the trust and the beneficiary's income from the Trust is deemed to be derived from Malaysia.

(j) the income of the executors of the estate of a deceased person from the sources of the estate is –

(i) where the deceased was domiciled in Malaysia at the time of his death and if any of the executors is resident in Malaysia, assessed as if it were the income of an unmarried individual ordinarily resident in Malaysia;

(ii) where the deceased was domiciled in Malaysia at the time of his death but none of his executors is resident in Malaysia, assessed as if it were the income of an unmarried individual resident but not ordinarily resident in Malaysia;

(iii) where the deceased was not domiciled in Malaysia at the time of his death, assessed as if it were the income of a non-resident individual.

Distributions (other than by way of annuities from the estate) are not chargeable to tax in the hands of the beneficiaries.

(k) the Inland Revenue Authorities have been given power to make assessments in advance of the year of assessment where –

(i) an individual is about to leave Malaysia; or

(ii) a person ceases to possess a source consisting of a business; or

(iii) where the accounts of a business have been made up to a date other than 31st December in the year preceding the year of assessment.

Assessments so made may be reviewed in the years of assessment for which the assessments were made or in a later year.

(l) where a person disputes an assessment made upon him an appeal may be made within one month from the service of the Notice of Assessment to the Special Commissioners of Income Tax made up of a Chairman and two Special Commissioners. The Special Commissioners hear all appeals at first instance. On an appeal being made the Inland Revenue Authorities may review the assessment and if agreement cannot be reached with the appellant the case is set down for hearing by the Special Commissioners. From the Special Commissioners, appeal lies to the High Court and from thence to the higher appellate bodies;

(m) tax is due and payable on the service of the Notice of Assessment notwithstanding that an appeal has been made against the assessment. A penalty of 10% of the tax will be imposed if tax is not paid within one month of the service of the notice.

(n) where a company resident in Malaysia pays, credits or distributes a dividend, tax is to be deducted from the dividend at the rate at which the company's profits are chargeable. Where, however, tax paid on the profits of the company exceeds the tax to be deducted from dividends paid, credited or distributed, a set off is allowed and no payment needs to be made to the Inland Revenue Authorities for the tax deductible. In the converse case, the excess of the tax deducted over tax paid on the profits is payable to the Revenue Authorities as a debt due to the Government.

(o) where any interest derived from Malaysia is paid to a person who is not resident or who does not have a place of business in Malaysia, tax at the rate applicable to non-residents must be deducted from the interest at the time of payment. The tax so deducted is to be paid to the Revenue within one month. Failure to do so will render the person paying the interest liable to the full amount of the tax which ought to have been paid as well as a penalty equal to 10% of the tax. Furthermore, the interest on which tax deductible has not been so paid will not be allowed as a deduction in computing the income of the person paying the interest.

(p) tax deducted from a dividend or interest received by a person is allowed as a set off against the tax payable by him for the year of assessment for which such dividend or interest is chargeable.

(q) where income derived from outside Malaysia is chargeable to tax in Malaysia, relief for any foreign tax suffered will be allowed against the tax chargeable in Malaysia on such income either in accordance with the terms of the double taxation agreement concluded between Malaysia and the country from which the income was derived or, where there is no double taxation agreement with that country, unilaterally at the rate of one-half of the tax paid in that other country.

(r) the penalty provisions have been enhanced in the Income Tax Act, 1967. These include –

(i) a penalty equal to 3 times the amount of tax chargeable for a year of assessment where a taxpayer fails to submit his return of income within the time allowed to him to do so;

(ii) a penalty equal to the amount of the tax payable on any income omitted from a return;

(iii) a penalty equal to 3 times the amount of the tax chargeable on any income which has been omitted wilfully and with intent to evade tax, as well as a fine not exceeding M$10,000 or to imprisonment for a term not exceeding 3 years or to both such fine and imprisonment.

The penalties referred to in (i) and (ii) above may be imposed by the Inland Revenue Authorities in lieu of instituting any legal proceedings for the offence committed.

(s) in order to counter efforts at legal avoidance, the Inland Revenue Authorities where they have reason to believe that any transaction has the direct or indirect effect of –

(i) altering the incidence of tax which is payable by any person; or

(ii) relieving any person from any liability to pay tax or to make a return; or

(iii) evading or avoiding any duty or liability imposed on any person by the Act; or

(iv) hindering or preventing the operation of the Act in any respect,

may disregard or vary the transaction or make such adjustments as they consider fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction and make such assessment or additional assessment as may be appropriate in accordance with the variation made.

Transactions made between persons one of whom has control over the other or between individuals who are related to each other or between persons both of whom are controlled by some other person are deemed to be transactions falling within the above categories if, in the opinion of the Revenue Authorities, those transactions have not been made on terms which might fairly be expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length.

(t) the Act prohibits any person who holds himself out as an accountant, a tax consultant or a tax advisor to act in Malaysia on behalf of any person for any of the purposes of the Act unless he falls within one of the following categories –

(i) a professional accountant authorised in Malaysia to be an auditor of companies; or

(ii) any other professional accountant approved for the purposes of the Act by the Minister; or

(iii) any other person approved for the purposes of the Act by the Minister on the recommendation of the Inland Revenue Authorities.

INVESTMENT INCENTIVES ACT, 1968

18. As a follow up to the Income Tax Act, 1967, the legislation existing in West Malaysia, Sabah and Sarawak for promoting industrial and manufacturing industries (commonly referred to as the "Pioneer Ordinances") were substituted by the Investment Incentives Act, 1968, which come into effect from 1st January, 1968. The Act applies throughout Malaysia and in

addition to re-enacting, with modifications and improvements, the provisions of the repealed Pioneer Ordinances, with respect to pioneer industries and tax relief periods –

(a) makes provision for the extension of tax relief periods from the previous maximum of 5 years to 8 years where,
(i) the pioneer factory is situated in an area declared to be a development area;
(ii) the company manufactures priority products; and
(iii) a specified percentage of local content is incorporated in the product;
(b) introduces an Investment Tax Credit as an incentive to enterprises which would not obtain much benefit by being declared a pioneer enterprise; this takes the form of an allowance on capital expenditure incurred at a rate of not less than 25% over and above the depreciation allowances otherwise due; the rate may be increased by a further 15% where the conditions referred to in (a) above are satisfied;
(c) seeks to encourage exports of manufactured products by –
(i) allowing certain expenses to be deducted twice in calculating the income of the exporter;
(ii) granting an export allowance calculated by reference to the ratio –

$$\frac{20\% \text{ of specified expenses} \times \text{increase in exports}}{\text{Total turnover}}$$

(iii) permitting depreciation allowances to be calculated at the rate of 40% on expenditure incurred in modernising the techniques of production; and
(iv) giving a refund of a proportion of the payroll tax paid by reference to the ratio that the value of exports bears to the total sales.

DR. ROCHMAT SOEMITRO S.H.*:

INVESTMENT OF FOREIGN CAPITAL IN INDONESIA

This article is designed as a brief but informative explanation of matters relating to foreign capital investment in Indonesia and current government policy towards it. It will be useful not only for prospective investors or investors whose interest has been renewed by the recent economic development in Indonesia, but also for intellectuals who are interested in the study of Indonesian affairs, including taxation.

Realizing that economic development requires the transformation of potential economic resources into actual economic strength, through capital investment and utilization of technology, expanded know-how and greater efficiency, and that the principle, that economic growth and development should be based on the capability and willingness of the Indonesian people themselves should not lead to reluctance in making use of foreign capital, technology and skills for the benefit of the national economy, without creating dependence on foreign countries, the Indonesian Government in 1966 and 1967 has given two clear signals of a new direction in policy affecting foreign investment based on the Cabinet Presidium Instruction no. 09/U/IN/2/1967 and on the Instruction of the Presidium Minister for Economy and Finance no. IN/024/MEKKU/IV/1967. The Government of Indonesia has invited negotiations aimed at the return of nationalized enterprises to their former owners, and in addition a new law has been adopted offering incentives to encourage foreign capital investment (Law. no. 1/1967 on Investment of foreign capital).

RESTORATION OF FOREIGN ENTERPRISES

Negotiations for the return of enterprises previously taken over have been opened with many firms; some have resulted in agreements for the return of assets, some are still in progress. The Instruction of the Presidium Minister for Economy and Finance No. IN/024/Mekku/IV/1967 holds provisions as follows.

A. Enterprises taken under Government control

During the negotiations with the owners of foreign estate plantation enterprises taken under Government control, the following stipulations should be taken as a guide.

1. An offer should be made to pay first the instalments falling due in 1966 in Rupiahs, which can only be transferred by D.P. Account (Complementary exchange, see below).
2. Irrespective of whether the owners of estates/plantations are prepared to accept the instalments referred to above, an offer should be made *to restore their* estates/plantations to them.
3. If the owners are prepared to accept the restoration of their estates/plantations, the purchase contract shall be annulled and the estate/plantation returned, in several phases where considered necessary. In this case the owners:

a) are to be granted operating permits for a period of 30 years, if the old permit has not yet expired and the owner is prepared to undertake rehabilitation and a concrete replanting programme;

b) are to be granted operating permits for a period of 15 years, if the owners are not prepared to undertake rehabilitation and a replanting programme.

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4. If the owner is not prepared to accept the restoration of his estate/plantation, payment of the remainder of the purchase price is to be rescheduled as follows:
a) payments are to be recommenced in 1972;
b) payments are to be effected in at least 8 annual instalments, due on January 1st each year;
c) interest is payable on the unpaid portions of the purchase price, calculated at the rate of 20% per annum and payable on January 1st each year.

B. Estates/plantations not yet purchased
1. Are to be restored to their owners in the form of a joint enterprise with the Government;
2. Are to be granted operating permits for a period of 30 years, if the old permit has not yet expired and the owners are prepared to undertake rehabilitation and a concrete replanting programme;
3. Are to be granted operating permits for only 15 years if the owner is not prepared to undertake rehabilitation and a replanting programme;
4. If the owner is not prepared to accept the return of his estate/plantations the said estate/plantation shall be considered to be the property of the Government, and the owner shall be given compensation, the payment of which is to be effected as follows:
a) payments shall be made annually on January 1st beginning on January 1st 1972;
b) payments are to be effected in at least 8 annual instalments;
c) interest is payable on the unpaid portions of the price, calculated at the rate of 2% per annum, and payable on January 1st each year.

The Minister of Finance is entitled to grant transfer opportunities to foreign enterprises formerly taken under control by the Government, after their restoration to their original owners, under the following conditions:
1. Transfer of profits, after reduction for taxes, is limited to 50% for a period of 3 years; thereafter the full amount may be transferred;
2. Social transfers are to be granted in keeping with the current general regulations;
3. Transfers for repatriation of *new capital* brought in for investment, in the context of rehabilitation and expansion of the enterprise, are to be granted in keeping with stipulations applicable to foreign investment based upon the Foreign Investment Law (Law no. 1, 1967);
4. a) Transfers of the proceeds from the sale of assets of foreign enterprises that cease their operation are to be permitted as from 1972 at the rate of one-fifth of the said proceeds per year, under guarantee as to their value in foreign currency;
b) Transfer of the proceeds from the sale of the assets of foreign enterprises whose period of operation has expired or whose operations have been stopped by the Government, are allowed at the rate of one-fifth of the said proceeds per annum beginning from the time of sale of assets, under guarantee as to the value of the proceeds in foreign currency.
The rate of Exchange applicable to the transfers referred to above is that of the B.E. (Bonus Export) which is fixed by the Indonesian State Bank Unit I.
New capital in foreign currency brought in by foreign enterprises after their restoration to their original owners in the context of rehabilitation and the expansion of the said enterprises, is treated as capital that may be granted tax holidays with the stipulations that:
a) the restriction that the capital must amount to at least US $2.5 million be disregarded;

b) the length of time for the tax holiday be limited to 3 years.
Furthermore the Minister of Finance may grant an extension of time for payment of taxes still owing at the time the said enterprises were restored to their original owners of such a nature that the unpaid taxes shall be paid in full by one year at the latest after the said enterprises were restored.

FOREIGN CAPITAL INVESTMENT

Foreign Capital Investment relates only to direct investment of foreign capital made in accordance with or based upon the provisions of the Law on Investment of Foreign Capital" (Law no. 1/1967) for the purpose of establishing enterprises in Indonesia, with the understanding that the owner of the capital directly bears the risk of the investment (art. 1). The term foreign capital (art. 2) in this law covers:
a) foreign exchange which does not form a part of the foreign exchange resources of Indonesia and which with the approval of the Government, is utilized for financing an enterprise in Indonesia;
b) equipment for an undertaking, including rights to technological developments and materials imported into Indonesia, provided that said equipment is not financed from Indonesian foreign exchange resources;
c) that part of the profits, which in accordance with this law are permitted to be transferred, is reinvested in Indonesia.

LEGAL FORM AND DOMICILE OF THE ENTERPRISE

An enterprise which is operated wholly or for the most part in Indonesia as a separate business unit must be a legal entity organized according to Indonesian law, and have its domicile in Indonesia. The Government shall determine whether an enterprise is operated entirely or for the most part in Indonesia as a separate business unit (art. 3). In effect the Government is given discretion to determine whether an enterprise will be required to organize as a legal entity organized under Indonesian Law.
Recognizing the legitimate desire of certain enterprises to carry on their operations in Indonesia as corporations organized under the laws of other (foreign) countries or in the case of the United States, under the laws of one of the several states, the government of Indonesia has arrived at a flexible policy in the application of the above-mentioned provision.
Generally this policy permits the government of Indonesia to look at the total international activities of a firm considering placing a project in Indonesia, and to decide upon examination of its total enterprise whether or not it should be regarded as an enterprise carried on wholly or for the most part in Indonesia.
This means, for example, that a bank with an international business located in many parts of the world and a substantial home office banking enterprise would be permitted to establish a branch office in Djakarta without the necessity to organize the Corporation under Indonesian law.
As an other example, a mining or oil and gas producing company with an international set of activities might undertake exploration and production work in Indonesia on a scale which, although substantial, would be secondary to its overall international operation. It also would be permitted to operate as a corporation organized under laws of any other (foreign) country whose content does not raise special problems for the government of Indonesia.
As a safeguard to this flexibility, however, the Government of Indonesia can be expected to make certain requirements of investors electing to do business through cor-

porations not organized under the laws of Indonesia. At present the laws of Indonesia on the subject of organization of Companies are the same as the Dutch Commercial Code as it existed prior to the Independence Day of August 17, 1945, as modified by official acts since that time. These laws do not contain a procedure for the registration or qualification of foreign corporations.

In order to furnish appropriate protection to citizens of Indonesia dealing with a foreign corporation, it is probable that the foreign corporation may be required to enter into binding commitments as follows:

1. To recognize Indonesia as the place of its domicile;
2. To appoint a registered agent in Indonesia, to maintain a registered office in Indonesia, and to file annual reports with the Ministry of Justice; and
3. To acknowledge that its business activities in Indonesia are governed by Indonesian law, and that if it fails to maintain an agent at the office last reported to the Ministry of Justice, it can be served with notice of legal proceedings by the mailing of notice of the suit to the last address it has given.

OPERATING AREA

The fields of operation (art. 4 and 6) in which foreign capital can operate within Indonesia are to be determined by the Government of Indonesia, in accordance with national and regional development plans taking into consideration national as well as regional economic development, the kind of enterprise, the amount of capital to be invested and the desires of the investor.

Fields of activity which are closed to foreign capital investment *exercising full control* are those of importance to the country and upon which depend the daily necessities of the people, as follows:

a. harbours;
b. production, transmission and distribution of electric power to the public;
c. telecommunication;
d. shipping;
e. aviation;
f. drinking water;
g. public railways;
h. development of atomic energy;
i. mass media.

Industries which fulfil a vital function in National defence, such as the production of arms, ammunition, explosives and war equipment, are *entirely closed* to foreign capital investment. There is considerably more flexibility in this provision (art. 6) than at first appears. The important feature of article 6 (1) apart from the major inference, that fields of operation *not listed* are fully open to foreign investment, is the fact that *even in these listed fields*, which deal with meeting the daily needs of the people, foreign capital *is invited to participate* provided this is done on an acceptable basis, to be worked out in the development of the meaning of the term "full control".

The basis on which foreign participation might become acceptable is not intended to be limited to a basis which involves the enlistment of local capital.

Foreign capital obviously is "*not in full control*" of an enterprise if some domestic capital is involved, and the use of local capital, to an extent to be determined in each case, will qualify an enterprise for participation in one of the listed fields of operation. In addition however, if the government of Indonesia has some other form of control, this may make the plan acceptable. For example, if the arrangements under which the enterprise is put into operation involve the establishment of controls by the Indonesian government to assure the public in Indonesia, that the cost and quality of the service to be provided will be regulat-

ed in the public interest, the government of Indonesia may be prepared to permit all of the capital investment to be made by foreign capital. Other acceptable arrangements might also be worked out in the form of sale and the leasing back of plant and equipment, by management agreement involving a sharing of profit with a governmental body, or by sharing ownership between the foreign investor and a unit of government through recognition of the contribution of land, franchises or other right as a contribution of capital which would create a joint enterprise.

Investment of foreign capital in the field of mining, (in the sense of activities concerned with oil and gas) shall be carried out in co-operation with the Government on the basis of a "work-contract" or some other form of co-operation in accordance with valid and subsisting regulations (art. 8).

PRIORITY FOR FOREIGN CAPITAL INVESTMENT

By decree of the Cabinet Presidium no. 06/EK/IN/1/1967 some direction for the priority of foreign capital investment has been laid down.

In accordance with the order of priorities in the framework of the Government's economic policy for economic stabilization and rehabilitation, the priorities for foreign capital investment are stipulated as follows:

1. Foreign capital investment which may increase foreign exchange earnings for the State (for example: mining, export of agricultural products, tourism, processing industry for export, etc:)
2. Foreign capital investment which may assist in lessening the importation of certain goods, materials and services.
3. Foreign capital investment, which, though it does not increase foreign exchange earnings for the State or noticeably lessen importing, still-
   a) yields quick returns, for instance, in less than two years,
   b) may (noticeably) increase employment opportunities,
   c) may introduce technology or new working procedures, which may increase the productivity in that sector of production, and
   d) may bring modern equipment which may increase working effectiveness or cut down production cost.

MANPOWER

The owner of foreign capital has full authority to appoint the management of the enterprise in which his capital is invested (art. 9).

However, a principal concern of the government of Indonesia is that Indonesian manpower be used and developed at a constructive rate.

There are no fixed requirements on this subject, but it is clear both in the law and in the policies of the Ministry concerned that companies will be expected to demonstrate an intention to employ Indonesian manpower to the maximum extent feasible under the circumstances, and to undertake a reasonable program of training and development, so that Indonesian staff will develop and progress to higher levels of responsibility.

Foreign capital enterprises are allowed to assign foreign managerial and technical employees to positions which cannot yet be filled by Indonesian nationals.

The policy of the foreign investment law is to permit foreign enterprises to employ foreign technicians and other manpower to the extent necessary under to-day's circumstances, with the understanding that in due course reasonable progress will be made in the training and introduction of Indone-

sian members to the staff at all levels. Recognizing the desirability of encouraging new projects and giving them a free hand in getting started, it is unlikely that the government will make severe demands on this score in the early years of operation.

However, the underlying desire to improve the role of Indonesian manpower is a strong one, fortunately coinciding with the policies of most companies with extensive international experience. A law adopted in 1958 concerning the employment and placement of foreigners is still in effect, subject only to modifications brought about by the foreign investment law. The effect of this 1958 law is to require every foreigner working in Indonesia to have a work permit. These work permits are only issued after a review by the Department concerned with the project involved, and by the Department of Manpower and the Department of Justice. This review is to determine whether the foreigner in question is going to undertake work for which Indonesians are in fact unavailable at the present time and to determine whether the individual represents any security risk to the country.

TAXATION OF FOREIGN INVESTMENT

Investors willing to invest a minimum of $2.5 million during the first two years of the project's life, whose enterprise either increases foreign exchange earnings for Indonesia or saves foreign exchange by import substitution, may be granted exemptions from corporate and dividend taxes for three years.

Foreign investors willing to invest a minimum of $ 2.5 million during the first two years, but whose investment does not earn or save foreign exchange, may be granted exemptions from corporate and dividend taxes for two years. For foreign capital invested outside of Java or foreign capital investment in Java, which require large capital or which face unusually great risks, additional exemption from corporate tax and dividend tax may be granted for one year.

Reliefs from corporate tax after the period of the tax exemption shall be further regulated (Article 3, 4 and 6 decree of the Cabinet Presidium No. 06/EK/IN/1/1967).

Enterprises undertaking projects in Indonesia are subject to a range of different taxes. Although there are taxes on company income (corporate tax) and individual income (income tax), the government also relies on other forms of direct and indirect taxes, and careful attention must be paid to all forms of tax in order to evaluate any proposed operation.

In addition to the tax on incomes of companies and individuals, the tax structure of Indonesia includes the following taxes; a sales tax; stamp duties; motor vehicle tax, transfer tax, property tax, land tax, etc.;

There may also be local and regional taxes.

Income taxation is based on variable, progressive rates. The Company tax (or corporate tax) rates are set by law, contained in a law which has been in effect since 1925 but amended frequently since that time.

Personal income taxation is based on a 1944 law which has also been frequently amended.

Indonesia is carrying out a transition to a withholding tax system for individual tax payers, and self-assessment of tax (M.P.S. and M.P.O.) by individuals as well as by companies or corporations.

In approaching the taxation of foreign individuals, Indonesia treats them as taxable non-residents if they work in Indonesia for three months or more and as residents if they stay for more than twelve months. Non-residents, individuals as well as companies, are taxable on their incomes derived from sources within Indonesia. Resident taxpayers are taxed on all income from all

sources, irrespective the location of the source.

Resident taxpayers are given credit for income tax or corporate tax paid to other countries, but only at the Indonesian rates at which the same income would have been taxed if earned in Indonesia. The concept of tax-free *reorganization* is recognized under Indonesian law, and there is a distinction between *ordinary income* and *capital gain*. The holding period to achieve capital gain treatment is six months on all property except real estate; for real estate it is 12 months. Capital assets sold short of this holding period are subject to taxation on the gain as if it were ordinary income. Profits on sale or exchange of assets beyond the required period are not treated as income to individuals but are taxed to companies. Special rules apply to the sale of shares of a business after holding for six months; if the seller owns less than 25% of the shares, he is subject to *no tax* on the gain. If he owns more than 25%, the gain on sales of shares is taxed as liquidation at a flat rate of 10%. If he sells shares after holding them for less than six months, the gain is subject to tax as ordinary income.

In addition to normal income tax or corporate tax practice which is affected in several respects by the foreign investment law, as described earlier, articles 15 and 16 of the law (Law no. 1/1967) grant special *exemption* and *reductions* from taxes.

Foreign capital enterprises are granted the following exemptions or reductions concerning taxes and other levies:—

A. EXEMPTION FROM:

1. corporation tax on profits during a specified period not exceeding five years from the time the enterprise starts production;
2. dividend tax on that part of accrued profits paid to shareholders, as long as these profits are earned during a period not exceeding five years from the time the enterprise starts production;
3. corporation tax on profits (referred to in article 19 paragraph a) which are *reinvested* in the enterprise in Indonesia, for a specified period not exceeding five years from the time of investment;
4. import duties at the time of entry of basic equipment and materials into Indonesia, such as machinery-supplies and equipment needed for the operation of said enterprise; and
5. capital stamp-tax on the movement of capital originating from foreign capital investment.

B. REDUCTIONS:

1. of Corporation tax through a proportional rate of not more than 50% for a period not exceeding five years after expiration of the exemption period as specified in paragraph A sub 1 above;
2. by carrying-forward losses during the period of exemption referred to in paragraph A sub 1, against the profits subject to tax following the period mentioned above; and
3. by allowing accelerated depreciation of fixed assets.

The implementation of the exemption from import duties, referred to in paragraph A sub 4 above, has been set forth by decree of the Minister of Finance no. 156/MENKEU/67.

Entrepreneurs who have acquired a permit from the Chairman of the Presidium to establish an enterprise in Indonesia in the framework of foreign capital investment, are granted exemption from import duties on:

a) machines, machine units, tools or appliances and their parts as equipment of the enterprise concerned;
b) raw materials, semi-finished and finished

goods to be processed in the enterprise concerned during a period not exceeding two years, if necessary this period may be prolonged;
c) all kinds and means of transport to be used in the enterprise concerned for transportation of goods;
d) personal effects belonging to foreign personnel assigned to the enterprise concerned, in so far as these goods are second-hand; and
e) on clothes, food stuffs and other consumer goods up to a value of US $50.— f.o.b. per person or US $100.— f.o.b. per family per month, for foreign personnel assigned to the enterprise concerned.
At the request of the enterprise concerned, het Minister of Finance may also grant exemption from import duties on:
a) office equipment, furniture and motor vehicles for transportation of personnel, except sedan-cars, to be used for the enterprise concerned; and
b) construction and building materials and other materials for building factories, offices, housing for personnel, schools, hospitals and houses of worship, all for the enterprise concerned.

RIGHT OF TRANSFER, REPATRIATION

Foreign capital enterprises shall be granted the right of transfer in the original currency of the invested capital, at the prevailing exchange rate for:
a) accrued profits after subtraction of taxes and other financial obligations in Indonesia;
b) costs related to the employment of foreign personnel working in Indonesia,
c) other costs to be determined in due course;
d) depreciation of capital assets; and
e) compensation in case of nationalization (article 19 Law no. 1/1967).
All transfers into Indonesia and abroad shall be carried out on the basis of the rate effective for the largest import volume.
For transfer abroad, Export Bonus should be bought by the interested party himself. To enable transfers for services to be made, the Export Bonus system should be appropriately adjusted.
Cash foreign exchange, if desired, may be kept in a foreign currency account at the foreign exchange bank in Indonesia. If needed, it can be spent to buy goods or services from abroad or converted into rupiah to pay domestic costs.
The transfer of profit and dividends is not limited, except that transfers which are in the nature of repatriation of capital are not permitted, during the time in which relief from taxes and other levies remains in effect (Article 20 Law no. 1/1967).
Each application for such transfer must be denoted in Rupiahs, and shall be submitted together with:
a) the balance sheet and profit and loss statement for the year concerned, including all data on the nature of the foreign capital, these annual statements shall be submitted to the B.L.L.D (Bureau of Foreign Exchange) preferably after verification by an authorised accountant;
b) a statement from the taxation office, declaring that corporation tax has been paid, or a similar declaration from the state's revenue office, or a tax exemption declaration from the Department of Finance in case said enterprise is granted a tax exemption as described in article 15 of Law No. 1/1967 on Foreign Capital Investment; and
c) specification of the profit covering the calendar year (January 1-December 31) or other period of 12 subsequent months.
The transfer of a part of depreciation funds, if not intended as a permanent repatriation of capital, can be authorized, after discussions concerning the need for this. A permit for

transfer for this purpose may be given after hearing the advice of the Foreign Capital Investment Council (about this, see below).
Transfers for paying various elements of cost such as salaries of foreign employees employed in Indonesia, insurance premiums, interest, patent royalties, and others, in general are not limited as long as they are properly calculated. Social transfers for foreign personnel which are permitted by the B.L.L.D. shall not exceed the amount of 20% of the taxable salary last earned abroad, up to a maximum of US $400.— per month (all inclusive, thus without any additional amounts for leave allowance, insurance premiums, pensions etc) whereas foreign exchange obtainable for travelling expenses on home leave is restricted to once in every two years. These social transfers will only be approved for foreign personnel who are in possession of the required working permit from the Department of Manpower.
Transfers for Indonesian personnel abroad borne by the foreign enterprise concerned, shall be permitted with the regulations for government officials as guide lines. Applications for transfer referred to above may be submitted annually to the B.L.L.D. stating the monthly or annual amounts to be transferred.
Transfers for patents, copyrights, royalties and survey fees, management fees etc. must be approved first by the Government Foreign Capital Investment Board (see later) and/or the Department Concerned, and the B.L.L.D.
Transfers of depreciation on Capital assets have to be approved first by the Foreign Capital Investment Council.

FOREIGN CAPITAL INVESTMENT COUNCIL

The F.C.I.C. consists of a chairman (who is the chairman of the Cabinet Presidium) nine members who are all ministers in the economic, financial banking and industrial sector, and there is a secretary in charge. The F.C.I.C. is in charge of submitting recommendations to the Government via the Council for Stabilization of National Economy on the implementation of the Law on Investment of Foreign Capital concerning:
a) formulation of implementing regulation of the Law on Investment of Foreign Capital;
b) recommendations for approval or rejection of applications to invest foreign capital in Indonesia; and
c) advice on matters relating to the granting of permits concerning taxation, transfers and changes of status of foreign capital enterprises, and the like.
This group, in fact the advisory body, is responsible for formulating and executing the policies of the law, for recommending whether or not particular investments are to be permitted, and for recommending action on matters, concerning permits, affecting taxes, currency transfers, the status of foreign companies and other matters, in all of which it is responsible to the Chairman.
The Foreign Capital Investment Council (F.C.I.C.) in performing its tasks is assisted by the Foreign Capital Investment Board (F.C.I.B) (Commonly known under the name of Technical Team) which is in charge of:
a) assistance in preparing recommendations for the Foreign Capital Investment Council;
b) administrative work regarding the applications for foreign capital investment; and
c) contact and coordination with, as well as supervision of the work at the Department level in connection with the implementation of the Law of Foreign Capital Investment (art. 3 and 4 Decree of the Cabinet Presidium no. 17/EK/Kep/1/1967).
The daily work of the Foreign Capital In-

vestment Board is performed by a Secretariat headed by the Secretary of the F.C.I.B. who is assisted by the vice-secretary of the Board.

In general the Technical Team (F.C.I.B.) acts as the source of information and staff advice for the Government in handling foreign private investment, and as expediters and problem solvers in an active and pragmatic sense. As a result, the Team, its Chairman, its individual members and its secretariat hold themselves genuinely available to investors for any reasonable assistance.

It is the responsibility of the Technical Team to assist and prepare recommendations for the advisory body (F.C.I.C.), receive and administer the formal applications for permits under the Foreign Investment Law, and to coordinate, assist and expedite the action of the various Ministries concerned with foreign capital investment. The Ministries have also organized internal committees to deal with foreign investment matters. In performing its task the F.C.I.B. is responsible to the Chairman of the F.C.I.C. and in performing its task the F.C.I.C. is subject to the guidance and instruction issued by the Government/the Cabinet Presidium.

PROCEDURE

In general the procedure for an application under the Foreign Investment Law is to apply in the first instance to the Ministry concerned with the kind of project to be undertaken. The Ministry in turn seeks the assistance of the Technical Team and these two units develop the recommendation which is eventually submitted to the Chairman and the F.C.I.C. for final disposition. When the approval of the Chairman and the Council is obtained, the Minister concerned is then authorized to execute the agreement or permit on behalf of the Government. Letters of intent and memoranda of agreement may also be used as preliminary and non-binding indications of mutual intention to proceed to an agreement in principle. These documents may be used before a full and final application has been submitted, in order to give the would be investor time to prepare his project, including further studies and surveys. They could be signed by the Secretary General of the Ministry or the responsible Director General, usually after consultation with the Technical Team.

The procedure in the fields of mining and oil and gas may be somewhat different, and certain agreements in the field of oil and gas development may require the approval of Parliament. Investors should examine with care the provision of Law No. 44 (oil and gas) and No. 37 (mining) in order to assure themselves that they have proceeded correctly in working out investment in this field.

FOREIGN EXCHANGE AND TRADE CONTROLS

Indonesian currency is the Rupiah. Its international value has fluctuated in recent months between 300 and 350 to the US $. The foreign exchange control of Indonesia is somewhat complex, but has recently been simplified by a series of government actions. The central concept is the movement away from multiple rates toward a concentration on the rates determined under the Bonus Export, or BE system, but multiple rates do still exist.

Under the Bonus Export system, exporters from Indonesia may earn freely transferable 90-day certificates known as "BE" as the result of export sales to any currency markets. Articles for export are now divided into two categories, and the category determines the percentage of export proceeds which the exporter actually received in BE.

Official net f.o.b. values are established for all articles in the first category (A), for the purpose of computations under the BE system. This category contains the most common and saleable Indonesian exports, covering about 80% of all export sales. Since July 28, 1967 the seller of class A articles receives BE certificates valued at 75% of the net export value of his goods, and he is required to turn in to the Central Bank the balance of the proceeds of the sale up to the official value. Examples of goods in this first category are rubber, coffee, and palm oil.

The second category, B, permits the exporter to keep 90% of the net f.o.b. value in BE and turn in 10%. A third category used to exist, but was abolished on July 28, 1967. In both of the categories – A and B – 10% of the value is allotted to the regional government (A.D.O.); in category A the remaining 15% is retained by the Central Government. Any excess of realized price over the net f.o.b. values can be retained by the exporter in a so called DP account (complementary exchange). This is good for transactions in the same currency in which it was earned. The net f.o.b. values are determined by deducting the normal export commission from the f.o.b. Indonesia value. The principal distinction between BE and DP is that DP may be used for virtually any purpose whereas BE may only be used for the purchase of specified imports. The specified list is fairly broad, but it is not all inclusive, and in particular excludes luxuries.

A number of banks are now permitted to carry on foreign exchange operations. At the present time several foreign banks have applied for permission to operate as foreign exchange banks, and it appears likely that they will receive this permission.

Import procedures have also been simplified. A rate of 280 Rupiah to the Dollar has been determined to govern import duty calculations. The availability of BE arising out of government credits has been improved for importers by permitting all banks to participate in financing import through BE credits. Import duties fall in four categories, with duties on essential goods at 0%, on most items at 20% and on less essential goods or luxury items at rates up to 100% or more, including surcharges and excess profit taxes on some items. Approved foreign investments are exempt from customs duties, on original plant and equipment, on spare parts and on raw materials needed for the first two years.

DEBT INVESTMENT CONVERSION SCHEME (DICS)

These are for the settlement of foreign debts, which are not guaranteed by a Foreign Government; as to the methods of settling them, Indonesia needs to reach an agreement with Creditors, that will be satisfactory to both parties. By Cabinet Presidium Instruction no. 28/EK/IN/5/1967, the Governor of the Indonesian Central Bank is authorised to reach a settlement with the appropriate foreign private creditor on the following basis:

I. To convert the claims of Creditors into Investments of foreign Capital for economic development under the scheme to be known as the Debt Investment Conversion Scheme (Dics);

II. The Central Bank is to pay the said foreign debt in Rupiahs with the special name "DICS Rupiahs" at the exchange rate fixed in the Context of the Foreign Investment Law (Law No. 1, 1967);

III. For payments effected in keeping with the Conditions of "II" above, the Government will make State Treasury Notes available to the Central Bank bearing interest of 3 per cent per annum and falling due at a

time in conformity with the rescheduling conditions reached in the Paris agreement; and

IV. DICS Rupiahs will be administered in the name of the Creditor by the Central Bank and may be used only for investments in projects or other development undertakings endorsed by the Government. Projects constructed by this means will be the equivalent of the foreign investments referred to in the Foreign Investment Law (Law No. 1, 1967).

The Central Bank is to establish implementing regulations for the DICS referred to, after seeking and heeding the considered opinions of the Foreign Investment Technical Team.

By decision of the Directors of the Indonesian State Bank/Central Bank no. 3/29 KEP/DIR 6th September 1967, the following regulations have been decided.

A. 1. Creditors who are desirous of settling their claims on the basis of DICS, should make a statement in writing to the Central Bank as to:

a) their desire to convert their claim into DICS-Rupiahs;

b) the amount of their claim that they wish converted into DICS-Rupiahs;

c) the time at which they desire the conversion mentioned in clause 1b above to be made;

2. Claims converted into DICS-Rupiahs will be administered through a DICS-Rupiah account in the name of the owner with the Indonesian State Bank (B.N.I.) Unit I;

3. The request for the conversion and the opening of a DICS-Rupiah account should be accompanied by:

a) The return of the documents proving the claim (bill of exchange, acceptance, promissory note or other documents);

b) Samples of signatures of persons entitled to make withdrawals against the DICS-Rupiah account;

4. Claims or parts of claims convertible into DICS-Rupiahs are, in principle, confined to claims or parts thereof which have already become due.

5. At the moment that the conversion to DICS-Rupiahs is effected, the foreign currency debt to the foreign creditor is deemed discharged.

6. Conversion into DICS-Rupiahs is to be made on the basis of the B.E. (Export Bonus) exchange rate in Djakarta.

B. 1. DICS-Rupiahs may change hands on the basis of direct agreement between the owner and purchaser.

2. DICS-Rupiahs may not be transferred to or used by firms or individuals who have a special agreement with the Indonesian Government for a rate exchange differing from that of the B.E. rate on the open market.

3. Purchasers may make use of their DICS-Rupiahs in conformity with the provisions of this regulation.

C. 1. DICS-Rupiahs may be used:

a) for investing in Indonesia through financing the establishment of a new enterprise or through participating in an existing enterprise;

b) as working capital for the enterprises referred to in C1 above;

c) for converting to B.E., D.P., or other evidence of the ownership of foreign exchange for special use in importing equipment, raw materials and other materials needed for setting up and running the enterprises referred to above.

2. Proof must be submitted to the Central Bank that the price for the goods so imported is a proper price on the international market at the time concerned.

3. Agreement must first be obtained from the Foreign Investment Council as to the

field of enterprise in which it is desired to invest DICS-Rupiahs.

In submitting a request for such agreement the following information at least must accompany the request:

a) the field of enterprise (agriculture, industry, mining etc.);

b) estimates of the size of the investment;

c) estimates of the extent of the import components needed to set up the enterprise; and

d) estimates of the extent of annual imports needed to run the enterprise.

All the provisions of the Foreign Investment Law concerning the right to transfer profits, the repatriation of capital and other privileges apply to DICS-Rupiahs invested in Indonesia. DICS-Rupiahs owned by national businessmen or enterprises may be used for purposes other than investment under the condition that the right to transfer profits, the repatriation of capital and other privileges attaching to foreign investments are no longer applicable.

LAND HOLDING

The government owns various tracts of land which it is in a position to offer foreign companies for use in desirable projects at concessional cost. Procedures exist now for offering industrial sites at 50% of market price, and consideration is being given to other bases under the broad authority of the new investment law. Local authorities have a significant voice in decisions of this kind and, in the case of Djakarta, local land use planning must be given recognition. There is a land use map and a comprehensive plan for the development of Djakarta which designates certain districts for industry, commerce and residence. Other portions of Indonesia do not as yet have such plans, but local authorities must nevertheless be consulted in connection with the location of industrial operations.

Housing is difficult to obtain in Djakarta at the present time. There is an excellent hotel. Foreigners should anticipate that houses and office space may be offered on a basis, which has become customary in Indonesia, of rental with up to five years' rent payable in advance, in dollars.

The land law of Indonesia is very different from that of common law countries such as the United States and Great Britain, but will be more familiar to Dutch and other European countries. It does not recognize a concept of full ownership, but rather divides the rights of land owner into separate elements which may be separately held and regulated. The primary rights are called: the right of ownership, the right of exploitation, the right of building, and the right of use. A subordinate set of rights is also identified and regulated, including the right to lease land for building, the right of opening up land and of collecting forest products, the right of using water and of breeding and catching fish, the right of using air space and the rights on land for religious and social purposes.

The approach taken by Indonesia is to offer foreign investors only those rights in land which seem to be essential for the purposes of different categories of land user. For example the most extensive set of rights – the right of "ownership", is a hereditary right, the strongest and fullest right one can have in land, which can only be possessed by a citizen of Indonesia.

Until the passage of the foreign investment law foreign companies could only enjoy the right of use, and were not entitled to receive the right of exploitation or the right of building. The Foreign Investment Law of 1967 changed this, however, and all right in land may under suitable circumstances be offered to foreign companies except for the

right of ownership.
The ownership of land and the tracing of title to the various rights which may be obtained in land is handled under two separate sets of concepts. Some land in the more developed areas is under a system of registration, which is intended to make it unnecessary to search prior documents in the chain of title. The government issues a certificate which is primary evidence of title. Much land in Indonesia is still held, however, under ancient customary law (adat law), and the transfer and ownership of land in this category can only be dealt with after an investigation of local custom and practice.

DISPUTES ON FOREIGN CAPITAL INVESTMENT

The Government of Indonesia has, by act no. 5/1968, approved and ratified the Convention on the Settlement of Investment Disputes between states and nationals, either natural persons or juridical persons, of other states.
Any dispute arising between Contracting States and foreign investors concerning foreign capital investment can be settled according to the provision of the aforementioned Convention.
The convention establishes the International Centre for settlement of Investment Disputes as an autonomous international institution.
The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes". The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commission and Arbitral Tribunals constituted in accordance with the provisions of the Convention.
A member state wishing to settle arising disputes is required:

I. to be a member of the International Bank for Reconstruction and Development (IBRD) conforming to article 67 of the Convention; and
II. to have signed the Convention and ratified the Convention according to the National Law in force, based on article 68 of the Convention.

To start the proceedings before the Conciliation Commission or Arbitral Tribunal the consent of the parties is needed. This consent, being the cornerstone of the jurisdiction of the centre, must be in writing and once given cannot be withdrawn unilaterally. Consent alone will not suffice to bring a dispute within its jurisdiction. Furthermore, the jurisdiction is limited by reference to the nature of the dispute, and the parties thereto must answer the requirement as set forth above.
The Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Persons designated to serve on the panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry and finance, who may be relied upon to exercise independent judgement.
In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators *from outside* the panels but requires that such appointees possess the qualities prescribed above. However, if the parties failed in appointing conciliators or arbitrators from outside the panels, and the chairman of the Centre is called upon to appoint a conciliator or arbitrator then he is restricted in his choice to Panel members. It must be pointed out that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre, or which, under their own law, they were not permitted to submit

to the Centre. In order to avoid any risk of misunderstanding on this score it is expressly permitted (Art 25.4) to Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision in article 26 makes clear that it was not intended to modify the rules of international law regarding the exhaustion of local remedies, it explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the state party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable.

The differences between proceedings before the Conciliation Commission and Arbitral Tribunal is that the process of Conciliation seeks to bring the parties to agreement, and that of arbitration aims at a binding termination of the dispute.

Article 53 of the Convention declares that the parties are bound by the award of the Tribunal, that it must be carried out according to the national law, and that it shall not be subjected to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Art 51) and annulment (Art 52). In addition a party may ask a Tribunal, which had omitted to decide any question submitted to it, to supplement its award and may request interpretation of the award. Any award of the Arbitral Tribunal can only be carried out in Indonesia after being approved by the Supreme Court of Indonesia.

Any dispute arising between Contracting States, concerning the application or interpretation of this Convention, which is not settled by negotiations shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

PROF. DR. HANS SPILLER*:

ZUM INTERNATIONALEN STEUERRECHT IM RECHTSSYSTEM DER DDR

1. STRUKTUR UND BEDEUTUNG DER STEUERN IM WIRTSCHAFTSSYSTEM DER DDR

Für die DDR ist, wie für jedes sozialistische Land, der beherrschende Anteil des sozialistischen Eigentums an den Produktionsmitteln charakteristisch. Dieses sozialistische Eigentum setzt sich nach Artikel 10, Absatz 1, der Verfassung der DDR[1] zusammen aus dem gesellschaftlichen Volkseigentum, dem genossenschaftlichen Gemeineigentum werktätiger Kollektive, sowie dem Eigentum gesellschaftlicher Organisationen der Bürger. Entsprechend der gesellschaftlichen Konzeption der DDR gilt für die Volkswirtschaft wie für alle anderen gesellschaftlichen Bereiche das Prinzip der Planung und Leitung. Mit der Verwirklichung dieses Prinzips wird die Volkswirtschaft der DDR zur sozialistischen Planwirtschaft, durch die die zentrale staatliche Planung und Leitung der Grundfragen der gesellschaftlichen Entwicklung mit der Eigenverantwortung der Betriebe und der örtlichen Staatsorgane verbunden wird.

Der Hauptanteil des Nationaleinkommens wird im Bereich des Volkseigentums und des genossenschaftlich-sozialistischen Eigentums erzeugt. Die volkseigenen Betriebe und Kombinate treten als selbständige juristische Personen auf, wobei jeweils eine Vielzahl volkseigener Betriebe nach den Kriterien ihrer Produktionsrichtung in Vereinigungen Volkseigener Betriebe (VVB) branchenmäßig zusammengefaßt werden. Die Vereinigungen Volkseigener Betriebe üben dabei bestimmte Leitungs- und Koordinierungsfunktionen aus. Im Jahre 1966 wurden im Bereich dieser volkseigenen Betriebe 72,6% des Bruttoproduktes der DDR erzeugt.[2]

Für die volkseigenen Betriebe besteht ein selbständiges System von Pflichtabführungen an den Staatshaushalt. Während die volkseigenen Betriebe einerseits eigene Fonds für die erweiterte Reproduktion, für kulturelle, soziale, Bildungs- und Prämiierungszwecke erwirtschaften und bilden, sind sie andererseits verpflichtet, eine Produktionsfondsabgabe, einen Teil des Nettogewinnes (Nettogewinnabführung) und die Produktions- bzw. Dienstleistungsabgabe an den Staatshaushalt zu entrichten. Diese Pflichtabführungen der volkseigenen Wirtschaft bilden die Hauptfinanzierungsquelle des Staatshaushaltes der DDR. Ihr Anteil an den Gesamteinnahmen des Staatshaushaltes betrug im Jahre 1967 = 52,4%.

Die Pflichtabführungen der volkseigenen Wirtschaft werden nach steuerartigen Methoden erhoben. Ihrem Wesen nach bilden sie jedoch keine Steuern im spezifischen Sinne dieses Begriffes, da es sich um bereits in der Hand des Staates befindliche Mittel handelt, bei denen das Element der Eigentumsüber-

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1. Verfassung der DDR vom 6. April 1968. Text der Verfassung und Ergebnisse des Volksentscheides über die Annahme der Verfassung, vgl. z.B. Außenpolitische Korrespondenz, Berlin, 15. 4. 1968, Seite 123 ff.

2. Statistisches Jahrbuch der DDR 1967, Staatsverlag Berlin, Seite 37.

tragung entfällt. Mit Hilfe der Pflichtabführungen der volkseigenen Wirtschaft zentralisiert der sozialistische Staat einen Teil der von den volkseigenen Betrieben erwirtschafteten Einnahmen, während ein anderer wesentlicher Teil in der Dispositionsbefugnis der Betriebe verbleibt und von ihnen im Rahmen des staatlichen Planes eigenverantwortlich für die Maßnahmen der erweiterten Reproduktion eingesetzt wird.

Der genossenschaftliche Sektor umfaßt die auf freiwilliger Grundlage gebildeten sozialistischen Genossenschaften. Dazu gehören vor allem die landwirtschaftlichen Produktionsgenossenschaften, die Produktionsgenossenschaften des Handwerks sowie die Konsumgenossenschaften, die nicht nur über ein über die gesamte DDR verbreitetes Handelsnetz mit eigenen Warenhäusern, Einzelhandelsgeschäften usw. verfügen, sondern auch selbständige Produktionsbetriebe besitzen. Die sozialistischen Genossenschaften genießen besondere staatliche Unterstützung, die vor allem auch durch steuerliche Befreiungen und steuerliche Begünstigungen zum Ausdruck kommt. Der Anteil der sozialistischen Genossenschaften am gesellschaftlichen Bruttoprodukt der DDR betrug im Jahre 1966 = 14,3% des Gesamtproduktes.[3]

Im nichtsozialistischen Bereich der Volkswirtschaft der DDR wurden insgesamt 13,2% des gesellschaftlichen Gesamtproduktes erzeugt. Vorherrschend sind hier vor allem die Betriebe mit staatlicher Beteiligung. Es gibt aber auch Betriebe kleiner und mittlerer Größe, die sich ausschließlich in Privateigentum befinden. Staatliche Beteiligungen werden im Prozeß der sozialistischen Entwicklung zur Erweiterung, Rationalisierung und Modernisierung der Produktion durch den Staat auf Antrag des Inhabers, also bei Wahrung der Freiwilligkeit, an private Betriebe gewährt. Die staatliche Beteiligung erfolgt in der Form, daß das Unternehmen auf Antrag seines Inhabers in eine Kommanditgesellschaft auf der Grundlage des Handelsgesetzbuches[4] umgewandelt wird. In dieser Kommanditgesellschaft nimmt im Regelfalle der private Inhaber die Stellung des leitungsbefugten persönlich haftenden Gesellschafters, des Komplementärs, ein, während die Interessen der staatlichen Beteiligung durch die die finanziellen Mittel gewährende Bank oder einen beauftragten volkseigenen Betrieb als Kommanditist in der Gesellschaft wahrgenommen werden. Die Beteiligung an den Gewinnen der Gesellschaft erfolgt nach dem Verhältnis der Kapitalanteile.

Diese Form der Betriebe mit staatlicher Beteiligung hat eine rasche Entwicklung genommen, weil unter den Bedingungen der gesamtwirtschaftlichen Planung sowohl der Absatz der Produkte wie auch die Materialversorgung gesichert sind und andererseits besondere Begünstigungen in steuerlicher Hinsicht gewährt werden.[5]

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3. Statistisches Jahrbuch a.a.O., Seite 37.

4. §§ 161 ff. des Handelsgesetzbuches vom 10. 5. 1897 vgl. auch Verordnung über die Bildung halbstaatlicher Betriebe vom 29. 3. 1959, GBl. Teil I, S. 253.

5. Die Umwandlung von privaten Betrieben in solche mit staatlicher Beteiligung löst regelmäßig keine Steuerpflichten aus. Insbesondere erfolgt keine Auflösung der stillen Reserven. Die Besteuerung des auf den privaten Inhaber entfallenden Gewinnanteiles, der seinem Kapitalanteil in der Kommanditgesellschaft entspricht, erfolgt nach den Grundsätzen des Einkommensteuerrechtes. Darüber hinaus erhält er jedoch für seine persönliche Leitungstätigkeit im Betrieb ein Gehalt, das dem Gehalt eines Werkleiters eines volkseigenen Betriebes gleicher Art und Größe entspricht und nach den besonders begünstigten Sätzen der Besteuerung des Arbeitseinkommens versteuert wird. (Vgl. VO über die Besteuerung der halbstaatlichen Betriebe und ihrer Gesellschafter vom 7. 1. 1960, GBl. I, Seite 29).

Seit 1956 haben allein im industriellen Bereich 5512 private Unternehmer eine staatliche Beteiligung aufgenommen, während weitere 4096 Unternehmen ausschließlich in den Händen privater Eigentümer tätig sind.[6]
Die neue Verfassung der DDR, die vom sozialistischen Eigentum an den Produktionsmitteln als der Basis der Volkswirtschaft der DDR ausgeht,[7] unterstreicht gleichzeitig nachdrücklich die Förderungswürdigkeit der Betriebe mit staatlicher Beteiligung[8] und regelt die Bedingungen für die weitere Existenz der privaten Wirtschaft.[9]
Auf der Basis dieser Verfassungsbestimmungen haben neben der raschen Entwicklung des volkseigenen und des genossenschaftlichen Sektors der DDR auch die Betriebe mit staatlicher Beteiligung und die privaten Betriebe eine bedeutende Wachstumsrate zu verzeichnen.[10]
Die steuerlichen Abführungen der Genossenschaften, halbstaatlichen und privaten Betriebe zusammengenommen betrugen im Jahre 1967 = 8% der Gesamteinnahmen des Staatshaushaltes.[11]
Eine weitere Einnahme des Staatshaushaltes erwächst aus der Besteuerung des Arbeitseinkommens der Arbeiter und Angestellten. Diese Gruppe von Steuerpflichtigen ist besonders begünstigt. Die Steuersätze weisen eine geringe Progression auf, die bei einem maximalen Steuersatz von 20% endet. Die Gesamteinnahme des Staatshaushaltes aus der Besteuerung des Arbeitseinkommens und ihnen gleichgestellter steuerbegünstigter freiberuflicher Tätigkeiten betrug im Jahr 1967 = 5%.
Diese Aufzählung der Einnahmekategorien des Staatshaushaltes ist nicht vollständig. Insbesondere fehlen die Einnahmen aus staatlichen Einrichtungen der Kultur, des Gesundheitswesens, des Bildungswesens, der

6. Stand vom 31. 12. 1966, Statistisches Jahrbuch 1967, a.a.O., Seite 113.
7. Artikel 9 Abs. 1 der Verfassung der DDR: „Die Volkswirtschaft der Deutschen Demokratischen Republik beruht auf dem sozialistischen Eigentum an den Produktionsmitteln."
Abs. 2: „Die Volkswirtschaft der Deutschen Demokratischen Republik dient der Stärkung der sozialistischen Ordnung, der ständig besseren Befriedigung der materiellen und kulturellen Bedürfnisse der Bürger, der Entfaltung ihrer Persönlichkeit und ihrer sozialistischen gesellschaftlichen Beziehungen.
8. Artikel 14 Abs. 2 der Verfassung der DDR: „Das enge Zusammenwirken privater mit sozialistischen Wirtschaftsunternehmen und -einrichtungen wird vom Staat gefördert. In Übereinstimmung mit den gesellschaftlichen Erfordernissen können private Betriebe auf Antrag staatliche Beteiligung aufnehmen."
9. Artikel 14 Abs. 1 der Verfassung legt fest: „Die Nutzung und der Betrieb privater Wirtschaftsunternehmen und -einrichtungen zu Erwerbszwecken müssen gesellschaftliche Bedürfnisse befriedigen, der Erhöhung des Volkswohlstandes und der Mehrung des gesellschaftlichen Reichtums dienen."
Artikel 14 Abs. 3:
„Privatwirtschaftliche Vereinigungen zur Begründung wirtschaftlicher Macht sind nicht gestattet."
10. Im ersten Halbjahr 1968 betrug z.B. die Erhöhung der industriellen Warenproduktion im Gesamtdurchschnitt der DDR = 7,3% im Vergleich zum gleichen Zeitraum des Vorjahres. Innerhalb dieser Gesamtsteigerung erhöhten die Betriebe mit staatlicher Beteiligung ihre Produktion um 7,9%, die privaten Industriebetriebe um 6,4%, während die Leistungen des Handwerks um 7,2% wuchsen. (Mitteilung der staatlichen Zentralverwaltung für Statistik über die Entwicklung der Volkswirtschaft im 1. Halbjahr 1968, Neues Deutschland vom 24. 7. 1968 Seite 3).
11. Die angegebenen Prozentzahlen sind mit statistischen Veröffentlichungen früherer Jahre nicht vergleichbar, da durch die Vergrößerung der eigenen Fonds der volkseigenen Betriebe und durch die Industriepreisreform Veränderungen in den Gesamtproportionen zwischen dem Staatshaushaltsfonds und anderen Finanzfonds eintraten.

Gebühren der Staatsorgane selbst, sowie vor allem die Einnahmen aus der Sozialversicherung.[12]

Wie aus dieser groben Skizzierung der Struktur der Einnahmen des Staatshaushaltes der DDR hervorgeht, haben die Leistungen der volkseigenen Wirtschaft an den Staatshaushalt das absolute Primat. Die Steuern, die von den nichtvolkseigenen Steuersubjekten an den Staatshaushalt zu entrichten sind, treten dahinter zurück.

Für Steuertatbestände mit internationalem Element, die im Bereich der Rechtsordnung der DDR auftreten, sind die normativen Quellen ihrer Regelung unterschiedlich. Zum geringeren Teil werden diese Tatbestände von völkerrechtlichen Normen und im Hauptumfang von innerstaatlichen Steuergesetzen geregelt. Für den Gesamtkomplex der völkerrechtlichen und innerstaatlichen Normen, die Steuertatbestände mit internationalem Element erfassen, wird hier der zusammenfassende Begriff „Internationales Steuerrecht" gebraucht.

2. DIE HAUPTPRINZIPIEN DES INTERNATIONALEN STEUERRECHTS DER DDR

a) DAS SOUVERÄNITÄTSPRINZIP

Die völkerrechtlich verbürgte Souveränität des Staates wird auch von der DDR anerkannt und in Anspruch genommen. Dabei geht die begriffliche Auffassung der staatlichen Souveränität in Abkehr von der überwundenen Theorie einer absoluten Souveränität mit ihrer extremen Auslegung eines „jus ad bellum" von einem Souveränitätsbegriff aus, der Anwendungsbreite und Schranken im geltenden Völkerrecht findet. Der Begriff der staatlichen Souveränität, der auch für alle steuerlichen Aktivitäten Kriterien setzt, ermächtigt den Staat, über alle inneren und äußeren Angelegenheiten frei zu entscheiden, soweit nicht geltende Grundsätze des Völkerrechtes und Rechte anderer Staaten entgegenstehen.[13]

Die Verpflichtung zur unmittelbaren Beachtung des Souveränitätsprinzips als eines der Hauptprinzipien des demokratischen Völkerrechts, wird durch die Verfassung der DDR statuiert.[14]

Die staatliche Souveränität ermächtigt, steuerrechtliche Normen mit verpflichtender Wirkung zu erlassen. Der Steuersouveränität sind primär unterworfen alle steuerlich erheblichen Tatbestände, die sich auf dem Territorium der DDR verwirklichen. Dieser Grundsatz gilt unabhängig davon, welcher Art, welcher Staatsangehörigkeit, welcher nationalen Zugehörigkeit die handelnden Rechtssubjekte sind.

Die Ausübung souveräner Besteuerungsrechte findet ihre Grenze am Souveränitätsbereich eines anderen Staates. Das Völkerrecht untersagt folglich auf steuerlichem Ge-

12. Die Sozialversicherung der Arbeiter und Angestellten ist staatliche Einrichtung, wird jedoch vom Freien Deutschen Gewerkschaftsbund verwaltet. Die Einnahmen der Sozialversicherung werden durch staatliche Organe realisiert und dem Freien Deutschen Gewerkschaftsbund zur Verwaltung übertragen. Darüber hinaus trägt der Staatshaushalt der DDR noch den die Einnahmen übersteigenden Differenzbetrag, um die vorgesehenen Leistungen der Sozialversicherung zu garantieren.

13. Vgl. zum Begriff der staatlichen Souveränität das Lehrbuch Völkerrecht, herausgegeben von der Akademie der Wissenschaften der UdSSR, Berlin 1960, Seite 119 ff.

14. Artikel 8 der Verfassung der DDR legt fest: „Die allgemein anerkannten, dem Frieden und der friedlichen Zusammenarbeit der Völker dienenden Regeln des Völkerrechts sind für die Staatsmacht und jeden Bürger verbindlich."

biet ebenso wie auf allen anderen Gebieten die Verletzung der Souveränität eines anderen Staates. Dieser theoretisch wohl unstrittige Satz wird in der Staatenpraxis durchaus nicht immer beachtet, wie die Eingriffe in die Steuersouveränität der DDR durch westdeutsche und westberliner Finanzorgane im Bereich der Beförderungssteuer belegen. Sie vollzogen sich in der Weise, daß über Jahre hinweg westdeutsche und westberliner Finanzorgane die für Beförderungsleistungen auf dem Verkehrsnetz des eigenen Landes vorgesehene Beförderungssteuer von eigenen und ausländischen Unternehmen auch dann und insoweit erhoben, als es sich um auf dem Territorium der DDR, insbesondere im Verkehr zwischen Westdeutschland und Westberlin, zurückgelegte Strecken handelte.

Auf der Grundlage der Steuersouveränität für das Territorium der DDR wurde nunmehr die Erhebung einer Steuerausgleichsabgabe für Beförderungsleistungen westdeutscher und westberliner Unternehmen auf Straßen und Wasserstraßen der DDR angeordnet und durch die Volkskammer der DDR bestätigt.[15] Der souveränitätsverletzende Zustand ist damit jedoch nicht aufgehoben.[16]

b) DAS PRINZIP DER STAATLICHEN PLANUNG UND LEITUNG

Im Finanzbereich erfaßt das bereits eingangs erwähnte Prinzip der staatlichen Planung und Leitung[17] komplex die Gesamtheit der Finanzinstrumente und Finanzfonds, also den Staatshaushalt mit allen seinen Untergliederungen in den Bezirken, Kreisen und Gemeinden, das Kreditsystem einschließlich der staatlichen Banken, die Finanzen der Betriebe und Zweige der VEW, das staatliche Versicherungssystem einschließlich der staatlichen Versicherungsanstalten und die Regulierung der Geldzirkulation in Übereinstimmung mit der Warenproduktion. Innerhalb dieses einheitlich geplanten und geleiteten Finanzsystems sind die Steuern als Teil der Einnahmen des Staatshaushaltes ein wesentlicher Bestandteil. Zwar tritt, wie aus den eingangs erläuterten zahlenmäßigen Proportionen erkenntlich ist, ihre Finanzierungsfunktion gegenüber den Einnahmen des Staates aus der volkseigenen Wirtschaft zurück, doch haben sie gegenüber den nichtsozialistischen Teilen der Volkswirtschaft mit Hilfe der durch sie verwirklichten materiellen Stimuli wichtige Lenkungsfunktionen zu erfüllen. Soweit es den Problemkreis des internationalen Steuerrechts betrifft, kommt hinzu, daß die Außenwirtschaftbeziehungen der DDR als staatliches Außenwirtschaftsmonopol ausgebildet worden sind.[18]

Bestandteile dieses Außenwirtschaftsmonopols sind im Bereich der materiellen Außenbeziehungen das Außenhandelsmonopol und im finanziellen Bereich das Valutamonopol. Das staatliche Valutamonopol, das der

15. Anordnung vom 11. 6. 1968. Text und Begründung der AO durch den Staatssekretär und Ersten Stellvertreter des Ministers der Finanzen vor der Volkskammer der DDR, vgl. Neues Deutschland vom 11. 6. 1968.

16. Im Zusammenhang mit der Einführung der Mehrwertsteuer wurde in Westdeutschland zwischenzeitlich das Beförderungssteuergesetz aufgehoben. Das Mehrwertsteuergesetz erstreckt sich jedoch ebenfalls auf Beförderungsleistungen unter Einschluß solcher auf dem Gebiet der DDR. Wenn auch nachträglich auf Grund einer widerruflichen Sonderbestimmung zum Mehrwertsteuergesetz Beförderungsleistungen westdeutscher und westberliner Unternehmer auf dem Gebiet der DDR von der Entrichtung der Mehrwertsteuer ausgeklammert wurden, bleibt die souveränitätsverletzende Festlegung des Geltungsbereichs des westdeutschen Mehrwertsteuergesetzes doch unverändert bestehen.

17. Artikel 9 Abs. 3 der Verfassung der DDR.

18. Artikel 9 Abs. 5 der Verfassung der DDR erhebt dieses Monopol zum Verfassungsgrundsatz.

Steuerung aller internationalen Finanzbeziehungen und sonstiger Faktoren, die direkt oder indirekt auf die Zahlungsbilanz der DDR einwirken, dient, gestattet es, die vielfach miteinander korrespondierenden internationalen Finanzbeziehungen einschl. internationaler Steuertatbestände zu koordinieren und einer einheitlichen Konzeption unterzuordnen.[19]

c) DAS PRINZIP DER GESETZLICHKEIT

Für die Gesamtheit des Währungs- und Finanzsystems ist die unmittelbare Verantwortung des Staates verfassungsmäßig fixiert worden. Diese Verantwortlichkeit schließt sowohl Gewährleistung der Stabilität der Währung durch ein auf der Basis steigender Arbeitsproduktivität ausgewogenes Verhältnis zwischen Warenproduktion und Geldzirkulation, als auch in unmittelbarer Verbindung damit eine ausgeglichene Haushaltswirtschaft und ein mit ihr korrespondierendes Kreditsystem ein. Darüber hinaus findet sich speziell für Steuern die verfassungsmäßige Festlegung, daß sie nur auf der Grundlage von Gesetzen erhoben werden dürfen.[20] Mit dieser Bestimmung wird einerseits gewährleistet, daß die grundlegende Ausprägung der Steuergesetze mit ihren unterschiedlichen, der staatlichen Gesamtkonzeption entsprechenden politischen, wirtschaftlichen und sozialen Zielsetzungen nur durch die oberste Volksvertretung erfolgt. Andererseits werden damit aber auch wichtige Grundrechte der Bürger hinsichtlich ihres persönlichen Eigentums von der steuerlichen Seite garantiert. Soweit Zweifel an der Richtigkeit dieser oder jener Besteuerungsmaßnahme im einzelnen auftreten, steht zur Nachprüfung ein dreistufiges Rechtsmittelverfahren zur Verfügung. Unabhängig von diesem formellen Rechtsmittelverfahren können, wie bei allen anderen Maßnahmen staatlicher Organe, die entsprechenden Ausschüsse der örtlichen Volksvertretungen sowie der Volkskammer angerufen oder auch der Staatsrat der DDR um Nachprüfung gebeten werden.

3. VÖLKERRECHTLICHE BESTEUERUNGSNORMEN

Mit der grundsätzlichen Gültigkeit der allgemein anerkannten Regeln des Völkerrechts in der innerstaatlichen Rechtsordnung der DDR sind auch die Steuerrechtsgrundsätze des Völkerrechtes für das Steuerrecht der DDR verbindlich. Allerdings stellt das Völkerrecht im Bereich der steuerrechtlich erheblichen Beziehungen nur wenige – und nicht immer unstrittige – Grundsätze zur Verfügung, die unmittelbar zu beachten wären.

Nach Völkergewohnheitsrecht werden diplomatische Vertreter von direkten Steuern des Empfangsstaates befreit. Diese allgemeine Regel wird auch von der Steuerordnung der DDR beachtet. Gewöhnlich werden detaillierte Bestimmungen über die Einzelheiten der Befreiung von steuerlichen Pflichten in den entsprechenden Verträgen über die Aufnahme diplomatischer und konsularischer Beziehungen fixiert.

In der Wiener Konvention über diplomatische Beziehungen vom 18. 4. 1960 und der Wiener Konvention über konsularische Beziehungen vom 24. 4. 1963 ist das völkerrechtliche Gewohnheitsrecht über die Befreiung diplomatischen und konsularischen

19. Zu diesen wechselseitigen Zusammenhängen vgl. Spiller, Valutamonopol und internationale Finanzbeziehungen, Staatsverlag Berlin 1963.
20. Artikel 9, Abs. 4 der Verfassung der DDR.

Personals von direkten Besteuerungen des Empfangsstaates bekanntlich detailliert durch multilateralen Vertrag festgelegt worden. Obgleich der DDR die Mitwirkung an diesem Vertragswerk versagt wurde, erfüllt sie doch prinzipiell die in diesen Vereinbarungen vorgesehenen Verpflichtungen gegenüber diplomatischem und konsularischem Personal und gegenüber diplomatischen Institutionen innerhalb des Territoriums der DDR; zum Teil erfolgt das in der Weise, daß in den bilateralen Verträgen über die Aufnahme diplomatischer und konsularischer Beziehungen die Festlegungen in den Wiener Konventionen für verbindlich erklärt werden.

Von besonderer Problematik ist in den Beziehungen zwischen nichtsozialistischen Staaten regelmäßig der Zugriff zweier Steuer-Rechtsordnungen auf dem gleichen internationalen Steuertatbestand. Dem dabei auftretenden Effekt der Doppelbesteuerung des gleichen wirtschaftlichen Vorganges steht nicht, wie zuweilen vermutet, die „fortschreitende Anerkennung des Satzes von der Unzulässigkeit internationaler Doppelbesteuerung"[21] entgegen.

Ein solcher völkerrechtlicher Gewohnheitssatz hat bisher keine allgemeine Anerkennung finden können. Stattdessen wurden zwischen einer Vielzahl vor allem nichtsozialistischer Staaten bilaterale Abkommen zur Vermeidung der Doppelbesteuerung abgeschlossen. Für die DDR ist ein solches Bedürfnis im kommerziellen Bereich bisher kaum praktisch geworden, da die Betriebe der DDR entsprechend ihrer wirtschaftlichen Konzeption im Prinzip keine Auslandsinvestitionen tätigen und folglich der wichtigste Anlaß zur Anregung solcher Abkommen entfällt. Die vom früheren Deutschen Reich mit zahlreichen anderen Staaten vor 1945 abgeschlossenen Abkommen zur Vermeidung der Doppelbesteuerung wurden ähnlich wie Organtheorie und Schachtelprivileg seitens der DDR wegen ihrer monopolbegünstigenden Wirkung in Auswertung des Potsdamer Abkommens nicht mehr angewandt.

Dennoch sind im Bereich der Lizenzen, der Patente und Erfinderentgelte zur Stimulierung wechselseitiger Austauschprozesse Neuabschlüsse solcher Abkommen zur Vermeidung von Doppelbesteuerungen denkbar.[22] Darüber hinaus kan zur Anregung erweiterter wissenschaftlicher und kultureller Austauschbeziehungen mit anderen Staaten die Begünstigung von Honoraren und sonstigen Entgelten für wissenschaftliche, schriftstellerische, künstlerische und andere Tätigkeiten durch Abkommen zur Vermeidung von Doppelbesteuerungen erwogen werden.

Völkerrechtliche Quellen liegen den Befreiungen internationaler Organisationen von einzelstaatlichen Besteuerungen zu Grunde. So hat die DDR durch ihren Beitritt zum multilateralen völkerrechtlichen Vertrag über die Bildung des Rates für Gegenseitige Wirtschaftshilfe die dort verankerten Bestimmungen akzeptiert, die den RGW von allen zentralen und örtlichen direkten Steuern und Abgaben befreien. Diese Befreiung erstreckt sich auf die Institutionen des Rates selbst, wie auch auf die Vertreter der Mitgliedsländer des RGW in dem jeweiligen Ratsorgan hinsichtlich der von ihnen bezogenen Gehälter, die ihnen vom ernennenden Land gezahlt werden. Gleiche Vergünstigungen genießen die Amtspersonen des Rates hinsichtlich der Steuern und

21. So Bühler, in: „Steuerrecht, Internationales", Wörterbuch des Völkerrechts, III Seite 378.

22. Vgl. als Beispiel etwa das Abkommen zwischen UdSSR und Frankreich über „Taxation of patent royalties" vom 14. 3./ 19. 12. 1967 (Textabdruck in Bulletin for international Fiscal Documentation Heft 3 — März 1968 — Seite 122 ff).

Abgaben, die nach den Steuergesetzen des Landes ihrer Tätigkeit auf das ihnen vom RGW gezahlte Gehalt zu entrichten wären.[23] In ähnlicher Weise werden die durch multilateralen völkerrechtlichen Vertrag vom 22. 10. 1963 gebildete Internationale Bank für Wirtschaftliche Zusammenarbeit und deren Leitungsmitgleider und Amtspersonen steuerlich privilegiert.[24]

Auch für die sonstigen zwischen den sozialistischen Staaten bestehenden gemeinsamen Einrichtungen wurden in den Gründungsverträgen und Statuten regelmäßig Festlegungen getroffen, die diesen Einrichtungen und dem in ihnen tätig werdenden Personal eine von steuerlichen Verpflichtungen unbeeinflußbare Stellung sichern und ihnen damit von dieser Seite die notwendige funktionelle Operationsfähigkeit gewährleisten. Auf ihre Darstellung im einzelnen soll hier verzichtet werden.[25]

4. INNERSTAATLICHE BESTEUERUNGSNORMEN FÜR STEUERTATBESTÄNDE MIT INTERNATIONALEM ELEMENT

Steuertatbestände mit internationalem Element werden von den innerstaatlichen Gesetzen des allgemeinen Steuerrechts erfaßt, die die mit einem echten Eigentumswechsel verbundenen steuerlichen Zuführungen zum Staatshaushalt zum Gegenstand haben. Folglich scheiden Rechtsnormen über die Pflichtabführungen der volkseigenen Wirtschaft der DDR an den Staatshaushalt aus dem Kreis der Betrachtungen aus.

Nachfolgend sollen für einige Steuerarten beispielhaft die innerstaatlichen Regelungen internationaler Steuertatbestände erläutert werden.

EINKOMMENS- UND KÖRPERSCHAFTSSTEUERRECHT

In Übereinstimmung mit dem Einkommens- und Körperschaftssteuerrecht der wichtigsten Industrieländer unterscheidet das Steuerrecht der DDR zwischen Steuerinländern und Steuerausländern und unterwirft diese beiden Gruppen der unbeschränkten bzw. beschränkten Steuerpflicht. In der Gesamtanlage besteht soweit Übereinstimmung mit dem Devisenrecht der DDR. Als Steuerinländer gelten natürliche Personen mit Wohnsitz oder gewöhnlichem Aufenthalt im Gebiet der DDR (wobei als gewöhnlicher Aufenthalt ein Aufenthalt von mehr als 6 Monaten auf dem Gebiet der DDR unabhängig von subjektiven Faktoren gilt, mit anderen Worten die Staatsangehörigkeit für die Steuerinländereigenschaft bedeutungslos ist). Soweit es sich um juristische Personen im Sinne des Steuerrechts handelt, treten bei der Unterscheidung zwischen unbeschränkter und beschränkter Steuerpflicht an die

23. Artikel II Abs. 2; Artikel IV Abs. 1 Ziff. d; Artikel V Abs. 2 c, der Konvention über die Rechtsfähigkeit, Privilegien und Immunitäten des Rates für Gegenseitige Wirtschaftshilfe, Gesetzblatt der DDR Seite I, Nr. 29 vom 16. 5. 1960.

24. Abkommen über die mehrseitige Verrechnung in transferablen Rubeln und die Gründung der Internationalen Bank für Wirtschaftliche Zusammenarbeit vom 22. 10. 1963, GBl. der DDR Teil I, Seite 4 und das dazugehörige Statut der Internationalen Bank für Wirtschaftliche Zusammenarbeit, insbesondere die Artikel 38 Ziff. 2 a und Artikel 39 Ziff. 1 d sowie Artikel 40 Ziff. 2 b dieses Statuts.

25. Als Überblick über eine Reihe solcher zwischenstaatlicher Einrichtungen vgl. Spiller, Rechtsprobleme gemeinsamer Betriebe sozialistischer Staaten, Der Außenhandel, Beilage Recht im Außenhandel, Berlin 1963, Heft 6 und 7.

Stelle des Wohnsitzes oder des gewöhnlichen Aufenthalts der Ort der Geschäftsleitung und der Sitz bzw. die Betriebsstätte.

Sowohl das Einkommensteuergesetz als auch das Körperschaftssteuergesetz[26] sehen bei Vorliegen der unbeschränkten Steuerpflicht die Erstreckung auf *sämtliche* Einkünfte des steuerpflichtigen Subjektes vor. Damit wird auch im Steuerrecht der DDR das in der Mehrzahl der Industriestaaten übliche Welteinkommensprinzip angewandt. Für die beschränkt Steuerpflichtigen sind dagegen nur diejenigen Einkünfte den Einkommens- bzw. Körperschaftssteuergesetzen der DDR unterworfen, die auf dem Territorium der DDR erzielt werden. Dabei kommen einige Sondervorschriften zur Anwendung, die sich auf die Abgrenzung zwischen inländischen und ausländischen Betriebsausgaben und Werbungskosten, auf den Ausschluß spezieller Vergünstigungen für Sonderausgaben, außergewöhnliche Belastungen und außerordentliche Einkünfte etc. beziehen.[27]

Eine Anrechnung im Ausland bezahlter Einkommens- bzw. Körperschaftssteuer findet nach den entsprechenden Gesetzen in der DDR nicht statt.

VERMÖGENSSTEUER

Nach dem Vermögenssteuergesetz[28] wird ebenfalls zwischen beschränkter und unbeschränkter Steuerpflicht unterschieden. Die unbeschränkt steuerpflichtigen Inländer werden mit ihrem Gesamtvermögen (Weltvermögen) erfaßt, während beschränkt Steuerpflichtige nur mit dem in der DDR belegenen Vermögen der Steuerpflicht unterworfen sind.[29]

Soweit Objekte beschränkt steuerpflichtigen Vermögens durch staatliche Banken bzw. volkseigene Grundstücksverwaltungen verwaltet werden, ist aus Vereinfachungsgründen für sie ein pauschaler Vermögenssteuersatz von 1% festgelegt worden.[30] Nach den §§ 9 und 10 des Vermögenssteuergesetzes ist bei Auslandsbeziehungen eine Pauschalbesteuerung möglich. Die Anrechnung im Ausland gezahlter Vermögenssteuer auf den in der DDR zu entrichtenden Vermögenssteuerbetrag ist nicht vorgesehen.

GEWERBESTEUER

Bei der Gewerbesteuer als einer Realsteuer ist die Steuerpflicht auf die innerhalb des Territoriums der DDR belegenen Gewerbebetriebe beschränkt.[31] Soweit ein Gewerbebetrieb Gewerbeertrag aus Betriebsstätten im Ausland erzielt, ist der Gesamtgewerbeertrag um diesen Teil zu kürzen. Das gleiche Verfahren ist nach § 12 Abs. 4 des Gewerbesteuergesetzes bei der Berechnung des Gewerbekapitals anzuwenden, da dies die zweite Besteuerungsgrundlage für die Berechnung der Gewerbesteuer bildet.

UMSATZSTEUER

Nach § 1 des Umsatzsteuergesetzes[32] sind nur solche Umsätze steuerpflichtig, die innerhalb des staatlichen Territoriums bewirkt werden. Dabei erfolgt die Besteuerung lediglich nach den objektiven Tatbeständen der Umsatzerzielung, d.h. unabhängig von der Staatsangehörigkeit des Steuerpflichti-

26. Einkommensteuergesetz in der Fassung vom 28. 4. 1951 und Körperschaftssteuergesetz vom 16. 10. 1934, RGBl. I, Seite 1031.
27. Vgl. etwa § 50 des Einkommensteuergesetzes.
28. Vermögenssteuergesetz vom 16. 10. 1935, RGBl. I 1935, S. 34.
29. § 13 der Vermögenssteuerdurchführungsbestimmung vom 8. 7. 1949 ZVOBl. 1949, Seite 637.
30. Ziff. 113 der Vermögenssteuer- und -bewertungsrichtlinien 1955.
31. § 2 Abs. 1 des Gewerbesteuergesetzes vom 1. 12. 1936.
32. Umsatzsteuergesetz vom 16. 10. 1934, RGBL. I, S. 249 ff.

gen, unabhängig von seinem Wohnsitz bzw. seiner Betriebsstätte. Als Sonderbedingungen sind die Steuerbefreiungen für die sogenannte verlängerte Einfuhr, d.h. die Einfuhr in den Seehäfenplätzen Rostock, Wismar und Stralsund nach § 4 Abs. 1 des Umsatzsteuergesetzes zu berücksichtigen.

LIZENZBESTEUERUNG

Das rasche Anwachsen internationaler Lizenzaustauschbeziehungen hat in der DDR zur Herauslösung der Lizenzbesteuerung aus dem allgemeinen Steuersystem geführt. Dabei wurden besonders begünstigte steuerliche Bedingungen vorgesehen, um die wissenschaftlich-technischen internationalen Austauschbeziehungen anzuregen. Mit der Anordnung über die Besteuerung der Lizenzeinnahmen von Unternehmen und Bürgern anderer Staaten sowie von westberliner Unternehmen und Bürgern aus der Überlassung von Urheberrechten an Betriebe der DDR[33] werden in der DDR erzielte Einkünfte von Ausländern aus der Lizenzvergabe einem Steuerabzug in Höhe von 25% des Bruttoentgeltes unterworfen. Diese Regelung gilt für die ständige oder zeitlich begrenzte Überlassung von literarischen, künstlerischen oder gewerblichen Urheberrechten, nicht geschützten Erfindungen, Produktionserfahrungen, Mustern und Ergebnissen ähnlicher gewerblicher Entwicklungsarbeiten und Warenzeichen. Mit dem Steuerabzug in Höhe von 25% sind die Einkommensteuer bzw. Körperschaftssteuer und die Umsatzsteuer abgegolten. Für die Berechnung des Steuerabzuges darf das Entgelt nicht durch Abzüge für Betriebsausgaben, Werbungskosten und Steuern gemindert werden.

BESTEUERUNG DES ARBEITSEINKOMMENS

Entsprechend dem Auftrag des Artikels 29 der Verfassung der DDR vom 7. 10. 1949, „bei der Besteuerung ist auf erarbeitetes Vermögen und Einkommen besonders Rücksicht zu nehmen", wurde die Besteuerung des Arbeitseinkommens aus dem System der allgemeinen Einkommensbesteuerung herausgelöst. Durch die Verordnung über die Besteuerung des Arbeitseinkommens[34] sind die Lohneinkünfte aus bestehenden Arbeitsverhältnissen und bestimmte steuerbegünstigte freiberufliche Einkünfte einem wesentlich begünstigten System der Besteuerung mit geringen Progressionssätzen zugeführt worden.

Die steuerrechtliche Erfassung des Arbeitseinkommens[35] ist expressis verbis auf das Arbeitseinkommen in der DDR beschränkt.[35 36 37]

Die denkbare Möglichkeit, im Hinblick auf die Anwendbarkeit der Verordnung über die Besteuerung des Arbeitseinkommens ausschließlich auf im Gebiet der DDR erzielte Einkünfte, die im Ausland erzielten Lohneinkünfte und steuerbegünstigten freiberuflichen Einkünfte der unbeschränkten Steuerpflicht des Einkommensteuergesetzes zu unterwerfen, ist im Rechtsmittelverfah-

33. AO vom 25. 6. 1965, GBl. Teil II, S. 554.
34. Verordnung über die Besteuerung des Arbeitseinkommens vom 22. 12. 1952, GBl. der DDR, S. 1413.
35. Nach § 2 der VO über die Besteuerung des Arbeitseinkommens zählt als solches „der Gesamtbetrag der in der DDR erzielten Lohneinkünfte und steuerbegünstigten freiberuflichen Einkünfte."
36. Berechtigt ist jedoch gleichzeitig auch jeder Ausländer zur Inanspruchnahme der steuerbegünstigten Sätze, unabhängig von seinem Wohnsitz oder seiner Staatsangehörigkeit, soweit das Arbeitseinkommen in der DDR erzielt wurde.
37. Vgl. Richtlinie zur Besteuerung des Arbeitseinkommens vom 22. 12. 1952, GBl. DDR S. 1413, Ziff. I.

ren geprüft und verworfen worden.[38] Damit tritt bei der Erzielung von Arbeitseinkünften im Ausland (und deren Besteuerung durch den Quellenstaat) keine Doppelbesteuerung in der DDR ein.

Eine ähnliche Regelung gilt für unmittelbare Arbeitstätigkeit im Ausland nach der Verordnung über Arbeitsbedingungen bei Auslandsmontage.[39] Es werden lediglich die in der DDR gezahlten Gehaltsanteile der Besteuerung unterworfen, während die im Ausland gewährten Leistungen steuerfrei bleiben. Das System der Besteuerung des Arbeitseinkommens vermeidet folglich prinzipiell die Möglichkeit einer Doppelbesteuerung von Arbeitseinkommen im Heimatstaat und im Quellenstaat.

Die aufgeführten Beispiele der Regelungen des innerstaatlichen Steuersystems der DDR bei internationalen Steuertatbeständen können selbstverständlich keinen Anspruch auf Vollständigkeit erheben. Darüber hinaus konnte an dieser Stelle auch nicht auf die zahlreichen Sonderbedingungen eingegangen werden, die in den steuerrechtlichen Beziehungen zwischen der DDR und der DBR vorliegen.

Für die DDR, die gegenwärtig mit 50 Staaten vertraglich geregelte Handelsbeziehungen unterhält und einen jährlichen Außenhandelsumsatz von etwa 25 Milliarden Mark erzielt, ist eine ständige zielstrebige Erweiterung der Außenwirtschaftstätigkeit vorgesehen. Diese Erweiterung wird sich nicht nur auf die quantitative, volumenmäßige Vergrößerung des Außenhandelsumsatzes, sondern auch auf die verstärkte Inangriffnahme komplexer Außenwirtschaftsbeziehungen richten, die über die einfachen Warenlieferungen hinausgehen. Damit wird unweigerlich ein Ansteigen der internationalen Steuertatbestände verbunden sein, die an die vertiefte Ausarbeitung der regelnden Normen und ihre einheitliche Konzipierung neue Anforderungen stellen.

5. DIE RECHTSSYSTEMATISCHE EINORDNUNG DES INTERNATIONALEN STEUERRECHTS

Das rasche Anschwellen des Wissensstoffes in allen gesellschaftlichen und naturwissenschaftlichen Bereichen zwingt bei der Systematisierung der Wissenschaften sowohl zur zunehmenden Differenzierung der einzelnen Wissenschaftszweige, als auch zur ebenso notwendigen Integration der verschiedenen Wissensgebiete, um Lösungen komplexer, neuartiger Aufgaben zu ermöglichen. Diesen Grundtendenzen gegenüber erweisen sich die traditionellen Abgrenzungskriterien der Wissenschaftszweige sowohl im Bereich der Naturwissenschaften als auch der Gesellschaftswissenschaften häufig als ungenügend und unsicher, weil es mit ihrer Hilfe oftmals nicht möglich ist, quantitative Anreicherungen in Grenzgebieten und ihren Umschlag in eine neue Qualität zu erfassen und mittels der überlieferten Klassifizierungsmerkmale einzuordnen. Oftmals stehen sogar die traditionellen Klassifizierungsmerkmale der erforderlichen schwerpunktmäßigen Orientierung auf neue heranwachsende Aufgaben entgegen.

38. Entscheidung des Ministeriums der Finanzen vom 29. 11. 1956, Aktenzeichen B 2110 (abgedruckt in der Loseblattsammlung „Abgabenrecht" des Zentralverlages Berlin unter Buchstabe Ca/3 Ziff. 19 AStR Nr. 7).

39. Verordnung vom 21. 5. 1959, GBl. DDR Teil I, Seite 551, in der Fassung vom 30. 1. 1964, GBl. Teil II, Seite 179.

Im Bereich der Rechtswissenschaften sind die Systematisierungsprobleme offensichtlich nicht geringer als in anderen wissenschaftlichen Gebieten. In besonders hohem Grade werden sie jedoch dort erkenntlich, wo die ihrem Wesem nach unendliche Arbeitsteilung die nationalen Grenzen überspringt und der einheitliche wirtschaftliche Vorgang den Rechtsordnungen verschiedener Staaten unterworfen wird. Infolge der Schwerfälligkeit der Herausbildung völkerrechtlicher Regelungen für internationale Tatbestände richten sich die primären Regelungsaktivitäten für internationale wirtschaftliche und finanzielle Vorgänge zunächst vorwiegend auf die Normierung mit Hilfe des innerstaatlichen Rechtes.

Das Völkerrecht in seiner traditionellen Ausprägung erfaßt die rasch anwachsende Fülle internationaler wirtschaftlicher und finanzieller Tatbestände gegenwärtig weder konzeptionell noch quantitativ in vollem Umfange. Gleichzeitig erweist sich die Einteilung der Rechtszweige in solche mit völkerrechtlich begründeten Normen und solche mit ausschließlich innerstaatlich begründeten Normen als unzureichend, weil sie zu einer künstlichen Trennung wirtschaftlich und finanziell einheitlicher Vorgänge führt.

In der DDR ist begonnen worden, aus dieser Situation heraus die Konzipierung neuer rechtswissenschaftlicher Zweige in Angriff zu nehmen, die der veränderten Situation angemessen sind. Unter den Bemühungen um die Konzipierung solcher neuen Rechtszweige, die der Dynamik der wissenschaftlichen und technischen Revolution unter den Aspekten der internationalen Arbeitsteilung angemessen sind, stehen vor allem das Internationale Wirtschaftsrecht [40] und das Internationale Finanzrecht [41] im Vordergrund. So wie durch den Grundsatz der staatlichen Planung und Leitung die Außenwirtschaftsbeziehungen sowohl in ihren innerstaatlichen Ursprüngen wie auch in ihren Aktivitäten in Konfrontation mit den Weltmärkten einheitlich gelenkt werden, scheint es möglich und zweckmäßig, auch die entsprechenden wissenschaftlichen Systematisierungen komplex vorzunehmen. Dabei spielen die internationalen Finanzbeziehungen infolge des staatlichen Valutamonopols und der einheitlichen Lenkung der Valutabeziehungen durch das Ministerium der Finanzen, die Staatsbank der DDR und die Deutsche Außenhandelsbank eine bedeutende und relativ selbständige Rolle. Ihre zusammenfassende wissenschaftliche Bearbeitung und komplexe lehrmäßige Darstellung erfolgt in einem einheitlichen wissenschaftlichen Zweig, dem Internationalen Finanzrecht. Er erfaßt alle diejenigen Finanzbeziehungen, die infolge eines internationalen Elementes von mehreren Rechtsordnungen berührt werden und an deren Gestaltung staatliche Willensakte – sowohl solche völkerrechtlichen als auch solche innerstaatlichen Charakters – beteiligt sind. Folglich können in den Bereich des Internationalen Finanzrechts sowohl die

40. Vgl. etwa Wiemann, Gedanken zur Gestaltung der Vorlesung „Recht der internationalen Wirtschaftsbeziehungen der DDR", Staat und Recht 1958, Heft 10, S. 1053.

41. H. Spiller, „Diskussionen über Probleme des internationalen Finanzrechts", Staat und Recht Berlin 1961, Heft 8, S. 1541.
V.J. Lissowski, Grundzüge und System des internationalen Finanzrechts, Pénzügyi Szemle, Budapest 1964, Heft 8, S. 636.
E.A. Rowinski, Die internationalen Finanzbeziehungen und ihre rechtliche Regelung, Sowjetstaat und Recht, Moskau 1965, Heft 2, S. 60 ff.
T. Nagy, „Die internationale Finanzrechtswissenschaft und ihre gegenwärtigen Entwicklungstendenzen", Acta Facultatis Politico, Juridicae Universitatis, Scientiarium Budapestinensis 1966, S. 37 ff.
Weralski/Nagy/Watschew, Probleme des internationalen Finanzrechts, Sowjetstaat und Recht, Moskau 1967, Heft 1, S. 63 ff.

zwischenstaatlichen (völkerrechtlichen) Finanzbeziehungen (etwa in Form zwischenstaatlicher Zahlungs- und Verrechnungsabkommen, internationaler Kreditabkommen usw.) als auch die Finanzbeziehungen zwischen internationalen Organisationen und einzelnen Staaten, wie auch die auf die Regelung internationaler Tatbestände gerichteten innerstaatlichen Normen einbezogen werden. Wichtigstes Beispiel zum letzten Problemkreis ist vor allem das Devisenrecht, das seinem Charakter nach innerstaatlicher Natur ist, jedoch die Regelung internationaler Tatbestände beabsichtigt.

Das internationale Steuerrecht ist nach dieser in der DDR vertretenen Konzeption ein Teilgebiet des Internationalen Finanzrechts. Es erfaßt diejenigen steuerrechtlich erheblichen Beziehungen, die sich durch ein internationales Element auszeichnen und auf die entweder das Völkerrecht oder das innerstaatliche Steuerrecht (das Außensteuerrecht) regelnd einwirken.

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1968

1968 was a year of fiscal development all over the world. In Western Europe the most significant point seems to be the development of TVA. In Sweden—member of EFTA—the fiscal 1968-69 budget contains a proposal that a value added tax be adopted and made effective January 1, 1969.[1] This proposal has been accepted and Sweden will follow its EFTA partner Denmark, which introduced a TVA on July 3, 1967. In the countries of the EEC, the Dutch proposals[2] were enacted and the TVA will come into force on January 1, 1969; the Netherlands being, after France and Germany, the third EEC country introducing the TVA.[3] The European TVA has its influence on the goods in international commerce. Is there from an American point of view—the U.S. not having a TVA—a development of an unintended system of pseudo tariffs?[4] On July 1, 1968, the EEC customs union was completed. The implementation of the Common Customs Tariff makes it necessary to harmonize the customs legislation of the Six. Ordinances of the EEC Commission became effective.[5] These ordinances having a direct influence on the legislation of the partners, ensure that all goods entering the Community receive identical overall customs irrespective of the point in the customs territory at which they enter.

The XXIInd IFA Congress was held in South America[6]. The taxation pattern in South America is changing rapidly as can be learned from a number of articles published on South American taxes.[7] Mr. Nowak[8] states that one of the more important reasons why taxes have become such an important factor in the life of South America is that now they have become part of the vocabulary of the common man. All over South America schools of tax law, tax management and tax administration are springing up backed by international agencies, foundations or by progressive governments. Income tax treaties are being concluded between South American States and highly industrialized countries, causing problems which are well-known to arise from such treaties between developed and developing countries[9].

The U.S. Foreign Investors Tax Act brought substantial changes in the taxation of income earned by aliens from U.S. sources. New regulations were elaborated[10] and new problems arose out of this law which, however, was an important step in the direction for improving the U.S. balance of payments deficit and in strengthening the international position of the dollar[11]. The U.S. Treasury's long and intensive effort to formulate rules to assure a proper allocation of income between related entities and persons has culminated in the adoption of comprehensive Regulations. The problems which these Regulations attempt to resolve are common to all industrialized states and our experience is that the Regulations are being thoroughly examined in European States.[12]

East African States signed an agreement for an East African Economic Community, which came into force on December 1, 1967, providing for a common customs and excise regime and for the application of a "transfer tax-system.[13] In African and Asian States there is a continuous process of actions and interactions aiming at the coordination of tax policy with the changes in national income and production[14]. Neutrality of taxation is far from being a substantial point of tax policy in these countries.[15]

Yugoslav economy has reached the stage when further growth depends on closer connections with the world market. The new investment law permits foreigners to contract long term investments with Yugoslav enterprises with the aim to realize joint business goals at joint risk.[16] Yugoslavia has not yet concluded any income tax treaty, but the closer the economic connections, the more it will be necessary to cooperate with other countries with respect to avoiding double taxation. That necessity does not exist in the German Democratic Republic,[17] unless it concerns agreements relating to taxation of patent royalties. Such an agreement has been concluded between France and U.S.S.R.[18]

The "Bulletin" wishes it could publish in 1969 still more articles on important or unknown tax subjects from all over the world and expresses its thanks to all correspondents for their cooperation in 1968.

DR. J.C.L. HUISKAMP

1. Bulletin 1968, p. 118; 2. ibid., p. 194, 205; 3. ibid., p. 2, 46; 4. ibid., p. 98; 5. ibid., p. 370, 397; 6. ibid., p. 290; 7. ibid., p. 67, 291, 304, 319, 325, 415; 8. ibid., p. 108; 9. ibid., p. 99 and Supplement B (1968); 10. ibid., p. 85. 11. ibid., p. 531; 12. ibid., p. 247; 13. Supplement A (1968); 14. Bulletin, p.47, 90, 142, 200, 350, 487, 496, 543, 557; 15. ibid., p. 234; 16. ibid., p. 3; 17. ibid., p. 511; 18. ibid., p. 122.

JAMES B. SITRICK*:

U.S. TAXATION OF STOCK AND SECURITIES TRADING INCOME OF FOREIGN INVESTORS

I. INTRODUCTION

The Foreign Investors Tax Act of 1966 embodied the most comprehensive revision of the application of the U.S. tax laws to income derived from investment in the U.S. by foreign investors since the inception of the U.S. tax laws. A central feature of that revision was the broadened exemption from U.S. income tax accorded foreign investors deriving income from trading in U.S. stocks and securities. This article is a succinct summary and description of the penumbra of that exemption.

Since the enactment of the Foreign Investors Tax Act on November 13, 1966, foreign investors are subject to U.S. income tax only if such investors derive (1) income effectively connected with the conduct by the foreign investor of a trade or business in the U.S.[1] or (2) gross income from sources within the U.S. which constitutes so-called "fixed or determinable annual or periodical" income.[2]

It is well settled that income derived by a foreign investor from the sale of property (including stocks and securities) is not considered "fixed or determinable annual or periodical" income for U.S. tax purposes.[3] Thus, foreign investors trading in U.S. stocks or securities generally can be subject to U.S. tax in respect of gains derived therefrom only if such foreign investors are considered engaged in trade or business within the U.S. for tax purposes.[4]

II. STOCK AND SECURITIES TRADING INCOME

Because foreign investors not "engaged in trade or business" in the U.S. rarely will be subject to U.S. capital gains tax in respect of gains derived from trading in U.S. stocks or securities, it is important to explore the U.S. rules applicable to so characterizing foreign investors who trade in the U.S. securities markets.

Pre-1967 U.S. law provided that the term "engaged in trade or business" did not include the effecting, through a resident broker, commission agent or custodian, of transactions in the U.S. in stocks or securities. However, that exclusion was interpreted by the courts in a manner which made it inapplicable to substantial foreign investors (a) who effected such transactions while physically present in the U.S.,[5] and (b) who

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1. I.R.C. §§871(b) and 882. See Sitrick, The Effectively Connected Concept in the Foreign Investors Tax Act of 1966, 45 Taxes 1 (1967)

2. I.R.C. §§871 (a) (1) (A), 881, 1441 and 1442.

3. Reg. §1.1441-2 (a) (3).

4. See I.R.C. §§864 (b) and (c). The only instance in which a foreign investor not engaged in trade or business in the U.S. can be subject to a U.S. tax in respect of gains from the sale of stocks or securities is if the foreign investor is (a) a nonresident alien individual, and (b) present in the U.S. for at least 183 days during the taxable year in which such gains are realized.

5. See *Commissioner v. Nubar*, 185 F2d 584 (4th Cir., 1950) *cert. denied* 341 U.S. 925 (1951). In the *Nubar* case a citizen of Egypt came to the U.S. in August 1939 and was unable to leave the

delegated discretion to U.S. persons [5a] to trade in stocks or securities for the account of the foreign investors.[6]

New Section 864(b) of the Internal Revenue Code, enacted by the Foreign Investors Tax Act of 1966, both clarified and broadened the exemption of prior law. First, it continued the exemption of prior law in the case of foreign investors who do not trade in stock or securities for their own account[7] e.g., foreign brokers. Such foreign investors may continue to utilize U.S. brokers or other independent agents[8] to trade in stocks or securities in the U.S. without the income from such transactions becoming subject to a U.S. capital gains tax by reason of the foreign investor (or his foreign principal) being characterized as engaged in a U.S. trade or business for tax purposes.[9] Second, new Section 864(b) provides that, except in the case of certain foreign investment companies[10] or a "dealer" in stocks or securities, a foreign investor will not be considered engaged in U.S. trade or business merely because he trades in stock or securities in the U.S. for his "own account", regardless of where the activities instrumental to such trading are performed or how such transactions are effected.[11] Thus, it is now immaterial whether a foreign corporation or foreign individual conducts trading activities and effects stock or security transactions,

U.S. until August 1945 due to travel limitations imposed during World War II. The Court held that *Nubar* was engaged in trade or business in the U.S. by reason of stock and commodities trading activities conducted by the taxpayer while in the U.S.

5a. The term "United States person" is defined by Section 7701 (a) (3) of the Code to mean (a) a citizen or resident of the U.S.; (b) a U.S. partnership, (c) a U.S. corporation, and (d) certain estates and trusts.

6. See *Commissioner v. Adda*, 10 TC 273, *affd. per curiam*, 117 F2d 457 (4th Cir., 1948), *cert. denied* 336 U.S. 952 (1949). In the Adda case a citizen of Egypt, who was a resident of France, had accounts with several U.S. brokers in commodities. Because *Adda* was fearful of wartime conditions which he thought would limit his U.S. trading activities, he granted discretionary power to his brother, who was a U.S. resident, to trade for his account. The Court held that, on the facts, *Adda* was engaged in business in the U.S. and his profits on such transactions were subject to U.S. capital gains tax.

7. I.R.C. §864 (b) (2) (A) (i).

8. For this purpose, an agent generally will be considered "independent" only if such agent (a) does not have authority to negotiate and conclude contracts in the name of the foreign investor, and does not regularly exercise that authority; (b) does not have a stock of merchandise from which he regularly fills orders on behalf of the foreign investor, and (c) is a general commission agent, broker, or other agent of independent status acting in the ordinary course of his business. I.R.C. §864 (c) (5) (A). With respect to the degree of "independence" required by (c), recent commentary and recent U.S. tax treaty negotiations indicate that an agent will be considered independent if the agent is not dependent, both from a legal and economic point of view, upon the foreign principal, see Report of the Fiscal Committee of the OECD on the Draft Double Taxation Convention on Income and Capital, §15, p 75 (1963); and so long as the agent does not act exclusively, or almost exclusively, for the foreign principal. See Article 8 (5) of the tax treaty between the U.S. and the Philippines.

9. Such a result will obtain, however, only if the foreign investor at no time during the taxable year in which the capital gains are realized, has an office or other fixed place of business in the U.S. through which the transactions in stocks or securities are effected. I.R.C. §864 (b) (2) (C). If such an office or fixed place of business exists, the foreign investor will be subject to a U.S. capital gains tax in respect of U.S. capital gains.

10. The term foreign investment company as used in this article is not intended to mean a foreign investment company as defined in Section 1246 (b) (1) of the Internal Revenue Code. Instead, it is intended to refer simply to a foreign corporation the principal business of which is trading in stocks or securities for its own account.

11. I.R.C. §864 (b) (2) (A) (ii).

or utilizes employees or agents in the U.S. (whether independent or dependent)[12] to perform any of the functions instrumental to such trading. It is also immaterial whether any such employee or agent, wherever located, is authorized to exercise discretion in connection with such trading activities on behalf of his foreign employer or principal.[13] To underscore the magnitude of the broadened exemption from "engaged in trade or business" characterization[13a] in the case of U.S. stock and securities trading activities by foreign investors, the regulations promulgated under Section 864(b) of the Code contain an example which, in almost all respects, includes facts identical to those which existed in the *Adda* case.[14] However, the conclusion of that example (unlike that of both the U.S. Tax Court and the U.S. Fourth Circuit Court of Appeals in the *Adda* case) is that the foreign investor is not "engaged in trade or business" within the U.S. by reason of substantial stock and securities trading activities in the U.S. effected by a U.S. discretionary agent of the foreign investor.[15]

12. See footnote 8, *supra.*
13. I.R.C. §864 (b) (2) (A) (ii).
13a. The effect of not being considered engaged in a U.S. trade or business, as previously indicated (See "I. Introduction"), is that foreign investors rarely will be subject to U.S. capital gains tax in respect of gains derived from trading in U.S. stocks or securities.
14. See footnote 6, *supra.*
15. Reg. §1.864-2 (c) (2), Example.
16. I.R.C. §864 (b) (2) (A) (ii), second sentence.
16a. For this purpose, stock is considered owned indirectly if it is owned through foreign estates, foreign trusts, foreign partnerships or other foreign corporations. I.R.C. §542 (c) (7).
17. I.R.C., §864 (b) (2) (A) (ii), second sentence. This result is accomplished by the parenthetical "exception to the exception" in I.R.C. §864 (b) (2) (A) (ii) which carves out a corporation which is, or but for Sections 542 (c) (7) or 543 (b) (1) (C) would be, a "personal holding company".
17a. See H. Rept. 1450, 89th Cong., 2d Sess. pp. 14-15.

A. DEALERS AND FOREIGN INVESTMENT COMPANIES

As indicated, the broadened exemption from U.S. tax for foreign investors under the new law does not extend to (1) a "dealer" in stocks or securities, or (2) a foreign corporation, the principal business of which is trading in stocks or securities, if its principal office is in the U.S.[16] The broadened exemption does apply, however, to a foreign corporation described in (2) if the foreign corporation's outstanding stock is owned more than 50 percent in value, directly or indirectly,[16a] by five or fewer individual shareholders.[17]

1. *Dealers*

The law did not extend to "a dealer in stocks or securities" the right to use U.S. discretionary agents to trade in stocks or securities in the U.S. for the account of such dealers without being considered engaged in trade or business in the U.S. This category of foreign investor was excluded from such a benefit because stock and security trading activities are so integral part of the trade or business of a foreign dealer in stocks or securities that to characterize such U.S. activities as not constituting a U.S. trade or business of a foreign dealer (a) might give foreign dealers an undue competitive advantage over U.S. dealers, and (b) would neglect a principal purpose of the Foreign Investors Tax Act of 1966, i.e., to impose a U.S. income tax on income generated by U.S. business activities of foreign investors.[17a]

Accordingly, a foreign dealer in stocks or securities will be exempt from U.S. tax on gains derived from trading in U.S. stock or securities only if the foreign dealer (a) conducts such trading activities through an in-

dependent agent,[18] and (b) does not maintain an office or other fixed place of business in the U.S. through which transactions in stocks or securities are effected.[19]

Because of the inherently ambiguous nature of the statutory "dealer" concept in Section 864(b)(2)(ii), it was necessary to refine the definition of the term "dealer" in the regulations in an attempt to clarify the outer limits of that exclusion. Thus, *inter alia* the regulations contain two examples, the purposes of which are to make clear that a foreign investor will not be considered a "dealer" for purposes of the exclusion contained in Section 864(b)(2)(A)(ii) solely because:

(1) The foreign investor acts as an underwriter, or a selling group member, for the purpose of making a distribution of stocks or securities of U.S. issuers to foreign purchasers of such stocks or securities (without regard to whether other members of the selling group distribute such stocks or securities to U.S. purchasers);[20] or

(2) The foreign investor (principally foreign banks) acts as a "dealer" in transactions other than those in connection with which discretion is given by the foreign investor to a U.S. agent to trade in stocks or securities for the account of the foreign investor (or its foreign principal)[21].

The exception stated in (2) of the preceding paragraph was designed to solve a problem which arises principally because foreign banks often operate both as investment or merchant bankers ("dealers"), and as commercial bankers, in the same manner as existed in the U.S. prior to the Banking Act of 1933.[22] Thus, because of the statutory "dealer" exclusion, under a strict interpretation of the statute a foreign bank which acts in a dealer capacity outside the U.S. would be required to pay a U.S. capital gains tax on gains derived from trading in stocks or securities in the U.S. (by reason of being considered engaged in a U.S. trade or business) solely because such foreign bank granted discretionary authority to a U.S. agent to trade in stocks or securities in the U.S. in transactions wholly unrelated to the dealer activities conducted by the foreign bank outside the U.S.

Example (2) of Reg. §1.864-2(c)(iv)(c) focuses on this question. That example provides, in effect, that the fact that a foreign bank deals in U.S. or foreign stocks or securities abroad will not trigger a U.S. capital gains tax on gains derived by that foreign bank from trading in stocks or securities for the account of customers of the foreign bank by means of a grant of discretion to a U.S. agent. The regulations take the position that in such a transaction the foreign bank is not acting as a dealer for "its own account" within the meaning of the first sentence of Section 864(b)(2)(A)(ii) but, instead, is acting

18. See footnote 8, above.

19. I.R.C., §864 (b) (2) (C). See pp. 2-3, above.

20. Reg. §1.864-2 (c) (iv) (C), Example (1). Thus, foreign financial institutions which assist in the distribution of U.S. securities to foreign purchasers are not *ipso facto* required to pay U.S. tax in respect of income derived from such underwriting activities, or in unrelated transactions in which such foreign financial institutions grant discretion to a U.S. agent to trade in stocks or securities for the account of such foreign financial institutions.

21. Reg. §1.864-2 (c) (iv) (C), Example 2.

22. The Banking Act of 1933 was the result of an extensive Congressional investigation of the role of banks in the débâcle of the U.S. stock market in 1929. That investigation revealed that when commercial banks engaged in underwriting activities, and in buying and selling stocks to and for customers, funds of the commercial banks often were placed in vulnerable financial positions. Thus, the Act forbids institutions which accept deposits of money subject to withdrawal by check, discount commercial paper and make loans, from engaging in underwriting activities or the sale or purchase of securities to or for customers.

as an agent for the account of its customer. It is clear that the foreign customer in such a transaction is permitted to grant discretion to a U.S. agent directly without incurring a U.S. capital gains tax (under the general exemption in Section 864(b)(2)(a)(iii)) in respect of gains realized by such agent for the account of the foreign customer. Thus, the regulations permit such an investment to be made under limited circumstances through the means of the foreign bank.[22a] The exemption from dealer characterization for foreign investors who otherwise may be considered dealers for U.S. tax purposes (e.g., foreign banks) is available only if such foreign investor-dealer at no time during the taxable year has an office or fixed place of business in the U.S. through which such stock or securities trades are effected; and only if such foreign investor-dealer supplies the U.S. discretionary agent with a written statement to the effect that (a) the funds invested by the U.S. discretionary agent for the foreign investor-dealer actually are the funds of a customer of the foreign investor; and (b) such customer is neither (i) a dealer in stocks or securities, nor (ii) a foreign corporation or foreign partnership, the principal business of which is trading in stocks or securities for its own account, which has its principal office in the U.S.[22b] (However, the disclaimer described in (ii) need not be submitted by a foreign corporation or foreign partnership described therein if such entities are considered owned more than 50 percent, directly or indirectly, by five or fewer individuals).[23] The purpose of such a written representation is to prevent a foreign investor from being used as a conduit for a discretionary grant to a U.S. agent by another foreign investor who is specifically prohibited by the statute from granting such discretion directly without incurring a U.S. capital gains tax.[24]

2. *Foreign Investment Companies*

a) Generally

The broad exemption from U.S. trade or business characterization in Section 864(b)(2) applies equally to investors who are, as to the

22a. See, Reg. §1.864-2 (c) (iv) (c), Example 2. The logic of this position apparently does not commend itself to the tax authorities of all nations. Thus, for example, under the U.K. tax treatment of U.K. investment trusts imposed by the U.K. Finance Act of 1965, U.K. shareholders in U.K. investment trusts who invest *directly* in U.S. stocks obtain a credit against their U.K. standard tax liability for the full 15% U.S. withholding tax imposed on U.S. dividend income of such investors. However, the U.K. does not permit the 15% U.S. withholding tax imposed upon U.S. dividend income of U.K. investment trusts (which 15% U.S. withholding tax will exceed the U.K. corporate tax imposed on the U.S. dividend income of a U.K. investment trust where the management expense and interest expense of the U.K. investment trust equal or exceed the U.S. dividend income of such trust) to be passed through the trusts, upon the distribution of dividends by the trusts to U.K. shareholders, and allowed as a credit to such shareholders against the U.K. standard tax imposed upon the dividend income which such U.K. shareholders receive from the U.K. investment trusts. Accordingly, to the extent that the 15% U.S. withholding tax exceeds the U.K. corporate tax on U.S. dividend income, such excess credit for U.S. tax may not be used by U.K. shareholders of the U.K. investment trust and is "wasted". Compare Section 853 of the Internal Revenue Code which accords such "pass through" credit benefits to U.S. shareholders in so-called "regulated investment companies" the assets of which are comprised more than 50% in value of stock or securities in foreign corporations.

22b. *Id.*

23. This is because such foreign corporations and foreign partnerships generally are treated for U.S. tax purposes as mere aggregations of individuals, as described below on page 536.

24. See I.R.C. §864 (b) (2) (A) (ii), parenthetical clause.

U.S., foreign corporations, foreign partnerships and nonresident alien individuals. However, that exemption does not apply to a foreign corporation, the principal business of which is trading in stocks or securities for its own account, which maintains its principal office in the U.S. (unless the value of the foreign corporation's stock is owned more than 50 percent, directly or indirectly, by five or fewer individuals)[25].

The breadth of the U.S. tax exemption for stock and securities trading income of foreign investment companies is graphically illustrated by the limited nature of the statutory limitation (described in the second sentence of the preceding paragraph) to the general exemption. That limitation does not affect (1) foreign investment companies owned, directly or indirectly, by five or fewer individuals, and (2) foreign investment companies (without regard to their ownership) which do not maintain their principal office in the U.S.

The statutory carve out of a foreign investment company which maintains its principal office in the U.S. was designed to prevent a foreign corporation which, in effect, is managed and controlled in the U.S. from avoiding a U.S. capital gains tax in respect of its trading income from U.S. stocks and securities. Obviously, as in the case of the "dealer" carve out, [25a] it would be difficult to conclude that such a foreign corporation is not engaged in trade or business in the U.S. for tax purposes.

The "exception to the exception",[26] for what are essentially foreign corporations which are personal holding companies within the meaning of the U.S. tax laws,[27] was included so as not to discriminate against entities which for U.S. tax purposes generally are treated as aggregations of individuals, rather than as corporations. As in the case of the foreign dealer question,[27a] Section 864(b) permits foreign individuals (1) to grant directly complete discretion to U.S. agents to trade in U.S. stocks and securities, and (2) to be physically present in the U.S. for up to 182 days during a taxable year, without requiring such individuals to pay a U.S. capital gains tax on gains resulting from such trading activities. Thus, it appears appropriate to permit an entity, which for U.S. tax purposes is regarded as merely an aggregation of individuals,[27b] to maintain its principal office in the U.S. without being considered as being engaged in trade or business in the U.S. for tax purposes—which characterization undoubtedly would trigger a U.S. capital gains tax on gains derived from such trading activities.

b) Principal office

(i) General Functions

Perhaps the most difficult question raised by Section 864(b) and the regulations thereunder relates to the determination whether the principal office of a foreign investment company is in the U.S. In this connection the legislative history of Section 864(b) stated:

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25. Foreign investment companies which are so "closely held" are entitled to the broad exemption from trade or business characterization (and, therefore, generally exempt from U.S. capital gains tax) even if such companies maintain their principal office in the U.S. See footnote 22A, *supra*.

25a. See page 533, above.

26. The reference to the "exception to the exception" refers to the fact that a general exemption from trade or business characterization is stated in Section 864 (b) (2) (A) (ii), first sentence; an exception to such an exception is contained in Section 864 (b) (2) (ii), second sentence; and an "exception to the exception" contained in Section 864 (b) (2) (A) (ii), second sentence, is contained in the parenthetical clause of such second sentence.

27. See I.R.C. §542 (a).

27a. See pp. 534-535, above.

27b. See footnote 22a, above.

"Whether a corporation's principal office is in the United States is to be determined by comparing the activities (other than trading in securities) which the corporation conducts from an office located in the United States with the activities it conducts from offices located outside the United States. For example, a corporation which carries on most of its stock and securities transactions through an agent with discretionary authority in the United States but maintains a general business office outside the United States in which its management is located and from which it communicates with its shareholders and the general public, solicits sales of its own stock, and maintains its corporate records and books of account, would not be considered as having its principal office in the United States."[28]

In furtherance of the above, the proposed Section 864(b) regulations contained an example permitting a foreign corporation to engage in U.S. stock and securities trading without incurring a U.S. capital gains tax even though (i) such foreign corporation, for a period up to three years, irrevocably grants discretion to a U.S. agent to trade for the account of the foreign corporation; (ii) such corporation issues a prospectus and otherwise advertises the services to be performed by the U.S. agent; and (iii) the management of such corporation make occasional business visits to the U.S. offices of the U.S. agent. The same, proposed regulations also required, however, that (i) the foreign corporation be "organized" by foreign investors; (ii) the only function which could be performed by the U.S. agent was the rendering of investment advice and the effecting of stock and securities transactions; (iii) the U.S. agent could not participate in the "marketing of the shares" of the foreign corporation; (iv) the foreign corporation must maintain a general business office outside the U.S.; and (v) the management of the foreign corporation must be, in all respects, independent of control by the U.S. agent.[28a]

In response to public comments, and in an effort to provide foreign investors with the kind of certainty essential to the precise planning of substantial stock and security investment commitments, the final regulations refined the substance of the proposed regulations (particularly with respect to the requirements stated in the immediately preceding paragraph) by providing (i) that the foreign investment company need not be "organized" by foreign interests but, instead, could be conceived, developed and promoted by U.S. financial interests; (ii) that foreign proselytizing activities by representatives of the U.S. agent in the form of speaking engagements outside the U.S. etc., for the purpose of explaining the nature of the investment advice being rendered by the U.S. agent, do not constitute a prohibited "marketing of the shares" of the foreign investment company by the U.S. agent; (iii) that notwithstanding the requirement of "independence", a foreign investment company can maintain a U.S. office staffed with employees (rather than agents) whose sole function is the rendering of investment advice and not be characterized as engaged in trade or business in the U.S.; (iv) that no single foreign office of the foreign investment company must be its "principal office" so long as the activities listed in Reg. §1.864-2(c)(2)(iii) are carried on outside the U.S., e.g., at three or four foreign offices of the foreign corporation; and (v) that shares of

28. Report of the Committee on Ways and Means of the House of Representatives to accompany H.R. 13103, p. 13 (1966).

28a. See the proposed regulations under Section 864 (b), which appeared in the Federal Register of October 26, 1967.

the foreign investment company may be sold by U.S. brokerage houses to their foreign customers, so long as such U.S. brokerage houses are unrelated to both the U.S. agent and the foreign investment company.

(ii) Accounting Functions

Questions also arose as to the accounting functions required to be performed by the various offices of a foreign investment company to assure that the "principal office" of such a foreign investment company is outside the U.S.

The only specific allusions to such functions in the regulations are those referred to in the list of factors contained in Reg. §1.864-2(c)(2)(iii) which, if complied with, will cause a foreign investment company to "not be considered as having its principal office in the U.S." Two of such factors require the foreign investment company to (i) maintain its principal corporate records and books of account outside the U.S., and (ii) conduct the audit of such books of account outside the U.S.

As a practical matter, compliance with the above-described accounting requirements of the regulations should be attained if the investment ledger,[29] shareholder ledger[30] and general ledger[31] of the foreign investment company is maintained at its office or offices outside the U.S.

Moreover, the initial valuation of the foreign investment company's net assets should be able to be performed periodically by the U.S. investment advisor of the foreign investment company without jeopardizing the conclusion that the principal office of the company is outside the U.S., since the valuation function is an integral part of the investment function performed for the foreign investment company by the U.S. investment advisor. However, the final computation of such net asset value as initially computed by the U.S. investment advisor, (e.g., reduction for expenses such as foreign taxes, legal and accounting fees, subscription rebates payable and similar administrative charges by the representatives of the office or offices of the foreign investment company) should be performed outside the U.S.

On the basis of the above-described changes incorporated into the final regulations, and the specific list of factors contained therein,[31a] with careful planning foreign investors may make investments in U.S. stocks or securities without fear of being subject to U.S. capital gains tax by reason of having fallen into an income tax 'trap for the unwary.'

3. *Partnerships*

As indicated, Section 864(b)(2) of the Code provides rules for determining when trading in stocks or securities for the "taxpayer's own account" will be considered to be engaged in trade or business in the U.S.; and then excepts from the general rule a "dealer", and certain foreign investment companies. Because a partnership is not a "taxpayer" for

29. The investment ledger generally contains a separate sheet for each stock or security investment as well as the date of the acquisition or sale, the number of shares traded, the price per share and the total cost involved in each trade. The outstanding balance in the investment ledger usually is reconciled periodically with the U.S. agent's statements as to transactions conducted on behalf of the foreign investment company.

30. The shareholder ledger consists of the financial shareholder records of the foreign investment companies and includes the name, address, number of shares and price per share paid by each shareholder of the company.

31. The general ledger is a summary of totals gleaned from the investment ledger, shareholder ledger and any other ledgers maintained by the foreign investment company.

31a. See, Reg. §1.864-2 (c) (2) (iii).

purposes of the U.S. tax laws,[32] no specific rule is contained in Section 864(b)(2) regarding the trade or business characterization of foreign partnerships, or of foreign individual and foreign corporate members of partnerships, which grant discretion to U.S. agents to trade in stocks or securities.[32a] In addition, U.S. law provides that a foreign individual or foreign corporation shall be considered as being engaged in trade or business within the U.S. if the partnership of which such individual or corporation is a member is so engaged.[33]

The effect of the above statutory provisions is to permit a foreign individual to trade in U.S. stocks or securities, without being subject to U.S. capital gains tax, by (1) being physically present in the U.S. for up to 182 days during a taxable year,[34] (2) granting discretion to an agent or employee present in the U.S. for an entire taxable year to effect stock or securities transactions,[35] or (3) becoming a shareholder in a foreign corporation which effects such transactions by granting discretion to a U.S. agent.[36] However, if such foreign individual or foreign corporation utilizes a partnership as a vehicle for granting discretionary authority to trade in stocks or securities in the U.S., the absence of statutory guidelines in Section 864(b)(2) and the provisions of Section 875(1)[36a] could be interpreted to require the partnership or its members, as the case may be, to pay a U.S. capital gains tax in respect of gains derived from identical stock or securities transactions.

If the final regulations under Section 864(b) had remained silent on the partnership question, there would appear to have been two possible results. First there is some authority for the proposition that a statutory reference to "individual" (or "taxpayer") under U.S. tax law may be read to include "partnership" by virtue of Section 703(a) of the Code and certain other cases and commentaries.[37] If such an interpretation is applicable to Section 864(b)(2), then foreign taxpayers might have been permitted to utilize the more liberal rules contained therein, relating to foreign individuals trading in stocks or securities, to circumvent the somewhat more stringent rules applicable to foreign corporations e.g., that the principal office of a widely-held foreign investment company may not be in the U.S. without subjecting that company to U.S. capital gains tax.[38] Second, because 864(b)(2) does not specifically refer to partnerships, the provisions of Section 875(1)[38a] could

32. Partnerships have a peculiar status under U.S. tax laws. They are not taxable as such; and persons carrying on business as partners are liable for tax only in their separate or individual capacities. I.R.C. §701. Therefore, the partnership files no tax return, but rather an information return which reports items of its gross income and deductions and the names and distributive shares of its members. I.R.C. §6031. Each member, in determining his income tax, is required to take into account separately in his return his proportionate share (whether or not distributed) of partnership income, gain, loss, deduction or credit. I.R.C. §702.

Compare, *Liflans Corp. v. Comm.* 390 F2d 951 (Ct. Claims, 1968) which held in part that a partnership is not a "person" for purposes of Section 267 of the Internal Revenue Code.

32a. The failure specifically to cover partnerships in Section 864 (b) (2) appears to have been merely an oversight, and not a reflection of reasons of policy.

33. I.R.C. §875 (1).

34. I.R.C. §871 (a) (2).

35. I.R.C. §864 (b) (2) (A) (ii).

36. *Ibid.*

36a. See footnote 33 and the text to which it relates.

37. See Roberts & Warren, U.S. Income Taxation of Foreign Corporations and Nonresident Aliens, p. VI-91, footnote 113.

38. Compare the first and second sentences of I.R.C. §864 (b) (2) (A) (ii).

38a. See footnote 33 and the text to which it relates.

have had the effect of imposing a U.S. capital gains tax on foreign partnerships, and foreign persons who are members of partnerships, which grant discretionary authority to U.S. agents to trade in stocks or securities for the partnership's account in respect of any gains derived from such transactions. In the first case, partnerships appear to be treated too leniently; and in the second case, too harshly.

The final regulations promulgated under Section 864(b)(2)(A)(ii) took an Aristotelean position on the partnership question. That is to say, such regulations remove the apparently unintended statutory discrimination against partnerships brought about by the interrelationship of Sections 864(b)(2) and 875(1) of the Internal Revenue Code, but do not permit partnerships to be used to circumvent the rules in 864(b)(2) applicable to foreign corporations. Therefore, examples (1) and (2) in Reg. §1.864-2(c)(2)(ii), respectively, permit a foreign individual to grant discretion to trade in stocks or securities to a partnership (which is not a dealer in stocks or securities) of which the foreign individual is a member without becoming subject to U.S. capital gains tax on gains derived from such trading activities (a) where more than 50 percent of the partnership interests are owned, directly or indirectly, by five or fewer individuals—a rule analagous to the personal holding company test described on page 536 above; and (b) where the partnership interest is more widely dispersed and the principal office of the partnership is not in the U.S.—a rule analagous to the foreign investment company test described on pages 535-536 above.

Example (3) of the same regulation merely provides that a partnership (as well as its partners, as in examples (1) and (2)) may grant discretionary authority to a U.S. agent to trade in stocks or securities without the partnership being characterized as engaged in a U.S. trade or business. Thus, Example (3), ameliorates what appears to be a technical defect in the statutory language of 864(b)(2) which, by using the term "taxpayer", unintendedly does not specifically cover partnerships.

III. COMMODITIES

The only statutory changes made by the Foreign Investors Tax Act of 1966 to the U.S. taxation of income derived by foreign investors from trading in commodities were conforming changes to those made by the same Act to the provisions governing trading in stocks and securities, e.g., permitting a foreign investor to grant discretion to a U.S. agent to trade in commodities for the account of the foreign investor without rendering the latter engaged in U.S. trade or business for tax purposes.[39] Accordingly, the benefits accorded commodity traders, like those accorded stock and securities traders, were not extended to a foreign investor who is "a dealer" in commodities.[40]

The statutory "dealer" exception creates some confusion since it can be interpreted to apply both to (1) a dealer in the physical, cash or spot commodity, e.g., grain, or (2) a dealer in commodities futures contracts.[41] Persons described in (1) generally buy or sel actual commodities for present or future delivery, buy or sell warehouse receipts,[41a]

38b. See footnote 37 and the text to which it relates.

39. I.R.C. §864 (b) (2) (B).

40. I.R.C. §864 (b) (2) (B), second sentence.

41. A commodity futures is to contract to purchase some fixed amount of a commodity at a future date for a fixed price.

41a. A warehouse receipt is a receipt given by a warehouseman for goods received by him for storage in a warehouse.

and/or buy or sell bills of lading.[41b] Moreover, such persons generally make or take delivery of the commodity. Persons described in (2) above, however, generally do not intend to take or make delivery of the commodity. Instead, such persons generally act in one or more of the following capacities: hedgers, i.e., persons who insure themselves against loss due to unfavorable changes in the price at the time of the future delivery of a commodity which they actually buy and sell; "legitimate capitalists", who exercise their judgment as to market conditions and purchase or sell for future delivery with a view to making a profit based on the law of supply or demand; and gamblers, who buy and sell as upon the turn of a card.[42] Because of the rather sophisticated and esoteric nature of the world of commodity trading, the final regulations under Section 864(b)(2)(B) attempted to clarify the fact that the commodity trading intended to be protected by the statute was trading in futures contracts (category (2) of the preceding paragraph), not trading in the actual commodity. Thus, for example, a foreign investor who has an employee or agent in the U.S. actually engaged in purchasing or selling (and, therefore, in making or taking delivery of) a physical, cash or spot commodity should be regarded as engaged in trade or business for U.S. tax purposes; and, accordingly, should be subject to U.S. tax on income derived from such activities. However, a foreign investor whose only U.S. activities are conducted by a U.S. agent or employee who trades commodity futures contracts for the foreign investor should not be subject to U.S. tax on any gain realized from such transactions. In this connection, because in common commercial parlance there is no such thing as a "dealer" in commodity futures contracts, the statutory exception for "a dealer in commodities" probably withdraws the benefits of the statutory protection only from foreign persons engaged in the business of making or taking delivery of the actual physical, cash or spot commodity.

The effect of the regulations, therefore, is that a foreign investor engaged only in trading commodity futures contracts in the U.S. through an employee or agent cannot be subject to U.S. tax by reason of the statutory exception applicable to "a dealer in commodities"; and a foreign investor engaged in the business of actually making and taking delivery of a commodity outside the U.S. (but not within the U.S.) will not be considered engaged in a U.S. trade or business, by reason of the provisions of Section 864(b)(2)(B), in respect of income from trading in commodity furutes contracts in the U.S. through an agent or employee. The latter proposition is made clear by the Example contained in Reg. §1.864(d)(2)(iii). However, a foreign investor engaged in the U.S. in the business of actually making and taking delivery of a cash, spot or physical commodity will be considered engaged in a U.S. trade or business, notwithstanding the provisions of Section 864(2)(B), even in the case of income derived from trading in futures contracts.[43] This is made clear by the provisions of Reg. §1.864(d)(3), which exclude from the statutory protection dealings in commodities as goods or merchandise in the ordinary channels of commerce.

IV. SERVICES INCOME

The subsection of the Internal Revenue

41b. A bill of lading is written evidence of a contract for the carriage of goods by land and the delivery of such goods.

42. *U.S. vs. New York Coffee & Sugar Exchange*, 263 U.S. 611 (1924).

43. See *Corn Products Refining Co. v. Comm.*, 350 U.S. 546 (1955); I.R.C. §864 (b) and (c).

Code which relates to the determination whether a foreign investor trading in stocks or securities in the U.S. is engaged in trade or business in the U.S. also contains rules applicable to the same determination in the case of income derived from the rendering of personal services.[44] Thus it seems appropriate to describe briefly the latter rules.

As an exception to the general rule that the term "engaged in trade or business" within the U.S. includes the performance of personal services within the U.S. at any time within the taxable year, pre-1967 law provided that the trade or business concept should not include the performance of personal services of a foreign individual for (1) another foreign individual, a foreign partnership or a foreign corporation, so long as the foreign employer was not engaged in a U.S. trade or business, or (2) a foreign office of a U.S. corporation. This rule applied, however, only if the foreign individual employee was present in the U.S. for not more than 90 days during the taxable year and the compensation of such foreign employee for services performed in the U.S. did not exceed $3,000. A principal purpose of this exemption is to permit foreign businessmen to visit the U.S. for reasonable periods of time without having to pay any U.S. income tax on such income, or file a U.S. income tax return.

The Foreign Investors Tax Act of 1966 broadened the exemption described in (2) of the preceding paragraph to encompass a foreign individual who performs services in the U.S. for a foreign business office of a U.S. citizen, a U.S. resident or a U.S. partnership (as well as for the foreign office of a U.S. corporation, as had been permitted under prior law). Thus, for example, under the broadened exemption if an individual resident of the U.K. is employed by the London branch of a U.S. brokerage partnership, such U.K. employee may visit the U.S. home office of the partnership for short periods of time each year without becoming subject to the requirements of the U.S. income tax laws.[45] As indicated, under prior law, such visits were permitted on a tax-free basis only in the case of foreign employees of a U.S. corporation of a foreign entity.

V. CONCLUSION

The Foreign Investors Tax Act of 1966 eliminated and modified many provisions of U.S. law which, while serving no sound fiscal purpose, discouraged foreign investment in U.S. stocks and securities. It also imposed simpler, more rational and more equitable U.S. rules of taxation on income derived from such investment. In so doing, the new law undoubtedly was an important step in the direction of ameliorating the U.S. balance of payments deficit and in strengthening the international position of the dollar.

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44. I.R.C. §864 (b) (1).

45. Reg. §1.864-2 (b) (3), Example 1. The 90 day, $3,000 statutory rule still applies. However, this rule frequently is liberalized in the case of individual residents of foreign countries with which the U.S. has concluded an income tax convention. See, for example, Articles 15 and 16 of the recently concluded (i.e., July 11, 1968) treaty between the U.S. and France which extends the 90 day period to 183 days and removes the dollar limitation.

SIHAM KAMIL SHARIF:

INCOME TAX IN IRAQ

1. PERSONAL INCOME TAX

The present law is a modification of Law No. (36) of 1939, which expanded upon the original income tax law of 1927.[1] In fact, the present law incorporates numerous amendments set forth in an intermediate Law No. (85) of 1956. The tax as it is visualized by income tax law of 1959, currently under force, is charged on income which has its origin in the national territories. Taxation is based on current income, the expenses incurred for earning such income can be summarized as follows:

Income from trade, industry and professions; interest, discounts, commissions, discounts and profits arising from trading with shares and bonds; cash rents of agricultural land; profits arising from transfer of ownership of real estate; salaries, pensions, annuities, wages; travelling expenses, board and residence, cost of living allowances.[2]

Less: Gross income deductions such as:

Interest paid on loans; rents of building occupied by the taxpayer for acquiring the income; capital consumption and losses; bad debts; pension contributions; grants for education and charity.

Less: Personal exemption.

The result will be the taxable income which is subject to a progressive tax rate.

Limitations of the existing tax system:

a) Coverage

The application of the present tax system has restricted tax coverage to a low level. In 1966-67, income tax covered 55,968 taxpayers.[3] In the same year total receipt under personal income taxation was only ID 5.34 million. Real national income and real per capita income increased during the ten years between 1953-63 by 6.4 per cent respectively.[4]

Although income tax revenues (including individuals and companies) increased from ID 2.20 million[5] to ID 11.60 million[6], in the same period, the fact remained that this increase did not keep pace with the increase in national and per capita income. The number of taxpayers amounted in 1966-67 to 25.9 thousand employees it both the government and the private sectors. Out of a population of 8.4 million about 30 thousand people who came within income tax brackets were self-employed individuals. Assuming an average figure of five persons effectively covered per taxpayer, the personal income tax would effect about 279,840 people, or a percentage of 3.3 of the total population. This narrow coverage prevents income tax from being highly productive. In 1966-67, its contribution to the ordinary budget was 3.4 per cent only.

b) Tax Base

One characteristic of the tax base is the high minimum exemption limit. A person has to earn more than seven times the national per capita income for a single person in 1963

1. Income tax was introduced at first in 1909 during the Ottoman rule. The tax was abolished after the First World War.
2. This earning was subject to tax according to Law No. (44) of 1968; Appendix no. I.
3. Ministry of Planning, Statistical Abstract 1966.
4. Central Bank of Iraq, Annual Report 1963, 1966.
5. Ministry of Finance, Annual Report of Government Accounts, 1953.
6. Statistical Abstract, 1966.

before he pays any tax on income[7], and around fourteen times for a married man with children less than eighteen years of age. The fact that this multiple per capita income is high can be explained by the low level of national per capita income. The device of exemption makes it possible to allow for a certain amount of income, which the tax legislator believes is necessary for the individual to secure a minimum level of health and decency. However, it is very difficult to lay down any absolute standard for the determination of the subsistence level, and in Iraq this level can be thought of as a subjective measure.

In addition, exemptions and deductions are allowed for incentive purposes as the facilities for accelerated depreciation and saving allowances and avoidance of double taxation. The last decade witnessed several amendments which lowered the tax base gradually. In that regard the exemption limits were raised on the ground that the loss of revenue could be offset by the increase of revenue yield of 50 per cent profit tax of oil companies. Table (1) in the appendix traces the changes in income tax exemption for certain selective years.

c) Tax Rate

The existing tax rate is a result of several amendments to income tax practice which date back to 1927 and 1939. The basic income tax rate of 1939 applied different schedules for resident and non-resident income. It commenced at 6 per cent for taxable income of ID 150 annually to a maximum of 15 per cent over ID 1200 annually. For non-residents, the rate was a flat one which stood at 15 per cent.

During the Second World War, a certain tax measure was adopted. An excess profit tax was added to the original income tax. It applied to incomes exceeding the average income of the three preceding years. In cases of new incomes, the tax was applied to any income exceeding an average profit determined by the Ministry of Finance using 7 per cent of invested capital as a standard rate of return[8]. The rate of tax ranged from 5 per cent to 20 per cent for the first ID 1,000 and for excess profit above ID 3,000.

Because of certain administrative difficulties, excess profit tax was replaced by an income surtax[9]. The tax applied to all income above ID 1,500 and rates ranged from 5 per cent for the first ID 1,000 to 45 per cent for all income above ID 8,000 of both residents and non-residents. Both taxes, after a decade, were consolidated into a single set of graduated rates. In addition, a separate graduated schedule was promulgated for residents and non-residents and for certain types of income. Thus in 1956[10], the schedular tax system replaced the old global one of income taxation. Accordingly, certain tax scales were established on incomes of residents from transactions in real estate; renting of agricultural land; wages, salaries, bonuses, allowances, and other sources of income. For incomes from real estate, the tax ranged from 3 per cent for an income up to ID 500 to 20 per cent above ID 5,000 while for agricultural rent it was a flat rate of 10 per cent. For other incomes (wages and salaries) the rate started very low, in the lowest brackets of income: the first chargeable income up to ID 500 was subject to a rate of only 2 per cent; at the top end of the schedule the maxi-

7. Per capita income of 1963 (constant prices of 1956) was estimated at ID 69. Central Bank, Annual Report, 1963.
8. United Nations, Public Finance Information Papers, Iraq, 1951, p. 22.
9. Income Tax Law No. 63 of 1943, Article 2, p. 40.
10. Income Tax Law No. 85 of 1956.

mum rate was 7 per cent for an income over ID 1,500, but not over ID 2,500. The taxable income above this maximum amount was subject to a different tax scale which was applicable to sources other than the ones mentioned above.

In considering the proper levels of tax rates, the tax rate schedules were modified and replaced again by the global system. The former schedules of rates integrated along with still a different set of tax rates for individual residents and individual non-residents. The legislature recognized through these changes the ability of the taxpayer to pay. Upon this ability, a single high progressive rate is set up on the high income brackets. However, tax rates grafted for each income bracket are, to some extent, the outcome of trail and error or the reflection of political decisions. Table 2 presents a comparison of tax rates specified by the laws for the years 1956, 1959, 1964, 1966 and 1968, after the deduction of legal allowances.

The current tax rates also apply to the combination of the income of wife and husband, taxed in the name of the husband; no income splitting is practiced in the law. This means that income tax liability with given income deductions and exemptions would be much higher than for a single taxpayer; and in this respect, the taxpayer will have to suffer from the increased progression applied to higher income brackets.

In conclusion, the current personal income tax is still a non-agricultural income tax. With exemptions and deductions, the tax is highly progressive. As to the personal exemption, the issue implies an element of tax equity between higher and lower income families in allowing for differences in the conditions of family situations since it takes into consideration marital status and the number of dependents. It also provides for the allowances that are necessary for maintaining health and decency. In addition, exemptions together with deductions represent an attempt to encourage spending in certain ways. They probably induce a higher consumption level, while deductions leave an opening for grants to charities, for religious activities and for education and research. However, increased personal exemptions would eliminate a number of taxpayers, especially in the starting income brackets, and thus impair, to an extent, tax compliance. As to the current tax rate, the rate is highly progressive for the higher income brackets and is now limited for the top income bracket to 75 per cent instead of 40 per cent as applied in 1956. In the eyes of the legislature a taxpayer with a taxable income of ID 8,000 can afford to pay more than triple the amount of the tax paid by a taxpayer with an income of ID 4,000. It is uncertain to what extent the different levels of income are important to different taxpayers. This implies psychological complications as well as economical ones. By the same token, it is difficult to justify the application of the same rate of tax to the same amount of income earned in a different way. The progressive tax rate cannot be objectively justified. Rates are the outcome of trial and errors or a reflection of political attitudes.

Although the progressive rates narrow the differences of income levels, they may encourage avoidance and illegal evasion from the tax. This would put some strain on the tax assessment machinery.

2. CORPORATION INCOME TAX

Corporation incomes are subject to taxation in much the same manner as individual incomes. In fact, the definition of income is similar in the two cases, and both taxes on individuals and on corporations are included under the same major heading 'Income Tax'.

Many of the provisions of the law apply equally to both entities.

All receipts of a corporation, over and above actual expenses, are taxable after appropriate deductions for depreciation and for interest paid out on loans. In addition to interest and other taxes paid, the corporation may take a deduction from income for the contributions to non-profit organizations (this deduction was limited to 2 per cent of income, but it was suspended in 1960)[11].

The major difference between the corporation tax and the individual income tax lies in the rate of the tax. At first, in 1939, the corporation income tax was proportional rather than a progressive tax. A flat rate of 15 per cent was imposed on all corporation incomes. Currently (1968) the tax rate varies between 15 per cent, up to ID 1,000 to 55 per cent over ID 12,000 for industrial limited liability companies and between 15 per cent up to ID 1,000, to 60 per cent over ID 15,000 for non-industrial companies. Corporation tax rate varies between 15 per cent up to ID 1,000 to 50 per cent over ID 10,000 for industrial corporations and between 15 per cent up to ID 1,000 to 55 per cent over ID 12,000 for non-industrial corporations. These rates are justified for encouraging investment in industry. It, also, enables the tax authority to maintain coordination of the present tax treatment of the companies with the existing industrial encouragement laws and regulations. To promote investment, depreciation allowances on plant and machinery of a maximum rate of 25 per cent of total annual profit is exempted from tax. Also, profits of new industries, up to 10 per cent of the paid-in-capital are exempted from taxation for a period of 5 years. This can be extended with the approval of the Council of Ministers by three more years in case the undertaking has not yet reached the stage which enables it to exist without exemption. Similar exemptions from income tax are provided for ploughing back of profit necessary for the expansion of an industry.

According to the corporation income tax, dividends are taxed before distribution. In the meantime, the individual shareholder is given a full rebate of tax on dividends received. Apparently, this practice would prevent the undue accumulation of undistributed profits to avoid taxation at higher rates of personal income tax. On the other hand, the corporation will not refrain from declaring the dividends. In addition, this practice is easier to administer since reliable accounting records of the dividend recipients are not widely prevalent.

There is a special flat rate of 50 per cent, the so-called Income Tax of Oil Companies. The tax has no connection with the other corporate tax rates. It can be considered as a payment to compensate for the loss of natural resources since the extraction of oil represents a depletion of the Iraqi national wealth. The agreement between the Government of Iraq and the Oil Companies stated that the government receives an equal amount of 50 per cent of the profit resulting from the operation of the oil companies in Iraq[12]. The profit was defined as equal to the difference between the Iraqi border value per ton of such oil and the actual costs or fixed cost per ton, as the case may be, multiplied by the number of tons of oil so exported[13]. The value per ton was set up by the two parties to 94 shillings and 81 shillings and 9 pence per ton at the Iraqi-Syrian border and at Fao

11. Income Tax Law No. 95, 1959 and its amendments, Government Press, Baghdad, 1961, Article 9, p. 11, (Arabic).

12. Government of Iraq, Oil Agreement with the Government of Iraq, February 3, 1952, Law No. 4 of 1952, Article 2 (a).

13. Ibid., Article 1 (a).

(port in the southernmost liwa). The costs were set up and agreed by the two parties to be:
For 1951 they were equal to 23 shillings per long ton.
For 1952 they were equal to $17^1/_2$ shillings per long ton.
And thereafter were equal to 13 shillings per long ton.
In the case that actual costs were different from the fixed costs by 10 per cent, the actual costs would be applied for calculation of the profit. The percentage share of profit paid to the Government made it possible for the companies to be exempted from the payment of any other taxation on their capital, plants, machinery, or buildings (other than those accruing from the transport of oil not produced from the defined areas)[14].

3. ADMINISTRATION OF INCOME TAX

Income tax is administered by the Directorate of Income Tax. This administrative unit retains various functional responsibilities such as: tax investigation, tax auditing, registration of individuals and corporations incomes, tax assessment, tax collection, refund and administration of staff affairs.

a) Tax administrative procedure

The taxpayer is required to file a return on his income during a specific period of time. This return is audited for errors; and in case the auditors are not convinced the taxpayers books are audited as well. In fact, the taxpayers are obliged to maintain adequate records, but most of them, particularly professionals and unincorporated businesses, frequently keep informal books, if they keep any; there is often no checking possible as to what is and is not entered. In case the taxpayer fails to provide the necessary information, he is subjected to an assessment based on the assessor's best guess[15]. Therefore, the location of primary responsibility for computing tax liability is on the official assessors. However, this is tempered considerably in the case of tax withheld from wages and salaries. In short, the tax assessor is responsible for (1) making tax return, (2) taking exemptions and deductions in accordance with stipulated regulations, (3) computing the individual tax liability and (4) making final adjustment in the expected payment of taxes. The taxpayer is responsible for providing certain information about his income and its sources.
An administrative feature that is provided in the income tax law against improper tax compliance is the possibility of penalties by law and enforced by the administrators with the aid of the courts. The income tax practice distinguishes two kinds of penalties. A criminal penalty deals with tax fraud. Currently, the penalty extends to a fine between ID 50 to ID 500 or imprisonment not to exceed one year. The other penalty is civil action by the Financial Authority in the case of tax paid on instalments, requiring less substantial evidence. This penalty covers evasion without intention to defraud, caused by oversight and negligence. The penalty is the addition of 5 per cent of the deficient tax; this amount being doubled if the tax is not paid within a specific period. In addition to penalties, the law provides the taxpayers with a measure of fairness against unjust assessment by the possibility of objecting against the assessment and appealing to the Finance Authority to revise the assessment.

b) Tax Enforcement

The more difficult problems of enforcement

14. Ibid., Article 9, 6 (i) & Article 27 (i).
15. Income tax law nos. 85, 95 of 1956, 1959, Articles 29 and 30.

arise in the attempt to avoid payment of taxes. Certain premiums are granted to informers who report tax delinquents. However there is no definite means of policing the tax effectively. This is a problem inherent in the Iraqi income tax. This is partly related to the absence of a high degree of taxpayer morality; and partly to the failure to assess and collect all tax revenues that would be forthcoming if the existing tax laws and regulations are correctly and fully applied. There seems to be a fiscal fraud. The existence of such fraud is widely recognized at present and encouraged by the high rate of taxes. This is especially true in those professions and occupations where income is not subjected to withholding. It becomes easy for the individual who receives his income directly from the sale of services or products for cash, to evade at least a certain share of the payment of tax. These groups evade taxes through considerable understatement of their incomes and overstatement of their business expenses. In addition to income tax lost through illegal escape, legal avoidance of tax is noticeable due to certain loopholes in tax legislation. Some of these avenues lie within the exemptions of certain incomes such as the purchase of government bonds, which insures a safe method of avoidance for persons with relatively high incomes; for these persons, the reduction in tax more than offsets the level of interest rate received. Also division of income among members of the family in order to escape the effect of progression. Similarly, insurance premiums not exceeding ID 150 annually are tax-free. The law provides a tax free provision of not less than ID 3,000 of salaries allowances and benefits to the executive director of a company and ID 1,000 to a member of the board. In addition, contributions to charitable and educational organizations are tax-free. This provision is utilized by the taxpayer as a method of reducing tax liability.

The problem of tax escape is considerably intensified by the weakness in technical efficiency, the lack of mechanization, and the absence of modern statistical methods applied in tax estimates and collection. Therefore, it is virtually difficult to establish accurate check by the tax authority upon reported incomes. Thus, the amount of tax forgone appears to be higher than what is actually collected[16].

c) Tax collection

Income tax is collected at the source according to the income statute. Withholding tax levy is applied to wages, salaries and dividends. It extends largely to government officials and to private and government employees. Salaried individuals represented about 46.2 per cent of the number of individual taxpayers in 1966-1967. The absolute number of tax payers were 55,968 (table 3) in the appendix. The largest portion of individual tax collection was paid by self-employed individuals whose number accounted for about 65 per cent in fiscal years 1956 and 1959. The average tax paid in both years was 79.2 of the total individual income tax. In 1966-67, the number decreased to 53.7 per cent. They paid 85 per cent of the total individual income tax. Companies paid 53 per cent of the total income tax for the financial year 1966-1967. As another illustration of the concentration of income tax, it may be noted that out of the total income tax paid by individuals about 91 per cent came from individuals living in the province (liwa) of Baghdad, which included more than 60 per cent of the taxpayers. Another 6 per cent of the individual personal income tax was paid by individuals living in the

16. Statistical evidence is not available.

provinces of Mosul (in the north) and Basrah (in the south).

So far, the high percentage of income taxpayers, in Baghdad, does not prevent the fact that total individual taxpayers constitute a very small percentage of the total population. In 1966, it was about 0.66 per cent. This inescapable fact prevents income tax from becoming a mass tax of high revenue yield. This is reflected in its contribution to national income and the ordinary budget. In 1965, it contributed 1.9 per cent to national income and 5 per cent only to the total revenue of the budget[17]. In 1966, the amount collected was higher by 2 per cent. However, in view of the changes in income tax formulas (rates and bases of the existing tax) occurred in 1968 the prospective tax yield in the same year was slightly less than double the amount realized in 1966. This change in tax yield represents basically the changes in tax policy through rates and bases. Therefore, the changes in national production and income have slight effect upon tax revenues. The percentage change in the ratio of income tax revenues to national income remained almost the same during the ten years between 1950-1960, while national income increased at 6.4 per cent annually between 1953-1963. During the period 1964-1965, national income increased by 5.5 per cent annually; income tax revenue increased during 1950-1966 by 10.5 per cent annually and 6.6 per cent during 1964-1965 (tables no. 4 and 5).

In conclusion, the survey presented above, discussed the major features of the income tax which has been subjected to constant modification and change. This fact makes it undesirable to discuss the detailed characteristics of the tax as many features discussed might be modified within the forseeable future. For example, the personal exemption currently in force may well be moved upward or downward, but the personal tax exemption as a part of the practice itself, seems certain to be retained. Perhaps most important, although the rate structure itself is subject to change at probably each rewriting of the tax law, an essential characteristic throughout these modifications is the fundamental progressive nature of the tax structure.

The yield from income tax expanded gradually, except for 1968. The growth rate of income tax revenue exceeded that of national income. This can be attributed to a large extent to policy measures rather than to automatic changes in tax revenues. However, its contribution to the budget did not increase considerably. In such a situation, there is to be a continuous process of actions and interactions aiming at the coordination of tax policy with the changes in national production and income. Superimposed on this consideration is the administrative factor viz. efficiency and collection. If the administrative capacity does not keep pace with the prospective increase in taxable income, the actual collection might be less than the prospective yield based on improving economic conditions.

17. Central Bank of Iraq, Annual Report, 1966.

STATISTICAL APPENDIX

Table (1)

PERSONAL INCOME TAX RELIEFS

(in Iraqi Dinars)

Type	*1952*	*1954*	*1956*	*1959*	*1966*	*1968*
Single	250	350	350	450	450	450
Widower	250	350	350	450	450	450
Widower with children	350 (plus 30 for each child)[1]	450 (plus 30 for each child)[2]	350 (plus 50 for each child)[3]	450 (plus 50 for each child)[4]	450 (plus 50 for each child)[5]	450 (plus 75 for each child)[6]
Married	250	350	350	450	450	450
For his wife	100	100	150	150	150	200
For each child	30[1]	30[2]	50[3]	50[4]	50[5]	75[6]
Over 63 years	—	—	—	100	100	100

1. Up to a maximum of ID 500.
2. Up to a maximum of ID 600.
3. Up to four children and below 18 years of age.
4. Without limitation on the number of children.
5. Idem
6. Up to a maximum of ID 350.

Table (2)

COMPARISON OF TAX RATES ON INDIVIDUAL RESIDENT AND NON-RESIDENT INCOME OCCASIONED BY LAWS NOS. 85, 95, 129, 6, 44, OF 1956, 1959, 1964, 1966 AND 1968

1956			
Type of Income	*Taxable income brackets*		*Tax rate*
Wages, Salaries and Allowances (residents)	Not over ID 500		2%
	Over	but not over	
	ID 500	ID 1,000	3%
	1,000	1,500	5%
	1,500	2,500	7%
Income from Real Estate Transactions (residents)	Not over ID 500		3%
	Over	but not over	
	ID 500	ID 1,000	5%
	1,000	2,000	7%
	2,000	3,000	9%
	3,000	4,000	12%
	4,000	5,000	15%
	5,000		20%

Table (2) continued

Type of Income	*Taxable Income Brackets*		*Tax Rate*
Rents of Agricultural Land (residents)	Flat rate of		10%
Income from other sources	(Residents Incomes)		(Non-Residents incomes)
	Not over ID 500		3%
	Over	But not over	
	ID 500	ID 1,000	5%
	1,000	2,000	7%
	2,000	3,000	10%
	3,000	4,000	15%
	4,000	5,000	20%
	5,000	6,000	25%
	6,000	7,000	30%
	7,000	8,000	35%
	8,000		40%
			(Non-Residents incomes)
			Not over ID 1,000 10%
			Over But not over
			ID 1,000 ID 2,000 15%
			2,000 3,000 20%
			3,000 4,000 25%
			4,000 5,000 30%
			5,000 6,000 35%
			6,000 40%

1959

(Residents Incomes)

Taxable income brackets		*Tax rate*
Not over ID 500		3%
Over	But not over	
500	1,000	5%
1,000	2,000	7%
2,000	3,000	10%
3,000	4,000	15%
4,000	5,000	20%
5,000	6,000	25%
6,000	7,000	30%
7,000	8,000	35%
8,000	9,000	40%
9,000	10,000	45%
10,000	15,000	50%
15,000	20,000	55%
20,000		60%

(Non-Residents Incomes)

Taxable income brackets		*Tax rate*
Not over ID 1,000		10%
Over	But not over	
1,000	2,000	15%
2,000	3,000	20%
3,000	4,000	25%
4,000	5,000	30%
5,000	6,000	35%
6,000	7,000	40%
7,000	8,000	45%
8,000	9,000	50%
9,000	10,000	55%
10,000		60%

Table (2) continued

1964 (Residents Incomes) and (Non-Residents Incomes)

Taxable income brackets		*Tax rate*
Not over ID 500		3%
Over	But not over	
500	1,000	5%
1,000	2,000	10%
2,000	3,000	15%
3,000	4,000	20%
4,000	5,000	25%
5,000	6,000	30%
6,000	7,000	35%
7,000	8,000	40%
8,000	9,000	45%
9,000	10,000	50%
10,000	11,000	55%
11,000	12,000	60%
12,000	13,000	65%
13,000	14,000	70%
14,000	15,000	75%
15,000	20,000	80%
20,000		90%

1966 (Residents Incomes)

Taxable income brackets		*Tax rate*
Not over ID 500		3%
Over	But not over	
500	1,000	5%
1,000	2,000	10%
2,000	3,000	15%
3,000	4,000	20%
4,000	5,000	25%
5,000	6,000	30%
6,000	7,000	35%
7,000	8,000	40%
8,000	9,000	45%
9,000	10,000	50%
10,000	11,000	55%
11,000	12,000	60%
12,000	15,000	65%
15,000		70%

(Non-Residents Incomes)

Taxable income brackets		*Tax rate*
Not over ID 1,000		10%
Over	But not over	
1,000	2,000	15%
2,000	3,000	20%
3,000	4,000	25%
4,000	5,000	30%
5,000	6,000	35%
6,000	7,000	40%
7,000	8,000	45%
8,000	9,000	50%
9,000	10,000	55%
10,000	11,000	60%
11,000	12,000	65%
12,000		70%

Table (2) continued

1968

(Residents Incomes)			(Non-Residents Income)		
Taxable income brackets		*Tax rate*	*Taxable income brackets*		*Tax rate*
Not over ID 500		5%	Not over 1,000		10%
Over	But not over		Over	But not over	
500	1,000	10%	1,000	2,000	15%
1,000	2,000	15%	2,000	3,000	20%
2,000	3,000	20%	3,000	4,000	25%
3,000	4,000	25%	4,000	5,000	30%
4,000	5,000	30%	5,000	6,000	35%
5,000	6,000	35%	6,000	7,000	40%
6,000	7,000	40%	7,000	8,000	45%
7,000	8,000	45%	8,000	9,000	50%
8,000	9,000	50%	9,000	10,000	55%
9,000	10,000	55%	10,000	11,000	60%
10,000	11,000	60%	11,000	12,000	65%
11,000	12,000	65%	12,000	15,000	70%
12,000	15,000	70%	15,000		75%
15,000		75%			

Table (3)

INCOME TAX PAYABLE BY CLASSES OF TAXPAYERS IN FISCAL YEARS 1952, 1954, 1956, 1959, 1964, 1965, 1966

1952-1953				*1954-1955*		
Classes of Tax-payers	No. of Tax-payers	Income Tax*	Percentage of total	No. of Tax-payers	Income tax*	Percentage
Individuals	15,211	1,014,751	42.7	17,725	882,301	39.3
Government Officials & Employees	7,513	120,825	5.0	4,115	97,769	4.3
Employees of Private firms and companies	3,558	251,404	10.6	4,074	264,687	11.8
Total	26,282	1,386,980	58.3	25,914	1,244,757	55.4
Companies, Iraqi & Foreign Companies	134	987,696	41.7	729	1,001,113	44.6
Grand Total	26,416	2,374,676	100.0	26,643	2,245,870	100.0

* Includes: Income and Income Surtax.

Source: IRAQ, Statistical Abstract, 1952, 1955.

Table (3) continued

1956-1957				*1959-1960*		
Classes of Taxpayers	No. of tax-payers	Income Tax (ID)	%	No. of tax-payers	Income Tax	%
Individuals	21,062	1,292,227	41.3	30,103	1,756,930	45.6
Government officials and employees	5,059	99,070	3.2	8,000	180,000	4.7
Employees of private firms and companies	5,053	180,210	5.7	6,734	350,350	9.1
Total	31,174	1,571,507	50.2	44,837	2,287,285	59.4
Companies: Iraqi and foreign companies	1,003	1,558,765	49.8	1,214	1,566,738	40.6
Grand Total	32,177	3,130,272		46,051	3,854,023	100.0

Source: Statistical Abstract, 1956, 1960.

	1964-1965			1965-1966			1966-1967		
Classes of taxpayers	No. of Tax-payers	Income Tax	Per-cent-age of total	No. of Tax-payers	Income Tax	Per-cent-age of total	No. of Tax-payers	Income Tax	Per-cent-age of total
Individuals	20,554	2,921,725	31.9	24,475	2,859,592	24.4	30,098	4,531,190	39.2
Government officials & employees	20,280	275,549	3.0	20,400	425,000	4.2	19,560	400,000	3.5
Employees of Private firms and companies	3,403	384,738	4.2	4,000	383,294	3.8	6,310	407,427	3.5
Total	44,337	3,582,012	39.1	48,875	3,667,886	36.4	55,968	5,338,617	46.2
Companies Iraqi & Foreign Companies	613	5,571,429	60.9	582	6,399,078	63.6	330	6,222,950	53.8
Grand Total	44,950	9,153,441	100.0	49,457	10,066,964	100.0	56,298	11,561,567	100.0

Source: Statistical Abstract, 1965, 1966.

Table (4)

BUDGET REVENUES AND INCOME TAX REVENUES FOR SELECTED FISCAL YEARS (ending 31 March) (in millions Iraqi Dinars)

Year	1 Budget Revenues	2 Income tax revenues	Percentage 2 : 1
1950	28.1	2.3	8.1
1952	50.5	2.4	4.7
1956	62.7	2.5	3.9
1959	89.7	3.8	4.2
1960	103.6	3.9	3.4
1962	114.7	6.9	6.1
1964	146.0	9.1	6.2
1966	154.9[1]	11.5	7.4
1967	187.2[2]	12.5[2]	6.6
1968	214.6[2]	22.5[2]	8.1

Source:
Central Bank of Iraq, Annual Report, 1966. Quarterly Bulletin. Bulletin, New Series, January-March, No. 1, 1968.
1. Provisional figures.
2. Estimates

Table (5)

POPULATION, NATIONAL INCOME, INCOME TAX REVENUES FOR SELECTED CALENDAR YEARS (in millions)

Year	Population[1]	National Income[2] (ID)	Income Tax[3] (ID)	$\frac{Inc.\ T}{N.I.}$ %
1953	5.8	244.0	2.2	0.9
1956	6.2	334.8	2.5	0.8
1959	6.8	391.6	3.8	1.0
1960	7.0	437.1	4.2	1.0
1962	7.5	526.5	7.1	1.3
1964	7.9	543.7	9.2	1.7
1965	8.3	573.6	10.1	1.9

Sources: Haseeb, K., National Income of Iraq, Seminar at the American University of Beirut, May 1964.
1. 1953-56, estimated at rate of growth of 1.9.
   1959-65, estimated at rate of growth of 3.3, *Central Bank of Iraq, Rates of Change In Economic Data for Iraq*, 1950-65.
2. 1964-1965, estimated at a rate of growth of 5.5% annually, *National Income of Iraq*.
3. Adjusted figures.

CLAUDE BARDIN*:

FISCALITÉ & CODE DES INVESTISSEMENTS EN RÉPUBLIQUE DU SÉNÉGAL

Le leurre de la neutralité fiscale n'a pas tenté le législateur sénégalais. Bien au contraire la fiscalité comme moyen d'intervention sur l'économie s'affirme; l'illustration de cette doctrine est le Code des Investissements.

Ce Code a fait l'objet de trois textes législatifs:

- la loi 62-33 du 22 mars 1962 publiée au Journal Officiel no 3520 du 31 mars 1962;
- la loi 65-34 du 19 mai 1965 publiée au Journal Officiel no 3747 du 5 mai 1965;
- un arrêté du Ministre des Finances no 10.581 du 3 août 1968 publié au Journal Officiel no 3981 du 17 août 1968.

Schématiquement, ce code crée deux catégories différentes d'entreprises fiscalement privilégiées: les entreprises prioritaires et les entreprises conventionnées.

LA FISCALITÉ DES ENTREPRISES PRIORITAIRES

Le bénéfice du régime d'entreprise prioritaire n'est accordé qu'à celles s'engageant à investir en trois ans la somme de quarante millions de francs CFA ou à créer quarante emplois permanents de cadres et ouvriers sénégalais. Ces chiffres minima sont ramenés à vingt millions de francs CFA et vingt emplois lorsque l'entreprise sollicitante s'installe hors de la Région du Cap Vert (presqu'île de DAKAR).

En outre, «les activités à créer ou à étendre devront concourir au développement économique et social du pays, dans le sens indiqué par les objectifs du Plan».

Les avantages fiscaux prévus sont, soit des avantages accordés de plein droit du seul fait de l'agrément, soit des avantages facultatifs qui doivent être expressément prévus par le décret agréant l'entreprise prioritaire.

A) LES AVANTAGES DE PLEIN DROIT

1e *Impôt sur les bénéfices industriels, commerciaux et agricoles*

a) L'entreprise prioritaire en est exonérée jusqu'à la fin de l'exercice clos au cours de la cinquième année suivant celle durant laquelle a été réalisée la première opération d'exploitation, lorsque l'entreprise a la majeure partie de ses installations dans la Région du Cap Vert. Lorsque la majeure partie des installations est hors de ladite région, l'entreprise bénéficie de trois années supplémentaires d'exonération. Le taux de cet impôt qui frappe les bénéfices réalisés est de 30% pour les sociétés.

Le Code précise que les bénéfices exonérés doivent cependant être déterminés dans les conditions du droit commun fiscal, notamment quant aux amortissements dont la durée doit être normale.

Enfin, le montant cumulé des bénéfices n'est exonéré qu'à concurrence du montant des investissements prévus et réalisés.

b) L'exonération d'impôt sur les bénéfices entraîne de plein droit celle de l'impôt minimum forfaitaire sur les sociétés (I.M.F.) de trois cent mille francs CFA par an; cet I.M.F. est un acompte de l'impôt sur les bénéfices.

c) L'entreprise prioritaire peut, sans limitation de durée, déduire de ses bénéfices impos-

* Fiduciaire France Afrique Sénégal.

ables les réinvestissements sous formes d'immobilisations au Sénégal, dans l'entreprise elle-même ou dans une autre entreprise agréée. Ne sont cependant pas déductibles les réinvestissements en matériel d'occasion antérieurement utilisés au Sénégal, non plus que ceux faits avec des fonds provenant de provisions pour renouvellement de l'outillage et du matériel.

Il convient de souligner que le régime de droit commun prévoit l'exonération d'impôt sur les bénéfices, pendant cinq années, en faveur des «usines nouvelles» c'est-à-dire des créations ou extensions d'industries. De même le régime de droit commun prévoit la la possibilité de déduire des bénéfices imposables la moitié des investissements effectués par une entreprise agricole, industrielle ou minière dans la mesure ou les investissements entraînent un accroissement notable de la production.

Ainsi les avantages prévus par le Code des Investissements en matière d'impôt sur les bénéfices constituent plus des extensions que des innovations par rapport au régime fiscal de droit commun.

2e *Impôt sur le revenu des capitaux mobiliers*

Cet impôt qui frappe les distributions de bénéfices des sociétés, ainsi que les intérêts et autres revenus de prêts, créances et dépôts a un taux de 16%. Le Code des Investissements en prévoit la réduction à 8% jusqu'à la fin de l'exercice clos au cours de la troisième année suivant celle durant laquelle a été effectuée la première opération d'exploitation.

Il n'existe plus, dans le régime de droit commun, de disposition équivalente.

3e *Patente*

Le Code des Investissements prévoit l'exonération de cet impôt dont le taux varie en fonction d'une part de la nature de la profession exercée et, d'autre part, de la valeur locative des biens meubles et immeubles d'exploitation.

Cette exonération s'étend:

– jusqu'à la fin de la cinquième année suivant celle de la mise en activité de l'entreprise lorsque la majeure partie de ses installations est située dans la Région du Cap Vert;

– jusqu'à la fin de la huitième année suivant celle de mise en activité au cas d'installation hors de la Région du Cap Vert.

Il faut observer que le régime de droit commun prévoit l'exonération de patente pour les créations ou extensions d'industries pendant l'année d'installation et les quatre années suivantes.

B) LES AVANTAGES FACULTATIFS

1e *Droits et taxes perçus par la Douane*

– Il peut être accordé la ristourne ou l'exonération des droits et taxes exigibles lors de l'entrée au Sénégal des matériels et matériaux nécessaires à la réalisation du programme agréé, ainsi que sur les pièces détachées et de rechange spécifiques des dits matériels.

– Les matières premières entrant dans la fabrication des produits finis peuvent bénéficier du régime de l'admission temporaire.

– L'exonération des droits et taxes exigibles à la sortie sur les produits exportés par l'entreprise agréée peut être également accordée.

De ces trois avantages le plus important est le premier, le gain de charge variant de 10 à 60% de la valeur CAF.

2e *Taxe sur le chiffre d'affaires*

Cette taxe est perçue soit à l'entrée (taux normal 13,50% – taux majoré 33%) soit lors de la première vente des produits de fabrication locale (taux 9%), soit enfin lors de prestations de services (taux 8,50%). L'entreprise prioritaire peut obtenir:

– l'exonération de la taxe qu'elle aurait à supporter du fait des opérations (importations, achats de produits fabriqués localement)

nécessaires à la réalisation de son investissement ou du fait des marchés de travaux ou de transports qu'elle passerait pour cette même réalisation avec des entrepreneurs régulièrement établis au Sénégal.
Il convient de souligner que l'arrêté ministériel no 10.581 du 3 août 1968 a remplacé cette exonération par un paiement suivi d'une restitution ou d'une imputation.
– l'exonération de la taxe sur les opérations de façon portant sur des produits ou marchandises destinés à l'exportation.

3e *Contribution foncière des propriétés bâties*
Elle porte sur les immeubles et, avec ses taxes et centimes annexes, représente environ 30% de la valeur locative; elle est à la charge du propriétaire.
L'entreprise prioritaire peut être exonérée pendant quinze ans au moins de cette contribution pour les immeubles dont la construction est prévue au programme agréé. L'exonération a son point de départ le 1er janvier de l'année suivant celle de l'achèvement de la construction.
Or le droit commun prévoit les exonérations suivantes:
– cinq ans pour les immeubles à usage commercial ou industriel;
– dix ans pour les immeubles d'habitation;
– quinze ans pour les immeubles qui, quelque soit leur usage, coûtent plus de cinquante millions de francs CFA.

4e *Autres droits et taxes*
L'entreprise prioritaire peut obtenir:
– l'exonération des droits de mutation (15% sur le prix) pour les acquisitions de terrains et de bâtiments nécessaires à la réalisation de son investissement, à condition que ces biens soient situés hors de la Région du Cap Vert;
– l'exonération ou la déduction des redevances forestières, minières ou foncières; la durée de ces avantages est fixée par le décret d'agrément.
De ce bref examen des avantages fiscaux réservés aux entreprises prioritaires peuvent être tirés les deux enseignements ci-après:
Le législateur sénégalais, en distinguant les les avantages de plein droit et ceux qui ne sont que facultatifs, a entendu laisser au Gouvernement une marge de manoeuvre suffisante pour ajuster, à sa guise, l'importance des exonérations à l'intérêt économique national présenté par les investissements.
Les suppléments de délai d'exonération aux entreprises qui s'installent hors de la région de DAKAR prouvent le désir de décentralisation qui anime les pouvoirs publics.

LA FISCALITÉ DES ENTREPRISES CONVENTIONNÉES

Les entreprises remplissant les conditions pour être agréées prioritaires et dont le programme d'investissement revêt une importance particulière pour le développement du Sénégal peuvent solliciter une convention d'établissement avec l'Etat. Cette convention est approuvée par décret et «ne peut être modifiée que du consentement mutuel des parties».
Les entreprises conventionnées peuvent bénéficier des mêmes dispositions fiscales que les entreprises prioritaires.
En outre, l'exonération de contribution foncière des propriétés bâties (cf ci-dessus B-3) peut être portée de quinze à vingt cinq années lorsque l'entreprise conventionnée bénéficie de la stabilisation fiscale.
Cette stabilisation n'est accordée qu'aux entreprises justifiant d'un programme d'investissement d'au moins cinq cent millions de

francs CFA réalisable en trois ans.
Le régime particulier de la stabilisation fiscale se caractérise comme suit:

A) DURÉE DU RÉGIME STABILISÉ
Elle est déterminée par la durée d'amortissement du capital investi. Elle ne peut cependant être supérieure à vingt cinq années majorées des délais normaux d'installation, lesquels ne peuvent dépasser cinq années.
La date de départ du régime fiscal stabilisé est fixée par le décret qui approuve la convention d'établissement.
L'entreprise s'engage à clore le dernier exercice de la période de stabilité le jour de l'expiration de ce régime.

B) L'ÉTENDUE DE LA STABILISATION
a) Les charges fiscales «de toute nature», telles qu'elles existent au jour de la convention peuvent être stabilisées, non seulement dans leur assiette et leur taux, mais aussi dans leurs modalités de perception.
b) En outre, les taxes parafiscales peuvent être également stabilisées; ces taxes parafiscales sont versées à des organismes publics, semi-publics ou para-publics dotés de l'autonomie financière (Caisse de Prestations Familiales, Caisse des Accidents du Travail, etc...).
c) La stabilisation fiscale entraîne le non aggravation c'est-à-dire la non application des charges fiscales dont la création est postérieure à la date de départ du régime stabilisé. Il importe d'observer que le principe de la stabilisation du taux posé par le Code vient d'être altéré par les dispositions de l'arrêté ministériel no 10.581 du 3 août 1968 qui, en matière de taxe sur le chiffre d'affaires, prévoit que l'entreprise acquitte ou supporte la taxe au taux de droit commun puis demande la restitution de la différence éventuelle avec le taux stabilisé.
d) L'entreprise bénéficiant de la stabilisation fiscale peut demander à être intégralement replacée sous le régime fiscal de droit commun.
Ainsi l'entreprise conventionnée, outre les exonérations accordées aux entreprises prioritaires, peut bénéficier d'un régime de stabilisation constituant une création originale. Ce régime présente un attrait certain pour l'investisseur légitimement soucieux de prévisions à moyen et long terme.

L'impératif du développement économique et la nécessité de l'appel aux capitaux privés étrangers ont ainsi amené le législateur fiscal sénégalais, comme ses homologues des autres pays africains francophones, non seulement à rejeter l'idéal de la neutralité fiscale, mais encore à introduire dans la fiscalité des éléments contractuels par le biais de la convention d'établissement.
Ce choix délibéré a permis, il faut bien le reconnaître quelque soit l'attachement que l'on porte au principe de l'égalité devant l'impôt, au Sénégal d'atteindre un degré d'industrialisation que nombre de ses voisins peuvent lui envier.

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AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 2, February/février 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

Kenya, Tanzania and Uganda signed an agreement on June 6, 1967 for the establishment of an East African Community and Common Market, to enter into force on December 1, 1967. The agreement provides for a common customs and tax regime and for the application of a "transfer tax". This Supplement contains the provisions of the treaty dealing with its general principles and the customs and tax regime.

TEXT

Whereas the United Republic of Tanzania, the Sovereign State of Uganda and the Republic of Kenya have enjoyed close commercial, industrial and other ties for many years:
And whereas provision was made by the East Africa (High Commission) Orders in Council 1947 to 1961 for the control and administration of certain matters and services of common interest to the said countries and for that purpose the East Africa High Commission and the East African Central Legislative Assembly were thereby established:
And whereas provision was made by the East African Common Services Organization Agreements 1961 to 1966 (upon the revocation of the East Africa (High Commission) Orders in Council 1947 to 1961) for the establishment of the East African Common Services Organization with the East African Common Services Authority as its principal executive authority and the Central Legislative Assembly as its legislative body:
And whereas the East African Common Services Organization has, since its establishment, performed on behalf of the said countries common services in accordance with the wishes of the said countries and its Constitution:
And whereas the said countries, while being aware that they have reached different stages of industrial development and resolved to

reduce existing industrial imbalances, are resolved and determined to foster and encourage the accelerated and sustained industrial development of all of the said countries:

And whereas the said countries, with a view to strengthening the unity of East Africa, are resolved to abolish certain quantitative restrictions which at present affect trade between them and are desirous of pursuing a policy towards the most favourable development of the freest possible international trade:

And whereas the said countries having regard to the interests of and their desire for the wider unity of Africa are resolved to co-operate with one another and with other African countries in the economic, political and cultural fields:

And whereas the said countries are resolved to act in concert for the establishment of a common market with no restrictions in the long term on trade between such countries:

Now therefore the Government of the United Republic of Tanzania, the Government of the Sovereign State of Uganda and the Government of the Republic of Kenya.

Determined to strengthen their industrial, commercial and other ties and common services by the establishment of an East African Community and of a Common Market as an integral part thereof.

AGREE AS FOLLOWS

PART I—PRINCIPLES

CHAPTER I—THE EAST AFRICAN COMMUNITY

Article 1

ESTABLISHMENT AND MEMBERSHIP OF THE COMMUNITY

1. By this Treaty the Contracting Parties establish among themselves an East African Community and, as an integral part of such Community, an East African Common Market.

2. The East African Community is in this Treaty referred to as "the Community" and the East African Market is referred to as "the Common Market".

3. The members of the Community, in this Treaty referred to as "the Partner States" shall be the United Republic of Tanzania, the Sovereign State of Uganda and the Republic of Kenya.

Article 2

AIMS OF THE COMMUNITY

1. It shall be the aim of the Community to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities the benefits whereof shall be equitably shared.

2. For the purposes set out in paragraph 1 of this Article and as hereinafter provided in the particular provisions of this Treaty, the Community shall use its best endeavours to ensure—

(a) the establishment and maintenance, subject to certain exceptions, of a common customs tariff and a common excise tariff;

(b) the abolition generally of restrictions on trade between Partner States;

(c) the inauguration, in the long term, of a common agricultural policy;

(d) the establishment of an East African Development Bank in accordance with the Charter contained in Annex VI to this Treaty;
(e) the retention of freedom of current account payments between the Partner States, and freedom of capital account payments necessary to further the aims of the Community;
(f) the harmonization, required for the proper functioning of the Common Market, of the monetary policies of the Partner States and in particular consultation in case of any disequilibrium in the balances of payments of the Partner States;
(g) the operation of services common to the Partner States;
(h) the co-ordination of economic planning;
(i) the co-ordination of transport policy;
(j) the approximation of the commercial laws of the Partner States; and
(k) such other activities, calculated to further the aims of the Community, as the Partner States may from time to time decide to undertake in common.

Article 3

INSTITUTIONS OF THE COMMUNITY

1. The institutions of the Community (established and regulated by Parts III and IV of this Treaty*) shall be—
the East African Authority
the East African Legislative Assembly
the East African Ministers
the Common Market Council
the Common Market Tribunal
the Communications Council
the Finance Council
the Economic Consultative and Planning Council
the Research and Social Council,
and such other corporations, bodies, departments and services as are established or provided for by this Treaty.

2. The institutions of the Community shall perform the functions and act within the limits of the powers conferred upon them by this Treaty or by any law.

3. The institutions of the Community shall be assisted in the exercise of their functions by a central secretariat of officers in the service of the Community.

4. Persons employed in the service of the Community, the Corporations or the Bank, and directors and alternate directors of the Bank—
(a) shall be immune from civil process with respect to acts performed by them in their official capacity; and
(b) shall be accorded such immunities from immigration restrictions or alien registration and where they are not citizens of a Partner State, such facilities in relation to exchange regulations, as the Authority may determine.

5. Experts or consultants rendering services to the Community, the Corporations or the Bank shall be accorded such immunities and privileges in the Partner States as the Authority may determine.

Article 4

GENERAL UNDERTAKING AS TO IMPLEMENTATION

The Partner States shall make every effort to plan and direct their policies with a view to creating conditions favourable for the development of the Common Market and the achievement of the aims of the Community and shall co-ordinate, through the institutions of the Community, their economic policies to the extent necessary to achieve such aims and shall abstain from any measure likely to jeopardize the achievement thereof.

* Not published here.

PART II—THE EAST AFRICAN COMMON MARKET

CHAPTER II—EXTERNAL TRADE

Article 5

COMMON CUSTOMS TARIFF

1. The Partner States, recognizing that a common external customs tariff is a basic requirement of the Common Market and subject to paragraphs 2 and 3 of this Article, agree to establish and maintain a common customs tariff in respect of all goods imported into the Partner States from foreign countries.

2. A Partner State may, with the agreement of the Ministers of the Partner States responsible for public finance, depart from the common external customs tariff in respect of the importation of a particular item into that State.

3. The Partner States agree to undertake early consultations in the Common Market Council with a view to the abolition generally of existing differences in the external customs tariff.

Article 6

REMISSION OF CUSTOMS DUTY

1. The Partner States agree not to exempt, remit or otherwise relieve from payment of customs duty any goods originating in a foreign country and imported by the Government of a Partner State if—

(a) such goods are imported for the purpose of resale or for any purpose other than consumption or use by that Government; and

(b) in the case of goods provided by way of aid, by any government or organization, either *gratis* or on terms less stringent than those appropriate to ordinary commercial transactions, such goods are intended for the purpose of resale or consumption in, or are transferred to, any country other than the Partner State which is the recipient of such goods.

2. The Partner States agree that the Community and the Corporations shall be enabled to import free of customs duty any goods required for the purpose of their operations except such goods as are intended for sale, or sold, to the public.

Article 7

EXTERNAL TRADE ARRANGEMENTS

No Partner State shall enter into arrangements with any foreign country whereunder tariff concessions are available to that Partner State which are not available to the other Partner States.

Article 8

DEVIATION OF TRADE RESULTING FROM BARTER AGREEMENTS

1. If as a result of any barter agreement involving a particular kind of manufactured goods, entered into between a Partner State or any body or person therein, and a foreign country, or any body or person therein, there is, in respect of that kind of manufactured goods, a significant deviation of trade away from goods coming from and manufactured in another Partner State to goods imported in pursuance of that agreement, then the Partner State into which such goods are so imported shall take effective measures to counteract such deviation.

2. In paragraph 1 of this Article "barter agreement" means any agreement or arrangement by which manufactured goods are imported into a Partner State, being goods

for which settlement may be effected, in whole or in part, by the direct exchange of goods.

3. In order to determine whether a deviation of trade in a particular kind of manufactured goods has occured for the purposes of this Article, regard shall be had to all relevant trade statistics and other records concerning that kind of manufactured goods of the East African Customs and Excise Department for the six months immediately proceeding a complaint that a deviation has occurred and to the average of the two comparable periods of six months in the twenty-four months which preceded the first importation of goods under the barter agreement.

CHAPTER III—INTRA-EAST AFRICAN TRADE

Article 9

EXTERNAL GOODS—GENERAL PRINCIPLES

1. The Partner States agree that where customs duty has been charged and collected on any goods imported into a Partner State (hereinafter in this paragraph referred to as "the importing State") from a foreign country then such goods shall not be liable to further customs duty on transfer to any other Partner State (hereinafter referred to as "the receiving State"):

Provided that where the rate of customs duty applicable to such goods in the receiving State exceeds that charged and collected in the importing State any excess of duty so arising may be charged and collected.

2. Each of the Partner States shall grant full and unrestricted freedom of transit through its territory for goods proceeding to or from a foreign country indirectly through that territory to or from another Partner State; and such transit shall not be subject to any discrimination, quantitative restrictions, duties or other charges levied on transit.

3. Notwithstanding paragraph 2 of this Article:—

(a) goods in transit shall be subject to the customs laws; and

(b) goods in transit shall be liable to the charges usually made for carriage and for any services which may be rendered, provided such charges are not discriminatory.

4. The Partner States agree that each Partner State shall be entitled to prohibit or restrict the import from a foreign country into it of goods of any particular description or derived from any particular source.

5. Where goods are imported from a foreign country into one Partner State, it shall be open to each of the other Partner States to restrict the transfer to it of such goods whether by a system of licensing and controlling importers or by other means:

Provided that, in the application of any restriction referred to in this paragraph, regard shall be had to the practicability of such restriction where goods have been repacked, blended, or otherwise processed.

6. The provisions of paragraphs 4 and 5 of this Article shall not apply to any goods which, under the provisions of Article 11 of this Treaty, fall to be accepted as goods originating in a Partner State.

Article 10

CUSTOMS DUTY COLLECTED TO BE PAID TO CONSUMING STATE

1. Where any goods, which are imported into a Partner State from a foreign country and in respect of which customs duty has

been charged and collected in that State (in this paragraph referred to as "the collecting State") are transferred to one of the other Partner States (in this paragraph referred to as "the consuming State"), the following provisions shall apply:—

(a) if the duty collected in the collecting State was a specific duty or if the goods are transferred to the consuming State in their original packages, the collecting State shall pay the full amount of the duty collected to the consuming State;

(b) if the duty collected in the collecting State was an *ad valorem* duty and the goods are transferred to the consuming State other than in their original packages the collecting State shall pay to the consuming State an amount equal to 70 per cent of the duty which would have been payable if the value of the goods for duty had been taken to be the ordinary retail price; and for this purpose "ordinary retail price" means the price at which the goods could be expected to sell at the time and place of their transfer to the consuming State:

Provided that the Authority may by order from time to time alter the amount to be paid by the collecting State to the consuming State under this sub-paragraph and the method of calculation thereof;

(c) if the duty collected was an *ad valorem* duty and the goods are transferred other than in their original packages and an alteration of the relevant tariff has been made in the collecting State within a material time, then, for the purpose of calculating the sum to be paid under sub-paragraph (b) of this paragraph, duty shall be deemed to have been collected in accordance with the tariff actually in force six weeks before the transfer of the goods.

2. Where any goods, which are imported from a foreign country into a Partner State (in this paragraph referred to as "the importing State") are chargeable to customs duty in that State, but the duty has been remitted either in whole or in part, and are subsequently transferred to one of the other Partner States (in this paragraph referred to as "the consuming State") the importing State shall, notwithstanding the said remission, pay to the consuming State the amount which would have been paid to the consuming State in accordance with paragraph 1 of this Article had the duty been collected but to the extent only that such duty would have been chargeable and collected if the goods had been imported directly into the consuming State.

Article 11

NO INTERNAL TARIFF ON EAST AFRICAN GOODS

1. Except as is provided in paragraph 2 of this Article no Partner State shall impose a duty in the nature of a customs duty or import duty in respect of goods which are transferred to that Partner State from one of the other Partner States and originate in the Partner States.

2. Paragraph 1 of this Article is subject to the rights and powers of Partner States to impose transfer taxes in accordance with and subject to the conditions contained in this Treaty.

3. For the purpose of this Treaty, goods shall be accepted as originating in the Partner States where—

(a) they have been wholly produced in the Partner States; or

(b) they have been produced in the Partner States and the value of materials imported from a foreign country or of undetermined origin which have been used at

any stage of the production of the goods does not exceed 70 per cent of the ex-factory value of the goods.

4. Rules for the administration and application of this Article are contained in Annex I to this Treaty.*)

5. The Common Market Council shall from time to time examine whether the rules contained in Annex I to this Treaty can be amended to make them simpler and more liberal and to ensure their smooth and equitable operation, and the Authority may by order from time to time amend or add to Annex I.*)

Article 12

NO QUANTITATIVE RESTRICTIONS ON EAST AFRICAN GOODS

1. Except as in provided in this Article, each of the Partner States undertakes that, at a time not later than the coming into force of this Treaty, it will remove all the then existing quota, quantitative or the like restrictions or prohibitions which apply to the transfer to that State of goods originating in the other Partner States (including agricultural products) and, except as may be provided for or permitted by this Treaty, will thereafter refrain from imposing any further restrictions or prohibitions:

Provided that this paragraph shall not preclude a Partner State introducing or continuing or executing restrictions or prohibitions affecting—

(a) the application of security laws and regulations;
(b) the control of arms, ammunition and other war equipment and military items;
(c) the protection of human, animal or plant health or life, or the protection of public morality;
(d) transfers of gold, silver and precious and semi-precious stones;
(e) the control of nuclear materials, radioactive products or any other material used in the development or exploitation of nuclear energy; or
(f) the protection of its revenue where another Partner State has, in accordance with paragraph 2 of Arcicle 17 of this Treaty, departed from a common excise tariff.

2. It is agreed that each of the Partner States shall have the right to impose restrictions and prohibitions against the transfer of goods from the other Partner States which originate in the other Partner States, insofar as may be necessary from time to time to give effect to the contractual and other obligations entered into by each of the States and listed in Annex II to this Treaty*.)

3. It is agreed that each of the Partner States shall have the right to impose quantitative restrictions or prohibitions in respect of certain agricultural products in the circumstances provided for by Article 13 of this Treaty.

4. If a Partner State encounters balance of payment difficulties, taking into account its overall position, that Partner State may, for the purpose only of overcoming such difficulties, impose quantitative restrictions on the goods of the other Partner States, subject to the following conditions being satisfied, namely that—

(a) the proposed quantitative restrictions do not contravene its obligations under the General Agreement on Tariffs and Trade or its obligations under the rules of the International Monetary Fund; and
(b) restrictions have been imposed on the import of goods from foreign countries and are inadequate to solve the difficulties; and
(c) the restrictions imposed under this paragraph shall in no case operate against the

*) not published here

goods of Partner States more unfavourably than the restrictions imposed on the goods of foreign countries; and

(d) consultation concerning the proposed quantitative restrictions has first taken place within the Common Market Council and thereafter, while such restrictions remain in force, the Common Market Council shall keep the operation thereof under review.

Article 13

EXCEPTION FOR CERTAIN AGRICULTURAL PRODUCTS

1. Notwithstanding the obligation of the Partner States in respect of agricultural products referred to in paragraph 1 of Article 12 of this Treaty, it is declared that each of the Partner States shall, to the extent set out in Annex III to this Treaty*), have the right to impose quantitative restrictions against the transfer of the agricultural products of the other Partner States which are basic staple foods or major export crops, subject to special marketing arrangements and listed in that Annex.

2. The Authority may from time to time amend or add to Annex III to this Treaty.

Article 14

LONG TERM AIM AS TO AGRICULTURE

Notwithstanding Articles 12 and 13 of this Treaty, it is declared that, in the long term, it is the aim and intention of the Partner States that the provisions of this Treaty relating to the establishment and maintenance of the Common Market should extend to agriculture and trade in agricultural products and that the development of the Common Market in respect of agricultural products should be accompanied by co-operation and consultation in the field of agricultural policy among the Partner States so that in particular, within the framework of the Community, trade arrangements between the national agencies or marketing boards of the Partner States may be entered into directly within a single system of prices and a network within the Partner States as a whole of marketing services and facilities.

Article 15

CUSTOMS DUTY ON GOODS USED IN MANUFACTURE

1. Where goods which are imported into a Partner State from a foreign country and in respect of which customs duty is charged and collected in that State (in this Article referred to as "the collecting State") are wholly or in part used in the collecting State in the manufacture of other goods (in this Article referred to as "the manufactured goods"), and the manufactured goods are subsequently transferred to another Partner State (in this Article referred to as "the consuming State"), the collecting State shall pay to the consuming State the full amount of the duty collected in the collecting State in respect of the goods imported into the collecting State and used in the manufacture of the manufactured goods subsequently transferred to the consuming State.

2. Where goods which are imported into a Partner State (in this paragraph referred to as "the importing State") from a foreign country are chargeable to customs duty in that State but the duty has been remitted either in whole or in part and the goods are wholly or in part used in the importing State in the manufacture of other goods (in this paragraph referred to as "the manufactured goods"), and the manufactured goods are subsequently transferred to another Partner

*) not published here

State (in this paragraph referred to as "the consuming State"), the importing State shall, notwithstanding the said remission, pay to the consuming State the amount of the duty chargeable in respect of goods imported into the importing State and used in the manufacture of the manufactured goods subsequently transferred to the consuming State to the extent that such duty would have been chargeable and collected if the goods had been imported into the consuming State.

3. Notwithstanding paragraphs 1 and 2 of this Article, if the value of the imported goods which are used in the manufacture of any manufactured goods transferred as a separate consignment is less than one hundred shillings in the currency of the State of manufacture, then in that case only no payment of duty shall be made to the consuming State under this Article.

Article 16

DISCRIMINATORY PRACTICES

1. The Partner States recognize that the following practices are incompatible with this Treaty to the extent that they frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between the Partner States—

(a) one channel marketing;
(b) discriminatory rates of taxes, duties or other charges levied in a Partner State on any goods originating in another Partner State;
(c) dumping; and
(d) discriminatory purchasing.

2. In paragraph 1 of this Article—

(a) "one channel marketing" means any arrangement for the marketing of goods, whether regulated by law or otherwise, which, by limiting the channels by which such goods may be marketed, has effect to exclude competition in the marketing of such goods;
(b) "discriminatory rates of taxes, duties or other charges" means rates of taxes, duties or other charges imposed upon goods by a Partner State which place such goods in an unfavourable position with regard to sale by comparison with similar goods originating in that Partner State or imported from any other country;
(c) "dumping" means the transfer of goods originating in a Partner State to another Partner State for sale—
(i) at a price less than the comparable price charged for similar goods in the Partner State where such goods originate (due allowance being made for the differences in the conditions of sale or in taxation or for any other factors affecting the comparability of prices); and
(ii) under circumstances likely to prejudice the production of similar goods in that Partner State; and
(d) "discriminatory purchasing" means any arrangement or practice whereby a Partner State or any body or person therein gives preference to the purchase of goods originating from a foreign country when suitable goods originating within the Partner States are available on comparable terms including price.

CHAPTER IV—EXCISABLE GOODS

Article 17

COMMON EXCISE TARIFF

1. Subject to paragraphs 2 and 3 of this Article, the Partner States agree to establish and maintain a common excise tariff in respect of exisable goods manufactured, processed or produced in the Partner States.

2. For revenue purposes, a Partner State may, in special circumstances and after consultation between the Ministers of the Partner States responsible for public finance, depart from the common excise tariff in respect of the manufacture, processing or production of particular excisable goods in that State: Provided that a Partner State before acting under this paragraph shall have due regard to the administrative practicability of enforcing the departure contemplated and to whether the proposed departure would be likely to affect detrimentally the proper functioning of the Common Market.

3. The Partner States acknowledge their intention to remove presently existing differences in the excise tariff which the Common Market Council may determine to be undesirable in the interests of the proper function of the Common Market.

Article 18

EXCISE DUTY TO BE PAID TO CONSUMING STATE

1. Where goods which are liable to excise duty in one of the Partner States (in this Article referred to as "the collecting State") are transferred to another Partner State (in this Article referred to as "the consuming State") the East African Customs and Excise Department shall collect excise duty either at the rate in force in respect of the collecting State or, whether the rate in force in respect of the consuming State is higher than that in force in respect of the collecting State, at that rate.

2. Where the rate of excise duty in force in respect of the consuming State is lower than that in force in respect of the collecting State, the owner or other transferor of goods referred to in paragraph 1 of this Article shall receive from the East African Customs and Excise Department, on proof of transfer to the consuming State, a refund of the difference between those rates of duty.

3. The East African Customs and Excise Department shall, in respect of goods liable to excise duty transferred from the collecting State to the consuming State, pay to the consuming State the amount of the excise duty collected at the rate in force in that State.

CHAPTER V—MEASURES TO PROMOTE BALANCED INDUSTRIAL DEVELOPMENT

Article 19

FISCAL INCENTIVES

The Partner States declare that they shall use their best endeavours to agree upon a common scheme of fiscal incentives towards industrial development which shall apply within the Partner States.

Article 20

TRANSFER TAX

1. As a measure to promote new industrial development in those Partner States which are less developed industrially transfer taxes may, with the aim of promoting industrial balance between the Partner States, be imposed, notwithstanding paragraph 1 of Article 11 of this Treaty, in accordance with and subject to the conditions and limitations imposed by this Treaty.

2. In this Article, "manufactured goods" means the goods defined, or otherwise listed, in Annex IV to this Treaty*) The authority

* The text being published on p. A16 of this Supplement.

may by order from time to time amend or add to Annex IV.

3. Subject to this Article, a Partner State which is in deficit in its total trade in manufactured goods with the other two Partner States may impose transfer taxes upon manufactured goods which are transferred to that State and originate from either of the other Partner States.

4. Subject to this Article, a Partner State may impose transfer taxes upon the manufactured goods of a Partner State being goods of a value not exceeding the amount of the deficit in trade in manufactured goods between the State which is imposing the transfer tax and the State of origin of the goods upon which the tax is to be imposed.

5. For the purposes of paragraphs 3 and 4 of this Article the deficit in trade in manufactured goods between Partner States shall at any time be taken to be that indicated in the most recently published annual trade statistics produced by the East African Customs and Excise Department and where, in any particular case, the manufactured goods of a Partner State upon which a transfer tax may under this Article be imposed are not readily identifiable within the trade statistics referred to in this paragraph, the Common Market Council may determine the extent to which any goods comprised in such statistics contribute to the amount of any deficit in any trade.

6. A Partner State may impose a transfer tax upon manufactured goods only if at the time the tax is imposed goods of a similar description are being manufactured in that State or are reasonably expected to be manufactured in that State within three months of the imposition of the tax, and for the purposes of this paragraph goods shall be deemed to be of a similar description to other goods if, in addition to similar function, constituent parts or content, they are of such a nature as will enable them actively to compete in the same market as those, other goods:

Provided that this paragraph shall not preclude the imposition, but not the bringing into operation, of a suspended transfer tax at any time:

Provided further that, if a transfer tax is imposed in the reasonable expectation that the manufacture of particular goods will commence within three months of the imposition of the tax and such manufacture does not commence within that period—

(a) the Partner State imposing the transfer tax shall, within twenty-one days, revoke it unless, before the expiration of that period, that Partner State has obtained the directive of the Common Market Council that, conditional upon the commencement of manufacture within a further period of three months, the revocation of such tax may be deferred for such further period;

(b) notwithstanding that a transfer tax has been revoked, for the reason that the Common Market Council has not within three months of the imposition of such tax given the directive referred to in sub-paragraph (a) of this proviso, it shall be competent to that Council, where application in that behalf has been made by a Partner State within three months of the imposition of such tax, to direct that, conditional upon the commencement of manufacture within a further period of three months, such tax may be reimposed.

7. A Partner State may impose a transfer tax upon a particular kind of manufactured goods only if at the time the tax is imposed, or within three months thereafter if the tax is imposed in the reasonable expectation that the manufacture of such goods will commence within three months, the industry within the tax imposing State has the capacity to produce in the ensuing year—

(a) a quantity of goods equivalent to not less than 15 per cent of the domestic consumption within that Partner State of goods of that particular kind in the period of twelve months immediately preceding the imposition of the tax; or

(b) goods of that particular kind having an ex-factory value of not less than 2,000,000 shillings.

8. The rate of transfer shall be determined by the Partner State which imposes it, but the rate for a particular item shall not exceed—

(a) where the duty is chargeable *ad valorem* or *ad valorem* as an alternative to the specific duty, 50 per cent of the rate of duty prescribed by the customs tariff of the tax imposing State in respect of the import of the same kind of item; or

(b) where the duty is a specific duty with no alternative *ad valorem*, 50 per cent of the *ad valorem* equivalent of the specific duty,

but if the same kind of item is not chargeable with any duty on import no transfer tax may be imposed.

9. For the purposes of paragraph 8 of this Article, the *ad valorem* equivalent of the specific duty on a particular item shall be the percentage which is equivalent to that proportion which the aggregate of the duties collected on all items of that kind imported into the tax imposing State in a period of one year bears to the total value of those items, calculated from the date used in compiling the most recently published annual trade statistics produced by the East African Customs and Excise Department:

Provided that, if in the course of the period covered by such annual trade statistics the relevant rate of specific duty was altered, the *ad valorem* equivalent of the specific duty shall be calculated with reference only to imports entered after the alteration of the rate of duty:

Provided further that, in the calculation of the *ad valorem* equivalent of the specific duty, no account shall be taken of manufactured goods which have been either exempted from the payment of customs duty or in respect of which the customs duty has been remitted:

Provided further that, in relation to goods subject to specific duty with no alternative *ad valorem*, where there has been no importation of such goods into the tax imposing State and consequently no *ad valorem* equivalent can be determined, the rate of transfer tax shall not exceed 50 per cent of the specific duty thereon.

10. Where, in accordance with this Article, a Partner State has imposed a transfer tax upon manufactured goods and subsequently the rate of customs duty chargeable in that State on goods of the same kind is reduced, so that by virtue of paragraph 8 of this Article the tax falls to be reduced, that State shall, within twenty-one days of such reduction, reduce the tax accordingly:

Provided that, where the relevant item in the customs tariff is expressed only as a specific duty, the obligation to reduce the tax shall be performed as soon as the *ad valorem* equivalent of the specific duty as defined in paragraph 9 of this Article can be recalculated on the basis of statistics produced by the East African Customs and Excise Department, in respect of imports into the tax imposing State for a period of three months following the reduction in the customs tariff.

11. Transfer tax shall be assessed on the value of the manufactured goods upon which it is imposed, which shall be taken to be the value set out in Annex V to this Treaty.*)

Provided that, in the case of manufactured goods transferred under a contract of sale and entered for the payment of transfer tax,

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* The text being published on p. A18 of this Supplement.

tax shall be demeed to have been paid on that value if, before the goods are released after transfer, tax is tendered and accepted on a declared value based on the contract price and for the purposes of this proviso—

(a) the declared value of any goods shall be their value as declared by or on behalf of the buyer in the country to which the goods are being transferred in making entry of the goods for transfer tax;

(b) that value shall deemed to be based on the contract price if, but only if, it represents that price properly adjusted to take account of circumstances differentiating the contract from such contract of sale as is contemplated by Annex V to this Treaty; and

(c) the rate of exchange to be used for determining the equivalent in the currency of the country to which the goods are transferred of any foreign currency shall be the current selling fate for sight drafts in the country to which the goods are transferred as last notified before the time when the goods are entered for transfer:

Provided further that, where under Article 15 of this Treaty the Partner State in which the goods are manufactured is liable to pay to the Partner State which has imposed the transfer tax the full amount of customs duty collected in respect of goods imported and used in the manufacture of the manufactured goods, the amount of such duty paid over shall be deducted from the value provided for by this Article:

Provided further that, where under Article 18 of this Treaty the Partner State in which the goods are manufactured is liable to pay to the Partner State which has imposed the transfer tax the full amount of excise duty collected in respect of goods manufactured or processed or used in the manufacture of the manufactured goods, the amount of such duty paid shall be deducted from the value provided for by this Article.

12. The Authority may from time to time make rules for the administration and operation of paragraph 11 of this Article and of Annex V to this Treaty and may from time to time amend or add to such rules.

13. Subject to this Treaty, the assessment, collection, administration and management generally of all transfer taxes imposed under this Treaty shall be performed by the East African Customs and Excise Department, but the costs and expenses thereof, including any costs and expenses incurred in establishing the system of such assessment and collection, shall be borne by the Partner States which impose such transfer taxes in such manner as the Finance Council may from time to time determine.

14. Every transfer tax shall expire, unless sooner revoked, eight years after the date of its first imposition: and for the purposes of this paragraph no regard shall be had, in the case of a suspended transfer tax to the date when, if at all, such tax is brought into operation.

15. Every transfer tax imposed under this Treaty shall be revoked fifteen years after the coming into force of this Treaty unless such tax has sooner expired.

16. Notwithstanding paragraphs 14 and 15 of this Article, the Partner States agree that, for the purpose of evaluating the effectiveness of the transfer tax system as an instrument for attaining the aims of the Community, and in particular its effectiveness as a measure to promote a more balanced industrial development, they will undertake joint consultations to review and reappraise the system five years after the first imposition of a transfer tax under this Treaty.

17. If, as a result of a Partner State imposing a transfer tax upon a particular kind of manufactured goods, there is, in respect of manufactured goods of that kind coming into

the Partner State which has imposed the transfer tax, a significant deviation of trade away from goods coming from and manufactured in the Partner State whose goods are subject to the transfer tax to goods imported from a foreign country, then the Partner State which has imposed the transfer tax shall take measures to counteract such deviation and the other Partner States shall, where appropriate, take steps, in co-operation with that Partner State, to make such measures effective.

18. In order to determine whether a deviation of trade in a particular kind of manufactured goods has occurred for the purpose of paragraph 17 of this Article, regard shall be had to the information concerning that kind of manufactured goods in the trade statistics of the East African Customs and Excise Department (or otherwise recorded by that Department) for the six months immediately preceding a complaint that a deviation has occurred and to the average of the two comparable periods of six months in the twenty-four months which preceded the imposition of the transfer tax.

19. If a transfer tax is imposed by a Partner State upon a particular kind of manufactured goods originating in one of the other Partner States, and subsequently not less than 30 per cent of the total ex-factory value of sales, in any period of twelve months, of manufactured goods of that kind originating in the tax imposing State is sold for transfer to the other Partner States, the transfer tax shall be revoked.

20. If a transfer tax is imposed by a Partner State upon a particular kind of manufactured goods originating in the Partner States, or one of them, and subsequently not less than 30 per cent of the total ex-factory value of sales, in any period of twelve months, of manufactured goods of that kind originating in the tax imposing State is sold for transfer to the other Partner State or to a foreign country, a Partner State may, if it considers that in the circumstances the tax ought not to continue in force, having regard to all relevant matters and to this Treaty, raise the matter within the Common Market Council and the Council may direct that the Partner State which imposed the tax shall revoke it.

21. If a Partner State which is entitled to impose transfer taxes transfers to the other Partner States in any year beginning on the 1st January manufactured goods originating in that Partner State and amounting in total value to not less than 80 per cent of the total value (measured on a fair and comparable basis in accordance with the annual trade statistics produced by the East African Customs and Excise Department) of manufactured goods transferred into that Partner State from the other Partner States during that year (and originating in those Partner States), that Partner State shall not thereafter be entitled to impose any new transfer tax or bring any suspended transfer tax into operation; but this paragraph shall not affect any subsisting transfer tax.

22. If a transfer tax is imposed by a Partner State upon a particular kind of manufactured goods, the manufacture of which is regulated under the East African industrial licensing laws in operation in the Partner States (or any laws which may be enacted in replacement of those laws in pursuance of Article 23 of this Treaty), the Partner State whose goods are subject to the transfer tax may, if it considers that there are such exceptional circumstances that the tax ought not to continue in force, having regard to all relevant matters and to this Treaty, raise the matter within the Common Market Council and if the Council after due consideration finds that such circumstances exist the Partner State which imposed the tax shall revoke it.

23. Each Partner State shall take effective action to prevent manufactured goods origi-

nating in a Partner State being transferred to another Partner State at a price lower than their true value if such transfer is likely to prejudice the production of similar goods by that other Partner State or retard or prevent the establishment of an industry to produce such goods in that State.

24. For the purpose of paragraph 23 of this Article—

(a) manufactured goods shall be considered to be transferred at a price lower than their true value if, due allowance having been made in each case for differences in conditions of sale, taxation or for any other factors affecting the comparability of prices, their price on transfer is less than—
  (i) the comparable price, in ordinary trading conditions, of similar goods destined for domestic consumption in the State in which they were produced; or
  (ii) the comparable price of similar goods on their export to a foreign country in ordinary trading conditions; or
  (iii) the cost of production of the goods in the Partner State where they are produced, together with a reasonable addition in respect of distribution and sales costs and profit; and

(b) "effective action" shall include the making available of facilities for enquiry relating to any allegation, by a Partner State, of transfer of goods to that Partner State at a price lower than the true value of such goods and where, on reference to the Common Market Council, the fact of such transfer at such lower value has been established, the taking of such measures as, in relation to any industry, shall be calculated to prevent its recurrence.

25. No Partner State shall directly or indirectly subsidize the transfer of any manufactured goods from that Partner State, or establish, maintain or support any system whereby such goods are sold for transfer to another Partner State at a price lower than the comparable price charged for similar goods on the domestic market, due allowance being made for differences in the conditions of sale or in taxation and for any factors affecting the comparability of prices.

26. For the purpose of paragraph 25 of this Article, tax incentives or refunds of a general and non-discriminatory nature granted by a Partner State with a view to encouraging production within that State of goods shall not constitute a transfer subsidy, provided they do not frustrate the purpose of the transfer tax system and are not inconsistent with this Treaty.

27. The Partner States agree that no transfer tax may be imposed upon manufactured goods which are required by the Community or by any of the Corporations for the purpose of their operations, otherwise than upon such goods as are intended for sale, or are sold, to the public.

ANNEX IV—MANUFACTURED GOODS

Manufactured goods shall be all those goods referred to in those Sections, Divisions or Items of the Official Import and Export List, as specified in the Schedule to Legal Notice No. 68 of 1963 of the Common Services Organization, which are set out below, subject to the modifications expressly stated in the description of goods given below—

Section, Division or Item		*Description of Goods*
012	(part)	Bacon, ham and other smoked meat, whether or not in airtight containers (excluding dried meat and salted meat)
013	(part)	Sausages and other prepared or preserved meat (excluding meat extracts and meat juices)
022 1	(part)	Milk or cream (in liquid or semi-solid form) evaporated or condensed, including buttermilk and whey but excluding skimmed milk
022 2		Milk and cream dry (in solid form such as blocks or powder), including buttermilk, skimmed milk and whey
023		Butter, including clarified butter
024		Cheese and curd
032	(part)	Fish and fish preparations (including crustacea and molluscs) in airtight containers
046	(part)	Meal and flour of wheat (excluding meal and flour of meslin)
047	(part)	Meal and flour of other cereals (excluding meal and flour of maize)
048		Cereal preparations and preparations of flour and starch of fruits and vegetables
053		Fruit preserved and fruit preparations (excluding dried and artificially dehydrated fruit)
055		Vegetables, roots and tubers, preserved or prepared, not elsewhere specified, whether or not in airtight containers
06	(part)	Sugar, sugar preparations and honey (excluding item 061 6 0, natural honey)
071 1 8		Coffee, roasted, including ground, and coffee substitutes containing coffee
073		Chocolate and other food preparations containing cocoa or chocolate, not elsewhere specified
074 1 0		Tea (other than unprocessed leaf)
075	(part)	Spices, ground only
081		Feeding stuff for animals (excluding unmilled cereals)
091		Margarine and shortening
099		Food preparations, not elsewhere specified
11		Beverages
122		Tobacco manufactures
243	(part)	Wood, shaped or simply worked (excluding item 243 1 0, railway sleepers (ties))
251		Pulp and waste paper
266		Synthetic and regenerated (artificial) fibres (including waste of such fibres)
33		Petroleum and petroleum products
34		Gas, natural and manufactured
42		Fixed vegetable oils and fats
5	(part)	Chemicals (excluding item 532 4 1, wattle bark extract)
6	(part)	Manufactured goods classified chiefly by material, excluding the following items:—

681 1 0	Silver, unworked or partly worked	
682 1 0	Copper and alloys, whether or not refined, unwrought	
683 1 0	Nickel and nickel alloys, unwrought	
684 1 0	Aluminium and aluminium alloys, unwrought	
685 1 0	Lead and lead alloys, unwrought	
686 1 0	Zinc and zinc alloys, unwrought	
687 1 0	Tin and tin alloys, unwrought	
688 0 0	Uranium and thorium and their Alloys	
689 0 0	Miscellaneous nonferrous base metals employed in metallurgy	
		7 Machinery and transport equipment
		8 Miscellaneous manufactured articles

ANNEX V—VALUE OF GOODS LIABLE TO TRANSFER TAX

1.—(1) The value of any goods liable to transfer tax shall be taken to be the normal price, that is to say the price which they would fetch when they are entered for the payment of transfer tax (or, if they are not so entered, at the time of transfer) on a sale in the open market between a buyer in the country to which the goods are transferred and a seller in the country from which the goods are transferred independent of each other.

(2) The normal price of any goods liable to transfer tax shall be determined on the following assumptions—

(a) that the goods are treated as having been delivered to the buyer at the point of entry into the country to which the goods are being transferred; and

(b) that the seller will bear freight, insurance, commission and all other costs, charges and expenses incidental to the sale and the delivery of the goods at that point of entry; but

(c) that the buyer will bear any tax chargeable in the country to which the goods are being transferred.

2. A sale in the open market between buyer and seller independent of each other presupposes—

(a) that the price is the sole consideration; and

(b) that the price paid is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller or any person associated in business with him and the buyer or any person associated in business with him (other than the relationship created by the sale of the goods in question); and

(c) that no part of the proceeds of the subsequent resale, use or disposal of the goods will accrue directly or indirectly to the seller or any person associated with him.

3. Where the goods to be valued—

(a) are manufactured in accordance with any patented invention or are goods to which any registered design has been applied; or

(b) are transferred under a foreign trade mark or are transferred for sale (whether or not after further manufacture) under a foreign trade mark,

the normal price shall be determined on the assumption that the price covers the right to use the patent, design or trade mark in respect of the goods.

4. For the purposes of paragraph 3 of this Annex, the expression "trade mark" includes a trade name and a get up, and a foreign trade mark is a trade mark used for the purpose of indicating that goods in relation to which it is used are those of—

(a) a person by whom the goods to be valued have been grown, produced, manufactured, selected, offered for sale or otherwise dealt with outside the country to which the goods are transferred; or

(b) a person associated in business with any such person as is referred to in sub-paragraph (a) of this paragraph; or

(c) a person to whom any such person as is mentioned in sub-paragraph (a) or (b) of this paragraph has assigned the goodwill of the business in connection with which the trade mark is used.

5. Two persons shall be deemed to be associated in business with one another if,

whether directly or indirectly, either one of them has any interset in the business or property of the other or both have a common interest in any business or property, or some third person has an interest in the business or property of both of them.

Convention between Japan and the United States of Brazil for the avoidance of double taxation with respect to taxes on income

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 4, April/avril 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

The Japan/Brazil tax treaty concluded January 24, 1967, was ratified by Brazil by the Legislative Decree no. 43 of the National Congress, dated November 23, 1967, and promulgated in Decree no. 61899 of December 14, 1967.
The Japanese Parliament approved the Treaty on July 21, 1967. The instruments of ratification were exchanged on December 1, 1967. In accordance with Art. 27 of the Treaty the Convention entered into force on December 31, 1967.

TEXT

The Government of Japan and the Government of the United States of Brazil,
Desiring to conclude a Convention for the avoidance of double taxation with respect to taxes on income,
Have agreed as follows:

Article 1

(1) The taxes which are the subject of this Convention are:
(a) In the case of the United States of Brazil, the federal income tax (hereinafter referred to as "Brazilian tax").
(b) In the case of Japan, the income tax and the corporation tax (hereinafter referred to as "Japanese tax").

(2) This Convention shall also apply to taxes substantially similar to those covered by paragraph (1) which are introduced in either Contracting State after the date of signature of this Convention.

Article 2

(1) In this Convention, unless the context otherwise requires:
(a) The term "Brazil" means the United States of Brazil;

(b) The term "Japan", when used in a geographical sense, means all the territory in which the laws relating to Japanese tax are in force;
(c) The terms "a Contracting State" and "the other Contracting State" mean Japan or Brazil, as the context requires;
(d) The term "tax" means Japanese tax or Brazilian tax, as the context requires;
(e) The term "person" includes an individual, a company and any other body of persons;
(f) The term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
(g) The terms "enterprise of a Contracting State" "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
(h) The term "competent authority" in relation to a Contracting State means the Minister of Finance of that Contracting State or his authorized representative.

(2) As regards the application of this Convention by a Contracting State, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes to which this Convention applies.

Article 3

(1) For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the law of that Contracting State, is liable to taxation therein by reason of his domicile, residence, place of head or main office, place of management or any other criterion of a similar nature.

(2) Where by reason of the provisions of paragraph (1) a person is a resident of both Contracting States, then the competent authorities shall determine by mutual agreement the Contracting State of which that person shall be deemed to be a resident for the purposes of this Convention

Article 4

(1) For the purposes of this Convention, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes especially:
a) a place of management;
b) a branch;
c) an office;
d) a workshop;
e) a factory;
f) a warehouse;
g) a mine, quarry or other place of extraction of natural resources;
h) a building site or construction or assembly project which exists for more than six months.

(3) The term "permanent establishment" shall not be deemed to include:
a) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
b) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
c) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
d) the maintenance of a stock of goods or

merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

(4) A person acting in a Contracting State on behalf of an enterprise of the other Contracting State—other than an agent of an independent status to whom paragraph (5) applies—shall be deemed to be a permanent establishment in the firstmentioned Contracting State if he
(a) has, and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
(b) maintains in that Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise, consecutive to a contract previously concluded by the enterprise without specifying either the quantity to be delivered, or the date and the place of delivery.

(5) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

(6) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute for either company a permanent establishment of the other.

(7) An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on business which consists in whole or in part of providing in that other Contracting State the services of public entertainers referred to in Article 15.

Article 5

(1) The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to that permanent establishment.

(2) Where an enterprise of a Contracting State carries on businesss in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are

incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred.

(4) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(5) For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(6) Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 6

Where
a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,
and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 7

(1) Profits from the operation of ships or aircraft in international traffic carried on by an enterprise of a Contracting State shall be taxable only in that Contracting State.

(2) In respect of the operation of ships or aircraft in international traffic carried on by an enterprise which is a resident of Brazil, that enterprise shall be exempt from the local inhabitant taxes and the enterprise tax in Japan.

Article 8

(1) Income from immovable property may be taxed in the Contracting State in which such property is situated.

(2) The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting immovable property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.

(3) The provisions of paragraph (1) shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

(4) The provisions of paragraphs (1) and (3) shall also apply to the income from immovable property of an enterprise and to

income from immovable property used for the performance of professional services.

Article 9

(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State.

(2) However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that Contracting State, but the tax so charged shall not exceed 10 per cent of the gross amount of the dividends if the recipient is a company which owns at least 25 per cent of the voting shares of the company paying such dividends during the period of six months immediately before the end of the accounting period for which the distributions of profits takes place.

(3) The provisions of paragraph (2) shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

(4) The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares by the taxation law of the Contracting State of which the company making the distribution is a resident.

(5) In the application of preceding paragraphs, in the case of Brazil, there shall also be considered as dividends all forms of disposition of profits by a permanent establishment, situated in Brazil, of an enterprise which is a resident of Japan, in which case the tax on such disposition of profits shall not exceed the rate of tax referred to in paragraph (2).

(6) The provisions of paragraphs (2) and (5) shall not apply to the Brazilian tax on activities of minor importance and excess remittance tax.

(7) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected. In such a case, the provisions of Article 5 shall apply.

Article 10

(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

(2) However, such interest may be taxed in the Contracting State in which it arises, and according to the laws of that Contracting State, but the tax so charged shall not exceed 10 per cent of the gross amount of the interest if:

(a) the interest is received by a bank or other financial institution which is a resident of the other Contracting State;

(b) the interest arises from loans made by an enterprise of the other Contracting State to an enterprise of the first-mentioned Contracting State engaged in an industrial undertaking, provided that the funds for such loans have been obtained by the first-mentioned enterprise from a bank or other

financial institution solely for the purpose of financing that other enterprise, and that the first-mentioned enterprise owns at least 25 per cent of the voting capital of that other enterprise at the time either such loans are made or such interest is to be paid;
(c) the interest arises from debentures or other similar bonds; or
(d) the interest arises from treasury bills or other public bonds.

(3) Notwithstanding the provisions of paragraph (2), interest arising in a Contracting State and paid to the Government of the other Contracting State, a political subdivision or local authority thereof or any agency or instrumentality (including financial institution) wholly owned by that Government, political subdivision or local authority shall be exempt from tax of the first-mentioned Contracting State.

(4) The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises.

(5) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establishment with which the debt-claim from which the interest arises is effectively connected. In such a case, the provisions of Article 5 shall apply.

(6) Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that Contracting State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(7) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 11

(1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

(2) However, such royalties may be taxed in the Contracting State in which they arise, and according to the laws of that Contracting State, but the tax so charged shall not exceed 10 per cent of the gross amount of royalties. This limitation shall not apply to royalties derived from Brazil during the first three calendar years of the application of this

Convention during which period of time Brazil may thus apply the tax on royalties provided for in the taxation law of Brazil.

(3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of scientific work, any patent, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience; but does not include payments of any kind received as a consideration for the use of, or the right to use, trade marks, cinematograph films, films or tapes for radio or television broadcasting.

(4) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State, has in the other Contracting State in which the royalties arise a permanent establishment with which the right of property giving rise to the royalties is effectively connected. In such a case, the provisions of Article 5 shall apply.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that Contracting State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connecting with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(6) Where any royalties exceed a fair and reasonable consideration in respect of the rights for which they are paid, the provisions of this Article shall apply only to so much of the royalties as represents as such fair and reasonable consideration. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In those cases, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12

(1) Gains from the alienation of immovable property, as defined in Article 8 paragraph (2), may be taxed in the Contracting State in which such property is situated.

(2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other Contracting State. However, gains derived by a resident of a Contracting State from the alienation of ships and aircraft operated in international

traffic and movable property pertaining to the operation of such ships and aircraft shall be exempt from tax of the other Contracting State.

(3) Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1) and (2) shall be taxable only in that Contracting State.

Article 13

(1) Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be exempt from tax of the other Contracting State unless he has a fixed base regularly available to him in that other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in that other Contracting State but only so much of it as is attributable to that fixed base.

(2) The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 14

(1) Subject to the provisions of Articles 18, 19 and 20, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be exempt from tax of the other Contracting State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Contracting State.

(2) Notwithstanding the provisions of paragraph (1), remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be exempt from tax of that other Contracting State if:

a) the recipient is present in that other Contracting State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other Contracting State, and

c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in that other Contracting State.

(3) Notwithstanding the provisions of paragraphs (1) and (2), remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that Contracting State.

Article 15

Notwithstanding the provisions of Articles 13 and 14, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

Article 16

A professor or teacher who makes a temporary visit to a Contracting State for a period not exceeding two years for the purpose of teaching or conducting research at a university, college, school or other educational institution and who is, or immediately before such visit was, a resident of the other Contracting State shall be exempt from tax of the

first-mentioned Contracting State in respect of remuneration for such teaching or research.

Article 17

Payments or income received for the purpose of his maintenance, education or training by a student or business apprentice who is present in a Contracting State solely for the purpose of his education or training and who is, or immediately before being so present was, a resident of the other Contracting State shall be exempt from tax of the first-mentioned Contracting State, provided that such payments are made to him from outside that first-mentioned Contracting State and that such income is received in respect of his personal services performed in the first-mentioned Contracting State in an amount not in excess of US.$ 1,000 or its equivalent in Japanese or Brazilian currency for any taxable year for a period not exceeding three consecutive taxable years.

Article 18

Remuneration derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other Contracting State in accordance with the law of that other Contracting State.

Article 19

Wages, salaries, and similar compensation, and pensions, or similar benefits paid by, or out of funds to which contributions are made by, a Contracting State, a political subdivision or local authority thereof to an individual who is a national of that Contracting State for services rendered to that Contracting State, political subdivision or local authority in the discharge of governmental functions shall be taxable only in that Contracting State.

Article 20

(1) Private pensions and private life annuities paid to individuals who are residents of a Contracting State shall be taxable only in that Contracting State.

(2) The term "pensions", as used in this Article, includes periodic payments made in consideration for, or by way of compensation for injuries received in connection with, past employment.

(3) The term "life annuities", as used in this Article, includes a stated sum paid periodically at stated times during life, or during a specified number of years, under an obligation to make the payments in return for adequate and full consideration.

Article 21

Any income not dealt with in the foregoing provisions derived by a resident of a Contracting State from sources in the other Contracting State may be taxed in both Contracting States.

Article 22

(1) Where a resident of Brazil derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, Brazil shall allow as a deduction from the tax on the income of that person, an amount equal to the income tax paid in Japan. The deduction shall not, however, exceed that part of the income tax as computed before the deduction is given, which

is appropriate to the income which may be taxed in Japan.

(2) (a) Where a resident of Japan derives income from Brazil which may be taxed in Brazil in accordance with the provisions of this Convention, the amount of the Brazilian tax payable in respect of that income shall be allowed as a credit against the Japanese tax imposed on that resident. The amount of credit, however, shall not exceed that part of the Japanese tax which is appropriate to that income.

(b) For the purposes of the credit referred to in sub-paragraph (a) above, there shall be deemed to have been paid by a taxpayer the amount which would have been paid if the Brazilian tax would not have been reduced or relieved in accordance with

(i) the provisions of paragraph 2 of Article 9, paragraph 2 of Article 10 and paragraph 2 of Article 11; and,

(ii) the special incentive measures designed to promote economic development in Amazonian Region and Northern and Northeastern Region of Brazil.

(c) In the application of the provisions of sub-paragraph (b) above, there shall not, in any event, be deemed to have been paid an amount of tax higher than that which, but for the reduction or relief of tax due to the special incentive measures mentioned in sub-paragraph (b) (ii), would result from the application of the Brazilian tax laws effective on the date of signature of this Convention.

(d) For the purposes of this paragraph, the term "Japanese tax" includes the local inhabitant taxes.

Article 23

(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other Contracting State in the same circumstances are or may be subjected.

(2) The term "nationals" means all individuals possessing the nationality of either Contracting State and all juridical persons created or organized under the laws of that either Contracting State and all organizations without juridical personality treated for the purposes of tax of that either Contracting State as juridical persons created or organized under the laws of that either Contracting State.

(3) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities.

This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement, connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-

mentioned Contracting State are or may be subjected.

(5) In this Article the term "taxation" means taxes of every kind and description.

Article 24

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection, including judicial determination, of the taxes to which this Convention applies.

(2) In no case shall the provisions of paragraph (1) be construed so as to impose on a Contracting State the obligation:
(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;
(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

(3) The competent authorities of the Contracting States may take appropriate measures and exchange the information for the prevention of fiscal evasion in the Contracting States concerning the taxes to which this Convention applies.

Article 25

(1) Where a resident of a Contracting State considers that the actions taken in the other Contracting State result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the laws of those Contracting States, present his case to the competent authority of the Contracting State of which he is a resident.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Convention.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Convention.

Article 26

Nothing in this Convention shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

Article 27

(1) This Convention shall be ratified and the instruments of ratification shall be exchanged at Rio de Janeiro as soon as possible .

(2) This Convention shall enter into force on the thirtieth day after the date of the exchange of instruments of ratification and shall have effect as respects income derived during the taxable years beginning on or after the first day of January in the calendar year next following that in which this Convention enters into force.

Article 28

Either Contracting State may terminate this Convention after a period of three years from the date on which this Convention enters into force by giving to the other Contracting State, through the diplomatic channel, written notice of termination, provided that any such notice shall be given only on or before the thirtieth day of June in any calendar year, and, in such event, this Convention shall cease to be effective in respect of income derived during the taxable years beginning on or after the first day of January in the calendar year next following that in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, being dully authorized thereto by their respective Governments, have signed this Convention.

DONE in duplicate at Tokyo on January 24, 1967 in the Japanese, Portuguese and English languages, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of Japan:

Takeo Miki

For the Government of the Unitid States of Brazil:

Juracy Magalhães

Agreement between the Federal Republic of Germany and the Kingdom of Thailand for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 6, June/juin 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

On July 10, 1967 a treaty between the Federal Republic of Germany and the Kingdom of Thailand for the avoidance of double taxation with respect to taxes on income and on capital was signed. The official English text of this as yet unratified agreement, which was recently submitted to the West German Parliament is reproduced below.

TEXT

THE FEDERAL REPUBLIC OF GERMANY

and

THE KINGDOM OF THAILAND,

DESIRING to conclude an Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital,

HAVE AGREED AS FOLLOWS:

Article 1

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 2

(1) This Agreement shall apply to taxes on income and on capital imposed on behalf of each Contracting State, of its "Laender", political subdivisions, local authorities, or local administrations, irrespective of the manner in which they are levied.

(2) There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total

amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation and the "Gewerbesteuer" (trade tax) levied in the Federal Republic of Germany.

(3) The existing taxes to which this Agreement shall apply are, in particular:
1. In the case of the Federal Republic of Germany:
a) the Einkommensteuer (income tax),
b) the Körperschaftsteuer (corporation tax),
c) the Vermögensteuer (capital tax), and
d) the Gewerbesteuer (trade tax)
(hereinafter referred to as "German tax");
2. In the case of the Kingdom of Thailand:
a) the income tax, and
b) the local development tax
(hereinafter referred to as "Thai tax").

(4) The Agreement shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.

(5) The provisions of this Agreement in respect of the taxation of income or profits shall likewise apply to the "Gewerbesteuer" (trade tax) computed other than on the basis of income or capital.

Article 3

(1) In this Agreement, unless the context otherwise requires:
a) The term "Federal Republic" means the Federal Republic of Germany, and, when used in a geographical sense, the territory in which the Basic Law for the Federal Republic of Germany is in force;
b) The term "Thailand" means the Kingdom of Thailand;
c) The terms "a Contracting State" and "the other Contracting State" mean the Federal Republic or Thailand, as the context requires;
d) The term "tax" means German tax or Thai tax, as the context requires;
e) The term "person" comprises individuals and companies;
f) The term "company" means any body corporate or any entity or any group of persons which is treated as a body corporate for tax purposes;
g) The terms "enterprise of a contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
h) The term "nationals" means:
1. in respect of the Federal Republic: all Germans in the meaning of Article 116 (1) of the Basic Law for the Federal Republic of Germany and all legal persons, partnerships and associations deriving their status as such from the law in force in the Federal Republic;
2. in respect of Thailand: all individuals possessing Thai nationality under the Thai law on nationality and all legal persons, partnerships and associations deriving their status as such from the law in force in Thailand;
i) The term "competent authority" means in the case of the Federal Republic the Federal Minister of Finance, and in the case of Thailand the Minister of Finance.

(2) As regards the application of this Agreement by a Contracting State any term not otherwise defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Agreement.

Article 4

(1) For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, registration, incorporation, seat (Sitz), place of management or any other criterion of a similar nature.

(2) If by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, this case shall be determined in accordance with the following rules:
a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (centre of vital interests);
b) If the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
c) If he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;
d) If he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

(3) If by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Article 5

(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

(2) The term "permanent establishment" shall include especially:
a) a place of management;
b) a branch;
c) an office;
d) a factory;
e) a workshop;
f) a mine, quarry or other place of extraction of natural resources.

(3) Notwithstanding the provisions of paragraphs 1 and 2, the term "permanent establishment" shall include a building site or construction or assembly project only if it exists for more than
a) 6 months, in the case of installation or setting up of plant equipment or machinery including the auxiliary construction as is necessary for such installation;
b) 3 months in all other cases.

(4) The term "permanent establishment" shall not be deemed to include:
a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

(5) Notwithstanding the provisions of paragraph 4, a person acting in a Contracting State on behalf of an enterprise of the other Contracting State — other than an agent of an independent status to whom paragraph 6 applies — shall be deemed to be a permanent establishment in the first-mentioned State if
a) he has, and habitually exercises in that Contracting State, an authority to conclude contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
b) he habitually maintains in that Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly delivers goods or merchandise for or on behalf of the enterprise; or
c)*) he habitually secures orders in that Contracting State, wholly or almost wholly for the enterprise itself, or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it.

(6) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, if such persons are acting in the ordinary course of their business. This shall not apply if such broker or agent carries on in that other State an activity described in paragraph 5 wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises which are controlled by or have a controlling interest in it.

(7) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute for either company a permanent establishment of the other.

Article 6

(1) Income from immovable property may be taxed in the Contracting State in which such property is situated.

(2) The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed pay-

*) According to an exchange of letters by the Excellencies Ministers of Foreign Affairs of the Contracting States on July 10, 1967, the term "wholly" or "almost wholly", as used in Article 5, paragraph 5, subparagraph c, shall be understood to mean that the person's activities for enterprises other than those referred to therein are of such minor importance in relation to his activities for or on behalf of the enterprises mentioned therein that for all practical purposes such person may be regarded as working solely for or on behalf of the latter enterprises.

ments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

(3) The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

(4) The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

Article 7

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other State but only so much of them as is attributable to that permanent establishment.

(2) Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

(4) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(5) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

(1) Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.

(2) If according to Article 7 an enterprise of a Contracting State operating ships in international traffic may be taxed in the other Contracting State the tax charged shall in that other State be reduced by an amount equal to 50 per cent thereof.

(3) The provisions of paragraphs 1 and 2 shall likewise apply to profits arising from participations in shipping or aircraft pools of any kind by such enterprises engaged in shipping or air transport.

Article 9

Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or

indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,
and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 10

(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

(2) However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, but
a) the Thai tax shall not exceed:
1. 20 per cent of the gross amount of the dividends if the company paying the dividends engages in an industrial undertaking or if the recipient of the dividends is a company which is a resident of the Federal Republic owning at least 25 per cent of the voting shares of the company paying the dividends;
2. 15 per cent of the gross amount of the dividends if the company paying the dividends engages in an industrial undertaking and the recipient of the dividends is a company which is a resident of the Federal Republic owning at least 25 per cent of the voting shares of the former company;
b) the German tax shall not exceed:
1. 20 per cent of the gross amount of the dividend, unless sub-paragraph 2 applies;
2. 15 per cent of the gross amount of the dividends, if the recipient of the dividends is a company which is a resident of Thailand owning at least 25 per cent of the voting shares of the company paying the dividends.

(3) Notwithstanding the provisions of paragraph 2 the tax of a Contracting State on dividends paid by a company which is a resident of that State may exceed the rates provided for in that paragraph, but shall not exceed 25 per cent of the gross amount of the dividends, if
a) the corporation tax of that State on distributed profits is lower than that on undistributed profits and the difference between those two rates is 20 percentage points or more, and
b) such dividends are paid by a company which is a resident of that State to a company resident of the other State and which owns at least 25 per cent of the voting shares of the first-mentioned company.

(4) In this Article
a) the term "dividends" means income from shares and income from other corporate rights assimilated to income from shares by the taxation law of the State of which the company making the distribution is a resident;
b) the term "industrial undertaking" means
1. any undertaking engaged in
i) manufacturing, assembling and processing,
ii) construction, civil engineering and shipbuilding,
iii) production of electricity, hydraulic power, gas or the supply of water, or
iv) agriculture, forestry and fishery and the carrying on of a plantation, and
2. any other undertaking entitled to the privileges accorded under the laws of Thai-

land on the promotion of industrial investment, and
3. any other undertaking which may be declared to be an "industrial undertaking" for the purpose of this Article by the competent authority of Thailand.

(5) The provisions of paragraphs 1 to 3 shall not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected, provided that under the law of that other State the dividends are taxed as part of the profits of the permanent establishment.

(6) Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company to persons who are not resident of that other State, or subject the company's undistributed profits to a tax on undistributed profits even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11

(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such interest may be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 25 per cent of the gross amount of the interest.

(3) Notwithstanding the provisions of paragraph 2, the tax of a Contracting State on interest received by any financial institution (including an insurance company) which is a company of the other Contracting State shall not exceed 10 per cent of the gross amount of the interest, if the enterprise paying the interest engages in an industrial undertaking within the meaning of paragraph 4, subparagraph b, of Article 10.

(4) Notwithstanding the provisions of paragraphs 2 and 3, interest arising in a Contracting State shall be exempt from tax in that State if the interest is received by
a) the other Contracting State, a "Land", a political subdivision, a local authority or a local administration thereof, or
b) any financial institution wholly owned by the other Contracting State, a "Land", a political subdivision, a local authority or a local administration thereof, and in particular, in the case of the Federal Republic, by the "Deutsche Bundesbank" or the "Kreditanstalt für Wiederaufbau", and in the case of Thailand, by the "Bank of Thailand", or
c) by a resident of the other Contracting State on bonds issued by the Government of the first-mentioned State.

(5) The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises.

(6) The provisions of paragraphs 1 to 4 shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establish-

ment with which the debt-claim from which the interest arises is effectively connected, provided that under the law of that other State the interest is taxed as part of the profits of the permanent establishment.

(7) Interest shall be deemed to arise in a Contracting State when the payer is that State, a "Land", a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(8) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount, In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 12

(1) Royalties including other like payments arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such royalties may be taxed in the Contracting State in which they arise, but the tax so charged shall not exceed
a) 5 per cent of the gross amount of such payments if they are made as consideration for the use of, or the right to use any copyright of literary, artistic or scientific work;
b) 15 per cent of the gross amount of such payments if they are made as consideration for the use of, or the right to use, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, or for the use of, or the right to use, cinematograph films or tapes for television or broadcasting.

(3) The provisions of paragraph 2 shall likewise apply to the gains from the alienation of any right or property giving rise to such royalties if such right or property is alienated by a resident of a Contracting State for exclusive use in the other Contracting State and the payment of such right or property is borne by an enterprise of that other State or a permanent establishment situated therein.

(4) The provisions of paragraphs 2 and 3 shall not apply if the recipient of the royalties, being a resident of a Contracting State, has in the other Contracting State in which the royalties arise a permanent establishment and the royalties are attributable to that permanent establishment, provided that under the law of that other State the royalties are taxed as part of the profits of the permanent establishment.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that State, a "Land", a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Con-

tracting State or not, has in a Contracting State a permanent establishment with which the right or property giving rise to the royalties is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(6) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 13

(1) Gains from the alienation of immovable property, as defined in paragraph 2 of Article 6, may be taxed in the Contracting State in which such property is situated.

(2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise), may be taxed in the other State. However, gains from the alienation of movable property of the kind referred to in paragraph 3 of Article 21 shall be taxable only in the Contracting State in which such movable property is taxable according to the said Article.

(3) Gains from the alienation of any property other than those mentioned in paragraph 3 of Article 12 and in paragraphs 1 and 2 of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14

(1) Subject to the provisions of Articles 15, 16 and 17 remuneration derived by an individual who is a resident of a Contracting State in respect of personal services (including the practice of a liberal profession) shall be taxable only in that State unless the services are rendered in the other Contracting State. If the services are so rendered, such remuneration as is derived therefrom may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph 1, remuneration derived by an individual who is a resident of a Contracting State in respect of such services rendered in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned, and

b) the remuneration is paid, by, or on behalf of, a person who is not a resident of the other State, and

c) the remuneration is not borne by a permanent establishment which the person paying the remuneration has in the other State.

(3) Notwithstanding the provisions of paragraphs 1 and 2, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic, operated by

an enterprise of a Contracting State, may be taxed in that State.

Article 15

(1) The provisions of paragraph 2 of Article 14 shall apply to remuneration derived from personal services rendered in a Contracting State by public entertainers such as theatre, radio or television artists and musicians and by athletes from their personal activities as such only if the visit to that State is substantially supported, directly or indirectly, by public funds of the other Contracting State.

(2) Notwithstanding anything contained in this Agreement, where the services mentioned in paragraph 1 are provided in a Contracting State by an enterprise of the other Contracting State, the profits derived from providing those services by such enterprise may be taxed in the first-mentioned State unless the enterprise is substantially supported, directly or indirectly, by public funds of the other Contracting State in connection with the provision of such services.

(3) For the purposes of this Article, the term "public funds of a Contracting State" shall include public funds created by a "Land", a political subdivision, a local authority or a local administration thereof.

Article 16

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17

(1) Remuneration paid by or out of funds created by a Contracting State, a "Land", a political subdivision, a local authority or a local administration thereof to any individual in respect of an employment, shall be exempt from tax in the other Contracting State unless the payment is made to a national of that other State who is not also a national of the first-mentioned Contracting State.

(2) Notwithstanding the provisions of paragraph 1 the provisions of Articles 14 and 15 shall apply to remuneration in respect of an employment in connection with any trade or business carried on by a Contracting State, a "Land", a political subdivision, a local authority or a local administration thereof.

(3) The provisions of paragraph 1 shall also apply to remuneration paid, in the case of the Federal Republic by the "Deutsche Bundesbank", the "Deutsche Bundesbahn" and the "Deutsche Bundespost", and in the case of Thailand by the "Bank of Thailand" and any other organization of a governmental nature.

Article 18

(1) Pensions and other payments for past employment as well as annuities derived by a resident of a Contracting State may be taxed in the other Contracting State only if such payments are deducted as expenses in determining the profits of an enterprise of that other State or of a permanent establishment situated therein.

(2) Notwithstanding the provisions of paragraph 1, pensions and other payments for past employment as well as annuities paid by

or out of funds created by a Contracting State, a "Land", a political subdivision, local authority or local administration thereof shall be exempt from tax in the other Contracting State.

(3) Paragraph 2 shall likewise apply in respect of pensions, annuities and other recurring or not recurring remuneration paid to any individual by a Contracting State, a "Land", a political subdivision, a local authority or local administration thereof as compensation for an injury or damage sustained as a result of hostilities or political persecution.

Article 19

An individual, who is or was a resident of a Contracting State immediately before visiting the other Contracting State and is temporarily present in that other Contracting State solely for the purpose of teaching at a university, college, school or other educational institution in that other State for a period not exceeding two years shall be exempt from tax in that other Contracting State on his remuneration for such teaching.

Article 20

(1) An individual who is or was a resident of a Contracting State immediately before visiting the other Contracting State and is temporarily present in that other Contracting State solely as a student at a recognised university, college, or school in that other Contracting State, or as a business apprentice (including in the Federal Republic a "Volontär" or a "Praktikant"), shall be exempt from tax in that other State on

a) all remittances from abroad for the purposes of his maintenance, education or training, and

b) any remuneration for personal services rendered in that other State supplementing the resources available to him for such purposes.

(2) An individual who is or was a resident of a Contracting State immediately before visiting the other Contracting State and is temporarily present in that other State for a period not exceeding two years solely for the purpose of study, research or training as a recipient of a grant, allowance or award from a scientific, educational, religious or charitable organization or under a technical assistance programme entered into by the Government of a Contracting State shall be exempt from tax in that other State on:

a) the amount of such grant, allowance or award, and

b) all remittances from abroad for the purposes of his maintenance, education or training, and

c) any remuneration for personal services rendered in that other State provided such services are in connection with his study, research or training or are incidental thereto.

(3) An individual who is or was a resident of a Contracting State immediately before visiting the other Contracting State and who is temporarily present in that other State for a period not exceeding twelve months solely as an employee of, or under contract or arrangement with, the Government or an enterprise of that other State for the purpose of acquiring technical, professional or business experience shall be exempt from tax in that other State on

a) all remittances from abroad for the purposes of his maintenance, education or training, and

b) any remuneration, so far as it is not in excess of 15.000 Deutsche Mark or the equivalent in Thai currency, for personal

services rendered in that other State, provided such services are in connection with his studies or training or are incidental thereto.

Article 21

(1) Capital represented by immovable property, as defined in paragraph 2 of Article 6, may be taxed in the Contracting State in which such property is situated.

(2) Capital represented by movable property forming part of the business property of a permanent establishment of an enterprise may be taxed in the Contracting State in which the permanent establishment is situated.

(3) Ships or aircraft operated in international traffic by an enterprise of a Contracting State and movable property pertaining to the operation of such ships and aircraft shall be taxable only in that State.

(4) All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

Article 22 *)

(1) The laws in force in either of the Contracting States will continue to govern the assessment and taxation of income and capital in the respective Contracting State except where express provision to the contrary is made in this Agreement.

(2) Subject to the provisions of paragraph 1, tax shall be determined in the case of a resident of the Federal Republic as follows:
a) Unless the provisions of subparagraph b) below apply, there shall be excluded from the basis upon which German tax is imposed any item of income from sources within Thailand and any item of capital situated within Thailand which according to this Agreement may be taxed in Thailand. The Federal Republic, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so excluded. The first sentence shall in the case of dividends apply only to such dividends as are paid to a company limited by shares (Kapitalgesellschaft) which is a resident of the Federal Republic by a company which is a resident of Thailand and at least 25 per cent of the voting shares of which are owned by the first-mentioned company. There shall also be excluded from the basis upon which German tax is imposed any share-holding, the dividends on which, if paid, would be excluded from the tax basis according to the immediately foregoing sentence.
b) Tax payable under the laws of Thailand and in accordance with this Agreement on the following items of income from sources within Thailand shall, subject to the provisions of German tax law regarding credit

*) According to an exchange of letters by the Excellencies Ministers of Foreign Affairs of the Contracting States on July 10, 1967, article 22, paragraph 2a) and 3a), shall not apply to any dividends paid by a company which does not derive its income exclusively or almost exclusively
a) from producing, selling goods or merchandise, leasing or renting, rendering services, or doing banking or insurance business, or
b) from dividends paid by one or more companies, being residents of Thailand, more than 25 per cent of the voting shares of which are owned by the first-mentioned company, which themselves derive their income exclusively or almost exclusively from producing, selling goods or merchandise, leasing or letting, rendering services or doing banking or insurance business.
In case of such dividends Article 22, paragraphs 2b) and 3b) shall apply.

for foreign tax, be allowed as a credit against such German tax on income as is payable in respect of the following items of income:
1. profits derived by operating ships in international traffic which may be taxed in Thailand according to paragraph 2 of Article 8;
2. dividends not dealt with in subparagraph a) above;
3. interest;
4. royalties and such gains as are mentioned in paragraph 3 of Article 12;
5. profits which may be taxed in Thailand according to paragraph 2 of Article 15;
6. remuneration mentioned in paragraph 1 of Article 17 paid to a German national who is not also a Thai national;
7. pensions and other payments and annuities which may be taxed in Thailand according to paragraph 1 of Article 18.

(3) Subject to the provisions of paragraph 1, tax shall be determined in the case of a resident of Thailand as follows:
a) Unless the provisions of subparagraph b) below apply, there shall be excluded from the basis upon which Thai tax is imposed any item of income from sources within the Federal Republic and any item of capital situated within the Federal Republic which according to this Agreement may be taxed in the Federal Republic. Thailand, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so excluded. The first sentence shall in the case of dividends apply only to such dividends as are paid to a company which is a resident of Thailand by a company limited by shares (Kapitalgesellschaft) which is a resident of the Federal Republic and at least 25 per cent of the voting shares of which are owned by the first-mentioned company. There shall also be excluded from the basis upon which Thai tax is imposed any shareholding, the dividends on which, if paid, would be excluded from the tax basis according to the immediately foregoing sentence.
b) Tax payable under the laws of the Federal Republic and in accordance with this Agreement by a resident of Thailand on income from sources within the Federal Republic shall be allowed as credit against Thai tax if such income consists of:
1. profits derived by operating ships in international traffic which may be taxed in the Federal Republic according to paragraph 2 of Article 8;
2. dividends not dealt with in subparagraph a) above;
3. interest;
4. royalties and gains such as are mentioned in paragraph 3 of Article 12;
5. profits which may be taxed in the Federal Republic according to paragraph 2 of Article 15;
6. remuneration mentioned in paragraph 1 of Article 17 paid to a Thai national who is not also a German national;
7. pensions and other payments and annuities which may be taxed in the Federal Republic according to paragraph 1 of Article 18.
Such credit shall be based on the amount of tax paid to the Federal Republic but shall not exceed the portion of the Thai tax which net income from sources within the Federal Republic bears to the entire net income subject to Thai tax. In determining such entire net income a loss incurred in any country shall not be taken into account.

Article 23

(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more

burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

(2) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.
This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

(3) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

(4) In this Article the term "taxation" means taxes of every kind and description.

Article 24

(1) Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs and for the exchange of information provided for in Article 25.

Article 25

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment including judical determination or collection of the taxes which are the subject of this Agreement.

(2) In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;
b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

Article 26

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

Article 27

If the law of either Contracting State or international obligations existing at present or established hereafter between the Contracting States in addition to this Agreement contain a regulation entitling a resident of a Contracting State to a treatment more favourable than is provided for by this Agreement, such regulation shall, to the extent that it is more favourable, not be affected by this Agreement.

Article 28

This Agreement shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Kingdom of Thailand within three months from the date of entry into force of this Agreement.

Article 29

(1) This Agreement shall be ratified and the instruments of ratification shall be exchanged at Bonn as soon as possible.

(2) This Agreement shall enter into force after the expiration of one month following the date on which the instruments of ratification are exchanged and shall thereupon have effect:
a) In respect of German tax, for taxes which are levied for the calender year 1967 and for the subsequent calendar years.
b) In respect of Thai tax
1. for the taxes on income, for the income of the calendar year 1967 and of subsequent calendar years and of accounting periods ending in the calendar year 1967 and subsequent calendar years;
2. for taxes on capital the payment of which is required on or after the first day of January 1967.

Article 30

This Agreement shall continue in effect indefinitely but either of the Contracting States may, on or before the 30th day of June in any calendar year beginning after the expiry of three years from the date of its entry into force give to the other Contracting State, through the diplomatic channel, written notice of termination and, in such event, this Agreement shall cease to be effective:
a) In respect of German tax, for taxes which are levied for the calendar year following the year in which the notice of termination is given.
b) In respect of Thai tax

1. for the taxes on income, for the income of the calendar year following the year in which the notice of termination is given and of accounting periods ending in that calendar year;
2. for taxes on capital the payment of which is required on or after the first day of January of the calendar year following the year in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned being duly authorized thereto have signed the present Agreement and have affixed thereto their seals.

DONE at Bangkok on this tenth day of July, one thousand nine hundred and sixty seven, in six originals, two each in the German, Thai and English languages, all texts being equally authentic, except in the case of doubt when the English text shall prevail.

For the Federal Republic of Germany
Hans-Ulrich von Schweinitz
Ambassador

For the Kingdom of Thailand
Thanat Khoman
Minister of Foreign Affairs

Convention between the United Kingdom of Great Britain and Northern Ireland and Portugal for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of March 27, 1968

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 7/8 July-August/juillet-août 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

A new comprehensive income tax treaty between the United Kingdom and Portugal was signed on March 27, 1968. One of its important features is a tax sparing provision. The United Kingdom will grant relief for Portuguese taxes which would have been payable but for a development stimulating exemption or reduction. The official text of the treaty is reproduced below.

TEXT

The United Kingdom of Great Britain and Northern Ireland and Portugal; Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;
Have agreed as follows:

Article 1

PERSONS COVERED

This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2

TAXES COVERED

(1) The taxes which are the subject of this Convention are:—
(a) In the United Kingdom of Great Britain and Northern Ireland:

(i) the income tax (including surtax);
(ii) the capital gains tax; and
(iii) the corporation tax

(hereinafter referred to as "United Kingdom tax").

(b) In Portugal:

(i) the property tax (*contribuição predial*);
(ii) the agricultural tax (*imposto sobre a indústria agrícola*);
(iii) the industrial tax (*contribuição industrial*);
(iv) the tax on income from movable capital (*imposto de capitais*);
(v) the professional tax (*imposto profissional*);
(vi) the complementary tax (*imposto complementar*);
(vii) the tax for overseas defence and development (*imposto para a defesa e valorização do Ultramar*);
(viii) the tax on capital gains (*imposto de mais-valias*);
(ix) any surcharges on the preceding taxes; and
(x) other taxes charged by reference to the taxes referred to in heads (i) to (viii) for the benefit of local authorities and the corresponding surcharges

(hereinafter referred to as "Portugese tax").

(2) The Convention shall also apply to any identical or substantially similar future taxes which are imposed in addition to, or in place of, the existing taxes by either Contracting State.

Article 3

GENERAL DEFINITIONS

(1) In this Convention, unless the context otherwise requires:

(a) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which, in accordance with international law, has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea bed and sub-soil and their natural resources may be exercised;

(b) the term "Portugal" means European Portugal comprising the continental territory and the archipelagoes of Azores and Madeira and includes any area outside the territorial sea of Portugal which, in accordance with international law, has been or may hereafter be designated, under the laws of Portugal concerning the Continental Shelf, as an area within which the rights of Portugal with respect to the sea bed and sub-soil and their natural resources may be exercised;

(c) the terms "a Contracting State" and "the other Contracting State" mean the United Kingdom or Portugal as the context requires;

(d) the term "competent authority" means, in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorized representative; in the case of Portugal, the Director-General of Taxation *(Director-Geral das Contribuições e Impostos)* or his authorized representative;

(e) the term "tax" means United Kingdom tax or Portuguese tax as the context requires;

(f) the term "person" comprises an individual, a company and any other body of persons;

(g) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(h) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(i) the term "international traffic" includes any voyage of a ship or aircraft other than a voyage solely between places in the Contracting State which is not the Contracting State of which a person deriving the profits of the operation of a ship or aircraft is a resident.

(2) Where under the Convention a person is entitled to exemption or relief from tax in a Contracting State on certain income if (with or without further conditions) he is subject to tax in the other Contracting State in respect thereof and he is subject to tax there by reference to the amount of that income which is remitted to, or received in, that other Contracting State the amount of that income on which exemption or relief is to be allowed in the first-mentioned Contracting State shall be limited to the amount so remitted or received.

(3) As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention.

Article 4

RESIDENCE

(1) For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and the terms "resident of the United Kingdom" and "resident of Portugal" shall be construed accordingly.

(2) Where by reason of the provisions of paragraph (1) an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (centre of vital interests);

(b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

(d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

(3) Where by reason of the provisions of paragraph (1) a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.

Article 5

PERMANENT ESTABLISHMENT

(1) For the purposes of this Convention, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

(2) The term "permanent establishment" shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, quarry or other place of extraction of natural resources;

(g) a building site or construction or assembly project which exists for more than twelve months.

(3) The term "permanent establishment" shall not be deemed to include:
(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of advertising for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.
(4) A person acting in a Contracting State on behalf of an enterprise of the other Contracting State—other than an agent of an independent status to whom paragraph (5) applies —shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.
(5) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status where such persons are acting in the ordinary course of their business.
(6) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 6

INCOME FROM IMMOVABLE PROPERTY

(1) Income from immovable property may be taxed in the Contracting State in which such property is situated.
(2) *(a)* The term "immovable property" shall, subject to sub-paragraph *(b)* below, be defined in accordance with the law of the Contracting State in which the property in question is situated.
(b) The term "immovable property" shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.
(3) The provisions of paragraph (1) shall apply to income derived from the direct use, letting, or use in any other form of immovable property. Those provisions shall also apply to income from property which, under the law of the Contracting State in which the property in question is situated, is assimilated to income from immovable property.
(4) The provisions of paragraphs (1) to (3) shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

Article 7

BUSINESS PROFITS

(1) The industrial or commercial profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the industrial or commercial profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

(2) Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the industrial or commercial profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, excluding expenses which would not be deductible if the permanent establishment were a separate enterprise.

(4) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(5) The term "industrial or commercial profits" means income derived by an enterprise from the conduct of a trade or business, including income derived by an enterprise from the furnishing of services of employees or other personnel and dividends, interest or royalties effectively connected with a trade or business carried on through a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, but the term does not include dividends, interest or royalties not so connected; nor does it include remuneration for personal (including professional) services.

Article 8

SHIPPING AND AIR TRANSPORT

(1) Profits which a resident of a Contracting State derives from the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State.

(2) The Agreement between the Contracting States for the Avoidance of Double Taxation on Income derived from Sea and Air Transport, signed at Lisbon on 31st July, 1961, shall, in relation to any tax for any period for which the present Convention has effect as respects that tax, cease to have effect so far as it exempts from United Kingdom tax or Portuguese tax, profits derived from the operation of ships or aircraft by, respectively, Portuguese undertakings or United Kingdom undertakings as therein defined.

Article 9

ASSOCIATED ENTERPRISES

Where

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or

capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,
and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 10

DIVIDENDS

(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
(2) Dividends paid by a company which is a resident of one Contracting State to a resident of the other Contracting State who is subject to tax in that other State in respect thereof, may be taxed in the first-mentioned State and according to the law of that State but the tax so charged shall not exceed:
(a) 10 per cent of the gross amount of the dividends if:
(i) the recipient is a company which is a resident of Portugal which controls directly at least 25 per cent of the voting power in the company paying the dividends; or
(ii) the recipient is a company which is a resident of the United Kingdom which holds directly at least 25 per cent of the capital of the company paying the dividends;
(b) in all other cases, 15 per cent of the gross amount of the dividends.
(3) The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares by the taxation law of the State of which the company making the distribution is a resident and, in the case of the United Kingdom, includes any item (other than interest or royalties relieved from United Kingdom tax under Article 11 or Article 12 of this Convention) which under the law of the United Kingdom is treated as a distribution of a company and, in the case of Portugal includes, in addition to profits attributed to members of a partnership, profits attributed under an arrangement for participation in profits *(conta em participação)*.
(4) If the recipient of dividends does not bear tax at a rate exceeding 20 per cent in respect thereof in the Contracting State of which it is a resident and owns 10 per cent or more of the class of shares in respect of which the dividends are paid then paragraph (2) shall not apply to the dividends to the extent that they can have been paid only out of profits which the company paying the dividends earned or other income which it received in a period ending twelve months or more before the relevant date. For the purposes of this paragraph the term "relevant date" means the date on which the recipient of the dividends became the owner of 10 per cent or more of the class of shares in question. Provided that this paragraph shall not apply if the shares were acquired for bona fide commercial reasons and not primarily for the purpose of securing the benefit of this Article.
(5) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is

a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected. In such a case, the provisions of Article 7 shall apply.

(6) Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company to persons who are not residents of that other State, or subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11

INTEREST

(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such interest may be taxed in the Contracting State in which it arises, and according to the law of that State; but where the resident of the other Contracting State is subject to tax there in respect thereof, the tax so charged in the first-mentioned State shall not exceed 10 per cent of the amount of the interest.

(3) The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises.

(4) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establishment with which the debt-claim from which the interest arises is effectively connected. In such a case, the provisions of Article 7 shall apply.

(5) Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(6) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12

ROYALTIES

(1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such royalties may be taxed in the Contracting State in which they arise, and according to the law of that State; but

where the resident of the other Contracting State is subject to tax there in respect thereof, the tax so charged in the first-mentioned State shall not exceed 5 per cent of the gross amount of the royalties.

(3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience and shall include gains derived from the sale or exchange of any right or property giving rise to such royalties.

(4) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State, has in the other Contracting State in which the royalties arise a permanent establishment with which the right or property giving rise to the royalties is effectively connected. In such a case, the provisions of Article 7 shall apply.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to pay the royalties was incurred, and the royalties are borne by the permanent establishment, then the royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(6) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13

CAPITAL GAINS

(1) Gains from the alienation of immovable property, as defined in paragraph (2) of Article 6, may be taxed in the Contracting State in which such property is situated.

(2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State.

(3) Notwithstanding paragraph (2) of this Article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

(4) Gains from the alienation of any property other than those mentioned in paragraphs (1) and (2), shall be taxable only in the Contract-

ing State of which the alienator is a resident.

Article 14

INDEPENDENT PERSONAL SERVICES

(1) Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other Contracting State but only so much of it as it attributable to that fixed base.

(2) The term "professional services" includes, especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15

EMPLOYMENTS

(1) Subject to the provisions of Article 17, salaries, wages and other similar remuneration (other than remuneration to which Article 18 applies) derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph (1), remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned, and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

(3) Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

Article 16

ARTISTES AND ATHLETES

Notwithstanding the provisions of Articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

Article 17

PENSIONS

(1) Any pensions and other similar remuneration (other than pensions or remuneration to which Article 18 applies) paid in consideration of past employment to a resident of a Contracting State and any annuity paid to such a resident shall be taxable only in that State.

(2) The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 18

GOVERNMENTAL FUNCTIONS

(1) *(a)* Subject to the provisions of sub-paragraph *(b)* of this paragraph, remuneration or pensions paid out of public funds of the United Kingdom or Northern Ireland or of the funds of any local authority in the United Kingdom to any individual in respect of services rendered to the Government of the United Kingdom or Northern Ireland or a local authority in the United Kingdom in the discharge of functions of a governmental nature, shall be taxable only in the United Kingdom.

(b) Where the individual is a Portuguese national without also being a United Kingdom national, sub-paragraph *(a)* of this paragraph shall not apply, but the remuneration or pension shall, for the purposes of Article 22, be deemed to be income from a source within the United Kingdom.

(2) *(a)* Subject to the provisions of sub-paragraph *(b)* of this paragraph, remuneration or pensions paid by, or out of funds created by, Portugal or a local authority thereof to any individual in respect of services rendered to Portugal or a local authority thereof, in the discharge of functions of a governmental nature, shall be taxable only in Portugal.

(b) Where the individual is a national of the United Kingdom without also being a Portuguese national, sub-paragraph *(a)* of this paragraph shall not apply, but the remuneration or pension shall, for the purposes of Article 22, be deemed to be income from a source within Portugal.

(3) The provisions of paragraphs (1) and (2) shall not apply to remuneration or pensions in respect of services rendered in connection with any trade or business.

Article 19

STUDENTS

(1) Payments which a student or business apprentice who is or was immedistely before visiting one of the Contracting States a resident of the other Contracting State and who is present in the first-mentioned Contracting State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in the first-mentioned State, provided that such payments are made to him from sources outside that State.

(2) Students attending a university, higher educational establishment or establishment for technical instruction in a Contracting State who take employment in the other Contracting State in order to obtain practical experience directly related to their studies shall not be taxed in that other State on income from that employment unless the duration of that employment exceeds 183 days.

Article 20

INCOME NOT EXPRESSLY MENTIONED

Items of income of a resident of a Contracting State who is subject to tax there in respect thereof being income of a class or from sources not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in that State. Provided that this Article shall not be construed as affecting the taxation of income attributable to a permanent establishment which a resident of one Contracting State has in the other Contracting State.

Article 21

PERSONAL ALLOWANCES

(1) Subject to paragraph (3) of this Article, individuals who are residents of Portugal shall be entitled to the same personal allowances, reliefs and reductions for the purposes of United Kingdom taxation as British subjects not resident in the United Kingdom.

(2) Subject to paragraph (3) of this Article, individuals who are residents of the United Kingdom shall be entitled to the same personal allowances, reliefs and reductions for the purposes of Portuguese tax as Portuguese nationals (other than Portuguese State employees) resident in the United Kingdom.

(3) Nothing in this Convention shall entitle an individual who is a resident of a Contracting State and whose income from the other Contracting State consists solely of dividends, interest or royalties (or solely of any combination thereof) to the personal allowances, reliefs and reductions of the kind referred to in this Article for the purposes of taxation in that other Contracting State.

Article 22

ELIMINATION OF DOUBLE TAXATION

(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof), Portuguese tax payable under the laws of Portugal and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within Portugal (excluding, in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Portuguese tax is computed.

(2) For the purposes of paragraph (1) of this Article, the term "Portuguese tax payable" shall be deemed to include any amount which would have been payable as Portuguese tax but for the exemption or reduction of tax granted under—

(a) any of the following provisions, that is to say:

(i) Agricultural Tax Code (Decree Law 45104 of 1st July, 1963)
Article 350

(ii) Industrial Tax Code (Decree Law 45103 of 1st July, 1963)
Articles 14 Heads 21 and 22
18 Heads 8 and 9
20
83

(iii) Code of the Tax on Income from Movable Capital (Decree Law 44561 of 10th September, 1962)
Articles 21 Head 2
22

(iv) Complementary Tax Code (Decree Law 45399 of 30th November, 1963)
Articles 8 Sub-head (1) *(q)*
35
85 Head 15

(v) Decree Law 46492 of 18th August, 1965
Article 27

so far as they were in force on, and have not been modified since, the date of signature of this Convention, or have been modified only in minor respects so as not to affect their general character;

(b) any other provision which may subsequently be made granting an exemption or reduction which is agreed by the competent authorities of the Contracting States to be of a substantially similar character, if it has not

been modified thereafter or has been modified only in minor respects so as not to affect its general character. Provided that relief from United Kingdom tax shall not be given by virtue of this sub-paragraph in respect of income from any source if the income arises in a period starting more than ten years after the exemption from, or reduction of, Portuguese tax was first granted in respect of that source.

(3) United Kingdom tax payable under the laws of the United Kingdom and in accordance with this Convention, whether directly or by deduction, on income or capital gains derived from sources within the United Kingdom by a resident of Portugal shall be allowed as a deduction from the Portuguese tax payable in respect of that income but the deduction shall not however exceed the smaller of:

(a) the fraction of the United Kingdom tax corresponding to the fraction of such income or capital gains charged to Portuguese tax; or

(b) the proportion of the Portuguese tax before any such deduction which the amount of such income or capital gains charged to Portuguese tax bears to the total income or capital gains chargeable to Portuguese tax.

(4) Where profits on which an enterprise of a Contracting State has been charged to tax in that State are also included in the profits of an enterprise of the other Contracting State and the profits so included are profits which would have accrued to that enterprise of the other Contracting State if the conditions made between each of the enterprises had been those which would have been made between independent enterprises, the amount of such profits included in the profits of both enterprises shall be treated for the purpose of this Article as income from a source in the other Contracting State of the enterprise of the first-mentioned Contracting State and credit shall be given accordingly in respect of the extra tax chargeable in the other Contracting State as a result of the inclusion of the said amount.

(5) For the purposes of this Article, profits or remuneration for personal (including professional) services performed in one of the Contracting States shall be deemed to be income from sources within that State, and the services of an individual whose services are wholly or mainly performed in ships or aircraft shall be deemed to be performed in the Contracting State in which is situated the place of the effective management of the enterprise operating the ships or aircraft.

Article 23

NON-DISCRIMINATION

(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

(2) The term "nationals" means:

(a) in relation to the United Kingdom:

(i) all citizens of the United Kingdom and Colonies other than those citizens who derive their status as such from connection with any territory to which this Convention may be extended under Article 27 but has not been so extended;

(ii) all legal persons and associations deriving their status as such from the laws of the United Kingdom or any territory for whose international relations the United Kingdom is responsible to which this Convention is extended under Article 27;

(b) in relation to Portugal: all individuals possessing the nationality of Portugal and all

legal persons and associations deriving their status as such from the laws of Portugal.

(3) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

(5) Nothing contained in this Article shall be construed as obliging either Contracting State to grant to individuals not resident in that State any of the personal allowances, reliefs and reductions for tax purposes which are granted to individuals so resident, nor as restricting the right of either Contracting State to tax in accordance with Article 10 dividends paid to a company which is a resident of the other Contracting State.

Article 24

MUTUAL AGREEMENT

(1) Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Convention.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs or for the purpose of giving effect to the provisions of the Convention.

Article 25

EXCHANGE OF INFORMATION

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is in accordance with this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those (including a court or administrative body) concerned with the assessment or collection of, or prosecution in respect of, or the determination of appeals in relation to, the taxes which are the subject of the Convention.

(2) In no case shall the provisions of paragraph (1) be construed so as to impose on one of the Contracting States the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy *(ordre public)*.
(3) The competent authorities of the Contracting States shall notify to each other any changes which have been made in their respective taxation laws.

Article 26

DIPLOMATIC AND CONSULAR OFFICIALS
Nothing in this Convention shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

Article 27

TERRITORIAL EXTENSION
(1) This Convention may be extended, either in its entirety or with any necessary modifications, to any territory for whose international relations the United Kingdom is responsible or to any part of Portugal which is implicitly excluded from the application of the Convention where, in either case, taxes are imposed substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions, as may be specified and agreed between the Contracting States in notes to be exchanged through diplomatic channels.
(2) Unless otherwise agreed by both Contracting States, the denunciation of the Convention by one of them under Article 29 shall terminate, in the manner provided for in that Article, the application of the Convention to any territory or part to which it has been extended under this Article.

Article 28

ENTRY INTO FORCE
(1) This Convention shall be ratified and the instruments of ratification shall be exchanged at London as soon as possible.
(2) The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:
(a) In the United Kingdom:
(i) as respects income tax, surtax and capital gains tax for any year of assessment beginning on or after 6th April in the calendar year next following that in which the Convention enters into force;
(ii) as respects corporation tax for any financial year beginning on or after 1st April in the calendar year next following that in which the Convention enters into force.
(b) In Portugal:
as respects Portuguese tax on profits, income or capital gains arising on or after 1st January in the calendar year next following that in which the Convention enters into force.

Article 29

TERMINATION
This Convention shall remain in force until denounced by one of the Contracting States. Either Contracting State may denounce the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year 1968. In such event, the Convention shall cease to have effect:

(a) In the United Kingdom:

(i) as respects income tax, surtax and capital gains tax for any year of assessment beginning on or after 6th April in the calendar year next following that in which the notice is given;

(ii) as respects corporation tax for any financial year beginning on or after 1st April in the calendar year next following that in which the notice is given.

(b) In Portugal:

as respects Portuguese tax on profits, income or capital gains arising on or after 1st January in the calendar year next following that in which the notice is given.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done in duplicate at Lisbon, this 27th day of March 1968, in the English and Portuguese languages, both texts being equally authoritative.

For the United Kingdom of Great Britain and Northern Ireland:

Anthony Lambert

For Portugal:

A. Franco Nogueira

Convention entre le Royaume des Pays-Bas et le Grand-Duché de Luxembourg tendant à éviter les doubles impositions et à prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 10, October/octobre 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort - 124 Sarphatistraat - Amsterdam

On May 8, 1968 the Netherlands and Luxembourg concluded a convention for the avoidance of double taxation. This treaty will take effect upon exchange of the instruments of ratification retroactive to January 1, 1967. After ratification the Netherlands will have bilateral tax treaties with all EEC *countries. This is not the case with Luxembourg; a treaty concluded with Italy is still failing.*

TEXT

Sa Majesté la Reine des Pays-Bas
et
Son Altesse Royale le Grand-Duc de Luxembourg,
Animés du désir de conclure une convention tendant à éviter les doubles impositions et à prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune, ont nommé pour leurs Plénipotentiaires, savoir:

Sa Majesté la Reine des Pays-Bas:
Son Excellence M. J. M. A. H. Luns, Ministre des Affaires Etrangères.

Son Altesse Royale le Grand-Duc de Luxembourg:
Son Excellence M. Paul Reuter, Ambassadeur Extraordinaire et Plénipotentiaire.

Lesquels, après avoir échangé leurs pleins pouvoirs reconnus en bonne et due forme, sont convenus des dispositions suivantes:

CHAPITRE I

CHAMP D'APPLICATION DE LA CONVENTION

Article 1

Personnes visées

La présente Convention s'applique aux personnes qui sont des résidents de l'un ou de chacun des deux Etats.

Article 2

Impôts visés

1. La présente Convention s'applique aux impôts sur le revenu et et sur la fortune perçus pour le compte de chacun des Etats, de ses subdivisions politiques et de ses collectivités locales, quel que soit le système de perception.

2. Sont considérés comme impôts sur le revenu et sur la fortune les impôts perçus sur le revenu total, sur la fortune totale, ou sur des éléments du revenu ou de la fortune, y compris les impôts sur les gains provenant de l'aliénation de biens mobiliers ou immobiliers, les impôts sur le montant des salaires payés par les entreprises, ainsi que les impôts sur les plus-values.

3. Les impôts actuels auxquels s'applique la Convention sont notamment:

a. en ce qui concerne les Pays-Bas:
   - de inkomstenbelasting (l'impôt sur le revenu);
   - de loonbelasting (l'impôt sur les traitements, salaires, pensions);
   - de vennootschapsbelasting (l'impôt des sociétés);
   - de dividendbelasting (l'impôt sur les dividendes);
   - de commissarissenbelasting (l'impôt sur les rémunérations des administrateurs de sociétés);
   - de vermogensbelasting (l'impôt sur la fortune);
   - de grondbelasting (l'impôt foncier);

b. en ce qui concerne le Luxembourg:
   - l'impôt sur le revenu des personnes physiques;
   - l'impôt sur le revenu des collectivités;
   - l'impôt spécial sur les tantièmes;
   - l'impôt sur la fortune;
   - l'impôt commercial communal (y compris l'impôt sur le total des salaires);
   - l'impôt foncier.

4. La Convention s'appliquera aussi aux impôts futurs de nature identique ou analogue qui s'ajouteraient aux impôts actuels ou qui les remplaceraient. Les autorités compétentes des Etats se communiqueront les modifications substantielles apportées à leurs législations fiscales respectives.

CHAPITRE II

DÉFINITIONS

Article 3

Definitions générales

1. Au sens de la présente Convention, à moins que le contexte n'exige une interprétation différente:

a. le terme «Etat» désigne, suivant le contexte, les Pays-Bas ou le Luxembourg; le terme «Etats» désigne les Pays-Bas et le Luxembourg;

b. le terme «Pays-Bas» comprend la partie du Royaume des Pays-Bas qui est située en Europe et la partie du lit de la mer et de son sous-sol située au-dessous de la mer du Nord, sur laquelle le Royaume

des Pays-Bas, conformément à la Convention sur le plateau continental, conclue à Genève le 29 avril 1958, a des droits souverains;

c. le terme «Luxembourg» désigne le Grand-Duché de Luxembourg;

d. le terme «personne» comprend les personnes physiques et les sociétés;

e. le terme «société» désigne toute personne morale ou toute entité qui est traité comme une personne morale aux fins d'imposition;

f. les expressions «entreprise de l'un des Etats» et «entreprise de l'autre Etat» désignent respectivement une entreprise exploitée par un résident de l'un des Etats et une entreprise exploitée par un résident de l'autre Etat;

g. l'expression «autorité compétente» désigne:

1. aux Pays-Bas: le Ministre des Finances ou son représentant dûment autorisé;
2. au Luxembourg: le Ministre du Trésor ou son représentant dûment autorisé.

2. Pour l'application de la Convention par chacun des Etats, toute expression qui n'est pas autrement définie a le sens qui lui est attribué par la législation de cet Etat régissant les impôts faisant l'objet de la Convention, à moins que le contexte n'exige une interprétation différente.

Article 4

Domicile fiscal

1. Au sens de la présente Convention, l'expression «résident de l'un des Etats» désigne toute personne qui, en vertu de la législation dudit Etat, est assujettie à l'impôt dans cet Etat, en raison de son domicile, de sa résidence, de son siège de direction ou de tout autre critère de nature analogue.

2. Aux fins de la présente Convention une personne physique qui est un membre d'une représentation diplomatique ou consulaire de l'un des Etats dans l'autre Etat ou dans un Etat tiers et qui possède la nationalité de l'Etat qui l'envoie, est considérée comme résident de l'Etat qui l'envoie si elle est soumise dans cet Etat aux mêmes obligations concernant les impôts sur le revenu et sur la fortune que les résidents dudit Etat.

3. Lorsque, selon la disposition du paragraphe 1, une personne physique est considérée comme résident de chacun des Etats, le cas est résolu d'après les règles suivantes:

a. Cette personne est considérée comme résident de l'Etat où elle dispose d'un foyer d'habitation permanent. Lorsqu'elle dispose d'un foyer d'habitation permanent dans chacun des Etats, elle est considérée comme résident de l'Etat avec lequel ses liens personnels et économiques sont les plus étroits (centre des intérêts vitaux);

b. Si l'Etat où cette personne a le centre de ses intérêts vitaux ne peut pas être déterminé, ou qu'elle ne dispose d'un foyer d'habitation permanent dans aucun des Etats, elle est considérée comme résident de l'Etat où elle séjourne de façon habituelle;

c. Si cette personne séjourne de façon habituelle dans chacun des Etats ou qu'elle ne séjourne de façon habituelle dans aucun d'eux, elle est considérée comme résident de l'Etat dont elle possède la nationalité;

d. Si cette personne possède la nationalité de chacun des Etats ou qu'elle ne possède la nationalité d'aucun d'eux, les autorités compétentes des Etats tranchent la question d'un commun accord.

4. Lorsque, selon la disposition du paragraphe 1, une personne autre qu'une personne physique est considérée comme résident de chacun des Etats, elle est réputée résident de l'Etat où se trouve son siège de direction effective.

Article 5

Etablissement stable

1. Au sens de la présente Convention, l'expression «établissement stable» désigne une installation fixe d'affaires où l'entreprise exerce tout ou partie de son activité.

2. L'expression «établissement stable» comprend notamment:

a. un siège de direction;
b. une succursale;
c. un bureau;
d. une usine;
e. un atelier;
f. une mine, une carrière ou tout autre lieu d'extraction de ressources naturelles;
g. un chantier de construction ou de montage dont la durée dépasse six mois.

3. On ne considère pas qu'il y a établissement stable si:

a. il est fait usage d'installations aux seules fins de stockage, d'exposition ou de livraison de marchandises appartenant à l'entreprise;
b. des marchandises appartenant à l'entreprise sont entreposées aux seules fins de stockage, d'exposition ou de livraison;
c. des marchandises appartenant à l'entreprise sont entreposées aux seules fins de transformation par une autre entreprise;
d. une installation fixe d'affaires est utilisée aux seules fins d'acheter des marchandises ou de réunir des informations pour l'entreprise;
e. une installation fixe d'affaires est utilisée, pour l'entreprise, aux seules fins de publicité, de fourniture d'informations, de recherches scientifiques ou d'activités analogues qui ont un caractère préparatoire ou auxiliaire.

4. Une personne agissant dans l'un des Etats pour le compte d'une entreprise de l'autre Etat – autre qu'un agent jouissant d'un statut indépendant, visé au paragraphe 5 – est considérée comme «établissement stable» dans le premier Etat si elle dispose de pouvoirs qu'elle exerce habituellement dans cet Etat et qui lui permettent de conclure des contrats au nom de l'entreprise, à moins que l'activité de cette personne ne soit limitée à l'achat de marchandises pour l'entreprise.

5. On ne considère pas qu'une entreprise de l'un des Etats a un établissement stable dans l'autre Etat du seul fait qu'elle y exerce son activité par l'entremise d'un courtier, d'un commissionnaire général ou de tout autre intermédiaire jouissant d'un statut indépendant, à condition que ces personnes agissent dans le cadre ordinaire de leur activité.

6. Le fait qu'une société qui est un résident de l'un des Etats contrôle ou est contrôlée par une société qui est un résident de l'autre Etat ou qui y exerce son activité – que ce soit par l'intermédiaire d'un établissement stable ou non – ne suffit pas, en lui-même, à faire de l'une quelconque de ses sociétés un établissement stable de l'autre.

CHAPITRE III

IMPOSITION DES REVENUS

Article 6

Revenus immobiliers

1. Les revenus provenant de biens immobiliers sont imposables dans l'Etat où ces biens sont situés.

2. L'expression «biens immobiliers» est définie conformément au droit de l'Etat où les biens considérés sont situés. L'expression englobe en tout cas les accessoires, le cheptel mort ou vif des exploitations agricoles et forestières, les droits auxquels s'appliquent les dispositions du droit privé concernant la

propriété foncière, l'usufruit des biens immobiliers et les droits à des redevances variables ou fixes pour l'exploitation ou la concession de l'exploitation de gisements minéraux, sources et autres richesses du sol, et les créances de toute nature – ne revêtant pas la forme d'obligations d'emprunts – qui sont assorties de garanties hypothécaires sur des biens immobiliers; les navires, bateaux et aéronefs ne sont pas considérés comme biens immobiliers.

3. Les dispositions du paragraphe 1 s'appliquent aux revenus provenant de l'exploitation directe, de la location ou de l'affermage, ainsi que de toute autre forme d'exploitation de biens immobiliers.

4. Les dispositions des paragraphes 1 et 3 s'appliquent également aux revenus provenant des biens immobiliers d'une entreprise ainsi qu'aux revenus des biens immobiliers servant à l'exercice d'une profession libérale.

Article 7

Bénefices des entreprises

1. Les bénéfices d'une entreprise de l'un des Etats ne sont imposables que dans cet Etat, à moins que l'entreprise n'exerce son activité dans l'autre Etat par l'intermédiaire d'un établissement stable qui y est situé. Si l'entreprise exerce son activité d'une telle façon, les bénéfices de l'entreprise sont imposables dans l'autre Etat mais uniquement dans le mesure où ils sont imputables audit établissement stable.

2. Lorsqu'une entreprise de l'un des Etats exerce son activité dans l'autre Etat par l'intermédiaire d'un établissement stable qui y est situé, il est imputé, dans chaque Etat, à cet établissement stable les bénéfices qu'il aurait pu réaliser s'il avait constitué une entreprise distincte et séparée exerçant des activités identiques ou analogues dans des conditions identiques ou analogues et traitant en toute indépendance avec l'entreprise dont il constitue un établissement stable.

3. Dans le calcul des bénéfices d'un établissement stable, sont admises en déduction les dépenses exposées aux fins poursuivies par cet établissement stable, y compris les dépenses de direction et les frais généraux d'administration ainsi exposés, soit dans l'Etat où est situé cet établissement stable, soit ailleurs.

4. Pour autant qu'il est d'usage, dans l'un des Etats, de déterminer les bénéfices imputables à un établissement stable sur la base d'une répartition des bénéfices totaux de l'entreprise entre ses diverses parties, aucune disposition du paragraphe 2 n'empêche cet Etat de déterminer les bénéfices imposables selon la répartition en usage; la méthode de répartition adoptée doit cependant être telle que le résultat obtenu soit conforme aux principes énoncés dans le présent article.

5. Aucun bénéfice n'est imputé à un établissement stable du fait que cet établissement stable a simplement acheté des marchandises pour l'entreprise.

6. Aux fins des paragraphes précédents, les bénéfices à imputer à l'établissement stable sont calculés chaque année selon la même méthode, à moins qu'il n'existe des motifs valables et suffisants de procéder autrement.

7. Lorsque les bénéfices comprennent des éléments de revenu traités séparément dans d'autres articles de la présente Convention, les dispositions de ces articles ne sont pas affectées par les dispositions du présent article.

Article 8

Navigation maritime, intérieure et aérienne

1. Les bénéfices provenant de l'exploitation, en trafic international, de navires ou d'aéronefs sont imposables dans l'Etat où le siège de la direction effective de l'entreprise est situé.

2. Les bénéfices provenant de l'exploitation de bateaux servant à la navigation intérieure sont imposables dans l'Etat où le siège de la direction effective de l'entreprise est situé.

3. Si le siège de la direction effective d'une entreprise de navigation maritime ou intérieure est à bord d'un navire ou d'un bateau, ce siège est réputé situé dans l'Etat où se trouve le port d'attache de ce navire ou de ce bateau, ou à défaut de port d'attache, dans l'Etat dont l'exploitant du navire ou du bateau est un résident.

Article 9

Entreprises associées

Lorsque

a. une entreprise de l'un des Etats participe directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise de l'autre Etat ou que
b. les mêmes personnes participent directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise de l'un des Etats et d'une entreprise de l'autre Etat,

et que, dans l'un et l'autre cas, les deux entreprises sont, dans leurs relations commerciales ou financières, liées par des conditions acceptées ou imposées, qui diffèrent de celles qui seraient conclues entre des entreprises indépendantes, les bénéfices qui, sans ces conditions, auraient été obtenus pas l'une des entreprises mais n'ont pu l'être en fait à cause de ces conditions, peuvent être inclus dans les bénéfices de cette entreprise et imposés en conséquence.

Article 10

Dividendes

1. Les dividendes payés par une société qui est un résident de l'un des Etats à un résident de l'autre Etat, ne sont imposables que dans cet autre Etat.

2. Les dispositions du paragraphe 1 ne portent pas atteinte au droit de chacun des Etats de percevoir un impôt sur les dividendes payés par une société qui est un résident de cet Etat à un résident de l'autre Etat.

Toutefois le taux de l'impôt ne peut excéder:

a. 2½ pour cent du montant brut des dividendes si le bénéficiaire est une société dont le capital, en tout ou en partie, est divisé en actions ou en parts sociales assimilées aux actions par la législation fiscale de cet autre Etat et qui dispose directement d'au moins 25 pour cent du capital de la société qui paie les dividendes;
b. 15 pour cent du montant brut des dividendes dans tous les autres cas.

3. Les autorités compétentes des Etats règlent d'un commun accord les modalités d'application du paragraphe 2.

4. Les dispositions des paragraphes 1 et 2 ne concernent pas l'imposition de la société pour les bénéfices qui servent au paiement des dividendes.

5. Le terme «dividendes» employé dans le présent article désigne les revenus provenant d'actions, actions ou bons de jouissance, parts de mine, parts de fondateur ou autres parts bénéficiaires ainsi que les revenus de créances assorties d'une clause de participation aux bénéfices et les revenus d'autres parts sociales assimilés aux revenus d'actions par la législation fiscale de l'Etat dont la société distributrice est un résident.

6. Les dispositions des paragraphes 1 et 2 ne s'appliquent pas lorsque le bénéficiaire des dividendes, résident de l'un des Etats, a dans l'autre Etat dont la société qui paie les dividendes est un résident, un établissement stable auquel se rattache effectivement la participation génératrice des dividendes. Dans ce cas, les dispositions de l'article 7 sont applicables.

7. Lorsqu'une société qui est un résident de l'un des Etats tire des bénéfices ou des revenus de l'autre Etat, cet autre Etat ne peut percevoir aucun impôt sur les dividendes payés par la société aux personnes qui ne sont pas des résidents de cet autre Etat, ni prélever aucun impôt, au titre de l'imposition des

bénéfices non distribués, sur les bénéfices non distribués de la société, même si les dividendes payés ou les bénéfices non distribués consistent en tout ou en partie en bénéfices ou revenus provenant de cet autre Etat.

8. Avant l'expiration d'un délai de cinq ans à compter de la date de l'entrée en vigueur de la présente Convention les autorités compétentes des Etats se concerteront pour examiner l'opportunité d'une modification du taux visé au paragraphe 2, lit. a, du présent article.

Article 11

Intérêts

1. Les intérêts provenant de l'un des Etats et payés à un résident de l'autre Etat ne sont imposables que dans cet autre Etat.

2. Les autorités compétentes des Etats règlent d'un commun accord les modalités auxquelles l'Etat d'où proviennent les intérêts abandonne son imposition.

3. Le terme «intérêts» employé dans le présent article désigne les revenus des fonds publics, des obligations d'emprunts et des créances de toute nature, ainsi que tous autres produits assimilés aux revenus de sommes prêtées par la législation fiscale de l'Etat d'où proviennent les revenus. Toutefois le terme ne comprend pas les revenus des créances visées au paragraphe 2 de l'article 6, ni les revenus provenant de créances assorties d'une clause de participation aux bénéfices, visées au paragraphe 5 de l'article 10.

4. Les dispositions du paragraphe 1 ne s'appliquent pas lorsque le bénéficiaire des intérêts, résident de l'un des Etats, a, dans l'autre Etat d'où proviennent les intérêts, un établissement stable auquel se rattache effectivement la créance génératrice des intérêts. Dans ce cas, les dispositions de l'article 7 sont applicables.

5. Si, par suite de relations spéciales existant entre le débiteur et le créancier ou que l'un et l'autre entretiennent avec de tierces personnes, le montant des intérêts payés, compte tenu de la créance pour laquelle ils sont versés, excède celui dont seraient convenus le débiteur et le créancier en l'absence de pareilles relations, les dispositions du présent article ne s'appliquent qu'à ce dernier montant. En ce cas, la partie excédentaire des paiements reste imposable conformément à la législation de chaque Etat et compte tenu des autres dispositions de la présente Convention.

Article 12

Redevances

1. Les redevances provenant de l'un des Etats et payées à un résident de l'autre Etat ne sont imposables que dans cet autre Etat.

2. Les autorités compétentes des Etats règlent d'un commun accord les modalités auxquelles l'Etat d'où proviennent les redevances abandonne son imposition.

3. Le terme «redevances» employé dans le présent article désigne les rémunérations de toute nature payées pour l'usage ou la concession de l'usage d'un droit d'auteur sur une oeuvre littéraire, artistique ou scientifique, y compris les films cinématographiques, d'un brevet, d'une marque de fabrique ou de commerce, d'un dessin ou d'un modèle, d'un plan, d'une formule ou d'un procédé secrets, ainsi que pour l'usage ou la concession de l'usage d'un équipement industriel, commercial ou scientifique et pour des informations ayant trait à une expérience acquise dans le domaine industriel, commercial ou scientifique.

4. Les dispositions du paragraphe 1 ne s'appliquent pas lorsque le bénéficiaire des redevances, résident de l'un des Etats, a, dans l'autre Etat d'où proviennent les redevances, un établissement stable auquel se rattache effectivement le droit ou le bien générateur

des redevances. Dans ce cas, les dispositions de l'article 7 sont applicables.

5. Si, par suite de relations spéciales existant entre le débiteur et le créancier ou que l'un et l'autre entretiennent avec de tierces personnes, le montant des redevances payées, compte tenu de la prestation pour laquelle elles sont versées, excède celui dont seraient convenus le débiteur et le créancier en l'absence de pareilles relations, les dispositions du présent article ne s'appliquent qu'à ce dernier montant. En ce cas, la partie excédentaire des paiements reste imposable conformément à la législation de chaque Etat et compte tenu des autres dispositions de la présente Convention.

Article 13

Limitation des articles 10, 11 et 12

Les organisations internationales, leurs organes et leurs fonctionnaires ainsi que les membres d'une représentation diplomatique ou consulaire d'un Etat tiers, qui se trouvent sur le territoire de l'un des Etats, n'ont pas droit, dans l'autre Etat, aux réductions ou exemptions d'impôt prévues aux articles 10, 11 et 12, en ce qui concerne les dividendes, intérêts et redevances provenant de cet autre Etat, si ces revenus ne sont pas soumis à l'impôt sur le revenu dans le premier Etat.

Article 14

Gains en capital

1. Les gains provenant de l'aliénation des biens immobiliers, tels qu'ils sont définis au paragraphe 2 de l'article 6, sont imposables dans l'Etat où ces biens sont situés.

2. Les gains provenant de l'aliénation de biens mobiliers faisant partie de l'actif d'un établissement stable qu'une entreprise de l'un des Etats a dans l'autre Etat, ou de biens mobiliers constitutifs d'une base fixe dont dispose un résident de l'un des Etats dans l'autre Etat pour l'exercice d'un profession libérale, y compris de tels gains provenant de l'aliénation globale de cet établissement stable (seul ou avec l'ensemble de l'entreprise) ou de cette base fixe, sont imposables dans cet autre Etat.

3. Nonobstant les dispositions du paragraphe 2, les gains provenant de l'aliénation de navires et aéronefs exploités en trafic international et de bateaux servant à la navigation intérieure ainsi que de biens mobiliers affectés à l'exploitation de ces navires, aéronefs et bateaux, sont imposables dans l'Etat où le siège de la direction effective de l'entreprise est situé, compte tenu des dispositions du paragraphe 3 de l'article 8.

4 Les gains provenant de l'aliénation de tous biens autres que ceux qui sont mentionnés aux paragraphes précédents ne sont imposables que dans l'Etat dont le cédant est un résident.

5. Les dispositions du paragraphe 4 ne portent pas atteinte au droit de chacun des Etats de percevoir, conformément à sa propre législation, un impôt sur les gains provenant de l'aliénation d'actions, d'actions de jouissance, de bons de jouissance ou de parts d'une société qui est un résident de cet Etat et dont le capital, en tout ou en partie, est divisé en actions ou en parts sociales assimilées aux actions par la législation fiscale de cet Etat, lorsque ces gains sont réalisés par une personne physique qui est un résident de l'autre Etat, qui possède la nationalité du premier Etat sans posséder la nationalité de l'autre Etat et qui a été un résident du premier Etat au courant des cinq dernières années antérieures à l'aliénation. Toutefois le taux de l'impôt ne peut excéder 20 pour cent.

Article 15

Professions indépendantes

1. Les revenus qu'un résident de l'un des Etats tire d'une profession libérale ou d'autres activités indépendantes de caractère

analogue ne sont imposables que dans cet Etat, à moins que ce résident ne dispose de façon habituelle dans l'autre Etat d'une base fixe pour l'exercice de ses activités. S'il dispose d'une telle base, les revenus sont imposables dans l'autre Etat mais uniquement dans la mesure où ils sont imputables à ladite base fixe.

2. L'expression «profession libérale» comprend en particulier les activités indépendantes d'ordre scientifique, littéraire, artistique, éducatif ou pédagogique, ainsi que les activités indépendantes des médecins, avocats, ingénieurs, architectes, dentistes et comptables.

Article 16

Professions dépendantes

1. Sous réserve des dispositions des articles 17, 19 et 20, les salaires, traitements et autres rémunérations similaires qu'un résident de l'un des Etats reçoit au titre d'un emploi salarié ne sont imposables que dans cet Etat, à moins que l'emploi ne soit exercé dans l'autre Etat. Si l'emploi y est exercé, les rémunérations reçues à ce titre sont imposables dans cet autre Etat.

2. Nonobstant les dispositions du paragraphe 1, les rémunérations qu'un résident de l'un des Etats reçoit au titre d'un emploi salarié exercé dans l'autre Etat ne sont imposables que dans le premier Etat si:

a. le bénéficiaire séjourne dans l'autre Etat pendant une période ou des périodes n'excédant pas au total 183 jours au cours de l'année fiscale considérée; et
b. les rémunérations sont payées par un employeur ou au nom d'un employeur qui n'est pas résident de l'autre Etat; et
c. la charge des rémunérations n'est pas supportée par un établissement stable ou une base fixe que l'employeur a dans l'autre Etat.

3. Nonobstant les dispositions précédentes du présent article, les rémunérations qu'un résident de l'un des Etats reçoit au titre d'un emploi salarié exercé à bord d'un navire ou d'un aéronef en trafic international, ou à bord d'un bateau servant à la navigation intérieure, ne sont imposables que dans cet Etat.

Article 17

Tantièmes

1. Les tantièmes, jetons de présence et autres rétributions similaires qu'un résident des Pays-Bas reçoit en sa qualité de membre du conseil d'administration ou de surveillance d'une société qui est un résident du Luxembourg, sont imposables au Luxembourg.

2. Les tantièmes, jetons de présence et autres rétributions similaires qu'un résident du Luxembourg reçoit en sa qualité de «bestuurder» ou «commissaris» d'une société qui est un résident des Pays-Bas, sont imposables aux Bays-Bas.

Article 18

Artistes et sportifs

Nonobstant les dispositions des articles 15 et 16, les revenus que les professionnels du spectacle, tels les artistes de théâtre, de cinéma, de la radio ou de la télévision et les musiciens, ainsi que les sportifs retirent de leurs activités personnelles en cette qualité sont imposables dans l'Etat où ces activités sont exercées.

Article 19

Pensions

Sous réserve des dispositions du paragraphe 1 de l'article 20, les pensions et autres rémunérations similaires, versées à un résident de l'un des Etats au titre d'un emploi salarié antérieur, ne sont imposables que dans cet Etat.

Article 20

Fonctions publiques

1. Les rémunérations, y compris les pensions, versées par l'un des Etats, ses subdivi-

sions politiques, collectivités locales ou autres personnes morales de droit public, soit directement soit par prélèvement sur des fonds qu'ils ont constitués, à une personne physique au titre de services rendus à cet Etat, à cette subdivision, collectivité ou autre personne morale de droit public dans l'exercice de fonctions de caractère public, sont imposables dans cet Etat.

2. Toutefois les dispositions des articles 16, 17 et 19 s'appliquent aux rémunérations ou pensions versées au titre de services rendus dans le cadre d'une activité commerciale ou industrielle exercée par l'un des Etats, ses subdivisions politiques, colletivités locales ou autres personnes morales de droit public.

Article 21

Autres éléments du revenu

Les élements du revenu d'un résident de l'un des Etats, autres que ceux auxquels s'appliquent les dispositions des articles précédents de la présente Convention ne sont imposables que dans cet Etat.

CHAPITRE IV

IMPOSITION DE LA FORTUNE

Article 22

1. La fortune constituée par des biens immobiliers, tels qu'ils sont définis au paragraphe 2 de l'article 6, est imposable dans l'Etat où ces biens sont situés.

2. La fortune constituée par des biens mobiliers faisant partie de l'actif d'un établissement stable d'une entreprise ou par des biens mobiliers constitutifs d'une base fixe servant à l'exercice d'une profession libérale est imposable dans l'Etat où est situé l'établissement stable ou la base fixe.

3. Les navires et les aéronefs exploités en trafic international et les bateaux servant à la navigation intérieure ainsi que les biens mobiliers affectés à leur exploitation sont imposables dans l'Etat où le siège de la direction effective de l'entreprise est situé, compte tenu des dispositions du paragraphe 3 de l'article 8.

4. Tous les autres éléments de la fortune d'un résident de l'un des Etats ne sont imposables que dans cet Etat.

CHAPITRE V

DISPOSITIONS POUR ÉLIMINER LES DOUBLES IMPOSITIONS

Article 23

1. Les Pays-Bas, en prélevant des impôts de ses résidents, pourront inclure dans la base selon laquelle l'impôt est prélevé, les éléments du revenu ou de la fortune qui, conformément aux dispositions de la présente Convention, sont imposables au Luxembourg.

2. Sous réserve de l'application des dispositions concernant la compensation des pertes dans les règlements internes tendant à éviter les doubles impositions, les Pays-Bas permettent de déduire du montant de l'impôt calculé selon le paragraphe 1 du présent article, un montant égal à la fraction de cet impôt qui correspond au rapport qui existe entre le montant du revenu ou de la fortune imposable au Luxembourg selon les articles 6, 7, 8, 9, 10, paragraphe 6, 11, paragraphe 4, 12, paragraphe 4, 14, paragraphes 1, 2 et

3, 15, 16, paragraphe 1, 17, paragraphe 1, 18, 20 et 22, paragraphes 1, 2, et 3 de la présente Convention et le montant du revenu ou de la fortune qui constitue la base visée au paragraphe 1 du présent article.

Pour les éléments du revenu qui en vertu de l'article 10, paragraphe 2, sont imposables au Luxembourg et qui sont compris dans la base visée au paragraphe 1 du présent article, les Pays-Bas permettent de déduire de l'impôt ainsi calculé le moins élevé des montants suivants:

a. un montant égal à l'impôt prélevé au Luxembourg;
b. un montant égal à la fraction de l'impôt des Pays-Bas, calculé selon le paragraphe 1 du présent article, qui correspond au rapport qui existe entre le montant desdits éléments du revenu et le montant du revenu qui constitue la base visée au paragraphe 1 du présent article.

3. Lorsqu'un résident du Luxembourg reçoit des revenus ou possède de la fortune qui, conformément aux dispositions de la présente Convention, sont imposables aux Pays-Bas, le Luxembourg exempte de l'impôt ces revenus ou cette fortune, sous réserve des dispositions du paragraphe 4, mais peut, pour calculer le montant de l'impôt sur le reste du revenu ou de la fortune de ce résident, appliquer le même taux que si les revenus ou la fortune en question n'avaient pas été exemptés. Cette exemption ne vaut toutefois pas pour les gains en capital visés au paragraphe 5 de l'article 14.

4. Lorsqu'un résident du Luxembourg reçoit des revenus qui, conformément aux dispositions du paragraphe 2 de l'article 10, sont imposables aux Pays-Bas, le Luxembourg accorde sur l'impôt dont il frappe les revenus de ce résident une déduction d'un montant égal à l'impôt payé aux Pays-Bas. La somme ainsi déduite ne peut toutefois excéder la fraction de l'impôt, calculé avant la déduction, correspondant aux revenus reçus des Pays-Bas.

5. Les dividendes payés par une société qui est un résident des Pays-Bas, à une société qui est un résident du Luxembourg, sont exemptés de l'impôt au Luxembourg, pour autant seulement qu'ils le seraient en vertu de la législation luxembourgeoise, si les deux sociétés étaient des résidents du Luxembourg. Dans ce cas, les dispositions du paragraphe précédent ne sont pas applicables.

6. Lorsqu'un résident de l'un des Etats reçoit de gains qui, conformément aux dispositions du paragraphe 5 de l'article 14, sont imposables dans l'autre Etat, cet autre Etat permet de déduire de son impôt sur lesdits gains un montant égal à l'impôt du premier Etat relatif à ces gains.

CHAPITRE VI

DISPOSITIONS SPÉCIALES

Article 24

Non-discrimination

1. Les nationaux de l'un des Etats, qu'ils soient des résidents dudit Etat ou non, ne sont soumis dans l'autre Etat à aucune imposition ou obligation y relative, qui est autre ou plus lourde que celle à laquelle sont ou pourront être assujettis les nationaux de cet autre Etat se trouvant dans la même situation.

2. Le terme «nationaux» désigne:

a. toutes les personnes physiques qui possèdent la nationalité de l'un des deux Etats;
b. toutes les personnes morales, sociétés de personnes et associations constituées conformément à la législation en vigueur dans l'un des deux Etats.

3. L'imposition d'un établissement stable qu'une entreprise de l'un des Etats a dans l'autre Etat n'est pas établie dans cet autre Etat d'une façon moins favorable que l'imposition des entreprises de cet autre Etat qui exercent la même activité.
Cette disposition ne peut être interprétée comme obligeant l'un des Etats à accorder aux résidents de l'autre Etat les déductions personnelles, abattements et réductions d'impôt en fonction de la situation ou des charges de famille qu'il accorde à ses propres résidents.
4. Les entreprises de l'un des Etats, dont le capital est en tout ou en partie, directement ou indirectement, détenu ou contrôlé par un ou plusieurs résidents de l'autre Etat, ne sont soumises dans le premier Etat à aucune imposition ou obligation y relative, qui est autre ou plus lourde que celle à laquelle sont ou pourront être assujetties les autres entreprises de même nature de ce premier Etat.

Article 25

Procédure amiable

1. Lorsqu'un résident de l'un des Etats estime que les mesures prises par l'un des Etats ou par chacun des deux Etats entraînent ou entraîneront pour lui une imposition non conforme à la présente Convention, il peut, indépendamment des recours prévus par la législation nationale de ces Etats, soumettre son cas à l'autorité compétente de l'Etat dont il est résident.
2. Cette autorité compétente s'efforcera, si la réclamation lui paraît fondée et si elle n'est pas elle-même en mesure d'apporter une solution satisfaisante, de régler la question par voie d'accord amiable avec l'autorité compétente de l'autre Etat, en vue d'éviter une imposition non conforme à la Convention.
3. Les autorités compétentes des Etats s'efforcent, par voie d'accord amiable, de résoudre les difficultés ou de dissiper les doutes auxquels peuvent donner lieu l'interprétation ou l'application de la Convention. Elles peuvent aussi se concerter en vue d'éviter la double imposition dans les cas non prévus par la Convention.
4. Les autorités compétentes des Etats peuvent communiquer directement entre elles en vue de parvenir à un accord comme il est indiqué aux paragraphes précédents.

Article 26

Echange de renseignements

1. Les autorités compétentes des deux Etats échangeront les renseignements nécessaires pour appliquer la présente Convention, en particulier pour prévenir la fraude et l'évasion fiscales. Les autorités compétentes ne sont pas obligées de fournir des renseignements qui ne résulteraient pas des pièces et documents dont disposent les autorités compétentes, mais qui nécessiteraient des recherches étendues. Tout renseignement ainsi échangé sera tenu secret et ne pourra être communiqué qu'aux personnes ou autorités chargées de l'établissement ou du recouvrement des impôts visés par la présente Convention.
2. Les dispositions du paragraphe 1 ne peuvent en aucun cas être interprétées comme imposant à l'un des Etats l'obligation:
a. de prendre des dispositions administratives dérogeant à sa propre législation ou à sa pratique administrative ou à celle de l'autre Etat;
b. de fournir des renseignements qui ne pourraient être obtenus sur la base de sa propre législation ou dans le cadre de sa pratique administrative normale ou de celles de l'autre Etat;
c. de transmettre des renseignements qui révéleraient un secret commercial, industriel, professionnel ou un procédé commercial ou des renseignements dont la communication serait contraire à l'ordre public.

Article 27

Etudiants

Les sommes qu'un étudiant ou un stagiaire qui est, ou qui était auparavant, un résident de l'un des Etats et qui séjourne dans l'autre Etat à seule fin d'y poursuivre ses études ou sa formation, reçoit pour couvrir ses frais d'entretien, d'études ou de formation ne sont pas imposables dans cet autre Etat, à condition qu'elles proviennent de sources situées en dehors de cet autre Etat.

Article 28

Fonctionnaires diplomatiques et consulaires

Les dispositions de la présente Convention ne portent pas atteinte aux privilèges fiscaux dont bénéficient les fonctionnaires diplomatiques ou consulaires en vertu soit des règles générales du droit des gens, soit des dispositions d'accords particuliers.

Article 29

Exclusion de certaines sociétés

La présente Convention ne s'applique pas aux Sociétés Holding au sens de la législation particulière luxembourgeoise (actuellement la loi du 31 juillet 1929 et l'arrêté-loi du 27 décembre 1937). Elle ne s'applique pas non plus aux revenus qu'un résident des Pays-Bas tire de pareilles sociétés ni aux actions ou autres titres de capital de telles sociétés que cette personne possède.

Article 30

Extension territoriale

1. Le présente Convention peut être étendue, telle quelle ou avec les modifications nécessaires, à l'un des deux pays ou à tous les deux pays Surinam et les Antilles Néerlandaises, si le pays en question prélève des impôts analogues en substance aux impôts auxquels s'applique la Convention. Une telle extension prend effet à partir de la date, avec les modifications et dans les conditions, y compris les conditions relatives à la cessation d'application, qui sont fixées d'un commun accord par échange de notes diplomatiques.
2. A moins qu'il ne soit convenu autrement, lorsque la Convention sera dénoncée en vertu de l'article 32, elle ne cessera pas de s'appliquer au pays auquel elle a été étendue conformément au présent article.

CHAPITRE VII

DISPOSITIONS FINALES

Article 31

Entrée en vigueur

1. La présente Convention sera ratifiée et les instruments de ratification seront échangés à Luxembourg aussitôt que possible.
2. La présente Convention entrera en vigueur dès l'échange des instruments de ratification et ses dispositions seront applicables pour les années et périodes fiscales commençant le premier janvier 1967 ou après cette date.

Article 32

Dénonciation

La présente Convention demeurera en vigueur tant qu'elle n'aura pas été dénoncée par l'une des Hautes Parties Contractantes. Chacune des Parties peut dénoncer la Convention par voie diplomatique avec un préavis d'au moins six mois avant la fin de chaque année civile et à partir de l'année 1972.
Dans ce cas, la Convention cessera d'être applicable pour les années et périodes fiscales, commençant après la fin de l'année civile

dans laquelle le préavis a eu lieu.
EN FOI DE QUOI les susdits Plénipotentiaires ont signé la présente Convention et y ont apposé leurs sceaux.

FAIT en double exemplaire, le 8 mai 1968 à La Haye en langues néerlandaise et française, les deux textes faisant également foi.

PROTOCOLE

Au moment de procéder à la signature de la Convention entre le Royaume des Pays-Bas et le Grand-Duché de Luxembourg tendant à éviter les doubles impositions et à prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune les Plénipotentiaires soussignés sont convenus des dispositions suivantes qui forment partie intégrante de la Convention:

I

Ad article 4

Une personne physique qui demeure à bord d'un navire ou d'un bateau, sans avoir de domicile réel dans l'un des Etats, sera considérée comme résident de l'Etat où se trouve le port d'attache de ce navire ou de ce bateau.

II

Ad article 4

Les dispositions du paragraphe 2 de l'article 4 ne s'appliquent pas aux consuls honoraires.

III

Ad articles 10, 11 et 12

Les demandes de remboursement d'impôt perçu contrairement aux dispositions des articles 10, 11 et 12 doivent être faites à l'autorité compétente de l'Etat qui a perçu l'impôt, dans le délai de trois ans après l'expiration de l'année civile dans laquelle l'impôt a été perçu.

IV

Ad article 16

Pour l'application du paragraphe 1 de l'article 16 les membres du conseil d'administration ou de surveillance d'une société, qui est un résident du Luxembourg, ainsi que les «bestuurders» et les «commissarissen» d'une société, qui est un résident des Pays-Bas, sont réputés exercer leur fonction au Luxembourg et aux Pays-Bas respectivement.
Les dispositions du paragraphe 2 de cet article ne s'appliquent pas.

V

Ad article 23

Il est entendu que pour autant qu'il s'agit de l'impôt néerlandais sur le revenu ou de l'impôt néerlandais des sociétés, la base visée à l'article 23, paragraphe 1 est le «onzuivere inkomen» (le total des revenus nets) ou «winst» (le bénéfice) au sens de la législation néerlandaise concernant l'impôt sur le revenu ou l'impôt des sociétés respectivement.

VI

Ad article 26

L'obligation d'échanger des renseignements ne concerne pas les renseignements provenant des banques ou institutions y assimilées. L'expression «institutions y assimilées» comprend entre autres les compagnies d'assurance.
FAIT en double exemplaire, le 8 mai 1968 à La Haye en langues néerlandaise et française, les deux textes faisant également foi.

Abkommen vom 5. Dezember 1966 zwischen der Bundesrepublik Deutschland und dem Spanischen Staat zur Vermeidung der Doppelbesteuerung und zur Verhinderung der Steuerverkürzung bei den Steuern vom Einkommen und vom Vermögen

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXII, No. 12, December/décembre 1968

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

The instruments of ratification of the German-Spain Convention for the Prevention of Double Taxation with respect to taxes on income and net worth of December 5, 1966, were exchanged on February 14, 1968. The Convention together with the exchange of letters of the same date went into force on March 14, 1968 and is effective with regard to taxes levied in 1968 and subsequent years with the exception of taxes levied on the income and net worth of international marine and air transport enterprises when it applies retroactively as of 1963.

TEXT

Artikel 1

Dieses Abkommen gilt für Personen, die in einem Vertragstaat oder in beiden Vertragstaaten ansässig sind.

Artikel 2

(1) Dieses Abkommen gilt, ohne Rücksicht auf die Art der Erhebung, für Steuern vom Einkommen und vom Vermögen, die für Rechnung eines der beiden Vertragstaaten, seiner Länder oder seiner Gebietskörperschaften oder örtlichen Verwaltungen erhoben werden.

(2) Als Steuern vom Einkommen und vom Vermögen gelten alle Steuern, die vom Gesamteinkommen, vom Gesamtvermögen oder von Teilen des Einkommens oder des Vermögens erhoben werden, einschließlich der Steuern vom Gewinn aus der Veräußerung beweglichen und unbeweglichen Ver-

mögens, der Lohnsummensteuer (außer den Beiträgen zur Sozialversicherung) sowie der Steuern vom Vermögenszuwachs.

(3) Zu den zur Zeit bestehenden Steuern, für die das Abkommen gilt, gehören insbesondere

1. in der Bundesrepublik Deutschland:
   (a) die Einkommensteuer,
   (b) die Körperschaftsteuer,
   (c) die Vermögensteuer,
   (d) die Gewerbesteuer,

(im folgenden als „deutsche Steuer" bezeichnet);

2. im Spanischen Staat:
   (a) die allgemeine Einkommensteuer der natürlichen Personen (el Impuesto General sobre la Renta de las Personas Físicas),
   (b) die allgemeine Körperschaftsteuer (el Impuesto General sobre la Renta de Sociedades y demás entidades jurídicas) einschließlich der Sondersteuer von 4 vom Hundert nach Artikel 104 des Gesetzes 41 vom 11. Juni 1964.
   (c) die folgenden Vorsteuern:
   die Steuer auf Einkünfte aus ländlichem Grundvermögen (la Contribución Territorial sobre la Riqueza Rústica y Pecuaria),
   die Steuer auf Einkünfte aus städtischem Grundvermögen (la Contribución Territorial sobre la Riqueza Urbana), die Steuer auf Einkünfte aus persönlicher Arbeit (el Impuesto sobre los Rendimientos del Trabajo Personal), die Steuer auf Kapitalerträge (el Impuesto sobre las Rentas del Capital), die Steuer auf gewerbliche Tätigkeit und Gewinne (el Impuesto sobre Actividades y Beneficios Comerciales e Industriales),
   (d) in Fernando Poo, Rio Muni, Sahara und Ifni die Einkommensteuer (auf Einkünfte aus Arbeit und aus Vermögen) und die Steuer auf den Gewinn von Unternehmen (los impuestos sobre la renta (sobre los rendimientos del trabajo y del patrimonio) y el impuesto sobre los beneficios de las empresas),
   (e) bei dem unter das Gesetz vom 26. Dezember 1958 fallenden Unternehmen, die sich met der Erforschung und der Ausbeutung von Erdöl- oder Erdgasvorkommen befassen, auch die „Bodenabgabe" (canon de superficie), die Steuer vom Bruttoerzeugnis (el impuesto sobre el producto bruto) und die Sondersteuer vom Gewinn dieser Gesellschaften (el impuesto especial sobre los beneficios),
   (f) die örtlichen Steuern vom Einkommen und vom Vermögen (los impuestos locales sobre la renta o el patrimonio),

   (im folgenden als „spanische Steuer" bezeichnet).

(4) Das Abkommen gilt auch für alle Steuern gleicher oder ähnlicher Art, die künftig neben den zur Zeit bestehenden Steuern oder an deren Stelle erhoben werden. Die zuständigen Behörden der Vertragstaaten teilen einander zu Beginn eines jeden Jahres die in ihren Steuergesetzen eingetretenen wesentlichen Änderungen mit.

(5) Die Bestimmungen dieses Abkommens über die Besteuerung des Einkommens oder des Gewinns gelten auch für die nicht nach dem Gewerbeertrag oder dem Gewerbekapital berechnete deutsche Gewerbesteuer.

Artikel 3

(1) Im Sinne dieses Abkommens bedeuten, wenn der Zusammenhang nichts anderes erfordert:

(a) der Ausdruck „Bundesrepublik" die Bundesrepublik Deutschland und, im geographischen Sinne verwendet, das

Gebiet des Geltungsbereichs des Grundgesetzes für die Bundesrepublik Deutschland;

(b) der Ausdruck „Spanien" den Spanischen Staat und, im geographischen Sinne verwendet, die Halbinsel Spanien, die Balearen und die Kanarischen Inseln, die spanischen Plätze und Provinzen in Afrika und Spanisch Guinea, das aus den Hoheitsgebieten Rio Muni und Fernando Poo besteht, die sich beide im Stadium des Übergangs zur Selbstbestimmung befinden;

(c) die Ausdrücke „ein Vertragstaat" und „der andere Vertragstaat", je nach dem Zusammenhang, die Bundesrepublik oder Spanien;

(d) der Ausdruck „Steuer", je nach dem Zusammenhang, die deutsche Steuer oder die spanische Steuer;

(e) der Ausdruck „Person" eine natürliche Person oder eine Gesellschaft;

(f) der Ausdruck „Gesellschaft" eine juristische Person oder einen anderen Rechtsträger, der für die Besteuerung wie eine juristische Person behandelt wird;

(g) die Ausdrücke „Unternehmen eines Vertragstaates" und „Unternehmen des anderen Vertragstaates" je nach dem Zusammenhang ein Unternehmen, das von einer in der Bundesrepublik ansässigen Person betrieben wird, oder ein Unternehmen, das von einer in Spanien ansässigen Person betrieben wird;

(h) der Ausdruck „Ort der tatsächlichen Geschäftsleitung eines Unternehmens" den Ort, an dem sich der Mittelpunkt der allgemeinen Geschäftsleitung befindet; befindet sich der Ort der tatsächlichen Geschäftsleitung eines Unternehmens der Seeschiffahrt an Bord eines Schiffes, so gilt er als in dem Vertragstaat gelegen, in dem der Heimathafen des Schiffes liegt, oder, wenn kein Heimathafen vorhanden ist, in dem Vertragstaat, in dem die Person, die das Schiff betreibt, ansässig ist;

(i) der Ausdruck „zuständige Behörde" auf seiten der Bundesrepublik
den Bundesminister der Finanzen
und auf seiten Spaniens
den Minister der Finanzen, den Generaldirektor für die direkten Steuern oder jede andere vom Minister ermächtigte Behörde.

(2) Bei Anwendung dieses Abkommens durch einen Vertragstaat hat, wenn der Zusammenhang nichts anderes erfordert, jeder nicht anders definierte Ausdruck die Bedeutung, die ihm nach dem Recht dieses Staates über die Steuern zukommt, welche Gegenstand dieses Abkommens sind.

Artikel 4

(1) Im Sinne dieses Abkommens bedeutet der Ausdruck „eine in einem Vertragstaat ansässige Person" eine Person, die nach dem Recht dieses Staates dort auf Grund ihres Wohnsitzes, ihres ständigen Aufenthalts, des Ortes ihrer Geschäftsleitung oder eines anderen ähnlichen Merkmals steuerpflichtig ist.

(2) Ist nach Absatz 1 eine natürliche Person in beiden Vertragstaaten ansässig, so gilt folgendes:

(a) Die Person gilt als in dem Vertragstaat ansässig, in dem sie über eine ständige Wohnstätte verfügt. Verfügt sie in beiden Vertragstaaten über eine ständige Wohnstätte, so gilt sie als in dem Vertragstaat ansässig, zu dem sie die engeren persönlichen und wirtschaftlichen Beziehungen hat (Mittelpunkt der Lebensinteressen).

(b) Kann nicht bestimmt werden, in welchem Vertragstaat die Person den Mittelpunkt der Lebensinteressen hat, oder verfügt sie in keinem der Vertragstaaten über eine ständige Wohnstätte, so gilt sie

als in dem Vertragstaat ansässig, in dem sie ihren gewöhnlichen Aufenthalt hat.

(c) Hat die Person ihren gewöhnlichen Aufenthalt in beiden Vertragstaaten oder in keinem der Vertragstaaten, so gilt sie als in dem Vertragstaat ansässig, dessen Staatsangehörigkeit sie besitzt.

(d) Besitzt die Person die Staatsangehörigkeit beider Vertragstaaten oder keines Vertragstaates, so regeln die zuständigen Behörden der Vertragstaaten die Frage in gegenseitigem Einvernehmen.

(3) Ist nach Absatz 1 eine Gesellschaft in beiden Vertragstaaten ansässig, so gilt sie als in dem Vertragstaat ansässig, in dem sich der Ort ihrer tatsächlichen Geschäftsleitung befindet. Kann der Ort der tatsächlichen Geschäftsleitung nicht bestimmt werden, so gilt die Gesellschaft als in dem Vertragstaat ansässig, in dem sie errichtet worden ist.

(4) Im Sinne der Artikel 5 bis 22 wird ein Gesellschafter einer Personengesellschaft für die Besteuerung der Einkünfte, die er von der Gesellschaft bezieht, oder des Vermögens, das er durch die Gesellschaft besitzt, so behandelt, als sei er in dem Vertragstaat ansässig, in dem sich der Ort der tatsächlichen Geschäftsleitung der Gesellschaft befindet. Diese Einkünfte und dieses Vermögen können, soweit sie nicht in diesem Staat der Steuer unterliegen, in dem anderen Staat besteuert werden.

Artikel 5

(1) Der Ausdruck „Betriebstätte" bedeutet eine feste Geschäftseinrichtung, in der die Tätigkeit des Unternehmens ganz oder teilweise ausgeübt wird.

(2) Der Ausdruck „Betriebstätte" umfaßt insbesondere:

(a) einen Ort der Leitung,

(b) eine Zweigniederlassung,

(c) eine Geschäftstelle,

(d) eine Fabrikationsstätte,

(e) eine Werkstätte,

(f) ein Bergwerk, einen Steinbruch oder eine andere Stätte der Ausbeutung von Bodenschätzen,

(g) eine Bauausführung oder Montage, deren Dauer zwölf Monate überschreitet.

(3) Als Betriebstätte gelten nicht:

(a) Einrichtungen, die ausschließlich zur Lagerung, Ausstellung oder Auslieferung von Gütern oder Waren des Unternehmens benutzt werden;

(b) Bestände von Gütern oder Waren des Unternehmens, die ausschließlich zur Lagerung, Ausstellung oder Auslieferung unterhalten werden;

(c) Bestände von Gütern oder Waren des Unternehmens, die ausschließlich zu dem Zweck unterhalten werden, durch ein anderes Unternehmen bearbeitet oder verarbeitet zu werden;

(d) eine feste Geschäftseinrichtung, die ausschließlich zu dem Zweck unterhalten wird, für das Unternehmen Güter oder Waren einzukaufen oder Informationen zu beschaffen;

(e) eine feste Geschäftseinrichtung, die ausschließlich zu dem Zweck unterhalten wird, für das Unternehmen zu werben, Informationen zu erteilen, wissenschaftliche Forschung zu betreiben oder ähnliche Tätigkeiten auszuüben, die vorbereitender Art sind oder eine Hilfstätigkeit darstellen.

(4) Ist eine Person – mit Ausnahme eines unabhängigen Vertreters im Sinne des Absatzes 5 – in einem Vertragstaat für ein Unternehmen des anderen Vertragstaates tätig, so gilt eine in dem erstgenannten Staat gelegene Betriebstätte als gegeben, wenn die Person eine Vollmacht besitzt, im Namen des Unternehmens Verträge abzuschließen, und die Vollmacht in diesem Staat gewöhnlich ausübt, es sei denn, daß sich ihre Tätigkeit auf

den Einkauf von Gütern oder Waren für das Unternehmen beschränkt.
(5) Ein Unternehmen eines Vertragstaates wird nicht schon deshalb so behandelt, als habe es eine Betriebstätte in dem anderen Vertragstaat, weil es dort seine Tätigkeit durch einen Makler, Kommissionär oder einen anderen unabhängigen Vertreter ausübt, sofern diese Personen im Rahmen ihrer ordentlichen Geschäftstätigkeit handeln.
(6) Allein dadurch, daß eine in einem Vertragstaat ansässige Gesellschaft eine Gesellschaft beherrscht oder von einer Gesellschaft beherrscht wird, die in dem anderen Vertragstaat ansässig ist oder dort (entweder durch eine Betriebstätte oder in anderer Weise) ihre Tätigkeit ausübt, wird eine der beiden Gesellschaften nicht zur Betriebstätte der anderen.

Artikel 6

(1) Einkünfte aus unbeweglichem Vermögen können in dem Vertragstaat besteuert werden, in dem dieses Vermögen liegt.
(2) Der Ausdruck „unbewegliches Vermögen" bestimmt sich nach dem Recht des Vertragstaates, in dem das Vermögen liegt. Der Ausdruck umfaßt in jedem Fall das Zubehör zum unbeweglichen Vermögen, das lebende und tote Inventar land- und forstwirtschaftlicher Betriebe, die Rechte, auf die die Vorschriften des Privatrechts über Grundstücke Anwendung finden, die Nutzungsrechte an unbeweglichem Vermögen sowie die Rechte auf veränderliche oder feste Vergütung für die Ausbeutung oder das Recht auf Ausbeutung von Mineralvorkommen, Quellen und anderen Bodenschätzen; Schiffe und Luftfahrzeuge gelten nicht als unbewegliches Vermögen.
(3) Absatz 1 gilt für Einkünfte aus der unmittelbaren Nutzung, der Vermietung oder Verpachtung sowie jeder anderen Art der Nutzung unbeweglichen Vermögens.
(4) Die Absätze 1 und 3 gelten auch für Einkünfte aus unbeweglichem Vermögen eines Unternehmens und für Einkünfte aus unbeweglichem Vermögen, das der Ausübung eines freien Berufes dient.

Artikel 7

(1) Gewinne eines Unternehmens eines Vertragstaates können nur in diesem Staat besteuert werden, es sei denn, daß das Unternehmen seine Tätigkeit im anderen Vertragstaat durch eine dort gelegene Betriebstätte ausübt. Übt das Unternehmen eine Tätigkeit in dieser Weise aus, so können die Gewinne des Unternehmens in dem anderen Staat besteuert werden, jedoch nur insoweit, als sie dieser Betriebstätte zugerechnet werden können.
(2) Übt ein Unternehmen eines Vertragstaates seine Tätigkeit in dem anderen Vertragstaat durch eine dort gelegene Betriebstätte aus, so sind in jedem Vertragstaat dieser Betriebstätte die Gewinne zuzurechnen, die sie hätte erzielen können, wenn sie eine gleiche oder ähnliche Tätigkeit unter gleichen oder ähnlichen Bedingungen als selbständiges Unternehmen ausgeübt hätte und im Verkehr mit dem Unternehmen, dessen Betriebstätte sie ist, völlig unabhängig gewesen wäre.
(3) Bei der Ermittlung der Gewinne einer Betriebstätte werden die für diese Betriebstätte entstandenen Aufwendungen, einschließlich der Geschäftsführungs- und allgemeinen Verwaltungskosten, zum Abzug zugelassen, gleichgültig, ob sie in dem Staat, in dem die Betriebstätte liegt, oder anderswo entstanden sind.
(4) Soweit es in einem Vertragstaat üblich ist, die einer Betriebstätte zuzurechnenden Gewinne durch Aufteilung der Gesamtgewinne des Unternehmens auf seine einzelnen Teile

zu ermitteln, schließt Absatz 2 nicht aus, daß dieser Vertragstaat die zu besteuernden Gewinne nach der üblichen Aufteilung ermittelt; die Art der angewendeten Gewinnaufteilung muß jedoch so sein, daß das Ergebnis mit den Grundsätzen dieses Artikels übereinstimmt.

(5) Auf Grund des bloßen Einkaufs von Gütern oder Waren für das Unternehmen wird einer Betriebstätte kein Gewinn zugerechnet.

(6) Bei Anwendung der vorstehenden Absätze sind die der Betriebstätte zuzurechnenden Gewinne jedes Jahr auf dieselbe Art zu ermitteln, es sei denn, daß ausreichende Gründe dafür bestehen, anders zu verfahren.

(7) Gehören zu den Gewinnen Einkünfte, die in anderen Artikeln dieses Abkommens behandelt werden, so werden die Bestimmungen jener Artikel durch die Bestimmungen dieses Artikels nicht berührt.

Artikel 8

Gewinne aus dem Betrieb von Seeschiffen oder Luftfahrzeugen im internationalen Verkehr können nur in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet.

Artikel 9

Wenn

(a) ein Unternehmen eines Vertragstaates unmittelbar oder mittelbar an der Geschäftsleitung, der Kontrolle oder am Kapital eines Unternehmens des anderen Vertragstaates beteiligt ist, oder

(b) dieselben Personen unmittelbar oder mittelbar an der Geschäftsleitung, der Kontrolle oder am Kapital eines Unternehmens eines Vertragstaates und eines Unternehmens des anderen Vertragstaates beteiligt sind,

und in diesen Fällen zwischen den beiden Unternehmen hinsichtlich ihrer kaufmännischen oder finanziellen Beziehungen Bedingungen vereinbart oder auferlegt werden, die von denen abweichen, die unabhängige Unternehmen miteinander vereinbaren würden, so dürfen die Gewinne, die eines der Unternehmen ohne diese Bedingungen erzielt hätte, wegen dieser Bedingungen aber nicht erzielt hat, den Gewinnen dieses Unternehmens zugerechnet und entsprechend besteuert werden.

Artikel 10

(1) Dividenden, die eine in einem Vertragstaat ansässige Gesellschaft an eine in dem anderen Vertragstaat ansässige Person zahlt, können in dem anderen Staat besteuert werden.

(2) Diese Dividenden können jedoch in dem Vertragstaat, in dem die die Dividenden zahlende Gesellschaft ansässig ist, nach dem Recht dieses Staates besteuert werden; die Steuer darf aber nicht übersteigen:

(a) 10 vom Hundert des Bruttobetrages der Dividenden, wenn der Empfänger eine Gesellschaft (ausgenommen eine Personengesellschaft) ist, die über mindestens 25 vom Hundert des Kapitals der die Dividenden zahlenden Gesellschaft verfügt, oder wenn die Dividenden aus Gewinnausschüttungen einer sociedad de personas bestehen;

(b) 15 vom Hundert des Bruttobetrages der Dividenden in allen anderen Fällen.

Dieser Absatz berührt nicht die Besteuerung der Gesellschaft in bezug auf die Gewinne, aus denen die Dividenden gezahlt werden.

(3) Ungeachtet des Absatzes 2 darf die deutsche Steuer von den Dividenden, die eine in der Bundesrepublik ansässige Gesellschaft an eine in Spanien ansässige Gesellschaft zahlt, der mindestens 25 vom Hundert des Kapitals

der erstgenannten Gesellschaft unmittelbar oder mittelbar gehören, 25 vom Hundert des Bruttobetrages der Dividenden nicht übersteigen, so lange der Satz der deutschen Körperschaftsteuer für ausgeschüttete Gewinne niedriger ist als der für nichtausgeschüttete Gewinne und der Unterschied zwischen diesen beiden Sätzen 20 Einheiten oder mehr beträgt. Beträgt der Unterschied zwischen den Sätzen mindestens 10 Einheiten, jedoch weniger als 20 Einheiten, so darf die deutsche Steuer von diesen Dividenden 15 vom Hundert des Bruttobetrages der Dividenden nicht übersteigen.

(4) Der in diesem Artikel verwendete Ausdruck „Dividenden" bedeutet Einkünfte aus Aktien, Genußrechten oder Genußscheinen, Kuxen, Gründeranteilen oder anderen Rechten – ausgenommen Forderungen – mit Gewinnbeteiligung sowie aus sonstigen Gesellschaftsanteilen stammende Einkünfte, die nach dem Steuerrecht des Staates, in dem die ausschüttende Gesellschaft ansässig ist, den Einkünften aus Aktien gleichgestellt sind. Er umfaßt auch die Einkünfte eines stillen Gesellschafters (cuentapartícipe) (der nicht am Vermögen des Unternehmens beteiligt ist), die von einer sociedad de personas an ihre Gesellschafter ausgeschütteten Gewinne und die Einkünfte aus Ausschüttungen auf Anteilscheine einer Kapitalanlagegesellschaft.

(5) Die Absätze 1 bis 3 sind nicht anzuwenden, wenn der in einem Vertragstaat ansässige Empfänger der Dividenden in dem anderen Vertragstaat, in dem die die Dividenden zahlende Gesellschaft ansässig ist, eine Betriebstätte hat und die Beteiligung, für die die Dividenden gezahlt werden, tatsächlich zu dieser Betriebstätte gehört. In diesem Fall ist Artikel 7 anzuwenden.

(6) Bezieht eine in einem Vertragstaat ansässige Gesellschaft Gewinne oder Einkünfte aus dem anderen Vertragstaat, so darf dieser andere Staat weder die Dividenden besteuern, die die Gesellschaft an nicht in diesem anderen Staat ansässige Personen zahlt, noch Gewinne der Gesellschaft einer Steuer für nichtausgeschüttete Gewinne unterwerfen, selbst wenn die gezahlten Dividenden oder die nichtausgeschütteten Gewinne ganz oder teilweise aus in dem anderen Staat erzielten Gewinnen oder Einkünften bestehen.

Artikel 11.

(1) Zinsen, die aus einem Vertragstaat stammen und an eine in dem anderen Vertragstaat ansässige Person gezahlt werden, können in dem anderen Staat besteuert werden.

(2) Diese Zinsen können jedoch in dem Vertragstaat, aus dem sie stammen, nach dem Recht dieses Staates besteuert werden; die Steuer darf aber 10 vom Hundert des Bruttobetrages der Zinsen nicht übersteigen.

(3) Zinsen, die aus Spanien stammen und an die Deutsche Bundesbank oder die Kreditanstalt für Wiederaufbau der Bundesrepublik gezahlt werden, sind von der spanischen Steuer befreit.

(4) Der in diesem Artikel verwendete Ausdruck „Zinsen" bedeutet Einkünfte aus öffentlichen Anleihen, aus Schuldverschreibungen, auch wenn sie durch Pfandrecht an Grundstücken gesichert oder mit einer Gewinnbeteiligung ausgestattet sind, und aus Forderungen jeder Art sowie alle anderen Einkünfte, die nach dem Steuerrecht des Staates, aus dem sie stammen, den Einkünften aus Darlehen gleichgestellt sind.

(5) Absatz 1 ist nicht anzuwenden, wenn der in einem Vertragstaat ansässige Empfänger der Zinsen in dem anderen Vertragstaat, aus dem die Zinsen stammen, eine Betriebstätte hat und die Forderung, für die die Zinsen gezahlt werden, tatsächlich zu dieser Betriebstätte gehört. In diesem Fall ist Artikel 7 anzuwenden.

(6) Zinsen gelten dann als aus einem Ver-

tragstaat stammend, wenn der Schuldner dieser Staat selbst, eine seiner Gebietskörperschaften, örtliche Verwaltungen oder eine in diesem Staat ansässige Person ist. Hat aber der Schuldner der Zinsen, ohne Rücksicht darauf, ob er in einem Vertragstaat ansässig ist oder nicht, in einem Vertragstaat eine Betriebstätte und ist die Schuld, für die die Zinsen gezahlt werden, für Zwecke der Betriebstätte eingegangen worden und trägt die Betriebstätte die Zinsen, so gelten die Zinsen als aus dem Vertragstaat stammend, in dem die Betriebstätte liegt.

(7) Bestehen zwischen Schuldner und Gläubiger oder zwischen jedem von ihnen und einem Dritten besondere Beziehungen und übersteigen deshalb die gezahlten Zinsen, gemessen an der zugrunde liegenden Forderung, den Betrag, den Schuldner und Gläubiger ohne diese Beziehungen vereinbart hätten, so wird dieser Artikel nur auf diesen letzten Betrag angewendet. In diesem Fall kann der übersteigende Betrag nach dem Recht jedes Vertragstaates und unter Berücksichtigung der anderen Bestimmungen dieses Abkommens besteuert werden.

Artikel 12

(1) Lizenzgebühren, die aus einem Vertragstaat stammen und an eine in dem anderen Vertragstaat ansässige Person gezahlt werden, können in dem anderen Staat besteuert werden.

(2) Diese Lizenzgebühren können jedoch in dem Vertragstaat, aus dem sie stammen, nach dem Recht dieses Staates besteuert werden; die Steuer darf aber 5 vom Hundert des Bruttobetrages der Lizenzgebühren nicht übersteigen.

(3) Der in diesem Artikel verwendete ausdruck „Lizenzgebühren" bedeutet Vergütungen jeder Art, die für die Benutzung oder für das Recht auf Benutzung von Urheberrechten an literarischen, künstlerischen oder wissenschaftlichen Werken einschließlich kinematographischer Filme, von Patenten, Warenzeichen, Mustern oder Modellen, Plänen, geheimen Formeln oder Verfahren oder für die Benutzung oder das Recht auf Benutzung gewerblicher, kaufmännischer oder wissenschaftlicher Ausrüstungen oder für die Mitteilung gewerblicher, kaufmännischer oder wissenschaftlicher Erfahrungen gezahlt werden.

(4) Absatz 1 ist nicht anzuwenden, wenn der in einem Vertragstaat ansässige Empfänger der Lizenzgebühren in dem anderen Vertragstaat, aus dem die Lizenzgebühren stammen, eine Betriebstätte hat und die Rechte oder Vermögenswerte, für die die Lizenzgebühren gezahlt werden, tatsächlich zu dieser Betriebstätte gehören. In diesem Fall ist Artikel 7 anzuwenden.

(5) Lizenzgebühren gelten dann als aus einem Vertragstaat stammend, wenn der Schuldner dieser Staat selbst, eine seiner Gebietskörperschaften, örtlichen Verwaltungen oder eine in diesem Staat ansässige Person ist. Hat aber der Schuldner der Lizenzgebühren, ohne Rücksicht darauf, ob er in einem Vertragstaat ansässig ist oder nicht, in einem Vertragstaat eine Betriebstätte und ist die Verpflichtung zur Zahlung der Lizenzgebühren für Zwecke der Betriebstätte eingegangen worden und trägt die Betriebstätte die Lizenzgebühren, so gelten die Lizenzgebühren als aus dem Vertragstaat stammend, in dem die Betriebstätte liegt.

(6) Bestehen zwischen Schuldner und Gläubiger oder zwischen jedem von ihnen und einem Dritten besondere Beziehungen und übersteigen deshalb die gezahlten Lizenzgebühren, gemessen an der zugrunde liegenden Leistung, den Betrag, den Schuldner und Gläubiger ohne diese Beziehungen vereinbart hätten, so wird dieser Artikel nur auf diesen letzten Betrag angewendet. In diesem Fall

kann der übersteigende Betrag nach dem Recht jedes Vertragstaates und unter Berücksichtigung der anderen Bestimmungen dieses Abkommens besteuert werden.

Artikel 13

(1) Gewinne aus der Veräußerung unbeweglichen Vermögens im Sinne des Artikels 6 Absatz 2 können in dem Vertragstaat besteuert werden, in dem dieses Vermögen liegt.
(2) Gewinne aus der Veräußerung beweglichen Vermögens, das Betriebsvermögen einer Betriebstätte darstellt, die ein Unternehmen eines Vertragstaates in dem anderen Vertragstaat hat, oder das zu einer festen Einrichtung gehört, über die eine in einem Vertragstaat ansässige Person für die Ausübung eines freien Berufes in dem anderen Vertragstaat verfügt, einschließlich derartiger Gewinne, die bei der Veräußerung einer solchen Betriebstätte (allein oder zusammen mit dem übrigen Unternehmen) oder einer solchen festen Einrichtung erzielt werden, können in dem anderen Staat besteuert werden. Jedoch können Gewinne aus der Veräußerung des in Artikel 22 Absatz 3 genannten beweglichen Vermögens nur in dem Vertragstaat besteuert werden, in dem dieses bewegliche Vermögen nach dem angeführten Artikel besteuert werden kann.
(3) Gewinne aus der Veräußerung des in den Absätzen 1 und 2 nicht genannten Vermögens können nur in dem Vertragstaat besteuert werden in dem der Veräußerer ansässig ist.

Artikel 14

(1) Einkünfte, die eine in einem Vertragstaat ansässige Person aus einem freien Beruf oder aus sonstiger selbständiger Tätigkeit ähnlicher Art bezieht, können nur in diesem Staat besteuert werden, es sei denn, daß die Person für die Ausübung ihrer Tätigkeit in dem anderen Vertragstaat regelmäßig über eine feste Einrichtung verfügt. Verfügt sie über eine solche feste Einrichtung, so können die Einkünfte in dem anderen Staat besteuert werden, jedoch nur insoweit, als sie dieser festen Einrichtung zugerechnet werden können.
(2) Der Ausdruck „freier Beruf" umfaßt insbesondere die selbständig ausgeübte wissenschaftliche, literarische, künstlerische, erzieherische oder unterrichtende Tätigkeit sowie die selbständige Tätigkeit der Ärzte, Rechtsanwälte, Ingenieure, Architekten, Zahnärzte und Bücherrevisoren.

Artikel 15

(1) Vorbehaltlich der Artikel 16, 18 und 19 können Gehälter, Löhne und ähnliche Vergütungen, die eine in einem Vertragstaat ansässige Person aus unselbständiger Arbeit bezieht, nur in diesem Staat besteuert werden, es sei denn, daß die Arbeit in dem anderen Vertragstaat ausgeübt wird. Wird die Arbeit dort ausgeübt, so können die dafür bezogenen Vergütungen in dem anderen Staat besteuert werden.
(2) Ungeachtet des Absatzes 1 können Vergütungen, die eine in einem Vertragstaat ansässige Person für eine in dem anderen Vertragstaat ausgeübte unselbständige Arbeit bezieht, nur in dem erstgenannten Staat besteuert werden, wenn
(a) der Empfänger sich in dem anderen Staat insgesamt nicht länger als 183 Tage während des betreffenden Steuerjahres aufhält,
(b) die Vergütungen von einem Arbeitgeber oder für einen Arbeitgeber gezahlt werden, der nicht in dem anderen Staat ansässig ist, und
(c) die Vergütungen nicht von einer Betriebstätte oder einer festen Einrichtung getra-

gen werden, die der Arbeitgeber in dem anderen Staat hat.

(3) Ungeachtet der vorstehenden Bestimmungen dieses Artikels können Vergütungen für unselbständige Arbeit, die an Bord eines Seeschiffes oder Luftfahrzeuges im internationalen Verkehr ausgeübt wird, in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet.

Artikel 16

Aufsichtsrats- oder Verwaltungsratsvergütungen und ähnliche Zahlungen, die eine in einem Vertragstaat ansässige Person in ihrer Eigenschaft als Mitglied des Aufsichts- oder Verwaltungsrates einer Gesellschaft bezieht, die in dem anderen Vertragstaat ansässig ist, können in dem anderen Staat besteuert werden.

Artikel 17

Ungeachtet der Artikel 14 und 15 können Einkünfte, die berufsmäßige Künstler, wie Bühnen-, Film-, Rundfunk- oder Fernsehkünstler und Musiker, sowie Sportler aus ihrer in dieser Eigenschaft persönlich ausgeübten Tätigkeit beziehen, in dem Vertragstaat besteuert werden, in dem sie diese Tätigkeit ausüben.

Artikel 18

(1) Vergütungen, die von der Bundesrepublik und einem Land oder einer ihrer autonomen öffentlichen Einrichtungen, örtlichen Behörden oder örtlichen Verwaltungen unmittelbar oder aus einem von ihnen errichteten Sondervermögen an eine natürliche Person für geleistete Dienste gezahlt werden, können in der Bundesrepublik besteuert werden. Diese Vergütungen sind von der spanischen Steuer befreit, es sei denn, daß diese Zahlung an einen spanischen Staatsangehörigen geleistet wird, der nicht zugleich die deutsche Staatsangehörigkeit besitzt.

(2) Vergütungen, die vom Spanischen Staat oder einer seiner autonomen öffentlichen Einrichtungen, örtlichen Behörden oder örtlichen Verwaltungen unmittelbar oder aus einem von ihnen errichteten Sondervermögen an eine natürliche Person für geleistete Dienste gezahlt werden, können in Spanien besteuert werden. Diese Vergütungen sind von der deutschen Steuer befreit, es sei denn, daß die Zahlung an einen deutschen Staatsangehörigen geleistet wird, der nicht zugleich die spanische Staatsangehörigkeit besitzt.

(3) Auf Zahlungen für Dienstleistungen, die im Zusammenhang mit einer gewerblichen Tätigkeit eines Vertragstaates und eines Landes oder einer ihrer autonomen öffentlichen Einrichtungen, örtlichen Behörden oder örtlichen Verwaltungen erbracht werden, finden die Artikel 15, 16 und 17 Anwendung.

(4) Die Absätze 1 und 2 gelten auch für Vergütungen, die im Falle der Bundesrepublik die Deutsche Bundesbank, die Deutsche Bundesbahn und die Deutsche Bundespost, und im Falle Spaniens die Red Nacional de los Ferrocarriles Españoles (RENFE) zahlen.

Artikel 19

(1) Ruhegehälter und ähnliche Vergütungen, die einer in einem Vertragstaat ansässigen Person für frühere unselbständige Arbeit gezahlt werden, können nur in diesem Staat besteuert werden.

(2) Ungeachtet des Absatzes 1 sind Ruhegehälter und ähnliche Vergütungen, die von einem Vertragstaat und einem Land oder einer ihrer autonomen öffentlichen Einrichtungen, örtlichen Behörden oder örtlichen Verwaltungen unmittelbar oder aus einem

von ihnen errichteten Sondervermögen für frühere unselbständige Arbeit gezahlt werden, in dem anderen Vertragstaat von der Steuer befreit.

(3) Absatz 2 ist entsprechend anzuwenden auf Ruhegehälter, Renten und andere wiederkehrende oder einmalige Vergütungen, die einer natürlichen Person von einem Vertragstaat und einem Land oder einer ihrer autonomen öffentlichen Einrichtungen, örtlichen Behörden oder örtlichen Verwaltungen als Vergütung für einen Schaden gezahlt werden, der als Folge von Kriegshandlungen oder politischer Verfolgung entstanden ist.

Artikel 20

Zahlungen, die ein Student oder Lehrling (einschließlich der Volontäre oder Praktikanten), der in einem Vertragstaat ansässig ist oder vorher dort ansässig war und der sich in dem anderen Vertragstaat ausschließlich zum Studium oder zur Ausbildung aufhält, für seinen Unterhalt, sein Studium oder seine Ausbildung erhält, werden in dem anderen Staat nicht besteuert, sofern ihm diese Zahlungen aus Quellen außerhalb des anderen Staates zufließen.

Artikel 21

Die in den vorstehenden Artikeln nicht ausdrücklich erwähnten Einkünfte einer in einem Vertragstaat ansässigen Person können nur in diesem Staat besteuert werden.

Artikel 22

(1) Unbewegliches Vermögen im Sinne des Artikels 6 Absatz 2 kann in dem Vertragstaat besteuert werden, in dem dieses Vermögen liegt.

(2) Bewegliches Vermögen, das Betriebsvermögen einer Betriebstätte eines Unternehmens darstellt oder das zu einer der Ausübung eines freien Berufes dienenden festen Einrichtung gehört, kann in dem Vertragstaat besteuert werden, in dem sich die Betriebstätte oder die feste Einrichtung befindet.

(3) Seeschiffe und Luftfahrzeuge im internationalen Verkehr und Betriebsvermögen, das nicht unbewegliches Vermögen darstellt und dem Betrieb dieser Schiffe und Luftfahrzeuge dient, können nur in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet.

(4) Alle anderen Vermögensteile einer in einem Vertragstaat ansässigen Person können nur in diesem Staat besteuert werden.

Artikel 23

(1) Bei einer in der Bundesrepublik ansässigen Person wir die Steuer wie folgt festgesetzt:

(a) Von der Bemessungsgrundlage der deutschen Steuer werden die Einkünfte aus Quellen innerhalb Spaniens und die innerhalb Spaniens gelegenen Vermögensteile ausgenommen, die nach diesem Abkommen in Spanien besteuert werden können, es sei denn, daß Buchstabe (b) anzuwenden ist. Die Bundesrepublik behält aber das Recht, die auf diese Weise ausgenommenen Einkünfte und Vermögensteile bei der Festsetzung des Steuersatzes zu berücksichtigen. Bei Dividenden ist Satz 1 nur anzuwenden auf die Dividenden, die

(aa) einer in der Bundesrepublik ansässigen Kapitalgesellschaft von einer in Spanien ansässigen Kapitalgesellschaft gezahlt werden, deren stimmberechtigte Anteile zu mindestens 25 vom Hundert der erstgenannten Gesellschaft gehören,
oder

(bb) aus den von einer sociedad de personas ausgeschütteten Gewinnen im Sinne von Artikel 10 Absatz 4 bestehen.

Von der Bemessungsgrundlage der deutschen Steuer werden ebenfalls Beteiligungen ausgenommen, deren Dividenden nach dem vorhergehenden Satz im Falle ihrer Ausschüttung auszunehmen wären.

(b) Auf die deutsche Steuer von den nachstehenden aus Spanien stammenden Einkünften oder von dem in Spanien gelegenen Vermögen wird die spanische Steuer angerechnet, die nach diesem Abkommen gezahlt worden ist von

(aa) den nicht unter Buchstabe (a) fallenden Dividenden;

(bb) Zinsen; fließen die Zinsen einem Bankinstitut zu und ist die Steuer, der sie in Spanien unterliegen, auf Grund des Decreto-Ley 19/1961 vom 19. Oktober 1961 niedriger als 10 vom Hundert ihres Bruttobetrages, so sind 10 vom Hundert des Bruttobetrages der Zinsen anzurechnen;

(cc) Lizenzgebühren;

(dd) Vergütungen im Sinne des Artikels 18 Absatz 2, die an einen deutschen Staatsangehörigen gezahlt werden, der nicht zugleich spanischer Staatsangehöriger ist;

(ee) Einkünften aus unbeweglichem Vermögen oder diesem Vermögen selbst, sofern dieses Vermögen nicht zu einer in Spanien gelegenen Betriebstätte tatsächlich gehört.

(2) Bei einer in Spanien ansässigen Person wird die Steuer wie folgt festgesetzt:

(a) Einkünfte oder Vermögen, die nach diesem Abkommen in der Bundesrepublik besteuert werden können, sind vorbehaltlich des Buchstaben (b) von der spanischen Steuer befreit; Spanien kann jedoch bei der Berechnung der Steuer von den restlichen Einkünften oder Vermögensteilen der betreffenden Person den Steuersatz anwenden, der anzuwenden wäre, wenn die steuerfreien Einkünfte oder Vermögensteile nicht von der Steuer befreit wären.

(b) Die deutsche Steuer von den Einkünften, die nach Artikel 10 Absätze 2 und 3, nach Artikel 11 Absatz 2, nach Artikel 12 Absatz 2 und nach Artikel 18 Absatz 1 in der Bundesrepublik besteuert werden können und die nicht von der spanischen Steuer befreit sind, wird auf die spanische Steuer angerechnet. Die deutsche Steuer von Einkünften aus unbeweglichem Vermögen, das in der Bundesrepublik gelegen ist und das nicht zu einer in der Bundesrepublik gelegenen Betriebstätte tatsächlich gehört, oder die deutsche Steuer von diesem unbeweglichen Vermögen wird auf die spanische Steuer von diesen Einkünften oder von diesem Vermögen angerechnet. Der anzurechnende Betrag darf aber in allen diesen Fällen den Teil der vor der Anrechnung errechneten Steuer nicht übersteigen, der auf die aus der Bundesrepublik stammenden Einkünfte oder auf das in der Bundesrepublik gelegene Vermögen entfällt. Die in der Bundesrepublik entrichtete Steuer wird in Übereinstimmung mit diesem Absatz auch auf die entsprechenden spanischen Vorsteuern angerechnet.

Artikel 24

(1) Die Staatsangehörigen eines Vertragstaates dürfen in dem anderen Vertragstaat weder einer Besteuerung noch einer damit zusammenhängenden Verpflichtung unterworfen werden, die anders oder belastender sind als die Besteuerung und die damit zusammenhängenden Verpflichtungen, denen

die Staatsangehörigen des anderen Staates unter gleichen Verhältnissen unterworfen sind oder unterworfen werden können.

(2) Insbesondere haben die Staatsangehörigen eines Vertragstaates, die in dem anderen Vertragstaat der Besteuerung unterliegen, Anspruch auf alle Steuerbefreiungen, -vergünstigungen und -ermäßigungen, die auf Grund des Personenstandes oder der Familienlasten den Staatsangehörigen des anderen Vertragstaates unter gleichen Verhältnissen gewährt werden.

(3) Der Ausdruck „Staatsangehörige" bedeutet:

(a) in bezug auf die Bundesrepublik alle Deutschen im Sinne des Artikels 116 Absatz 1 des Grundgesetzes für die Bundesrepublik Deutschland sowie alle Gesellschaften, die nach dem in der Bundesrepublik geltenden Recht errichtet worden sind;

(b) in bezug auf Spanien alle natürlichen Personen, die nach dem Código Civil die spanische Staatsangehörigkeit besitzen, und alle Gesellschaften, die nach dem in Spanien geltenden Recht errichtet worden sind.

(4) Staatenlose dürfen in einem Vertragstaat weder einer Besteuerung noch einer damit zusammenhängenden Verpflichtung unterworfen werden, die anders oder belastender sind als die Besteuerung und die damit zusammenhängenden Verpflichtungen, denen die Staatsangehörigen dieses Staates unter gleichen Verhältnissen unterworfen sind oder unterworfen werden können.

(5) Die Besteuerung einer Betriebstätte, die ein Unternehmen eines Vertragstaates in dem anderen Vertragstaat hat, darf in dem anderen Staat nicht ungünstiger sein als die Besteuerung von Unternehmen des anderen Staates, die die gleiche Tätigkeit ausüben.

Diese Bestimmung ist nicht so auszulegen, als verpflichte sie einen Vertragstaat, den in dem anderen Vertragstaat ansässigen Personen Steuerfreibeträge, -vergünstigungen und -ermäßigungen auf Grund des Personenstandes oder der Familienlasten zu gewähren, die er den in seinem Hoheitsgebiet ansässigen Personen gewährt.

(6) Die Unternehmen eines Vertragstaates, deren Kapital ganz oder teilweise, unmittelbar oder mittelbar, einer in dem anderen Vertragstaat ansässigen Person oder mehreren solchen Personen gehört oder ihrer Kontrolle unterliegt, dürfen in dem erstgenannten Vertragstaat weder einer Besteuerung noch einer damit zusammenhängenden Verpflichtung unterworfen werden, die anders oder belastender sind als die Besteuerung und die damit zusammenhängenden Verpflichtungen, denen andere ähnliche Unternehmen des erstgenannten Staates unterworfen sind oder unterworfen werden können.

(7) In diesem Artikel bedeutet der Ausdruck „Besteuerung" Steuern jeder Art und Bezeichnung.

Artikel 25

(1) Ist eine in einem Vertragstaat ansässige Person der Auffassung, daß die Maßnahmen eines Vertragstaates oder beider Vertragstaaten für sie zu einer Besteuerung geführt haben oder führen werden, die diesem Abkommen nicht entspricht, so kann sie unbeschadet der nach innerstaatlichem Recht dieser Staaten vorgesehenen Rechtsmittel ihren Fall der zuständigen Behörde des Vertragstaates unterbreiten, in dem sie ansässig ist.

(2) Hält diese zuständige Behörde die Einwendung für begründet und ist sie selbst nicht in der Lage, eine befriedigende Lösung herbeizuführen, so wird sie sich bemühen, den Fall durch Verständigung mit der zuständigen Behörde des anderen Vertragstaates so zu regeln, daß eine dem Abkom-

men nicht entsprechende Besteuerung vermieden wird.
(3) Die zuständigen Behörden der Vertragstaaten werden sich darüber verständigen, wie die in den Artikeln 10, 11 und 12 vorgesehenen Steuerbegrenzungen verwirklicht werden sollen.
(4) Die zuständigen Behörden der Vertragstaaten werden sich bemühen, Schwierigkeiten oder Zweifel, die bei der Auslegung oder Anwendung des Abkommens entstehen, in gegenseitigem Einvernehmen zu beseitigen. Sie können auch gemeinsam darüber beraten, wie eine Doppelbesteuerung in Fällen, die in dem Abkommen nicht behandelt sind, vermieden werden kann.
(5) Die zuständigen Behörden der Vertragstaaten können zur Herbeiführung einer Einigung im Sinne der vorstehenden Absätze unmittelbar miteinander verkehren. Erscheint ein mündlicher Meinungsaustausch für die Herbeiführung der Einigung zweckmäßig, so kann ein solcher Meinungsaustausch in einer Kommission durchgeführt werden, die aus Vertretern der zuständigen Behörden der Vertragstaaten besteht.

Artikel 26

(1) Die zuständigen Behörden der Vertragstaaten werden die Informationen austauschen, die erforderlich sind zur Durchführung dieses Abkommens und des innerstaatlichen Rechts der Vertragstaaten betreffend die unter das Abkommen fallenden Steuern, soweit die diesem Recht entsprechende Besteuerung mit dem Abkommen in Einklang steht. Alle so ausgetauschten Informationen sind geheimzuhalten und dürfen nur solchen Personen oder Behörden zugänglich gemacht werden, die mit der Veranlagung oder Erhebung der unter das Abkommen fallenden Steuern befaßt sind.
(2) Absatz 1 ist auf keinen Fall so auszulegen, als verpflichte er einen der Vertragstaaten:
(a) Verwaltungsmaßnahmen durchzuführen, die von den Gesetzen oder der Verwaltungspraxis dieses oder des anderen Vertragstaates abweichen;
(b) Angaben zu übermitteln, die nach den Gesetzen oder im üblichen Verwaltungsverfahren dieses oder des anderen Vertragstaates nicht beschafft werden können;
(c) Informationen zu erteilen, die ein Handels-, Geschäfts-, Gewerbe- oder Berufsgeheimnis oder ein Geschäftsverfahren preisgeben würden oder deren Erteilung der öffentlichen Ordnung widerspräche.

Artikel 27

Dieses Abkommen berührt nicht die steuerlichen Vorrechte, die den diplomatischen und konsularischen Beamten nach den allgemeinen Regeln des Völkerrechts oder auf Grund besonderer Vereinbarungen zustehen.

Artikel 28

Dieses Abkommen gilt auch für das Land Berlin, sofern nicht die Regierung der Bundesrepublik Deutschland gegenüber der Regierung des Spanischen Staates innerhalb von drei Monaten nach Inkrafttreten des Abkommens eine gegenteilige Erklärung abgibt.

Artikel 29

(1) Dieses Abkommen bedarf der Ratifikation; die Ratifikationsurkunden sollen so bald wie möglich in Madrid ausgetauscht werden.
(2) Dieses Abkommen tritt einen Monat nach Austausch der Ratifikationsurkunden in Kraft und findet dann auf die Steuern Anwendung, die für das Kalenderjahr, in dem

dieses Abkommen in Kraft tritt, und für die folgenden Kalenderjahre erhoben werden. (3) Ungeachtet des Absatzes 2 finden Artikel 8 und Artikel 22 Absatz 3 auf die Steuern Anwendung, die für das Kalenderjahr 1963 und die folgenden Jahre erhoben werden.

Artikel 30

Dieses Abkommen bleibt auf unbestimmte Zeit in Kraft, jedoch kann jeder der Vertragstaaten bis einschließlich 30. Juni eines jeden Kalenderjahres nach Ablauf von drei Jahren, vom Tage des Inkrafttretens an gerechnet, das Abkommen auf diplomatischem Wege schriftlich kündigen; in diesem Falle findet das Abkommen nicht mehr Anwendung auf die Steuern, die für die auf das Kündigungsjahr folgenden Kalenderjahre erhoben werden.

Spanische Botschaft

Bonn, den 5. Dezember 1966

Herr Staatssekretär,

Ich beehre mich, den Empfang Ihres heutigen Schreibens zu bestätigen, das in Übersetzung wie folgt lautet:

„Anläßlich der heutigen Unterzeichnung des Abkommens zwischen der Bundesrepublik Deutschland und dem Spanischen Staat zur Vermeidung der Doppelbesteuerung und zur Verhinderung der Steuerverkürzung bei den Steuern vom Einkommen und vom Vermögen beehre ich mich, Ihnen im Namen der Regierung der Bundesrepublik Deutschland mitzuteilen, daß die beiden Vertragstaaten übereingekommen sind, Artikel 23 Absatz 1 Buchstabe (a) auf Dividenden und Beteiligungen nur anzuwenden, wenn die Einkünfte der in Spanien ansässigen Gesellschaft ausschließlich oder fast ausschließlich

(a) aus der Herstellung oder dem Verkauf von Gütern oder Waren, aus Vermietung oder Verpachtung, aus Dienstleistungen oder aus Bank- oder Versicherungsgeschäften stammen oder

(b) aus Dividenden bestehen, die von einer oder mehreren in Spanien ansässigen Gesellschaften gezahlt werden, die ihre Einkünfte ausschließlich oder fast ausschließlich aus der Herstellung oder dem Verkauf von Gütern oder Waren, aus Vermietung oder Verpachtung, aus Dienstleistungen oder aus Bank- oder Versicherungsgeschäften beziehen, sofern mindestens 25 vom Hundert des Kapitals jeder dieser Gesellschaften der erstgenannten Gesellschaft gehören.

In den übrigen Fällen ist Artikel 23 Absatz 1 Buchstabe (b) bzw. Artikel 22 Absatz 4 anzuwenden.

Ich wäre dankbar, wenn Sie mir Ihr Einverständnis mit dem Vorstehenden bestätigten; in diesem Fall sollen die vorliegende Note und Ihre Antwortnote als Bestandteil des Abkommens gelten."

Ich beehre mich, Eurer Exzellenz mitzuteilen, daß meine Regierung mit dem Vorstehenden einverstanden ist.

Genehmigen Sie, Herr Staatssekretär, den Ausdruck meiner ausgezeichnetsten Hochachtung.

J.S. de Erice

An den
Staatssekretär des Auswärtigen Amts
Herrn Professor Dr. Carstens

Spanische Botschaft

Bonn, den 5. Dezember 1966

Herr Staatssekretär,

Ich beehre mich, den Empfang Ihres heutigen Schreibens zu bestätigen, das in Übersetzung wie folgt lautet:

„Anläßlich der heutigen Unterzeichnung des Abkommens zwischen der Bundesrepublik

Deutschland und dem Spanischen Staat zur Vermeidung der Doppelbesteuerung und zur Verhinderung der Steuerverkürzung bei den Steuern vom Einkommen und vom Vermögen beehre ich mich, Ihnen im Namen der Regierung der Bundesrepublik Deutschland mitzuteilen, daß die beiden Vertragstaaten übereingekommen sind, daß Artikel 24 auch auf die spanische Abgabe, die von oder zu Lasten von deutschen Staatsangehörigen für die Erteilung einer Arbeitserlaubnis zu entrichten ist, sowie auf entsprechende deutsche Abgaben anzuwenden ist, die gegebenenfalls von oder zu Lasten von nichtdeutschen Staatsangehörigen zu entrichten sind.

Ich wäre dankbar, wenn Sie mir Ihr Einverständnis mit dem Vorstehenden bestätigten; in diesem Fall sollen die vorliegende Note und Ihre Antwortnote als Bestandteil des Abkommens gelten."

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