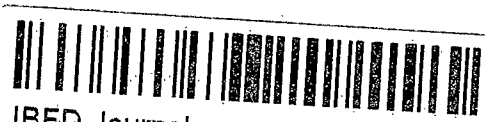
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Bureau Intern. de Documentation Fiscale

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Amsterdam.

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The International Bureau of Fiscal Documentation was founded in 1938. For reasons of organizing character this Bureau is established as a separate foundation according to Netherlands law. The Bureau is a scientific, independent, non-profit making, non-political foundation of which the purpose is defined in the articles as follows:

(art. 2) The Object of the International Bureau of Fiscal Documentation is the foundation and maintenance of an international documentation bureau, in order to supply information in fiscal legislation and the application of fiscal law, and to stimulate the study of fiscal science.

(art. 3) The International Bureau of Fiscal Documentation shall endeavour to realise this object by:

a. founding a library on fiscal legislation, books, periodicals and other publications;
b. supplying information;
c. giving any one the opportunity to study all material available in its library;
d. issuing a periodical;
e. any other appropriate measures.

In close cooperation with the I.F.A., and with the aid of expert correspondents throughout the world, the Bureau acquires as much information as possible in the field of international and comparative law. The Bureau is thus able to supply data (but not advice) on specific tax problems. A fee, necessary for the maintenance and extension of the Bureau, is charged on a time/cost basis. The Bureau has published two series of monographs: "Publications of the International Bureau of Fiscal Documentation" and "Studies on Taxation and Economic Development".

The Bureau also published *European Taxation,* now a monthly journal on the tax systems of Europe. *Tax News Service,* published twice per month, provides rapid information on worldwide tax developments. *Supplementary Service to European Taxation* is a loose-leaf reference work.

The loose-leaf series, *Guides to European Taxation* comprises "The Taxation of Patent Royalties, Dividends, Interest, in Europe", "The Taxation of Companies in Europe", "The Taxation of Private Investment Income" and "Value Added Taxation in Europe".

The loose-leaf series, *Tax Treaty Guides* comprises "Handbook on the U.S.-German Tax Convention" and "Handbook on the Dutch-German Tax Convention" (in German). The Bureau has also published two loose-leaf reference works, *Corporate Taxation in Latin America* and *African Tax Systems.*

Le Bureau International de Documentation Fiscale fut fondé en 1938. Pour des raisons de caractère organisatoire, ce Bureau est établi comme une fondation séparée conformément au droit civil néerlandais. Le Bureau est une institution scientifique, indépendante, sans but lucratif et sans objet politique, dont le but est défini dans les statuts comme suit:

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a. en établissant une bibliothèque fiscale d'ouvrages, revues et autres publications;
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d. en publiant un périodique;
e. en recourant à tout autre moyen adéquat.

Par une coopération étroite avec l'IFA et avec l'aide de correspondants à travers le monde, le Bureau rassemble toutes les données possibles en matière de droit international et comparé. De cette façon, le Bureau est à même de fournir des renseignements concernant des problèmes fiscaux spéciaux mais sans donner d'avis. Des honoraires, nécessaires pour le maintien et l'expansion du Bureau, sont demandés sur base du temps nécessaire et du coût. Le Bureau a publié deux séries de monographies: "Publications du Bureau International de Documentation Fiscale" et "Studies on Taxation and Economic Development".

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(art. 2) The aim of the Association is the study and advancement of international and comparative law in regard to public finance and especially international and comparative fiscal law and the financial and economic aspects of taxation.

Plan of action
(art. 3) The Association shall endeavour by all legal means to realise this aim:
a) by scientific research;
b) by holding congresses and conferences;
c) by publications;
d) by co-operation with all data collecting organisations, especially the International Bureau of Fiscal Documentation in Amsterdam;
e) by all other appropriate methods.

L'IFA fut fondée le 12 février 1938 par un nombre d'experts en matière fiscale de divers pays. Le but et l'organisation sont définis dans les Statuts comme suit:

Objet
(art. 2) L'association a pour objet l'étude et la promotion du droit international et comparé en matière de finances publiques, et spécialement le droit fiscal international et comparé ainsi que les aspects financiers et économiques de la fiscalité.

Plan d'Action
(art. 3) L'association tendra par toutes voies légales à réaliser cet objet:
a) par la recherche scientifique;
b) par la tenue de congrès et de colloques;
c) par des publications;
d) par la collaboration au fonctionnement de tous organismes de documentation, notamment le Bureau International de Documentation Fiscale à Amsterdam;
e) par tout autre moyen approprié.

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* * * ARTICLES * * *

THE UNITED STATES INTEREST EQUALIZATION TAX

RICHARD D. POMP *:

In 1964, the Bulletin presented an article on the newly proposed United States Interest Equalization Tax (See Volume XVIII, p. 3). Although the tax was intended to be only a temporary measure, it has been continually extended and amended. The following article describes the present contours of the tax.

I. INTRODUCTION

The United States interest equalization tax (IET) [1] is a one-time tax levied on the acquisition of certain foreign securities. It was proposed by President Kennedy [2] in order to reduce the United States balance-of-payments deficit by restricting portfolio investment. [3] Prior to the enactment of the tax in 1964, [4] many foreign debt issues were attracting a substantial amount of dollars because of their high interest rates. The IET attempts to equalize the yield of foreign issues with that of domestic issues and thus diminish the attractiveness of foreign obligations.

The tax was introduced as a temporary measure and was originally scheduled to expire in 1965. The continuing Unted States balance-of-payments deficit, coupled with the IET's success in reducing foreign investment, has resulted in six extensions of the tax. The IET is now scheduled to expire on July 1, 1974, but current international monetary conditions may necessitate another extension.

II. TAXABLE EVENT

The IET is a tax on the acquisition by a United States person of stock of a foreign issuer [5] or of a debt obligation of a foreign obligor (if such obligation has a period

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1. INT. REV. CODE of 1954, §§ 4911-4931.
2. President's Special Message on Balance of Payments, 109 CONG. REC. 12806 (1963).
3. Portfolio investment is generally considered to be a less than 10% interest in a corporation or partnership. Foreign direct investment (i.e., a 10 % or more interest in a corporation or partnership) is regulated by the Department of Commerce's Foreign Direct Investment Program. See Section VII A, infra.
4. Act of September 2, 1964, 78 Stat. 809. The tax applies retroactively to July 19, 1963.
5. Although the IET was in response to the higher interest rates of foreign debt obligations, it was made applicable to the purchase of equity issues in order to prevent a substitution of stock for debt.

remaining to maturity of one year or more). Although the tax is imposed on the United States person acquiring the foreign securities, it is normally passed on to the seller or borrower.

The tax is levied on the actual value of the securities acquired. [6] In general, the actual value is determined by the consideration that would have been paid by a purchaser in an arm's length transaction.

A. *Acquisition*

The term "acquisition" includes any purchase, transfer, distribution, exchange, or other transaction by virtue of which ownership is obtained. [7] In order to reach those situations that are arguably outside the definition of acquisition but which should nonetheless be taxable under the rationale of the IET, the statute specifies that certain transactions constitute acquisitions. For example, a contribution to the capital of a foreign corporation or partnership is considered to be an acquisition of stock. [8] The acquisition of securities of a domestic corporation or partnership availed of for the principal purpose of obtaining funds for a foreign issuer or obligor is treated as the aquisition of foreign securities. [9]

On the other hand, certain transactions that do not result in an outflow of dollars are specifically excluded from the definition of acquisition. Thus stock dividends and transfers by legacy or gift are not treated as acquisitions. [10]

B. *United States persons*

"United States persons" include citizens or residents of the United States, partnerships or corporations created or organized in the United States, agencies or wholly-owned instrumentalities of the United States, States or political subdivisions thereof, and certain estates and trusts. [11]

C. *Stock or debt obligations*

The term "stock" includes any stock, share, or other capital interest in a corporation, or any interest of a partner in a partnership. Stock includes an option to acquire stock. A debt instrument whose terms allow it to be converted to stock within 5 years from the date on which interest begins to accrue is also considered to be stock. [12]

The term "debt obligation" includes any indebtedness, whether or not represented by a bond, note, or other writing, and whether or not bearing interest. [13] Annuities or obligations of an insurer to pay under an insurance contract are not considered to be debt obligations.

As mentioned above, debt obligations are taxable only if the "period remaining to maturity" is at least 1 year. [14] In general, the period remaining to maturity begins on the date of the obligation's acquisition and ends on the date of payment. [15] A debt obligation having no fixed or determinable date for the payment of principal is treated as having a period remaining to maturity of 28½ years. Debt obligations that are

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6. INT. REV. CODE of 1954, § 4911 (b). Hereafter, all references are to this Code unless otherwise indicated. A special rule applies where securities are acquired as the result of the surrender, extension, renewal, or conversion of previously owned securities, or the exercise of an option or similar right. See § 4913 (a).
7. § 4912 (a).
8. § 4912 (b) (2).
9. § 4912 (b) (3).
10. § 4914 (a).
11. § 4920 (a) (4).
12. § 4920 (a) (2).
13. § 4920 (a) (1).
14. The President has the power to levy the tax on foreign debt obligations having a period remaining to maturity of less than 1 year. See § 4921 (a).
15. § 4920 (a) (7).

payable on demand (e.g., certain bank deposits) are deemed to have a period remaining to maturity of less than 1 year.

D. *Foreign issuer or obligor*

The term "foreign issuer or obligor" includes any nonresident alien individual and any corporation, partnership, estate, or trust that is not a United States person. Also included is any international organization of which the United States is not a member and any foreign government or political subdivision, agency, or instrumentality thereof.

Under certain circumstances, a United States person may elect to be treated as a foreign issuer or obligor. See Section VII, infra.

III. RATES

A. *Debt obligations*

The rates of tax levied on the acquisition of foreign debt obligations are a function of the period remaining to maturity. Specifically, the tax rates are intended to equal the present value of the difference between European interest rates and the United States interest rate. [17] In this manner the IET attempts to equalize foreign and domestic interest rates.

The base rates of tax are specified in the statute. [18] Because there is fluctuation in both the foreign and domestic interest rates, the President has the authority to increase or decrease the base rates in order to achieve the balance-of-payments objective of the IET. [19] Statutory ceilings are provided above which the tax may not be increased [20] but no floors are provided; the President thus has the power to effectively eliminate the tax.

In 1969, President Nixon set the present rates as indicated in the table on p. 6. [21]

B. *Stock*

The tax on the acquisition of foreign stock is 11.25% of the stock's actual value; thus stock is treated as long-term debt.

IV. EXEMPT TRANSACTIONS

Although the basic principles of the IET can be stated simply, the actual legislation is quite complex. This complexity arises from a profusion of exemptions and elective provisions. These provisions exempt from the tax those areas of foreign investment where the United States balance-of-payments is not adversely affected. In addition, they exempt investment that is not motivated by interest rate differentials. The exemptions also avoid impairing normal commercial transactions and reduce unnecessary hardship. Finally, they avoid conflicts with other national objectives, for example, aid to less developed countries. Many exemptions are quite technical and affect only special interest groups. This Section discusses the exemptions that have more general applicability.

16. § 4920 (a) (3).
17. H. R. REP. No. 1046, 88th Cong. 1st Sess. 11-12 (1963).
18. § 4911 (b) (1). With respect to debt obligations, the base rates range from 1.05% (for a maturity period between 1 and 1¼ years) to 15% (for a maturity period exceeding 28½ years). The base rate for stock is 15%.
19. § 4911 (b) (2).
20. The ceiling is 22.5% in the case of stock and ranges from 1.58% (for a maturity period between 1 and 1¼ years) to 22.5% (for a maturity period exceeding 28½ years) in the case of debt obligations. See § 4911 (b) (2).
21. Exec. Order No. 11464, 1969-1 CB 292.

If the period remaining to maturity is:	The rate of tax as a percentage of actual value is:
At least 1 year, but less than 1¼ years	0.79
At least 1¼ years, but less than 1½ years	0.98
At least 1½ years, but less than 1¾ years	1.13
At least 1¾ years, but less than 2¼ years	1.39
At least 2¼ years, but less than 2¾ years	1.73
At least 2¾ years, but less than 3½ years	2.06
At least 3½ years, but less than 4½ years	2.66
At least 4½ years, but less than 5½ years	3.26
At least 5½ years, but less than 6½ years	3.83
At least 6½ years, but less than 7½ years	4.35
At least 7½ years, but less than 8½ years	4.88
At least 8½ years, but less than 9½ years	5.33
At least 9½ years, but less than 10½ years	5.78
At least 10½ years, but less than 11½ years	6.23
At least 11½ years, but less than 13½ years	6.83
At least 13½ years, but less than 16½ years	7.73
At least 16½ years, but less than 18½ years	8.51
At least 18½ years, but less than 21½ years	9.19
At least 21½ years, but less than 23½ years	9.79
At least 23½ years, but less than 26½ years	10.31
At least 26½ years, but less than 28½ years	10.76
28½ years or more	11.25

A. *Prior United States ownership*

Since transactions between United States persons do not affect the balance-of-payments, an exemption is provided for foreign securities acquired from a United States person. [22] The seller must have been a United States person throughout his period of ownership (or since July 18, 1963) and must have either paid the IET with respect to his acquisition of the securities or acquired them tax-free.

B. *Investments in less developed countries or areas*

To avoid deterring the flow of private capital to less developed areas, an exemption is provided for the acquisition of: [23]

22. § 4918 (a). An exemption from the IET is provided for any acquisitions made by a resident (who is not a United States citizen) during the first 90 days after becoming a resident. § 4914 (b) (15). On a subsequent disposition of the securities, the resident is not considered as a United States person. § 4914 (j). Therefore, if the resident were to sell the securities, the purchaser could not claim an exemption on the grounds of having purchased them from a United States person.

23. § 4916 (a).

(1) debt obligations issued or guaranteed by the governments (national or local) of a less developed country, [24] or by an agency or instrumentality of such governments; (2) stock or debt obligations of a less developed country corporation with the exception of certain shipping corporations (discussed infra); or (3) debt obligations issued by an individual or partnership resident in a less developed country in return for money or other property which is used wholly within one or more less developed countries.

Prior to 1973, stock or debt obligations of all less developed country corporations (LDCC's) were exempt from the IET. In general, the LDCC's are those foreign corporations that have significant operations within less developed countries. [25] Included, however, are the so-called less developed country shipping corporations. These are foreign corporations that derive a large percentage of their income from the operation of ships or aircraft registered in less developed countries and whose stock is substantially owned by United States persons or residents of those countries. Experience has shown that these types of shipping corporations do not make capital investments in the less developed countries and thus their securities should not be exempt from tax. Accordingly the 1973 Interest Equalization Tax Extension Act (1973 Act) taxes the acquisition of securities issued by these shipping corporations after January 29, 1973. [26]

C. *Direct investments*

1. *In foreign corporations or partnerships*

The acquisition of a foreign corporation's securities is exempt if immediately after the acquisition the United States person owns (directly or indirectly) at least 10% of the total combined voting power of all classes of stock of the foreign corpora-

24. The following areas and countries are designated as less developed countries for purposes of the IET:
(1) All foreign countries (including Trust Territories) in existence on or after June 11, 1966, other than Australia, Austria, Belgium, Canada, Denmark, Federal Republic of Germany, France, Iran, Iraq, Ireland, Italy, Japan, Kuwait, Kuwait-Saudi Arabia Neutral Zone, Libya, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Saudi Arabia, Spain, Sweden, Switzerland, Union of South Africa, United Kingdom, and any foreign country within the Sino-Soviet bloc (defined infra).
(2) A territory, department, province, and possession (other than Abu Dhabi, the Bahamas, Bahrain, Bermuda, Hong Kong, and Qatar), of any foreign country existing on or after June 11, 1966, except a foreign country within the Sino-Soviet bloc, if the territory, department, province, or possession is overseas from the foreign country of which it is a territory, department, province, or possession; and
(3) Puerto Rico and all possessions of the United States.
The term "foreign country within the Sino-Soviet bloc" includes Albania, Bulgaria, any part of China which is dominated or controlled by International Communism, Cuba, Czechoslovakia, Estonia, Hungary, any part of Korea which is dominated or controlled by International Communism, Latvia, Lithuania, Outer Mongolia, Poland (including any area under its provisional administration), Rumania, Soviet Zone of Germany and the Soviet Sector of Berlin, Tibet, Union of Soviet Socialist Republics, the Kurile Islands, Southern Sakhalin and areas in East Prussia, which are under the provisional administration of the Union of Soviet Socialist Republics, and any part of Viet Nam which is dominated or controlled by International Communism. Exec. Order 11071, 1963-1 CB 137; Exec. Order 11224, 1965-1 CB 507; Exec. Order 11285, 1966-2 CB 480.

25. The precise definition of a less developed country corporation for purposes of the IET is rather elaborate. See § 4916 (c) (1).

26. § 4916 (e). Special rules apply to commitments existing before January 29, 1973.

tion.[27] The exemption also applies to securities acquired from a foreign partnership, if immediately after the acquisition the United States person is entitled to at least a 10% interest in the partnership's profits.[28]

Direct investment in foreign corporations or partnerships is exempted from the IET because such investment is usually concerned with long-range profitability and market position, rather than interest rate differentials.[29] It should be noted, however, that foreign direct investment is regulated by the Office of Foreign Direct Investment.[30]

In order to prevent tax avoidance, (e.g., by using a more than 10% owned foreign corporation to acquire foreign securities) the exemption is denied if the foreign corporation or partnership (other than commercial banks, underwriters, and certain domestic corporations electing to be treated as a foreign corporation)[31] is formed or availed of for the principal purpose of acquiring foreign securities that would have been subject to the IET if acquired directly by the United States person.[32] The exemption is also denied if the securities were acquired with an intent to sell any part of them to United States persons.

2. *In the United States*

Prior to 1973, foreign corporations or partnerships wishing to make direct investments in the United States could not raise funds from United States persons without the transaction being subject to the IET. In order to encourage foreign investment within the United States, the 1973 Act exempts foreign stock or debt obligations issued for the purpose of financing new or additional direct investment in the United States if, inter alia:[33]

(1) at least 50 percent of the total funds required for the direct investment will come from sources outside the United States;
(2) such investment will be made for a period of at least 10 years; and
(3) during such 10-year period the aggregate amount of all investments in the United States by the foreign issuer or obligor will at no time be reduced below the aggregate amount of such investments as determined immediately after the investment to which the exclusion applies.

D. *Acquisitions required under foreign law*[34]

If a United States person doing business in a foreign country is required by the laws of that country to hold a minimum amount of securities, their acquisition will be exempt from the IET.[35] The exemption also applies if the acquisition is made in

27. § 4915 (a) (1). Also exempted are debt obligations which a United States parent receives from its 10% owned foreign subsidiary, if such obligations were received by the subsidiary in the ordinary course of its trade or business as a result of the sale or rental of products manufactured or assembled by it.
Id. This rule allows the United States parent to factor the receivables of its foreign subsidiary. Special rules apply to "creeping acquisitions". See § 4915 (a) (2).
28. § 4915 (a) (1).
29. H. R. REP. No. 1046, 88th Cong., 1st Sess. 15 (1963).
30. See Section VII A, infra.
31. See Sections VII B, C, and D, infra.
32. § 4915 (c).
33. § 4922.
34. For the treatment of stock or debt obligations acquired in connection with nationalization, expropriation, seizure, etc. § 4914 (k).
35. § 4914 (b) (3). On a subsequent transfer of such securities, the United States person will be treated as a foreign person. See note 22, supra.

conformity with foreign law as a substitute for the payment of tax.

E. *Export transactions and financing*

In order not to impede the export of United States goods and services, exemptions are provided for securities acquired in connection with export credit transactions.

1. *Intangible personal property*

If foreign stock or debt obligations are acquired arising out of the sale or license of patents, inventions, models, copyrights, secret processes, trademarks, and other intangible personal property, the acquisition is exempt from the IET provided at least 85% of the purchase price or license fee is attributable to the sale or license of property produced or developed in the United States by the seller or licensor.[36]

2. *Tangible personal property*

a. Producing or manufacturing exporter

This exemption is directed toward United States persons who contract to supply an entire plant or installation (turn-key contract) and are required to take part of the contract price in the form of foreign securities. These persons often sub-contract some of the work to non-United States persons.[37] In order not to affect their competitive position, an exemption is provided if: (1) at least 30% of the purchase price, or 60% of the actual value of the foreign stock or debt obligation acquired is attributable to the sale of goods produced in the United States, or to services performed, by the seller, and (2) at least 50% of the purchase price or 100% of the value of the stock or debt acquired is attributable to the sale of United States produced goods or services.[38]

b. Merchant exporters

The 1973 Act enlarges the conditions under which debt obligations acquired by merchant (i.e., non-producing) exporters are exempt from the IET. Debt obligations arising out of the sale or lease of tangible personal property or services (or both) are exempt if at least 85% of the amount of the loan is attributable to the sale or lease of United States made goods or to the performance of services by United States persons. The acquisition of the debt obligations must be reasonably necessary to effectuate the sale or lease of the property or services and the terms of the obligation must be commercially reasonable.[39]

3. *Loans guaranteed by agencies of the United States*

Exempt from the IET are debt obligations arising out of the sale or lease of tangible personal property or the provision of services (or both) by any United States person if payment of the debt obligations is guaranteed or insured by a United States agency (e.g., the Export-Import Bank or the Foreign Credit Insurance Association).

4. *Export related loans (foreign distribution facilities)*

Debt obligations resulting from a loan that the debtor will use for the construction or improvement of facilities maintained by it

36. § 4914 (c) (3).
37. H. R. REP. No. 1046, 88th Cong., 1st Sess. 17 (1963).
38. § 4914 (c) (2). A similar rule, limited to debt obligations, is applicable to export leases. § 4914 (c) (6).
39. § 4914 (c) (1) (B). See also § 4914 (c) (6) (B). The refunding or the refinancing of the debt obligation may also qualify for the exemption. § 4914 (c) (8).
40. § 4914 (c) (1) (A).

outside the United States and used for the storage, handling, transportation, processing, packaging, or servicing of property, a substantial portion of which will be produced in the United States by the debtor, are exempt from the IET. [41] This provision facilitates the financing of the foreign distribution facilities of United States producer-exporters.

5. *Loss of exemption*

In order to prevent abuse (e.g., by using an export credit transaction as a subterfuge for a financing transaction) the exemptions provided above for export-related transactions will be revoked upon a subsequent transfer of the securities unless the transfer is to certain specified persons (e.g., an agency of the United States or a commercial bank acquiring the securities in the ordinary course of its commercial banking business). [42]

F. *Japanese and Canadian Securities*

The President has the power to exempt the acquisition of foreign securities, whether issued by a foreign government (including local governments) or a corporation organized under its laws, or by any individual resident therein, if the application of the IET would have such consequences for that foreign government as to imperil the stability of the international monetary system. [43] This power is in accordance with the United States' treaty obligation to the International Monetary Fund which requires the United States "... to collaborate with the fund to promote exchange stability..." [44]

The President has exercised the above power with respect to both Japanese and Canadian securities. The acquisition of a new issue of Canadian securities (with the exception of securities issued by a Canadian corporation, partnership, or trust formed for the principal purpose of acquiring stock or debt obligations of a Canadian or other foreign issuer or obligor) is exempt from the IET. [45] The future of this provision is somewhat in doubt as the 1973 Act [46] requires the Secretary of the Treasury to re-examine the exemption for Canadian securities.

Prior to February 3, 1970, the President had also exempted, under certain conditions, debt obligations issued by the Govenement of Japan and by certain Japanese corporations. [47] President Nixon revoked this exemption for debt obligations acquired after February 3, 1970, but generally continued it for any stock acquired pursuant to conversion rights. [48]

G. *Commercial bank loans*

Debt obligations acquired by a commercial bank in the making of loans in the ordinary course of its commercial banking business are exempt from the IET. This exemption is subject to modification by the President if he finds that such loans materially impair the effectiveness of the IET

41. § 4914 (c) (4).
42. See generally § 4914 (j). Debt obligations guaranteed by an agency of the United States can be transferred to any person without a loss of the exemption.
43. § 4917 (a).
44. Articles of agreement between the United States of America and other powers respecting the International Monetary Fund, Bretton Woods Agreement, Art. IV, Sec. 4 (a).
45. Exec. Order 11304, 1966-2 CB 482, amending Exec. Order 11175, 1964-2 CB 460.
46. 87 Stat. 12.
47. See Exec. Order 11211, 1965-1 CB 509, as amended by Exec. Order 11368, 1967-2 CB 386. Stock acquired by the conversion of a previously exempt debt obligation was also exempt under certain conditions.
48. See Exec. Order 11506, 1970-1 CB 254.

by substituting for other debt obligations that are subject to the tax. [49] In a series of Executive Orders, [50] the President exercised this authority and narrowed the scope of the exemption. The exemption currently applies, inter alia, to the acquisition of debt obligations by a commercial bank at any of its branches located outside of the United States [51] and to the acquisition of debt obligations arising out of the sale or lease of personal property or services under conditions similar to those discussed in Section IV. E 2 (b), supra. [52]

H. *Foreign property*

1. *Tangible property*
The acquisition of a debt obligation arising out of the sale of tangible property located outside the United States that was held for personal use by the person acquiring the obligation is exempt from the IET. [53]

2. *Real property*
A debt obligation arising out of the sale of real property (other than real property included in (1) above) and located outside the United States is exempt if acquired by the person selling the property. [54]

I. *Foreign stock treated as domestic*
The stock of a foreign corporation (other than a company registered under the Investment Company Act of 1940) is considered to be domestic stock if: (1) as of the corporation's latest record date before July 19, 1963, more than 65% of the stock was held of record by U.S. persons, or (2) the stock's principal market during 1962 was one or more U.S. securities exchanges registered with the Securities and Exchange Commission, and more than 50% of the stock was held of record by U.S. persons. [55] This provision is intended to grant an exemption for stock of a foreign corporation in which there was substantial American ownership at the time the IET first became effective.

J. *Additional exemptions* [56]
Other exemptions apply to loans to foreign corporations to assure sources of raw materials, securities acquired by insurance companies, securities acquired by tax-exempt organizations, student loans, stock purchased to acquire a dwelling, acquisitions by United States persons residing in foreign countries of stock of certain foreign corporations investing exclusively in the United States, sales by underwriters and dealers to foreign persons, acquisitions of debt on the sale or liquidation of foreign subsidiaries or branches, mortgages secured by United States property, and direct investments in certain lending and finance corporations.

VII. ELECTIONS

The IET legislation contains a number of elective provisions that enable a United States person to be treated as a foreign issuer or obligor. In addition, a United States corporation may elect to treat its debt obligations as subject to the IET if acquired by United States persons.

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49. § 4931 (a).
50. Exec. Order 11198, 1965-1 CB 513; Exec. Order 11304, 1966-2 CB 482; Exec. Order 11328, 1967-1 CB 316.
51. Exec. Order 11328, 1967-1 CB 316. This exemption is one of the advantages a United States bank obtains by establishing a foreign branch office.
52. See § 4931 (c) (1).
53. § 4914 (b) (14) (A).
54. § 4914 (b) (14) (B).
55. § 4920 (b) (1).
56. See generally §§ 4914, 4919.

A. *Debt obligations treated as subject to the IET*

1. *Prior to 1971*

In 1968 the Department of Commerce introduced its mandatory Foreign Direct Investment Program, administered by the Office of Foreign Direct Investment (OFDI).[57] This program limits foreign direct investment by United States persons and forces many United States corporations to finance their overseas operations by borrowing abroad. This borrowing is often done through a specially created foreign or domestic finance subsidiary.[58]

The use of a finance subsidiary accomplishes two objectives. First, it allows interest to be paid to foreigners free of withholding taxes.[59] This condition is necessary as a practical matter if the issue is to be marketable. Second, the debt obligations issued by a finance subsidiary are subject to the IET if purchased by a United States person.[60] This provision enables the issue to qualify as long-term borrowing for purposes of the OFDI, a classification which is generally advantageous to the United States parent.[61]

2. *1971 and 1973 amendments*

The incorporation and use of a finance subsidiary requires careful tax planning since the required objectives are achieved only by the proper utilization of both domestic tax law and tax treaties. Finance subsidiaries are also costly in terms of the administrative effort needed to properly police them. In an attempt to eliminate these subsidiaries and to simplify foreign financing, the 1971 Interest Equalization Tax Extension Act[62] (1971 Act) made two changes. First, it allowed a United States corporation (or partnership) to treat its debt obligations as those of a foreign obligor, and therefore subject to the IET if acquired by United States persons.[63] Second, the inte-

57. See generally Foreign Direct Investment Regulations, 15 C. F. R. § 1000 et seq.

58. Finance subsidiaries may also be used to raise money in the Eurodollar market for use by the parent in the United States. If the money raised by the finance subsidiary is to be used in the United States, the subsidiary is usually incorporated abroad. Because of favorable treaty provisions, foreign finance subsidiaries are often incorporated in Luxembourg, the Netherlands, or the Netherlands Antilles. If the money raised by the finance subsidiary is to be used abroad, the subsidiary is usually incorporated in the United States. However, if the money is to be used in a less developed country, the subsidiary is usually incorporated abroad. For a detailed analysis of the organization and use of finance subsidiaries, see Boffa, International Finance Subsidiaries, 215-2nd T.M.; see also Forsyth and Singer, The IET Extension Act: Simplification of foreign financing for United States companies, 35 J. TAX. 80 (1971).

59. In the case of domestic finance subsidiaries, this result is achieved because of the "80-20" rule. Under domestic tax law, interest paid by a domestic corporation is exempt from the United States withholding tax if less than 20% of the corporation's gross income comes from United States sources. § 861 (a) (1). Since domestic finance subsidiaries (also known as "80-20" subsidiaries) invest most of their funds abroad, they satisfy the "80-20" test. Foreign finance subsidiaries are incorporated in those countries where tax treaties provide for the payment of interest free of withholding taxes.

60. Domestic finance subsidiaries are normally formed or availed of for the principal purpose of obtaining funds for a foreign issuer or obligor. The securities issued by the subsidiary are therefore subject to the IET if acquired by United States persons. See text accompanying note 9, supra. Securities issued by a foreign finance subsidiary are subject to the IET under the normal principles.

61. See 16 C. F. R. § 1000.324.

62. 85 Stat. 13.

63. § 4912 (c). The tax on the acquisition of such obligations is levied at the rate applicable to the acquisition of stock issues (currently 11.25%).

rest payments on these debt obligations are exempt from the United States withholding tax provided the debt has a maturity period of less than 15 years and was originally purchased by underwriters with a view to distribution through resale. [64]

Although the 1971 Act allowed a corporation to both issue debt obligations that complied with the OFDI regulations and to make interest payments on these obligations free of withholding tax, it still failed to significantly reduce the use of finance subsidiaries. This failure stemmed from a difference between the estate tax treatment of debt obligations issued by a finance subsidiary and those issued directly by the parent. A nonresident alien is not subject to the United States estate tax with respect to debt obligations issued by a finance subsidiary, regardless of where the subsidiary is incorporated. [65] However, debt obligations issued by a United States corporation that elected to treat such obligations as a foreign issue for purposes of the IET were, in most cases, subject to the estate tax. [66] Because of this potential tax liability, United States corporations feared they could not market debt which they themselves had issued, and thus they continued to utilize finance subsidiaries.

The 1973 Act eliminates the disparity in estate tax treatment by providing an exemption from the estate tax for debt obligations that a United States corporation elects to treat as subject to the IET. [67] This exemption, together with the 1971 provisions, should now allow a corporation to directly issue its own debt and achieve the same advantages as if it had used a finance subsidiary.

B. *Foreign office of a United States securities dealer*

A United States corporation (or partnership) that is a dealer [68] in securities may elect to treat its foreign branch office as a foreign person. [69] This election enables the foreign branch to buy foreign securities free of the IET.

C. *Foreign lending and finance business*

A United States corporation (together with its subsidiaries) that is primarily engaged in the lending or finance business through foreign offices and that holds itself out as lending money to the public generally may elect to be treated as a foreign corporation. [70] This election places finance companies on the same competitive footing as the foreign branches of United States banks.

Prior to the 1973 Act, a corporation was considered to be primarily engaged in the lending or finance business only if it made loans whose remaining maturity period were less than 48 months. In order to re-

64. § 861 (a) (1) (G).

65. Foreign debt obligations are not included in a nonresident alien's gross estate. §§ 2103 and 2104. Debt obligations issued by domestic corporations are not included in a nonresident alien's gross estate if less than 20% of the corporation's gross income comes from United States sources. Since domestic finance subsidiaries are structured so that they comply with the "80-20" test (see note 59, supra), their debt obligations are exempt from the estate tax.

66. It would be unusual if the corporation could satisfy the "80-20" test.

67. § 2104 (c).

68. The term "dealer" means any person who is a member of a national securities association registered with the Securities and Exchange Commission and who is regularly engaged, as a merchant, in purchasing stock or debt obligations and selling them to customers with a view to the gains and profits which may be derived therefrom. § 4919 (c) (2).

69. § 4902 (a) (5).

70. § 4920 (a) (3) (C).

flect current trade practice, the 1973 Act increases this period to 60 months. [71]

D. *Commercial financing branches*

The foreign branch of a United States corporation that is primarily engaged in the trade or business of acquiring debt obligations arising out of the sale of tangible personal property produced, manufactured, or assembled by affiliated corporations may be treated as a foreign corporation under certain conditions. [72]

E. *Other elections*

Other elections apply to a United States registered management company [73], insurance companies, [74] lending or financing corporations, [75] and foreign underwriters. [76]

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71. § 4920 (a) (3A) (A).
72. § 4920 (a) (5A).
73. See § 4920 (a) (3) (B).
74. See § 4914 (e).
75. §§ 4920 (a) (3B) and 4915 (c) (3).
76. § 4920 (c).

SIJBREN CNOSSEN [1]:

SALES TAXATION IN INDONESIA

It is generally held that the tax system of a developing country should include a general sales tax, because of its high revenue potential at tolerable rates, restraining influence on household consumption and thus favorable effects on savings, relative simplicity, and administrative feasibility compared to an income tax. It is argued that the tax burden distribution of a sales tax can be improved through the exemption of basic necessities and the application of differential rates. For these and other reasons, Indonesia introduced a general sales tax in 1950. As revised in 1951, 1960 and 1968, the tax is a single stage levy imposed on importation and manufacture. A number of services are also taxable, but exports are free of tax. The general rate of tax is 10 per cent, but a 5 percent rate applies to a wide range of raw materials and intermediate goods, as well as to services; some luxury goods are taxed at 20 per cent. In fiscal year 1971, the sales tax contributed 12 per cent of the central government's total tax receipts, more than half of which was collected on imports. This article explores the general design of the tax, examines some structural problems, and briefly considers some of the chief alternatives.

GENERAL DESIGN OF THE TAX [2]

Taxable activities

The Indonesian Sales Tax Act charges three kinds of activities with tax: (a) the delivery of goods by manufacturers; (b) services rendered by specifically enumerated entrepreneurs; and (c) the importation of goods by entrepreneurs. An entrepreneur, including a manufacturer, is defined as "any person who, within Indonesia, independently carries on a business or profession". The qualifying term "independently" implies that employees are excluded.

Government activities are subject to the sales tax, unless they concern a form of activity which because of its nature can be performed by government only. Self-deliveries are not taxable. Manufacturing encompasses a wide range of activities — the Act includes production, manufacture, processing, growing or preparing of goods — whose common characteristic is change in the physical form of goods. Thus, in addition to industrial manufactures, agricultural and mining products are also included, but trading per se is not. Processing is covered only if the nature of the goods has changed; this means that activities involving the packing, sorting, mixing, and marking of goods are not taxable, unless the manufacturer himself performs them. Whether a change in the nature of a good has taken place depends largely on circumstances; restoring used and damaged goods to their original condition is not considered a change in nature, unless such goods were completely obsolete before the repair. Manufacturers and importers are subject to sales tax only if they deliver or import goods, defined as corporeal mov-

1. The author is on the staff of the International Monetary Fund, but this article represents his personal views only.

2. For a structural analysis and legal commentary, see Sijbren Cnossen, *The Indonesian Sales Tax: Status and Structure, Technical Features* (Kluwer: Deventer, The Netherlands, 1973).

able property. Following the concept of the Civil Code, goods are considered sold when they have been delivered, that is the ownership has been transferred, most commonly in pursuance of an agreement to buy and sell. [3]

Taxable price of manufactures

The taxable price of domestically produced goods is defined as the money value of goods sold at arm's length, and comprises all costs under whatever name, including packing and transportation expenses, as well as late and extra charges, incurred by the client, so long as they are paid in respect of the delivery of the good. However, the sales tax itself is not part of the selling price and it has to be quoted separately. An unusual feature of the Indonesian sales tax is that the tax becomes payable only when payment for the goods and services has been received, although manufacturers may be authorized to calculate the tax on an accrual basis of accounts. Thus, discounts for immediate cash payments are a reduction in ascertaining the taxable price and tax cannot be incurred for bad debts. Similarly, if the selling price is paid in installments, the tax is calculated accordingly. A tax credit is allowed on goods that are returned and on discounts extended after the full amount of the selling price has been paid.

Services and imports

The provisions governing the taxation of services and imports are broadly similar to those dealing with manufacturers. [4] However, in contrast to goods, services are not taxable when performed gratuitously, and there is no corresponding arm's length provision. Neither is an agreement required, although the consideration must be directly related to the service. Charges for services rendered which include the delivery of goods, for example in the case of repair shops, are not split into separate parts if the service element constitutes the dominant part. The import sales tax is collected by the customs authorities on the total of the sum of the c.i.f. value of the imports and duties payable thereon, plus an uplift of 5 per cent. A curious feature is that goods imported for personal use are free of the import sales tax, since the definition of 'entrepreneur' determines what imports are liable to tax.

Exemptions and rates

Basically two approaches have been adopted to provide for a more equitable burden distribution: exemptions and rate variations. All unprocessed foodstuffs such as rice, grains, vegetables, and fruit, as well as milk, fish, and eggs, are free from tax on the ground that they are basic necessities. Bamboo (an important construction material for the lower income groups), fuels, medicines, and textiles are exempted for the same reason. On the other hand, a number of luxury items such as expensive clothing, alcoholic beverages, passenger cars, gasoline, appliances, sound

3. See also K. S. Jap, "The Concept of Delivery of Goods by a Manufacturer under the Indonesian Sales Tax Act (1951—1968), *Bulletin for International Fiscal Documentation,* Vol. XXIII, May 1969, pp. 223-8.

4. The Indonesian Sales Tax Act lists the taxable services of the following entrepreneurs: notaries, lawyers or attorneys, consultants, administration offices, auditors, brokers, commission agents, auctioneers, contractors, (except food or foodstuff contractors), planning offices, repair workshops and service stations, all persons or institutions administering physical care, insurance companies (except transport insurance companies), lessors of movable goods, lessors of rooms (with the exception of living quarters), advertising offices, laundries, travel bureaus.

and photographic equipment, are subject to a higher rate of tax - 20 per cent, or double the standard rate. To mitigate cascade effects a large number of raw materials and intermediate products, including chemicals, minerals, metals, tools, implements, some agricultural products, and all services, are taxed at 5 per cent, which is half the standard rate of 10 per cent applied to most finished goods. The import sales tax rates, which can be easily ascertained as they are listed against the relevant tariff item, do not necessarily coincide with the rates applicable to the same domestic goods.

STRUCTURAL ISSUES

A number of problems are encountered in designing and administering a manufacturers' sales tax which may conflict with the objectives pursued or impede an efficient functioning of the tax. First, because the tax is added to the price of goods and services at every transaction, the sales tax becomes cumulative in its effect on prices, with uneven effects on different products depending on the number of transactions, thereby influencing consumer preferences and the form or method in which business is carried on. Even though the tax is basically a single-stage levy, cascading may occur to the extent that manufacturing is defined to include the production of raw materials and intermediate goods; besides sales tax is also imposed on imported goods which may be incorporated in the final product. Second, the taxation of imports may lead to discrimination against domestic goods, because the tax is levied at an earlier stage than corresponds to the import stage, or because inherent cascade effects impose a higher burden on domestically produced goods. Third, although a good case can be made for exempting exports, technical difficulties may arise with the refunding of tax paid in previous stages of production. Fourth, administrative problems are often encountered in applying the tax to services and to small manufacturers. These issues are briefly considered below.

Cumulative taxation

To prevent cumulative taxation, initially, the Indonesian Sales Tax Act allowed for a tax credit or refund for the tax paid on raw materials and supplies or on imports. However, the tax credit system was abolished in 1960 as part of a drive to increase tax collections; presumably it had also proved difficult to administer. [5] Elsewhere, for instance in Malaysia, cumulative effects are alleviated by way of the suspension technique whereby designated manufacturers are entitled to import or purchase from other manufacturers raw materials and other supplies free of tax, sales tax being levied only when a licensed manufacturer sells to an unlicensed firm. Experience indicates that there is little to choose between the tax credit and suspension rule; administratively, both are difficult to police effectively given the paucity of adequately trained tax officials and the dearth of proper business accounts in developing countries. To restrict multiple taxation, Indonesia, as for instance also Thailand, at present relies on the

5. Compare M. D. Dris, "Taxation in Indonesia", *Ekonomi dan Keuangan Indonesia* (Economics and Finance in Indonesia), August/September 1958, p. 481: "the proper application of this provision ... is hindered by serious practical difficulties. Most undertakings do not have an accounting system capable of showing the amount and the cost of the materials and supplies already taxed and actually used during each tax period."

application of a reduced rate to various raw materials and other industrial goods. As the extent of multiple taxation may be serious in only a few industries now taxed, this approach may provide an acceptable solution, particularly if revenue considerations are taken into account.

Taxation of imports

Indonesia has not attempted to harmonize import sales tax rates with the generally lower rate on domestically produced goods. The lower rates are justifiable to the extent that domestically produced goods are subject to cumulative effects, or because the price of domestic manufactures includes a large segment of marketing cost not reflected in the price of imports. A tax uplift of 5 per cent is also applied to the duty-inclusive c.i.f. value of imports before the import sales tax is calculated. Although this is considered an arbitrary and crude device, various other countries such as Thailand and the Philippines also apply such uplifts. However, the latter keep domestic and import sales tax rates at par, the desire for protecting domestic industries being left to the import duty tariff proper.

Exemption of exports

The Sales Tax Act exempts not only direct exports, but also authorizes the Minister of Finance to exempt the total production of any commodity which by its nature is principally destined for export, even though some may be utilized locally. This unique rule, which unfortunately has fallen into disuse since 1964, ensures that the produce of smallholders being bought and sold by a number of processors before delivery for export, does not attract sales tax at each stage. In this situation, refunds at the time of export are difficult to effect in view of administrative requirements for proving that the tax has been paid. The significance of this exemption may be gauged by the fact that smallholders export 90 per cent of their rubber, almost 80 per cent of their palm products, and more than 60 per cent of their coffee, linking the small farmer to the money economy and imbuing him with invaluable entrepreneurial skills. On these grounds it would appear desirable to restore the exemption. This is not an argument against the taxation of particular agricultural export products for which a favorable international demand situation exists, but it would then be better to impose the duties directly at the export stage.

Taxation of services and small manufacturers

Since they are retail in nature, conceptually the inclusion of services under a manufacturers' sales tax is less defensible than under other forms of sales taxation. Although discriminatory features, such as the higher taxable price at the retail level can be taken care of by the imposition of a lower rate of tax, cumulative effects remain to the extent that services are performed for manufacturers. Moreover, because of their retail nature, administratively services are generally more difficult to tax than goods.

This argument also applies to small manufacturers of which there may well be 3 million in Indonesia, particularly if it is realized that even large and medium sized establishments are small by most standards: almost 90 per cent of these establishments employ less than 50 persons each. For administrative reasons therefore, these should either be exempted or taxed indirectly, for instance, by way of their inputs. Unfortunately, the Indonesian Sales

Tax Act is very vague in this respect. Only the cottage industry working for a principal is exempted from the charge. A solution may be found in an exemption based on turnover, but that would create additional administrative ramifications to the extent that the determination of turnover for applying the exemption provision may be as difficult as ascertaining it for tax purposes. A more workable criterion may be the number of laborers. For instance, it should be possible to exempt small establishments employing five or less workers, confining the tax liability to the sales tax paid on their inputs which are either imported or produced by large manufacturing units.

EVALUATION OF THE TAX

It is generally believed that a manufacturers' sales tax can be successfully implemented in developing countries. This form of sales tax offers also better possibilities for avoiding the discriminatory features of a multipoint cumulative tax.

Pakistan, Thailand, the Philippines and most recently Malaysia also impose a general single stage sales tax at the manufacturer's level with varying degrees of success.

Like Indonesia, Thailand applies a lower rate to raw materials and intermediate goods, but Pakistan, and the Philippines provide for a tax credit in respect of the tax paid on these goods, while Malaysia adopted the suspension rule in conjunction with a licensing system. All countries exempt basic consumption goods as well as exports. Pakistan and Malaysia exclude services from the taxable base, Thailand and Indonesia include them, while the Philippines taxes services under separate legislation. But for Indonesia, these countries tax imports at the same rate as domestically produced commodities, although Pakistan and Malaysia do not employ mark-up systems.

To conclude, the Indonesian manufacturers' sales tax is a workable tax, although it has been difficult to formulate a conscious policy for the treatment of producers goods and the exemption of exports, the treatment of small manufacturers is not adequately dealt with, manufacturing activities are not precisely defined - a problem under any manufacturers' sales tax - and the Act's provisions are rather sweeping, an effect which is aggravated by the lack of a proper appeal system. In spite of these shortcomings, however, the potential for attaining specific policy objectives and implementing the tax properly, appear better than under the alternative of a value-added tax.

This form of sales tax which is applied to the value added at each stage of production and distribution, usually measured under the subtractive technique in conjunction with a tax credit device, is widely advocated on grounds of its so-called internal neutrality - the tax is only a function of taxable price and rate and not of the number of stages through which the product has passed - and external neutrality - exports are completely freed of tax by refunding exporters for the tax paid at earlier stages. Whether these premises are realistic depends, however, on how well the value added tax is administered. If the tax administration service does not have a sufficient number of auditors and the accounts maintained by most businesses are inadequate, internal neutrality may come to naught in spite of the so-called self-enforcing features of the tax (the possibility of checking claims for tax credits by one taxpayer against tax paid by

another); equally, claims for refunds at the export stage may remain unaffected. The point is that it is unrealistic to assume that a value-added tax will be properly administered, even though other taxes are not. In this connection, it may be instructive to refer to South Viet-Nam's experience.

Until recently, this country also employed a manufacturers' sales tax, but replaced it by a value-added tax in the spring of 1973. However, after six weeks, the new tax proved a failure as it was too sophisticated and complicated to enforce in a country where tax evasion is widespread. In practice, the tax was imposed as an across the board 10 per cent sales tax with all accompanying multi-stage cumulative repercussions which were supposed to have been avoided in the first place. [6]

Another question is wether Indonesia would not have done better to postpone the introduction of a general sales tax and extend its excise system. Even now the sales tax revenue derived from domestically produced goods and services is not much more than the yield of the excise duty on tobacco alone; in fact most of the revenue is collected from a few agricultural commodities. Thus, sugar (on which an excise duty is also imposed) and rubber yield more than 40 per cent of domestic sales tax revenue. If building activities (which could also be taxed through an excise on cement) are added, close to two-thirds of the domestic tax base is covered. Under an excise system, import tariffs could be raised to substitute for the import sales tax revenue, particularly since a credit is not given anyway. Generally, a few carefully selected excises would be easier to administer, their incentive effects could be more consciously designed to be beneficial, while some luxury excise taxes might be added to achieve a progressive incidence. However, given its existence in Indonesia, it is probably better to retain and improve the present manufacturers' sales tax. The best policy for the years to come appears then to remove some of the structural defects of the tax, clarify the meaning of its charging provisions through departmental instructions, and administer the tax as effectively as possible.

6. Washington Post, August 11, 1973, p. A5.

* * * DOCUMENTS * * *

INDIA

Decision of the Madras High Court of May 4, 1973[1]

NONRESIDENT COMPANY SUPPLYING TECHNICAL INFORMATION, KNOW HOW, TECHNICAL MANAGEMENT ETC. PART OF THE FEE TAXABLE

A nonresident company concluded an agreement with an Indian company for rendering certain services, inter alia: (i) the supply of technical information and know how with respect to the manufacture of bonded and abrasive products by the Indian company; (ii) the supply of technical management (factory design, lay out, plant and equipment, production, purchase of materials, manufacturing specifications, quality of product); (iii) the supply of technical information of all developments in the manufacture of the products; (iv) the providing of a resident factory manager for starting the plant and for the supervision of its operations during the initial period; (v) the providing of foreign technical staff; (vi) the training of Indian staff. The salaries of the foreign staff were paid by the Indian company. The nonresident company would receive a fee equal to 3% of the net sales of the products manufactured by the Indian company. The tax administration considered 75% of the technical fee was taxable in India. The High Court held, inter alia:

(a) that the tax administration could not contend that the nonresident company worked in conjunction with the Indian company in the manufacture of the latter's products and that the fees it received related to the part it played in such manufacture;

(b) that the services rendered in the examination and approval of the factory design and lay out, advice as to the nature of the plant and equipment necessary etc. have not been rendered in India;

(c) that the providing of foreign staff to work with the Indian company to run the factory in the initial stage and to train Indian staff is a service rendered in India;

(d) that know how agreements may constitute a "business connection", this will depend on the facts and circumstances surrounding each case;

(e) the nonresident company rendered at least some services in India constituting a "business connection" and, therefore, the technical fee received by it is fully taxable in India.

JUDGMENT

The judgment of the court was delivered by Ramanujam J.

The assessee, a foreign company having its registered office in America, has been declared as a company by the Central Board of Revenue under section 2(5A) of the Indian Income-tax Act, 1922. The assessee-company specialised in the manufacture of bonded and coated abrasive products. As part of its business the assessee con-

1. Reported in Income Tax Reports, Madras (1973) 92 I.T.R. at 411.

tinuously carries on research with a view to find new methods for the manufacture of these products and to improve their quality. The fruits of this research are incorporated in pamphlets which are made available not only to its own technicians but also to such other persons, firms or companies with whom the assessee has entered into agreeement and who are engaged in the manufacture of these products.

The assessee entered into an agreement, dated June 22, 1955, with an Indian company, Messrs. Carborundum Universal Ltd., having its registered office at Madras. According to the terms of the said agreement the assessee was to receive from the Indian company an annual service fee equal to 3 per cent. of the net sales of the products manufactured by the Indian company each year. The services to be rendered by the assessee to the Indian company include:

(1) furnishing of technical information and know-how with respect to the manufacture of bonded and coated abrasive products by the Indian company,

(2) furnishing to the Indian company technical management, including factory design and lay-out, plant and equipment, production, purchase of materials, manufacturing specifications and quality of product,

(3) furnishing to the Indian company comprehensive technical information of all developments in the manufacture of the products,

(4) providing the Indian company with a resident factory manager for starting the plant and superintending its operations during its initial production stages and other foreign technical personnel necessary for the operation of the plant of the Indian company, and

(5) training here and abroad the Indian personnel to replace the foreign technical personnel as rapidly as possible. The salary and other emoluments of these foreign technical personnel were to be paid by the Indian company so long as they are in its service.

In pursuance of the said agreement, the Indian company set up a factory near Madras for the manufacture of bonded and coated abrasive products. According to the assessee, the factory design and lay-out were prepared by the Indian company in India and were sent to its office in the U.S.A. for examination and advice and the assessee examined it and sent its advice to the Indian company by post along with the information as to the nature of the plant and equipment required for the factory and also as regards the production data. It also lent the services of a number of foreign technical personnel to the Indian company for the purpose of helping the latter to start and run the factory. The terms of service of such personnel, however, were fixed by the Indian company under agreements entered into between such personnel and the company and the salaries and emoluments of such personnel were also paid by the Indian company.

The said foreign technical personnel actually worked in the factory of the Indian company and, as part of their work, imparted training to the Indian personnel working in the factory. Some of the personnel of the Indian company were also sent to the foreign countries from time to time where technical training was imparted to them by the assessee. The assessee also sent by post technical bulletins, instructional films, etc., from time to time to the Indian company containing information which was necessary for the manufacture of the products by the Indian company. The assessee also gave advice from time to time to the

officers of the Indian company with regard to the manufacture of the products.

During the accounting year relevant to the assessment year 1957-58, the assessee had received a sum of Rs. 95,762 from the Indian company as its service fee under the terms of the agreement referred to above, being equal to 3 per cent, of the net sales of the products manufactured by the Indian company in the year of account. In respect of this sum, the income-tax and super-tax were deducted by the Indian company at the prescribed rates. The assessee, thereafter, applied for refund of the entire income-tax and super-tax so deducted at source on the ground that the entire technical fee was earned by the assessee outside the taxable territories. The Income-tax Officer took the view that at least 5 per cent. of the technical fee should be taken to have been earned by the assessee in India and that the assessee was liable to be taxed under the Income-tax Act to that extent. Deducting the tax payable on that part of the income, the Income-tax Officer directed the refund of Rs. 56,606.75 to the assessee.

The Commissioner of Income-tax, however, initiated proceedings under section 33B of the Indian Income-tax Act, 1922, as he was of the view that at least 75 per cent. of the technical fee earned by the assessee would have accrued or arisen in India. After issuing a show cause notice and after hearing the objections of the assessee, the Commissioner determined a sum of Rs. 71,822 as being assessable to income-tax and super-tax and directed the Income-tax Officer to revise the assessment accordingly. According to the Commissioner, though the technical information was supplied by the assessee-company from outside India, the information having been put to use in India, the technical fee should be taken to have been earned in India and although the foreign technical personnel were paid for by and the control over them vested with the Indian company, their services having been made available by the assessee in India, it should be taken that the technical fee was for providing such services in India. The Commissioner was also of the view that the technical fee paid to the assessee or at least a portion thereof was in the nature of royalty which has to be taken as income accruing in India.

Aggrieved against the order of the Commissioner, the assessee preferred an appeal to the Appellate Tribunal contending that no portion of the technical fee received from the Indian company could be assessed in India. The Tribunal, after referring to the several clauses in the agreement and the nature of the services rendered by the assessee to the Indian company for starting and running the factory in India, found that these services consisted mostly of examination of the factory design and the lay-out prepared by the Indian company and in sending advice by post regarding the nature of the plant and equipment required for the factory and in the supply of bulletin, etc., and that these services were not rendered in India. With regard to the foreign technical personnel supplied by the assessee to the Indian company, the Tribunal found that the assessee's responsibility ended with the provision of such technicians and that as the services rendered by the foreign technical personnel including the training imparted to the Indian personnel at the factory were governed by the agreement entered into between the Indian company and such personnel, they cannot be taken to be the services rendered by the assessee under the agreement. As regards training imparted

to the Indian personnel by the assessee in foreign countries, the Tribunal held that such training having been admittedly imparted outside India, the services of the assessee in this respect cannot be said to have been rendered in India. On these findings, the Appellate Tribunal disagreed with the view of the Commissioner that the technical fee paid was for the use of the information by the Indian company according to the volume and extent of such use and held that the agreement itself did not make the service fee of 3 per cent. payable by the assessee dependent upon the use of the information in India or on the volume and the extent of such use, that on the other hand the service fee was payable to the assessee, whether or not the Indian company made use of the information supplied by the assessee and irrespective of the volume and extent of such use. The Tribunal also disagreed with the Commissioner's view that the technical fee amounted to royalty. Ultimately, the Tribunal set aside the order of the Commissioner. At the instance of the Commissioner the following question has been referred to this court:

"Whether, on the facts and in the circumstances of the case, the technical service fee in excess of 5 per cent. received by the assessee-company from the Indian company during the account year relevant to the assessment year 1957-58 has accrued or arisen in India?"

Before us, firstly, it is contended by the revenue that the assessee must be deemed to be working in conjunction with the Indian company in the manufacture of abrasive products in India and, therefore, the service fee received by the assessee should be taken to relate to the part played by the assessee in the manufacture of abrasive products in India. But, we are of the view that there is no material on record to support this contention. The relationship between the assessee and the Indian company is governed by the agreement dated June 22, 1955, and the terms of the agreement do not indicate that the assessee worked in conjunction with the Indian company in the manufacture of abrasive products in India.

Then, it is contended by the revenue that the said agreement between the assessee and the Indian company clearly establishes a business connection between them, that the technical fee received, accrued or arose from such business connection in India, that, therefore, the technical fee received becomes taxable under section 4(1)(c) read with section 42 of the Income-tax Act, that the Tribunal has clearly overlooked this position when it held that the technical fee received by the assessee was not in relation to any service rendered in India and that the entire services of the assessee were rendered outside India. The learned counsel for the assessee would, however, contend that the plea based on "business connection" was not put forward by the revenue at any time before and that, therefore, it should not be allowed to be raised at the stage of the reference. But we are of the view that the question referred to us is general in its terms and comprehends the question of applicability of section 42(1) to the transactions in question. The question which we are asked to answer is whether the technical fee in question received by the assessee from the Indian company has accrued or arisen in India, and, in considering that question, one cannot but consider the scope of section 42 which practically defines as to what is accrual. Therefore, we proceed to consider the question arising in this case in the

light of sections 3, 4(1) and 42(1) of the Income-tax Act.

Section 3 brings to charge the total income of the previous year of every individual, Hindu undivided family, and company, local authority or firm and other association of persons. Section 4 states that the total income of any previous year of any person would include all income, profits and gains from whatever source derived, which, if such person is not resident in India during the year, accrue or arise or are deemed to accrue or arise to him in India during such year. The assessee in this case is a non-resident company, and if any portion of its income has accrued or arisen in India during the year, such portion of the income is liable to be charged to income-tax under section 3 read with section 4. Section 4, in turn, attracts section 42(1) and that provision, so far as it is relevant, is as follows:

"All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in the taxable territories, ... shall be deemed to be income accruing or arising within the taxable territories, and where the person entitled to the income, profits or gains is not resident in the taxable territories, shall be chargeable to income-tax either in his name or in the name of his agent, ..."

According to the revenue, the technical fee received by the assessee from the Indian company has to be taken as having accrued or arisen in India in view of section 42(1), while the assessee would contend that section 42(1) cannot be invoked in the case of mere "know-how" agreements such as the agreement in question which does not contemplate any service being rendered in India.

In *Bangalore Woollen, Cotton and Silk Mills Co. Ltd.* v. *Commissioner of Income-tax,* [2] Satyanarayana Rao J., dealing with the scope of the words "business connection" occurring in section 42(1), expressed:

"In order to elucidate the meaning of the expression 'business connection' the learned counsel on both sides drew our attention to several decisions which have considered the question. A detailed examination of these decisions, however, does not enable us to arrive at the exact meaning of the expression 'business connection' and define its scope and ambit. It is, however, clear that it is an expression of a very comprehensive nature and not necessarily confined to the definition of 'business' in section 2(4) of the Act ... In order to constitute a business connection there must be some continuity of relationship between a person in British India who makes profits and the non-resident who receives them. As observed by Rangnekar J. in *Commissioner of Income-tax* v. *National Mutual Life Association of Australasia Ltd.,* [3] the expression 'business connection' is a more comprehensive expression as including not only the kinds of things specifically described as being included in the term, but the kind of things which are specifically mentioned in the English Act."

Viswanatha Sastri J. had expressed:

"There is no definition of the words 'business connection' and the legislature has deliberately chosen words of wide though uncertain import (see *Hira Mill's* case [4]). It is difficult to extract from the language of section 42 or from the decisions a comprehensive principle which

2. (1950) 18 I.T.R. 423, 433, 451 (Mad.).
3. (1933) 1 I.T.R. 350; I.L.R. 57 Bom. 519, 534.
4. (1946) 14 I.T.R. 417, 428 (All.).

would serve as a guide for all cases. One can only take the particular facts and circumstances and decide whether the case falls within the words of section 42(1) or outside them."

In that case the assessee, a factory in Mysore State, purchased raw materials through its managing agents in Madras State and the question was whether such purchase of raw materials constituted "business connection" within the meaning of section 42(1). The court held that the transactions constituted a "business connection" within the Madras State. In *Commissioner of Income-tax* v. *Little's Oriental Balm and Pharmaceuticals Ltd.* [5] this court had expressed the view that:

"The expression 'deemed to have received or accrued in British India' is explained in section 42 which has really to be read with section 4 on which it is a commentary. Section 4 is the charging section and section 42 gives the definition of the expression 'deemed to accrue and arise' or 'deemed to have been received in British India' in section 4."

The Supreme Court has also expressed the view in *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai and Co.:* [6]

"Strictly speaking, the word 'accrue' is not synonymous with 'arise', the former connoting the idea of growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. There is a distinction in the dictionary meaning of these words, but throughout the Act they seem to denote the same idea or ideas very similar and the difference only lies in this that one is more appropriate when applied to a particular case. In the case of a composite business, i.e., in the case of a person who is carrying on a number of businesses, it is always difficult to decide as to the place of the accrual of profits and their apportionment *inter se.*"

In *Jethabhai Javeribhai* v. *Commissioner of Income-tax,* [7] the Nagpur High Court considered a case where a company in British India purchased raw materials for his beedi business in Baroda State through a non-resident to whom commission was paid, and the question for consideration was whether the commission paid to the non-resident in respect of the purchases made in Baroda State accrued or arose in India through or from a business connection within the meaning of section 42. It was held that the purchase and supply of raw materials to a resident-manufacturer by a non-resident would not render the commission earned by the latter liable to tax under section 42(1) in the absence of anything to show that there was any course of dealing between the resident and the non-resident and the commission earned was made to depend on business done in British India, and that something more than mere rendering services out of British India for remuneration to a resident businessman is necessary to establish a business connection within the meaning of that expression in section 42(1). In *Commissioner of Income-tax* v. *R. D. Aggarwal and Co.* [8] the assessee canvassed orders from dealers in Amritsar for the supply of goods and communicated them to certain non-resident exporters and the orders were ultimately accepted, the price was received by them and delivery was given outside the taxable territories. The assessee

5. (1950) 18 I.T.R. 849, 859 (Mad.).
6. (1950) 13 I.T.R. 472, 496; (1950) S.C.R. 335 (S.C.).
7. (1951) 20 I.T.R. 331 (Nag.).
8. (1965) 56 I.T.R. 20, 24; (1965) 1 S.C.R. 660 (S.C.).

was entitled to certain commission on those sales. The question arose whether there was any business connection between the assessee and the non-resident and whether the assessee could not be treated as an agent of the non-resident for the purpose of taxing the profits that accrued to them from their export business. Dealing with that question the Supreme Court, after a review of all the important cases which have arisen before the courts for the purpose of finding out as to what relation between the non-resident and the activity in the taxable territories which contributes to the earning of income may or may not be regarded as business connection, said that the expression "business connection" postulates a real and intimate relation between the trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity and that it must in all cases be remembered that by section 42, income, profits or gains which accrues or arises to a non-resident outside the taxable territories is sought to be brought within the net of income-tax law, and not income, profits or gains which accrues or arises or is deemed to accrue or arise within the taxable territories, that income received or deemed to be received, or accruing or arising or deemed to be accruing or arising within the taxable territories in the previous year, is taxable by section 4(1)(a) and (c) of the Act, whether the person earning is a resident or non-resident, and that income not taxable under section 4 of a non-resident becomes taxable under section 42(1) if there subsists a connection between the activity in the taxable territories and the business of the non-resident, and if through or from that connection income directly or indirectly arises. The court expressed thus:

"A business connection in section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the non-resident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. In each case the question whether there is a business connection from or through which income, profits or gains arise or accrue to a non-resident must be determined upon the facts and circumstances of the case."

In the light of the principles laid down in the above cases as regards the scope of the expression "business connection" we have to consider whether in this case the technical fee received by the assessee has accrued or arisen through or from business connection in India. According to the revenue the income in question has been received by the assessee, a non-resident, from some activity in India, that the activity is commercial in character and, therefore, the income is taxable under section 4(1)(c) read with section 42(1). The assessee would, however, state that no service has been rendered in India by the assessee, that all the services which the assessee had to render as per the terms of the agree-

ment had been rendered outside India and that such rendering of services outside India to a person carrying on business in India would not amount to a "business connection" in India. In this case the Income-tax Officer found that a perusal of the terms of the agreement between the assessee and the Indian company makes it clear that at least 5 per cent. of the technical service fee is earned by the assessee in India and that the same is liable to be assessed under the Income-tax Act. The Commissioner, however, held that having regard to the obligations undertaken by the assessee under the agreement, 75 per cent. of the technical fee received by the assessee should be taken on a reasonable basis as income accruing or arising in India. The Tribunal took the extreme view that no portion of the technical fee can be said to have accrued or arisen in India. The question is whether the Tribunal's view could be sustained.

In the context of the question to be considered it is necessary to find out as to what are the services rendered by the assessee in pursuance of the agreement and whether such services were rendered in India or outside. The nature of the services to be rendered by the assessee under the agreement has already been referred to.

Some of the services rendered by the assessee to the Indian company consisted of examination and approval in the U.S.A. of the factory, design and lay-out which were prepared by the Indian company in India and advice sent by the assessee to the Indian company by post as to the nature of the plant and equipment required for the factory as also to the production data, etc. These services had been held to have been rendered by the assessee outside India as the entire correspondence was by post. Some of the other services to be rendered by the assessee to the Indian company is to send periodically technical bulletins, instructional films, etc. The Tribunal also finds that the correspondence between the assessee and the Indian company showed that these services were rendered by the assessee outside India. So far as these services are concerned, the Commissioner held that such technical information furnished by the assessee by post has been used in India and, therefore, the services can be said to have been rendered by the assessee in India. This view is not acceptable to the Tribunal. The Tribunal says that the use of the technical information by the Indian company without reference to the actual supply of this information by the assessee cannot be taken to be the criterion and that it is not possible to say that the services such as furnishing of the technical information in the form of bulletins, etc., were rendered by the assessee in India. We are inclined to agree with the view taken by the Tribunal that in respect of the above services, it cannot be said that the assessee rendered those services in India.

But the assessee has also undertaken to provide the Indian company with foreign technical personnel for the starting, supervision and operation of the plant for the manufacture of the products by the Indian company in India and for the training of Indian personnel by such technical foreign personnel to assist the Indian company in the starting, supervision and operation of the plant for the manufacture of the products in India. The Commissioner took the view that the provision for providing by the assessee foreign technical personnel to work in India would suggest that the assessee is rendering some services in India in pursuance of the terms of the said agreement. The Tribunal, however disagreed with the Commissioner and held

that as these foreign technicians had worked as whole-time employees under the Indian company, they should be taken to be the employees of the Indian company and, therefore, the services rendered by the foreign technicians in India cannot be attributed to the assessee as the assessee had nothing to do with the day-to-day work of the said foreign technicians. It also held that the training imparted by its technicians to the Indian personnel in India was a part of the work which they have to do under the Indian company and that, therefore, the training of the Indian personnel by the foreign technicians cannot be taken to be services rendered by the assessee in India.

On a due consideration of the matter, we are of the view that the Tribunal did not have a proper perspective of the said services rendered by the assessee. The question is not whether foreign technicians were under the employ of the assessee or the Indian company and whether they received the salary from the assessee or from the Indian company for the services rendered by them in India. Here the relevant question is whether the assessee has sent the foreign technicians to India to help the Indian company in the starting, supervision and operation of the plant for the manufacture of the products in India, and to train suitably the Indian technicians. Under the contract the assessee is obliged to send foreign technicians to work in India, and if really foreign technicians were sent to India by the assessee under that agreement, it cannot be said that the assessee has not rendered any service in India. The fact that those foreign technicians were paid by and were under the control of the Indian company will not affect the question. The requirement that the assessee has to send foreign technicians to India for the purposes set out in the agreement leads to the inference that the assessee has undertaken to do some service or activity in India by sending its foreign technicians to work in India. The payment of salary and other emoluments to such foreign technicians is purely a matter of bargain between the assessee and the Indian company and they have agreed that the foreign technicians will be paid by the Indian company. But this will not affect the question whether the assessee is obliged to send foreign technicians to India to assist the Indian company. Similarly the obligation of the assessee to train the Indian personnel in India through their foreign technicians can also be said to be services rendered in India. Though the foreign technicians did train the Indian technicians in the course of their duties which they have to perform as employees of the Indian company, still the obligation to train Indian personnel is that of the assessee and, therefore, such training of Indian personnel in India through the assessee's foreign technicians can be said to be a service rendered by the assessee in India.

We cannot, therefore, agree with the view of the Tribunal that the assessee has not rendered any service in India. As already stated, the sending of foreign technicians to India to work under the Indian company and to assist the Indian company in the starting, supervision and operation of the plant for the manufacture of the products and also to train the Indian personnel working under the Indian company amounts to the assessee doing some activity or service in India and the technical fee received cannot be said to be only for the purpose of providing technical information through the form of bulletins, etc., and for the approval of the lay-out, plant and

equipment, etc. Therefore, the question is as to what portion of the technical fee is attributable to the services rendered by the assessee in India.

The learned counsel for the revenue, however, would contend that the assessee should be taken to have received the technical fee through or from its business connection in India, that, therefore, the entire technical fee should be taken to have accrued or arisen in India and that in such cases section 42(3) for apportionment of the income cannot come into play. The learned counsel for the assessee would contend that providing foreign technicians to work in India is a very insignificant part of the assessee's services and, therefore, the Income-tax Officer's view that 5 per cent. of the technical fee received by the assessee should represent the services rendered by the assessee has to be accepted as reasonable. He also contends that the theory of business connection will not arise in the case of "know-how" agreements and relies on the following passage occurring under the head "receipts from know-how" or "secret process" in *Sampath Iyengar's Income-tax,* 6th edition, volume 1, at page 168:

"Manufacturing houses and business institutions evolve at great cost by experience and research over long periods of time, process of manufacture which are held by them secret, only a small part of which is capable of being patented. The technical knowledge not so patented is known in commercial circles as "know-how". This "know-how" is not comparable with a fixed asset, such as, factory, office building, warehouse, plant and machinery, or even with such independent legal rights as patents, copyrights or trade marks, or even with goodwill. It is not a balance-sheet item. It is not diminished by imparting it to outsiders. It has the peculiar quality that it can be communicated to, or shared with, others without in any sense destroying the value thereof to its owner. It is a product of the brain and just as a person cannot sell his brain, he cannot sell the 'know-how' outright."

It is true the learned author proceeds on the basis that when the owner of a "know-how" undertakes to impart it for conderation, such consideration cannot be regarded as price for the property and, therefore, it is not a capital receipt but that in exceptional cases such remuneration may be of a capital character where the owner, in consequence of his imparting of the "know-how" to another person, has to discontinue his own manufacture or to give up a market which is open to him. But we are not concerned with the question as to whether the receipts by the sale of "know-how" is capital or revenue. Besides, in this case, the agreement cannot merely be treated just a "know-how" agreement, for, as already stated, the assessee has undertaken to send foreign technicians to work in India under the Indian company and to train the Indian technicians working in the Indian company. We are not inclined to agree with the submission of the learned counsel for the assessee that in all cases of "know-how" agreements there will not be any business connection. Whether there is business connection or not has to be considered with reference to the facts and circumstances of each case. In this case the terms and conditions of the agreement between the assessee and the Indian company have to be looked into to find out whether there is any business connection instead of saying that the agreement in question is a "know-how" agreement and in the case of "know-how" agreements there cannot be any business connection.

We are of the view that the whole agreement has to be read together and, if so done, we think that it is not exclusively for the provision of "know-how", but also for the provision of some technical services. In *Evans Medical Supplies Ltd.* v. *Moriarty* [9] dealing with "know-how" agreements, Lord Denning expressed:

"What, then, is the position of 'know-how" for tax purposes? It is undoubtedly a revenue producing asset. The possessor can use it to make things for sale, or he can teach it to others for reward. But he cannot sell it outright. It is rather like the 'know-how' of a professional man. He can use it to earn fees from his clients, or he can teach it to pupils for reward, and so produce revenue. But he cannot sell it as a capital asset for a capital sum. He cannot sell his brains. So with a company which has special manufacturing skill and experience but has no secret processes. Its 'know-how' is inseparable from the 'know-how' of its staff and servants. It cannot prevent them using it any more than it can prevent them using their own brains: See *Herbert Morris Ltd.* v. *Saxelby.* [10] It cannot sell it as a capital asset. It can only use it or teach it. Even with a company which owns secret processes, the supply of 'know-how' is not like the sale of goodwill or a secret process, for such a sale imports that the seller cannot thereafter avail himself of the special knowledge with which he has parted: See *Trego* v. *Hunt;* [11] and it may then rightly be regarded as the sale of a capital asset: See *Handley Page* v. *Butterworth.* [12] But the supplier of 'know-how' always remains entitled to use it himself. . . ."

In *Jeffrey* v. *Rolls-Royce Ltd.* [13] it is observed that exploitation of "know-how" is one method of development of the owner's own trade, though it may not amount to a separate business. The assessee, therefore, is not right in its submission that in cases of "know-how" agreement there is no question of any business connection. As already stated, in this case the agreement is not only a "know-how" agreement but also an agreement to provide foreign technicians to work in India to assist the Indian company and also to train the Indian personnel in the manufacture of the products. Therefore, we are of the view that the assessee having rendered at least some services in India which amounts to a business activity, the technical fee should be taken to have accrued through or from its business connection in India. In that view the entire receipts by the assessee-company have to be taken to have accrued or arisen in India as a result of its business connection and, therefore, taxable. The apportionment made by the Commissioner or the one made by the Income-tax Officer cannot, therefore, be sustained for the assessee cannot be said to have carried on business in India in the context of the definition of "business" and, therefore, there is no question of any apportionment.

But, having regard to the fact that the Commissioner has directed the assessment of only 75 per cent. of the technical fee received by the assessee as income accrued in India and it is only that order which was appealed before the Tribunal, the assessment can be made only in relation to the said 75 per cent.

The result is, the question is answered in the affirmative and against the assessee.

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9. (1957) 37 T.C. 540, 589 (H.L.).
10. (1916) 1 A.C. 638, 704 (H.L.).
11. (1896) A.C. 7, 24, 25 (H.L.).
12. (1935) 19 T.C. 328 (H.L.).
13. (1962) 40 T.C. 443, 495; (1965) 56 I.T.R. 580 (H.L.).

The assessee will pay the costs of this reference to the revenue.

Counsel's fee Rs. 250.

27th IFA-CONGRESS IN LAUSANNE 1973

Second Subject

(Partnerships and joint enterprises in international tax law)

Summary of the *plenary and panel discussions* on October 9th and 10th and in the working session on October 12th, 1973 by Dr. E. W. Klimowsky (Israel), chairman resolutions committee.

The discussion has turned around two basic problems:

A.

1) (a) In most countries a partnership is recognised as a legal entity according to the respective *civil* law; however, in a great number of tax systems (including those of the Anglo-American states, the Federal Republic of Germany and many developing countries) not the partnership is the chargeable assessee of its income but the partners direct.

In view of this situation para 6 of the commentary on Article 3 of the OECD Model Convention contains a proposition — although only for the purpose of clarifying the definition of "an enterprise carried on by a resident of a Contracting State" — according to which "each participation in a partnership should be looked upon as a separate enterprise, the test being whether the partner holding the participation is a resident of the one or the other Contracting State or of a third State".

The majority of the participants in the deliberations of this congress did not follow this line of thought but preferred to have a partnership which is subject in one State to unlimited liability, being taxwise treated as a resident entity in that State with regard to income received from another Contracting State; should, however, the partnership not be treated as a taxable unit subject to unlimited liability in a Contracting State and should, therefore the income from another Contracting State be included in the tax basis of the different partners, cases of double taxation arising therefrom should be protected by an appropriate tax credit.

(b) It would perhaps be desirable to postulate a generally binding recognition of the partnership as a subject of taxation separate from its members, similar to a company; however, this goal does not seem obtainable in the foreseeable future.

(c) It seems, therefore, that if a uniformity of tax treatment of partnerships is to be a realistic goal, especially for the speedy and unhampered process of taxation and as well as in the interest of sound commercial tax planning, this could be achieved only within the framework of a change in the pertaining treatment of this object by double taxation conventions.

To this end, an authoritative interpretation or even an express extension of Art. 10 of the OECD Model Convention would be advisable. The contracting parties should agree to treat a partnership as if it were a company and its profits as "quasi-dividends". For the avoidance of doubts it should be made clear that a partnership comprises its permanent establishments which, also in this context,

should be distinguished from branches or subsidiaries. Consequently, only the commercial connection between those branches and subsidiaries and not that between various permanent establishments could be recognised as a partnership. There might, however, a right of option be granted to a permanent establishment to be treated as a separate tax entity.

2) A special version of this problem is the question whether the country of residence of the partnership or the country of the source of the income attributable to the partnership shall be preferable for the chargeability of the respective income. The view of the participants in the discussion was that the country of residence of the partnership should prevail and that the country of source should follow suit. In cases of hardship the most-favoured-treatment-clause should be applied.

B.
In cases of differing characterisations of profits and remuneration in the country of the residence of the partnership, on the one hand, and the countries of residence of the various partners, on the other hand, the tax law of the country of residence of the partnership itself should be applied.
This was considered to be of special importance if one Contracting State applies the exemption method and the other Contracting State the credit method.
The underlying principle should be that tax relief emanating from a Double Taxation Convention should be granted only if and inasmuch a clear case of double taxation exists.

It has been announced that an IFA Conference of the Benelux countries will be held in Luxembourg on May 3-4, 1974.

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Library International Bureau of Fiscal Documentation no. B 7588

UNITED KINGDOM

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by C. T. Sandford, J. R. M. Willis and D. J. Ironside, with an appendix by D. E. Bailey and C. A. del Tufo. Published by the Institute for Fiscal Studies, London, 1973. 18 + 220 pp. £ 2.50. Publication No. 7.

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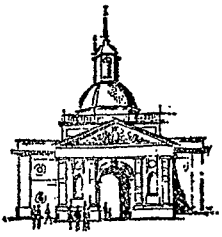

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* * * ARTICLES * * *

OLIVIER CHAMBOSSE:

COTE D'IVOIRE: LA TAXATION DES REVENUS DE VALEURS MOBILIERES

Actuellement, et depuis 1968, la taxation des revenus de valeurs mobilières fait l'objet d'un régime hybride dû à l'institution d'un prélèvement forfaitaire sur ces revenus et au maintien partiel de l'I.R.V.M., ces deux taxations étant parfois cumulatives.

Jusqu'à la promulgation de la loi n° 67.588 du 31 décembre 1967, la situation était claire: le produit des valeurs mobilières était soumis à l'impôt sur le revenu des valeurs mobilières (I.R.V.M.).

La loi de finances pour la gestion de 1968 a abrogé le Code de l'I.R.C.M., remplaçant cet impôt par une augmentation du taux de l'impôt sur les bénéfices industriels et commerciaux qui est passé de 25% à 33% (35% depuis le 1er janvier 1973).

La suppression de l'I.R.V.M. étant concomitante à une augmentation du taux de l'impôt sur les BIC, les distributions qui pour une raison quelconque ne supportaient pas l'impôt BIC auraient été totalement exonérées d'impôt cédulaire. Il en aurait été de même pour les distributions de bénéfices échappant, en vertu de dispositions particulières, à l'augmentation du taux de l'impôt sur les BIC.

Le Législateur a donc maintenu l'I.R.V.M. pour ces distributions.

En dehors des cas de non taxation au nouveau taux de l'impôt sur les BIC l'I.R.V.M. n'est donc plus exigible depuis 1968. Cette situation s'est prolongée pendant 4 années.

La loi n° 71 683 du 28 décembre 1971 a institué un nouveau mode de taxation des distributions anciennement taxables à l'I.R.V.M. Ces distributions font l'objet depuis 1972 d'une retenue à la source ayant le caractère d'un acompte à valoir sur l'impôt sur le revenu.

On assistera ainsi, dans certains cas, à une double taxation: I.R.V.M. et prélèvement forfaitaire.

A côté du régime général d'imposition des distributions de revenus de valeurs mobilières, coexistent des régimes particuliers aux sociétés ayant, soit leur siège social, soit des succursales, hors de Côte d'Ivoire.

Notre étude se subdivisera donc en trois parties consacrées respectivement:

— A l'impôt sur le revenu des valeurs mobilières
— Au prélèvement forfaitaire
— Au régime d'imposition des sociétés multi-nationales, c'est à dire des sociétés exerçant leurs activités dans plusieurs Etats.

I. L'IMPOT SUR LE REVENU DES VALEURS MOBILIERES (I.R.V.M.)

A - *Distributions taxables*

Restent taxables à l'I.R.V.M.:

1°) *Les distributions de bénéfices exonérées d'impôt sur les B.I.C.*

Il s'agit des distributions effectuées par:

— les usines nouvelles (article 4-6° CGI)
— les entreprises prioritaires (loi n° 59-134 du 3 septembre 1959)

2°) *Les distributions de bénéfices taxés à l'ancien taux de l'impôt sur les B.I.C.*

Il s'agit des distributions effectuées par les sociétés bénéficiant d'un régime fiscal de longue durée.

Toutefois, ces sociétés peuvent opter pour l'application des nouveaux taux de l'impôt sur les BIC et par là même, ne plus être taxables à l'IRVM sur leurs distributions. Il convient de noter que cette option, irrévocable, doit être notifiée au service des Contributions au moment du dépôt de la déclaration devant donner lieu à imposition au nouveau taux de l'impôt sur les BIC.

3°) *Les distributions de réserves n'ayant pas supporté le nouveau taux de l'impôt sur les B.I.C.*

Si la comptabilité ne distingue pas les réserves ayant supporté l'impôt au taux de 33 ou de 35% des autres. l'Administration considère qu'en cas de distribution ce sont celles qui n'ont pas supporté les nouveaux taux qui sont d'abord distribuées.

Les entreprises qui veulent éviter une taxation de leurs distributions de réserves à l'IRVM doivent donc prendre le soin de distinguer en comptabilité:

— les réserves ayant supporté les BIC aux nouveaux taux
— les réserves ayant supporté les BIC à l'ancien taux
— les réserves n'ayant pas supporté l'impôt sur les BIC.

4°) *Les distributions de bénéfices dissimulées*

Si, à l'occasion d'une vérification fiscale, l'Administration constate l'existence de distributions dissimulées, elle impute d'office ces distributions sur les réserves n'ayant pas supporté l'impôt sur les BIC au nouveau taux.

5°) *Les revenus visés à l'article 13 du Code de l'IRCM lorsqu'ils n'ont pas supporté effectivement les nouveaux taux de l'impôt sur les BIC.*

Sont visées, ici, les distributions qui entrent dans les frais généraux de la société, à savoir:

— les jetons de présence
— les remboursements forfaitaires de frais et autres rémunérations d'administrateurs
— les intérêts d'emprunts des sociétés.

6°) *D'une manière générale: TOUTES LES DISTRIBUTIONS N'AYANT PAS SUPPORTE LES NOUVEAUX TAUX DE L'IMPOT SUR LES B.I.C.*

B - *Commentaires*

1°) *Les bénéfices exonérés d'impôt en vertu de l'article 84 CGI.*

Nous avons vu, ci-dessus, (A - 1°) que les distributions de bénéfices exonérées d'impôt étaient taxables à l'IRVM. On peut se demander si c'est le cas des bénéfices exonérés par le jeu de l'article 84 CGI.

Si en fait, une partie des bénéfices n'est pas soumise à l'impôt c'est non pas parce qu'elle est exonérée d'impôt, maise parce que c'est le procédé le plus simple qui permette d'obtenir *une réduction de l'impôt lui-même.*

L'intitulé de la section VII du Code est d'ailleurs sans équivoque: «REDUCTIONS D'IMPOTS CEDULAIRES EN CAS D'INVESTISSEMENT DE BENEFICES EN COTE D'IVOIRE».

En conclusion, on doit considérer que les distributions portant sur la partie «exonérée» d'impôt ne sont pas taxables à l'I.R.V.M.

2°) *Les intérêts d'emprunts*
Faisant partie des charges déductibles ils ne supportent pas l'impôt BIC et sont donc passibles de l'IRVM.
Il est à noter que ces intérêts ne sont pas taxables à l'IRVM dans la mesure où les capitaux qu'ils rénumèrent proviennent:
— de banques ou organismes financiers à condition que les capitaux prêtés ne proviennent pas des fonds propres de ces établissements
— de sociétés, à condition que les fonds prêtés proviennent d'emprunts eux-mêmes soumis à l'IRVM.

3°) *Les amortissement d'actions et parts*
Le remboursement des actions ou des parts sociales effectuée par un prélèvement sur le compte pertes et profits ou sur les comptes de réserves ou de provisions peut faire l'objet d'une taxation à l'IRVM.
Par contre, si ce remboursement est effectué au moyen d'une réalisation d'actif et de prélèvements sur des éléments autres que ceux visés ci-dessus, il n'est pas taxable à l'I.R.V.M.

4°) *Les distributions de réserves*
Lorsqu'elles portent sur des réserves non soumises à l'impôt BIC au nouveau taux, elles sont passibles de l'IRVM.
Toutefois, lorsqu'elles sont effectuées sous la forme d'augmentation de capital ces distributions, qui supportent alors le droit d'apport majoré au taux de 5%, sont exonérées d'I.R.V.M.

5°) *Les dividendes, intérêts, arrérages et produits de parts de S.A.R.L.*
Lorsque les bénéfices auxquels elles se rapportent n'ont pas supporté l'impôt BIC au nouveau taux, ces distributions sont taxables à l'IRVM.
Une exception importante est à noter; les dividendes, intérêts, arrérages et produits des parts revenant à deux associés gérants seulement d'une société à responsabilité limitée et dans la limite de 300.000 Frs pour chacun, sont exonérés d'I.R.V.M.

6°) *La rémunération des membres du Conseil d'Administration*
Sont exonérés d'I.R.V.M.:
Les produits correspondant à des fonctions de Direction et revenant, *en sus* des sommes attribuées aux membres du Conseil d'Administration:
— à l'Administrateur délégué,
— au Directeur ou à l'Administrateur unique,
— au Président du Conseil d'Administration,
— à l'Administrateur Adjoint au Président,
— à l'Administrateur provisoirement délégué.
Toutefois, cette exonération est limitée *à deux administrateurs nommément désignés.*
En fait, elle peut s'appliquer à d'autres administrateurs dans l'hypothèse où ceux-ci auraient exercé avant d'accéder au Conseil d'Administration et continuent à occuper, dans la Société, des emplois de salariés.
Dans ce cas, seuls les produits leur revenant en qualité d'Administrateurs seraient taxables à l'IRVM.

C - *Taux de l'I.R.V.M.*

L'I.R.V.M. conserve le taux en vigueur en 1967, à savoir:
— 18% en règle générale,
— 10% en ce qui concerne:
- Les intérêts d'emprunts représentés par des titres négociables,
- Les produits des actions, parts d'in-

térêts et commandites distribués par les sociétés nouvelles au cours des trois premiers exercices sociaux.

II. LE PRELEVEMENT FORFAITAIRE DE 10% SUR LES REVENUS DE VALEURS MOBILIERES

La loi n° 71-683 du 28 décembre 1971 a institué une retenue à la source forfaitaire de 10% sur les distributions et paiements de toutes natures visés à l'article 13 du Code de l'IRCM.
Ici, il n'y a donc pas à distinguer selon le mode de taxation des bénéfices.

A - *Nature juridique de la retenue*

La retenue forfaitaire de 10% est représentative d'impôt sur le revenu.
Elle est libératoire pour les non résidants n'ayant pas d'autre source de revenu imposable en Côte d'Ivoire; ils sont donc dispensés de déposer une déclaration de revenus.
A contrario, les résidants n'ayant pas d'autre source de revenu imposable en Côte d'Ivoire sont tenus de déposer une déclaration de revenus.
Les bénéficiaires de revenus atteints par la retenue forfaitaire et acquittant l'impôt sur le revenu en Côte d'Ivoire peuvent déduire de cet impôt (BIC pour les sociétés ou IGR pour les particuliers) le montant du prélèvement effectué à la source.
Au cas où la retenue serait supérieure à l'impôt dû, la différence constatée ne serait pas remboursable. Toutefois, les sociétés auraient la possibilité d'imputer cette différence sur l'impôt BIC des années suivantes, dans la limite de la prescription (3 ans).
Le déduction de la retenue s'effectue sur présentation d'une attestation de paiement délivrée par le Service de l'Enregistrement, sur la demande du Contribuable.

B - *Domaine d'application*

La retenue doit être pratiquée par les sociétés sur toutes les distributions visées à l'article 13 du Code de l'IRCM réalisées postérieurement au 26 janvier 1972.
Elle doit être appliquée sur le montant total de la distribution, sans considération de la personne qui en bénéfice ou de l'origine du revenu distribué.
Ainsi, les revenus versés à des personnes dont le domicile fiscal est en France ou dans un pays membre de l'OCAM doivent également supporter la retenue. Il est vrai que ces personnes peuvent solliciter le remboursement de la retenue sous les conditions que nous verrons plus loin.

C - *Distributions taxables*

Il s'agit des distributions et paiements visés à l'article 13 du Code de l'IRCM. Toutefois, on peut considérer que les exemptions de la section IV de ce code, auxquelles l'article 13 fait référence jouent également en matière de prélèvement forfaitaire.
L'article 13, dont le texte intégral figure en Annexe I de cette étude, vise essentiellement:

— les dividendes et tous autres produits des actions et parts versés par les sociétés,
— les tantièmes, jetons de présence, remboursements forfaitaires de frais et autres rémunérations revenant aux administrateurs (à l'exception de celles revêtant le caractère de salaires),
— les intérêts et tous autres produits des obligations et emprunts de toute nature des sociétés.

Il conviendra de se reporter au «B» de la première partie de cette étude en ce qui concerne les cas d'exemption du prélèvement forfaitaire qui sont identiques à ceux prévus en matière d'IRVM.

D - *Paiement de la retenue*

Le texte instituant la retenue prévoit que celle-ci est assise et perçue selon des mêmes modalités que l'IRVM. En fait, une pratique s'est instituée qui fait que le versement de la retenue est effectué par la société, dans les 30 jours de la mise en paiement des sommes distribuées. Ce mode de paiement est d'ailleurs également utilisé en matière d'IRVM depuis 1968. Cette pratique n'a jamais été mise en cause par l'Administration et l'ancien mode de recouvrement, tombé en désuétude, n'est plus appliqué.

E - *Cumul du prélèvement forfaitaire avec l'IRVM*

Lorsque la distribution réalisée est passible de l'IRVM on assiste à un cumul d'imposition.
La retenue globale à effectuer par la société, dans le cas de distribution de jetons de présence par exemple, sera de 18% + 10% = 28%.
Il est préférable d'effectuer un règlement séparé de ces deux impositions.
Seul, le prélèvement de 10% peut ouvrir droit à récupération.

F - *La possibilité de remboursement du prélèvement forfaitaire*

Nous avons vu que le prélèvement frappait tous les bénéficiaires de distributions. Cette disposition, contraire aux dispositions des conventions FRANCE-COTE D'IVOIRE et OCAM, a conduit le Directeur Général des Impôts à admettre que les bénéficiaires de revenus Ivoiriens ayant supporté le prélèvement et fiscalement domiciliés en France ou dans un pays membre de l'OCAM, pouvaient prétendre au remboursement du prélèvement Ivoirien.
Pour ce faire, ces personnes doivent justifier du paiement de l'impôt frappant leurs revenus Ivoiriens dans leur pays.
Cette possibilité de remboursement ne s'est encore jamais concrétisée; le service de l'Enregistrement, questionné, nous a répondu que «par suite des correspondances en cours entre la Direction Générale des Impôts et celle de France, il sera plus tard défini les conditions et modalités de restitution, si celà est rendu possible».
Nous avons jugé néanmoins utile de joindre en Annexe II l'instruction n° 41 du 1er mars 1973 émanant de la Direction Générale des Impôts Française.
Ce document pourra être lu avec intérêt par les actionnaires des Sociétés Ivoiriennes résidant en France et désireux de solliciter le remboursement du prélèvement forfaitaire de 10%.

III. LE REGIME D'IMPOSITION DES SOCIETES MULTINATIONALES

Trois cas sont à envisager:
- le cas des sociétés ayant leur siège en Côte d'Ivoire et une ou plusieurs succursales à l'étranger,
- le cas des succursales Ivoiriennes de sociétés dont le siège est situé dans un état ayant signé une convention fiscale avec la Côte d'Ivoire,
- le cas des succursales Ivoiriennes de sociétés dont le siège est situé dans un autre Etat (Sociétés dites externes).

Dans chacun de ces cas, les règles applicables en matière d'IRVM et de prélèvement

forfaitaire vont jouer mais les distributions taxables, déterminées conformément aux règles étudiées dans les deux premières parties de notre étude, seront soumises à un prorata déterminant, dans les deux premiers cas, la quote-part de distributions taxables devant effectivement supporter l'IRVM ou le prélèvement forfaitaire.
D'autre part, en ce qui concerne les succursales des sociétés dites externes, les modalités d'imposition et de recouvrement sont particulières.

A - *Cas de Sociétés ayant leur siège en Côte d'Ivoire et une ou plusieurs succursales en France ou dans un ou plusieurs Etats membres de l'OCAM*

Le prorata à appliquer aux distributions taxables est donné par la formule:

$$\frac{B - A}{B}$$

A désigne les bénéfices réalisés dans la ou les succursales situées en France et dans les Etats membres de l'OCAM.
B désigne l'ensemble des bénéfices réalisés par la Société.

NOTA:

Pour déterminer le bénéfice comptable total B, il est fait abstraction des résultats déficitaires constatés pour l'ensemble des établissements stables de la Société dans un Etat quelconque, toutes compensations étant faites entre les résultats bénéficiaires et les résultats déficitaires de ces établissements.
Dans le cas où le bénéfice comptable total d'un exercice est nul ou négatif, la répartition s'effectue sur les bases antérieurement dégagées.

B - *Cas des succursales Ivoiriennes des sociétés dont le siège est situé en France ou dans un Etat membre de l'OCAM.*

Ces succursales sont imposables sur une quote part de leurs distributions déterminée au moyen du rapport

$$\frac{A}{B}$$

A désignant ici le bénéfice réalisé par la succursale Ivoirienne.

C - *Cas des succursales Ivoiriennes de sociétés dont le siège est situé dans un autre Etat.*

Les succursales des sociétés dites externes doivent procéder à la retenue forfaitaire de 10% (plus IRVM éventuellement) sur 65% de leurs bénéfices ayant servi de base au calcul de l'impôt sur les BIC en Côte d'Ivoire, *qu'il y ait eu ou non distribution.*
Elles doivent acquitter la retenue sur les bénéfices apparaissant à leurs bilans arrêtés postérieurement au 26 janvier 1972.
Le versement auprès du service de l'Enregistrement doit intervenir dans les 30 jours qui suivent la date de clôture du Bilan.

CONCLUSION

Le régime d'imposition des revenus de valeurs mobilières que la suppression de l'IRCM aurait dû simplifier à l'extrême, s'avère être relativement complexe et la création d'une retenue à la source d'une nature juridique éloignée de son but effectif n'est pas faite pour améliorer le système actuel.
Nous avons vu que cette retenue posait des problèmes quant à son éventuel rem-

boursement nécessité par le respect de la convention France-Côte d'Ivoire et de la convention OCAM.

Un retour à l'idée première, c'est-à-dire à la suppression pure et simple de l'IRVM, compensée par une augmentation du taux de l'impôt sur les BIC et conjuguée avec un système de réduction d'impôt en cas de réinvestissement de bénéfices, de façon à ne pas pénaliser les sociétés qui pratiquent l'autofinancement, permettrait d'atteindre un double objectif:

— simplifier le système fiscal actuel

— assurer une plus grande incitation fiscale à l'investissement en étendant à l'impôt de distribution l'exonération accordée en matière d'impôt sur les BIC par le Code des Investissements.

Le système du prélèvement forfaitaire à la source pourrait par ailleurs n'être maintenu, comme moyen de perception de l'impôt sur le revenu, que lorsque les distributions de bénéfices seraient faites au profit de personnes établies ni en Côte d'Ivoire ni dans un état lié à la Côte d'Ivoire par une convention fiscale.

Annexe I

ARTICLE 13 DU CODE DE L'I.R.C.M.

«Indépendamment des créances, dépôts et cautionnements visés à la section II du présent chapitre et sous réserve des exemptions prévues à la section IV (1), l'impôt sur le revenu des capitaux mobiliers s'applique:

1° Aux dividendes, intérêts, arrérages, revenus et tous autres produits des actions de toute nature et des parts de fondateurs des sociétés, compagnies et entreprises quelconques financières, industrielles, commerciales ou civiles, ayant leur siège social en Côte d'Ivoire, dont le capital n'est pas divisé en actions;

2° Aux intérêts, produits et bénéfices des parts d'intérêts et commandites dans les sociétés, compagnies et entreprises ayant leur siège social en Côte d'Ivoire, dont le capital n'est pas divisé en actions;

3° Au montant des remboursements et amortissements totaux ou partiels que les sociétés désignées dans les numéros que précèdent effectuent sur le montant de leurs actions, parts d'intérêts ou commandites, avant leur dissolution ou leur mise en liquidation;

4° Au montant des tantièmes, jetons de présence, remboursements forfaitaires de frais et toutes autres rémunérations revenant à quelque titre que ce soit à l'administrateur unique ou aux membres des conseils d'administration des sociétés visées au n° 1 qui précède;

5° Aux traitements, remboursements forfaitaires de frais et toutes autres rémunérations revenant aux associés commandités dans les sociétés en commandite simple qui ont exercé l'option prévue au second alinéa de l'article 77 (2);

6° Aux jetons de présence payés aux actionnaires de ces sociétés à l'occasion des assemblées générales;

7° Aux intérêts, arrérages et tous autres produits des obligations et emprunts de toute nature des communes, établissements publics, ainsi que des sociétés, compagnies et entreprises désignées aux numéros 1 et 2 qui précèdent;

8° Aux lots et primes de remboursement payés aux créanciers et aux porteurs d'obligations des communes, établissements publics, ainsi que des sociétés,

compagnies et entreprises désignées aux numéros 1 et 2 qui précèdent.

Les dividendes, arrérages, bénéfices et produits visés aux numéros 1 et 2 du présent article s'entendent de toutes sommes ou valeurs attribuées à quelque époque que ce soit aux sociétés et porteurs de parts, à un autre titre que celui de remboursement de leurs apports».

(1) Nous avons donné l'essentiel de ces exemptions dans la première partie de notre étude. Les dispositions non reprises concernent des situations beaucoup moins fréquentes et sont d'un intérêt très limité.

(2) Il s'agit de l'option pour le régime applicable aux sociétés en commandite par action ou à leurs membres.

Annexe II

INSTRUCTION DU 19 FEVRIER 1973 RELATIVE A L'IMPOSITION DES REVENUS DE CAPITAUX IVOIRIENS (BO . DGI . 14 . B . 2 . 73)

«...

1. La loi de finances Ivoirienne pour 1968, n° 67-588 du 31 décembre 1967 (J.O. de la République de Côte d'Ivoire du 16 janvier 1968) a supprimé l'impôt sur le revenu des capitaux mobiliers en Côte d'Ivoire à compter du 1er janvier 1968 en ce qui concerne les produits prélevés sur les bénéfices compris dans les bases d'assiette de l'impôt sur les bénéfices industriels et commerciaux à la charge des sociétés, corrélativement à une majoration du taux de cet impôt de 25 à 32%, auquel s'ajoutent une cotisation de 1% au titre de la contribution nationale et un prélèvement de 10% au profit du Fonds National d'Investissement.

   Depuis cette date, les dividendes, tantièmes et produits assimilés ne subissent plus, en principe, au moment de leur distribution, de retenue à la source en Côte d'Ivoire sauf lorsque ces produits sont prélevés sur des bénéfices ou des réserves qui n'ont pas été taxés au nouveau taux majoré, auquel cas l'impôt sur le revenu des capitaux mobiliers est maintenu, au taux de 18% (loi Ivoirienne n° 68-589 du 28 novembre 1968, publiée au J.O. de la République de Côte d'Ivoire du 23 décembre 1968).

2. Dans le cas général où ces produits ne donnent lieu à aucun prélèvement à la source en Côte d'Ivoire, les dividendes en provenance de cet Etat ouvrent droit à un crédit d'impôt de $\frac{100 - 25}{2}$ soit 37,50% de leur montant brut (cf. instruction du 20 mars 1969; BOCD 1969-11-4443, BOED 1969 10540 et instruction du 1er octobre 1971, documentation de base, série 14 A-1, division B, Côte d'Ivoire B 2353).

3. La loi Ivoirienne n° 71-683 du 28 décembre 1971, portant loi de finances pour la gestion 1972 (JO de la République de Côte d'Ivoire du 4 janvier 1972) a institué une retenue forfaitaire de 10% sur les revenus mobiliers.

4. Cette retenue, qui est perçue quel que soit le bénéficiaire du revenu, représente un acompte sur l'impôt général sur le revenu ou l'impôt sur les bénéfices dus par l'intéressé; elle n'est libératoire que lorsqu'elle vise un non-résidant n'ayant pas d'autre source de revenu en Côte d'Ivoire.

   Toutefois, pour tenir compte des dis-

positions de la convention fiscale Franco-Ivoirienne du 6 avril 1966, la retenue ainsi visée sera remboursée par le Trésor Ivoirien aux non-résidants fiscalement domiciliés en France, sur justification de la perception dans notre pays de l'impôt sur le revenu ayant subi ladite retenue.

L'appréciation des droits des intéressés ainsi que la mise en oeuvre de la procédure de remboursement de l'impôt perçu en Côte d'Ivoire relèvent au premier chef de l'Administration Ivoirienne.

Du côté Français, le service délivrera, le cas échéant, les attestations qui lui seraient demandées à cet effet.

5. En définitive, les dividendes de source Ivoirienne qui ouvrent droit en France au Crédit d'impôt de 37,50% continueront à bénéficier de ce même crédit. La perception de ces dividendes sera considérée comme s'effectuant en deux temps. Dans un premier temps, le crédit de 37,50% s'appliquera au montant effectivement encaissé. Dans un deuxième temps, le montant correspondant au remboursement de la retenue Ivoirienne sera considéré comme un complément de revenu donnant lieu à son tour pour son imposition en France à un crédit de 37,50%.

DR. P. K. BHARGAVA AND G. S. SRIVASTAVA *:

TAX BURDEN ON INDIAN AGRICULTURE

(PART ONE)

I. INTRODUCTION

It has been the experience of developing countries that it is both easy and quick to raise resources from agriculture for development purposes. [1] Agriculture occupies a key position in the Indian economy as it contributes about 45 percent to national income and provides livelihood to nearly 70 percent of the population. It is, however, unfortunate that the Plan documents do not state any policy regarding the mobilisation of surpluses from the agricultural sector. Under the Indian Constitution only the State Governments are empowered to tax agricultural land or income — a written policy statement on the taxation of agriculture does not exist. Unfortunately, the State Governments have not laid down any guiding principles for the purpose because their policies have often been guided by their own needs and interests rather than any rationale. The result has been that the State Governments have hesitated to tax the agricultural sector. The inadequate taxation of the agricultural sector has imposed a heavy tax burden on the non-agricultural sector. [2] This has not only violated equity in taxation but has also altered the terms of trade in favour of the agriculturists as against non-agriculturists. [3] The adequate taxation of the agricultural sector has become essential not only to bring about equity in taxation between the agricultural and non-agricultural sectors but also to raise a substantial amount of revenue from the agricultural sector for development purposes. The resources that can be mobilised successfully from the agricultural sector will, however, depend upon the extent to which it is undertaxed. It becomes, therefore, necessary to make an estimate of the tax burden on the agricultural and non-agricultural sectors. It is,

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1. For a detailed discussion see H. P. Wald, *"Taxation of Agricultural Land in Underdeveloped Economies"*, Harvard University Press, Cambridge, Massachusetts 1959; The Role of Agricultural land taxes in Japanese Development (by the Food and Agriculture Organisation of the United Nations) in *Readings on Taxation In Developing Countries* (ed.) R. Bird and O. Oldman, The Johns Hopkins Press, Baltimore, 1964; E. R. Schlesinger, "The use of special Assessments to Finance Development Projects". International Bank for Reconstruction and Development (Mimeographed) July 15, 1953.

2. See P. K. Bhargava, "Need for Raising Agricultural tax, *Capital,* February 29, 1969; P. K. Bardhan, "Agriculture Inadequately Taxed." *The Economic Weekly,* XIII, 49, December 9, 1961; Y. K. Alagh, Case for an Agricultural Income Tax, *The Economic Weekly,* XIII, 39, September 30, 1961; K. N. Raj, *"Resources for* the Third Plan, *The Economic Weekly,* Annual Number, 1959; I. S. Gulati, *"Resource Prospects of the Third Five-Year Plan,* Orient Longman's Ltd., Bombay, 1960; C. H. Hanumanta Rao, *"Taxation of Agricultural Land in Andhra Pradesh"*, Asia Publishing House Bombay, 1966; *Report of the Taxation Enquiry Commission,* (1953-54) Vol. III, Government of India Press, Manager of Publication Delhi-1955, V. P. Gandhi, *"Tax Burden On Indian Agriculture,* Harvard Law School, Cambridge, Massachusetts, 1966; A. M. Khusro, "Taxation of Agricultural Land: A proposal, *The Economic Weekly,* XV, 4-6, February 1963.

3. See A. M. Khusro, "Inter-Sectoral Terms of Trade and Price Policy," *The Economic Weekly* (Vol. XIII, Annual Number, February 4, 1961).

however, unfortunate that no reliable data are available for the purpose. Even so we shall estimate the tax burden on agricultural (henceforth called 'A') and non-agricultural (henceforth called 'N') sectors. Keeping in view the following assumptions: —

(1) Indirect taxes are shifted to the consumers while direct taxes are not;

(2) Revenue from indirect taxes has been allocated between the 'A' and 'N' sectors in proportion to their per capita expenditure incurred on the commodities and services subject to indirect taxes;

(3) Where data for 'A' and 'N' sectors are not available, figures available for rural and urban sectors have been used;

(4) It is assumed that the tax paying capacity of each sector will depend upon its income;

(5) No attempt has been made to calculate the tax burden on different groups of income within the 'A' and 'N' sectors;

(6) In allocating the direct taxes of Union and State Governments between the 'A' and 'N' sectors, the following procedure has been adopted.

As for the direct taxes of Union Government, we have assumed that income-tax, wealth tax, corporation tax, gift tax and expenditure tax fall entirely on 'N' sector. Among the direct taxes of the State Governments agricultural income tax, land revenue and surcharge on cash crops is borne completely by 'A' sector. Other direct taxes such as profession tax, urban-immovable property tax fall entirely on 'N' sector. The revenue from stamps and registration is assumed to fall in the ratio of 80 percent and 20 percent on 'N' and 'A' sectors respectively. [4] Estate duty has been paid by the 'A' sector to the extent of 8 percent in 1956-57 and 12 percent in 1961-62. For the remaining years its share in estate duty remains at 8 percent of the total collection.[5]

(7) With respect to indirect taxes of Union and State Governments we have assumed that they fall on both the sectors in proportion to their per capita expenditure on commodities and services consumed. (See (2) supra.) We have taken per capita cash expenditure of 'A' and 'N' sectors from National Sample Survey Thirteenth Round (September 1957—May 1958 Report No. 71) and have assumed that expenditure pattern of the consumers in both the sectors has remained the same throughout the period of our study. [6] To obtain the percentage share of the agricultural sector in various indirect taxes [7] the per capita expenditure of the rural/agricultural sector has been multiplied by its population according to the following formula:

$$\left\{ \frac{1}{1 + \frac{CEna \times Pna}{CEe \times Pa}} \right\} 100$$

Where CEna = Per capita expenditure of non-agricultural sector.

CEa = Per capita expenditure of agricultural sector.

Pna = Population of non-agricultural sector.

Pa = Population of agricultural sector.

4. V. P. Gandhi, *"Tax Burden on Indian Agriculture,"* Harvard Law School, Cambridge, Massachusetts, 1966, p. 73.

5. The percentage share of the Agricultural sector in revenue from estate duty has been calculated taking into consideration the amount contributed by agriculturists in total collection of estate duty in different years. For details see Budgets of State Governments for different years.

The revenue from Union duties of excise has been allocated in accordance with the per capita expenditure [6] of each sector on the various commodities subject to such duty. Though it is correct that the consumption of these commodities differs from person to person within a state and between the consumers of different States; we have assumed that the All-India per capita expenditure on excisable commodities will hold good for all the States and for all the expenditure groups. The percentage share of the 'A' sector in the revenue from various commodities subject to Union duties of excise is shown in Annexure 4 (see Part 2 of this article in the next issue). The percentage share of the 'A' sector for each commodity has been arrived at by taking into account its per capita expenditure on each such commodity. Thereafter the revenue attributable, from each such commodity, to the 'A' sector has been added and then this sum is subtracted from the total revenue of Union excise duties to find out the share of the 'N' sector. [7]

Revenue from import duty has been divided in the ratio of 20 percent and 80 percent on 'A' and 'N' sectors, respectively. [8]

Export duty has been assumed to fall entirely on the foreigners.

The share of 'A' sector in the tax on passengers and goods has been obtained by using per capita expenditure on conveyance. It may, however, be mentioned that the question of finding out the share of 'A' sector in the tax on railway passenger fares does not arise as the tax was imposed from September 15, 1957 and was abolished from April 1, 1961.

For State excise duty the share of 'A' sector has been obtained by using per capita expenditure on country liquor.

Various States levy sales tax on different commodities at different rates. In the absence of commodity-wise revenue accrual it is difficult to locate the burden of this tax. However, we have obtained the share of 'A' sector by adding up the per capita expenditure on the following items: Vegetables, Sugar, Tobacco, Fuel and Light, Cotton clothing, Salt, Spices, Drugs, Oranaments, Footwear, Toilets, Sundry goods, Oils, Kerosine, Matches, Tea, Country liquor and Confectioneries. For 'N' sector we have taken the per capita expenditure on the following commodities: Cereals, Milk and Milk Products, *Ghee* and Butter, Pulses, Sugar, Cotton clothing, Bedding, Amusements, Ornaments, Domestic Utensils, Footwear, Toilets, Sundry Goods, Gingelly and Groundnut, Kerosine, Matches, Country liquor and Confectioneries.

Per capita expenditure by 'A' sector on conveyance is used for obtaining the share of 'A' sector in sales tax on motor spirits and motor vehicles tax.

Per capita expenditure by 'A' sector on cinema is used for obtaining the share of 'A' sector in entertainment tax.

The share of the 'A' sector in electricity duty has been calculated on the basis of consumption of electricity for irrigation purposes by the agriculturists.

(8) Other taxes and duties have been distributed between 'A' and 'N' sectors in relation to their respective population of each sector.

(9) We are not considering the taxes levied by the local Governments as the relevant data and information is not available.

6. Per capita expenditure of agricultural/rural and non-agricultural/urban sectors on different items is given in Annexure II.

7. The percentage share of the agricultural sector in different indirect taxes has been given in Annexure III.

8. V. P. Gandhi, *"Tax Burden on Indian Agriculture,"* p. 75.

However, this will not be a serious omission in our analysis as the local Governments are not in an advanced stage in raising the tax revenue in our country and they are mostly dependent on State Governments for financial assistance.

II. CONTRIBUTION IN DIRECT AND INDIRECT TAXES

The contribution of the 'A' sector in the revenue from direct and indirect taxes is relatively much less as compared to the 'N' sector. Throughout the period 1951-52 to 1971-72 (Revised) we find that the tax burden on the 'N' sector is relatively greater. It is clear from Table 1 that total tax revenue contributed by 'A' sector in 1951-52 was Rs. 215.67 crores whereas the revenue in direct and indirect taxes paid by the 'N' sector amounted to Rs. 430.88 crores during the same year which was almost double the contribution of 'A' sector. However there was some change in the relative position of tax burden on 'A' and 'N' sectors in 1956-57 when the total tax revenue of the 'A' sector was of the order of Rs. 314.16 crores as against Rs. 524.12 crores of the 'N' sector. The disparity in the tax burden of the 'A' and 'N' sectors further widened in 1961-62 when the contribution of 'N' sector was almost 2.3 times greater than that of 'A' sector. In absolute amount the contribution of the 'A' sector was Rs. 439.82 crores as against Rs. 1046.77 crores of the 'N' sector. The same trend has continued in future years also. In the year following the Third Plan the amount paid in taxes by 'A' sector was of the order Rs. 831.98 crores as against Rs. 2307.46 crores of 'N' sector which shows that during this year the 'N' sector was still 2.7 times more taxed than that of the 'A' sector. The situation has not improved since then and it is clear from the Table that in 1971-72 (Revised) the 'N' sector was paying 2.7 times in taxes more than that of the 'A' sector. During this year the total tax revenue paid by the 'A' sector was Rs. 1461.89 crores as against Rs. 3997.0 crores of the 'N' sector. It may also be emphasised here that during the decade 1951-52 to 1961-62 and further during the decade 1961-62 to 1971-72 the taxes paid by the 'A' sector increased by 103.4 percent and 232.3 percent, respectively. During the same period the taxes paid by the 'N' sector increased by 142.9 percent and 282.7 percent, respectively. The fact that 'N' sector is relatively more taxed than 'A' sector is also evident from the fact that in 1951-52 the total taxes (direct and indirect) paid by the 'A' sector formed 33.2 percent of the total tax revenue of the Union and State Governments as against the corresponding percentage of 66.8 of 'N' sector. [9] However in 1956-57 the relative share of the 'A' sector in the total tax revenue of the Union and State Governments increased while that of the 'N' sector decreased as compared to its contribution in 1951-52; though in absolute amount the 'N' sector was still contributing relatively more as compared to the 'A' sector. This slight change in the relative position of the 'A' sector was primarily due to the fact that following the *Zamindari* abolition in 1952, the direct taxes (namely land revenue) paid by the agriculturists increased. It may, however, be emphasised that despite the increase in the yield of direct taxes from 'A' sector the position of the agriculturists, in fact, had improved because the amount which the agriculturists were paying to the State was relatively less as compared to the amount which they were paying to the *Zamindar* in the form of money and other

9. See Table 3.

services. In addition, the *Zamindar* used to extract some illegal charges also from the agriculturists. In 1961-62 and in 1966-67 the total tax burden on the 'A' sector again declined while it increased on the 'N' sector and was relatively greater as compared to the tax burden in 1951-52 and 1956-57. In 1966-67 the contribution of 'A' sector in total tax revenue of Union and State Governments was 26.4 percent and was almost at the same level in 1971-72 (Revised). However, the 'N' sector has borne relatively greater tax burden and since 1961-62 it is paying more than 2.5 times greater in taxes as compared to the 'A' sector. It may also be emphasised that the share of the 'N' sector in total tax revenue of the Union and State Governments has continued to increase except during the year 1956-57 when it declined as compared to its own contribution in 1951-52.

III. CONTRIBUTION IN DIRECT TAXES

The direct taxes paid by the agriculturists have increased from Rs. 52.32 crores in 1951-52 to Rs. 91.10 crores in 1956-57 and further to Rs. 104.60 crores in 1961-62 but declined to Rs. 100.20 crores in 1966-67. However it rose to Rs. 105.30 crores in 1971-72 (Revised). As against this the direct taxes paid by the 'N' sector have continuously shown an upward trend. The yield from the direct taxes paid by the 'N' sector has increased from Rs. 211.55 crores in 1951-52 to Rs. 233.84 crores in 1956-57 and further to Rs. 379.70 crores in 1961-62. Thereafter the direct taxes paid by the 'N' sector increased rapidly and amounted to Rs. 730.13 crores in 1966-67 and further to Rs. 1147.56 crores in 1971-72 (Revised). It may also be emphasised that during the decade 1951-52 to 1961-62 and again during the decade 1961-62 to 1971-72 (Revised) the direct taxes paid by the agriculturists increased by 99.9 percent and 0.6 percent, respectively. During the same years the direct taxes paid by the 'N' sector increased by 79.4 percent and 202.2 percent, respectively. The direct taxes paid by the agriculturists formed 8.0 percent of the total tax revenue of the Union and State Governments in 1951-52. This percentage, however, rose to 10.8 in 1956-57 but declined to 7.0 in 1961-62, to 3.1 in 1966-67 and further to 1.9 in 1971-72 (Revised). The corresponding percentage figure of direct taxes for the 'N' sector in 1951-52 was 32.5; since then it declined to 25.5 in 1961-62 and further to 21.0 in 1971-72 (Revised). Though the contribution of 'N' sector in total tax revenue of the Union and State Governments shows a declining trend throughout the period yet their contribution has been much greater as compared to the 'A' sector.

It is however unfortunate that direct taxes paid by the agriculturists form a small percentage of the income originating in the agricultural sector. Table 3 shows that in 1951-52 direct taxes paid by the agriculturists formed 1.0 percent of the income originating in the agricultural sector. This percentage increased to 1.8 in 1956-57 but declined to 1.5 in 1961-62. Thereafter the decline has been very rapid and in 1966-67 and 1971-72 (Revised) the percentage share of the direct taxes in the output originating in the agricultural sector declined to 0.8 and further to 0.7, respectively. On the other hand the direct taxes paid by the 'N' sector in 1951-52 formed 4.1 percent of the income originating in the non-agricultural sector which means that 'N' sector during the year was contributing four times than that of the

'A' sector. However, in 1956-57 the contribution of 'N' sector declined (as compared to its own contribution in 1951-52) when direct taxes paid by 'N' sector formed 3.4 percent of the income originating in 'N' sector but this percentage further rose to 4.8 in 1961-62, to 6.1 in 1966-67 and further to 6.3 in 1971-72 (Revised). From these data it is very clear that the 'A' sector has been contributing a very small proportion of its income in the form of direct taxes whereas the 'N' sector has continued to contribute a relatively greater percentage of its income in direct taxes throughout the period and that the disparity in the contribution of both the sectors widens rapidly since 1961-62.

IV. CONTRIBUTION IN INDIRECT TAXES

The indirect tax burden is also relatively greater on the 'N' sector as compared to the 'A' sector. Table 1 shows that the indirect tax revenue from 'A' sector increased from Rs. 163.35 crores in 1951-52 to Rs. 223.06 crores in 1956-57 and further to Rs. 335.22 crores in 1961-62. During the same period the indirect taxes paid by the 'N' sector increased from Rs. 219.33 crores, to Rs. 290.28 crores and further to Rs. 667.07 crores, respectively. It may also be emphasised that during the decade 1951-52 to 1961-62 the indirect tax revenue paid by the 'A' sector increased by 105.2 percent and that of the 'N' sector by 204.1 percent. Thereafter, there has been a rapid increase in the yield of indirect taxes by both the sectors but this increase has been relatively greater for the 'N' sector. In 1966-67, 'A' sector contributed Rs. 731.78 crores in indirect taxes which increased to Rs. 1356.59 crores in 1971-72 (Revised). During the same period the indirect tax revenue of the 'N' sector increased from Rs. 1577.33 crores to Rs. 2849.44 crores, respectively. Although the contribution of both the sectors in absolute amount has increased rapidly as explained above but it may be emphasised that the increase in the indirect tax revenue of the 'A' and 'N' sectors during the decade 1961-62 to 1971-72 (Revised) was 304.6 percent and 327.1 percent, respectively. It may, however, be emphasised that the disparity in the percentage increase of revenue from indirect taxes for both the sector during the decade 1961-62 to 1971-72 (Revised) is relatively much less as compared to the disparity in the percentage increase of revenue from indirect taxes for both the sectors during the preceding decade 1951-52 to 1961-62.

We may also emphasise here that throughout the period 1951-52 to 1971-72 (Revised) the indirect taxes paid by the 'N' sector form a relatively greater percentage of the total tax revenue of the Union and State Governments as compared to the corresponding percentage contribution of 'A' sector. The percentage contribution of the 'N' sector in the total tax revenue of the Union and State Governments through indirect taxes was almost double than that of the 'A' sector. During the decade 1951-52 to 1961-62 the indirect taxes paid by the 'A' sector formed 25.2 percent of the total tax revenue of Union and State Governments in 1951-52 but declined to 22.5 percent in 1961-62 whereas the percentage share of the 'N' sector increased from 34.3 to 45.0 during the same years, respectively. These data also demonstrate that the 'A' sector is relatively lightly taxed and the tax burden on the 'N' sector has continued to increase.

That contribution of the 'A' sector towards

the indirect taxes has been relatively less as compared to the 'N' sector is also evident from the fact that in 1951-52 indirect taxes paid by the 'A' sector formed 3.2 percent of national income originating in the agricultural sector where as the corresponding percentage contribution of 'N' sector was 4.3 during the year. The disparity in percentage contribution of both the sectors appears to be small during the year but at the end of the decade in 1961-62 the indirect taxes paid by the 'N' sector formed 8.4 percent of the income originating in the 'N' sector while the corresponding percentage share of the 'A' sector was almost the half at 4.8 during the year. However in 1971-72 (Revised) the indirect taxes paid by the 'A' sector formed 9.5 percent of the income originating in the agricultural sector which was almost double of its corresponding percentage contribution in 1961-62. The indirect taxes paid by the 'N' sector formed 8.4 percent of the income originating in the 'N' sector in 1961-62 and increased to 15.7 percent in 1971-72 (Revised). This increase, however, was slightly less than double but it should be noted that even after a three-fold increase in contribution of indirect tax revenue by the 'A' sector (from 3.2 percent of the income originating in the 'A' sector in 1951-52 to 9.5 percent in 1971-72 (Revised)) during the last twenty years; the corresponding increase in the indirect tax revenue of the 'N' sector has been relatively more as compared to the 'A' sector as is clear from Table 3.

The above discussion amply demonstrates that the contribution of the 'A' sector in the direct and indirect taxes is relatively less as compared to the 'N' sector. It may also be emphasised here that the per capita tax burden on the 'N' sector is relatively much more as compared to the 'A' sector.

V. PER CAPITA TAX BURDEN

The per capita tax burden on the 'A' sector in 1951-52 was as little as Rs. 9.3 as against Rs. 39.7 for the 'N' sector. Table 2 shows that in 1956-57 per capita tax burden on the 'A' sector increased by a small amount of Rs. 1.9 whereas it increased by Rs. 4.4 in the case of 'N' sector. However during the later years the per capita tax burden on the 'N' has increased rapidly and we find that in 1961-62 the disparity in the tax burden for both the sectors was much more as compared to the preceding years. In 1961-62 the per capita taxes paid by the 'A' sector were of the order of Rs. 14.5 — showing an increase of 55 percent over 1951-52. During the same year the per capita tax burden on the 'N' sector was Rs. 78.3 — showing an increase of 97 percent over 1951-52. The disparity in the tax burden of both the sectors has widened and we find that during the quinquennium 1961-62 to 1966-67 per capita taxes of the 'A' sector increased by only Rs. 9.8 as against an increase of Rs. 71.3 for the 'N' sector. In 1971-72 (Revised) per capita tax burden for the 'A' sector was of the order of Rs. 38.5 as against Rs. 230.5 for 'N' sector, which is 5.9 times than that of the 'A' sector. It may be noted that during the decade 1961-62 to 1971-72 (Revised) the per capita tax burden of the 'A' sector increased by 165 percent while that of the 'N' sector by 194 percent. The increase in per capita tax burden of the 'N' sector has been relatively faster as compared to the increase in the per capita tax burden of 'A' sector during the decade 1951-52 to 1961-62 also.

That 'A' sector is making a relatively smaller sacrifice is also evident from the fact that the per capita taxes paid by this sector formed 4.2 percent of its per capita income

in 1951-52. This percentage rose to 6.8 in 1966-67 and further to 10.2 in 1971-72 (Revised). Against this it may be emphasised that the per capita taxes paid by the 'N' sector formed 8.4 percent of its per capita income in 1951-52 — this percentage is almost double than that of the during the year. The share of the per capita taxes in per capita income of the 'N' sector has almost been double (except during the year 1956-57) throughout the period as compared to the 'A' sector. In fact the percentage share of the per capita taxes in the per capita income of the 'N' sector was slightly less than three times than that of the corresponding percentage share of the 'A' sector in 1966-67. Thus it is clear that the per capita tax burden of the 'A' sector has been relatively much less as compared to the per capita tax burden of the 'N' sector.

VI. DIRECT TAXES PER CAPITA

The burden of direct taxes per capita has also been much more for the 'N' sector. The figure for per capita direct taxes for the 'N' sector in 1951-52 was Rs. 19.3 which was 9.1 times greater as compared to the corresponding per capita tax figure for 'A' sector. The disparity has continued during the subsequent year also. In 1961-62 the per capita direct taxes paid by the 'A' sector were Rs. 3.5 as against Rs. 28.4 of 'N' sector which mean that during the year per capita direct tax burden on the 'N' sector was 8.1 times higher as compared to the 'A' sector. The situation has not improved since then and in 1971-72 (Revised) the burden of per capita direct taxes on the 'N' sector was 23.6 times higher than that of the 'A' sector. In absolute amount per capita direct taxes paid by the 'A' sector were Rs. 2.86 as against Rs. 66.2 paid by the 'N' sector. The per capita direct taxes paid by the 'A' sector increased by 66.6 percent during the decade 1951-52 to 1961-62 and declined by 25 percent during the decade 1961-62 to 1971-72 (Revised).

However, the per capita direct taxes paid by the 'N' sector increased by 47.1 percent and 133.0 percent, respectively during the same period.

In this context it may be emphasised that the per capita income of the 'N' sector has also been relatively higher and one may be inclined to think that if the per capita income of 'N' sector is higher it should also bear a greater burden of per capita taxes. Unfortunately, the burden of per capita direct and indirect taxes on the 'N' sector has not been in relation to the proportion in which its per capita income has been higher in the sense that in 1951-52 per capita income of the 'N' sector was 2.3 times higher than that of the 'A' sector but the per capita taxes were 4.2 times higher than that of the 'A' sector. Similarly in 1961-62 the per capita income of the 'N' sector was 2.6 times higher than that of the 'A' sector but the total per capita taxes paid by it were 5.3 times higher and per capita direct taxes were 8.1 times higher than that of the 'A' sector. The per capita tax load on the 'N' sector has continued to increase rapidly while the increase in its per capita income has been only marginal. In 1971-72 (Revised) the per capita income of the 'N' sector was 2.7 times higher than that of the 'A' sector but the per capita direct taxes paid by it were 23.6 times higher and per capita total tax burden was 5.9 times higher than that of the 'A' sector.

VII. INDIRECT TAXES PER CAPITA

The burden of indirect taxes per capita is also higher on the 'N' sector as compared to the 'A' sector, although the amount of per capita indirect taxes paid by the 'A' sector has continued to increase throughout the period but this percentage increase has been much lower as compared to the corresponding percentage increase for the 'N' sector. In 1951-52 the per capita indirect taxes paid by the 'A' sector were Rs. 6.5 which increased to Rs. 8.0 in 1956-57 and further to Rs. 11.0 in 1961-62. During this period the per capita indirect taxes paid by 'A' sector increased by 69 percent while that of 'N' sector by 144.6 percent. From Table 2 it may also be noted that the disparity in the burden of indirect taxes per capita between 'A' and 'N' sectors has continued to increase and that during the decade 1961-62 to 1971-72 (Revised) the amount of per capita indirect taxes for the 'A' sector rose from Rs. 11.0 in 1961-62 to Rs. 35.7 in 1971-72 (Revised) — showing an increase of 214.5 percent. During the same period indirect taxes per capita of the 'N' sector increased from Rs. 49.9 to Rs. 164.3 — showing an increase of 229.2 percent.

These data make it clear that even with regard to the per capita indirect tax burden we find that 'A' sector is undertaxed. The disparity between the two sectors is also evident from the fact that in 1951-52 the burden of indirect taxes per capita on the 'N' sector was 3.1 times higher than that of the 'A' sector. The disparity further increased and in 1961-62 and in 1971-72 (Revised) the 'N' sector was paying almost 4.5 times more in per capita indirect taxes as compared to the 'A' sector.

It is also necessary to emphasise that the 'A' sector is contributing a smaller portion of its income in the form of per capita indirect taxes. Per capita indirect taxes paid by the 'A' sector formed 3.2 percent of its per capita income in 1951-52 whereas the per capita indirect taxes of the 'N' sector formed 4.3 percent of its per capita income. This percentage increased to 8.4 in 1961-62 as against the corresponding percentage figure of 4.8 for the 'A' sector during the year. It must be noted as is clear from Table 2 that the burden of indirect taxes per capita (as percentage of per capita income) on the 'A' sector doubled in a span of fifteen years (1951-52 to 1966-67) whereas it doubled in a span of ten years (1951-52 to 1961-62) for the 'N' sector. It became almost thrice on the 'N' sector in a period of fifteen years (indirect taxes per capita of 'N' sector formed 13.2 percent of its per capita income in 1966-67 as against 4.3 percent in 1951-52).

However during the decade 1961-62 to 1971-72 (Revised) there was a slight change in the relative position in the burden of per capita indirect taxes (as percentage of per capita income) on 'A' and 'N' sectors. During this decade indirect tax per capita of 'A' sector formed 9.5 percent of its per capita income in 1971-72 (Revised) as against 4.8 percent in 1961-62, whereas during the same period the corresponding percentage figures for 'N' sector were 15.7 and 8.4, respectively. These data show that during this period the per capita indirect taxes (as percentage of per capita income) paid by the 'A' sector almost doubled while it was little less than double for 'N' sector. However this should not be interpreted to mean that the burden of per capita indirect taxes on the 'A' sector has increased. In fact during the past two decades from (1951-52 to 1971-72 (Revised)) the burden of indirect tax per capita for the 'A' sector

increased from Rs. 6.5 to Rs. 35.7 — showing an increase of less than six times where as it increased from Rs. 20.4 to Rs. 164.3 for the 'N' sector during the same period — showing an increase of almost 8 times.

VIII. AVERAGE AND MARGINAL RATES OF TAX

The inequity in the tax burden of the 'A' and 'N' sectors will become evident if we compare the average rate and marginal rate of taxation for both the sectors. The 'A' sector paid 4.2 percent of its income in taxes in 1951-52 whereas the 'N' sector paid 8.4 percent of its income in taxes as shown in Table 3. The percentage of income raised through taxes from the 'A' sector increased to 6.3 in 1961-62 and further to 10.2 in 1971-72 (Revised). The corresponding percentage figure for the 'N' sector were 13.2 and 22.0 respectively during these years. From these data it should be noted that throughout the period 1951-52 to 1971-72 (Revised) the 'N' sector has contributed relatively much more in taxes as compared to the 'A' sector and that its contribution in taxes (as percentage of income) has almost been double than that of the 'A' sector. As a result we find that the average tax rate for the 'N' sector has been twice than that of 'A' sector throughout the period. From Table 4 it is clear that the average tax rate for the 'A' sector in 1951-52 was 4.2 as against 8.4 for the 'N' sector. The same position continued in 1961-62 and 1971-72 (Revised). The average tax rate for the 'A' sector stood at 6.3 in 1961-62 and 10.2 in 1971-72 (Revised) as against 13.2 and 22.0 respectively for the 'N' sector during the same years.

It may also be emphasised that the 'N' sector is carrying a relatively greater burden of additional taxation. During the decade 1951-52 to 1961-62 the 'N' sector contributed 21.7 percent of its additional income in taxes whereas the 'A' sector contributed only 11.5 percent — which means that 'N' sector has contributed a little less than twice of its additional income in taxes as compared to the 'A' sector. During the decade 1961-62 to 1971-72 (Revised) the 'N' sector contributed 28.9 percent of its additional income in taxes which is exactly double the contribution of the 'A' sector. Thus we find that the marginal tax rate has also been relatively higher on the 'N' sector as shown in Table 5. The marginal rate of taxation for the 'N' sector during the decade (1951-52 to 1961-62) was a little less than twice and exactly twice during the decade (1961-62 to 1971-72 (Revised)) as compared to the 'A' sector. It can, therefore, be concluded that 'N' sector is carrying double the burden of additional taxation of planned economic development.

(to be continued)

TABLE 1

Revenue from direct and indirect taxes from Agricultural and Non-agricultural sectors

(Crores of Rupees)

Year	Agricultural Sector			Non-agricultural Sector			Combined		
	Revenue from direct taxes	Revenue from indirect taxes*	Total tax revenue	Revenue from direct taxes	Revenue from indirect taxes*	Total tax revenue	Total revenue from direct taxes	Total revenue from indirect taxes*	Total direct and indirect taxes
1951-52	52.32	163.35	215.67	211.55	219.33	430.88	263.87	382.68	646.55
1956-57	91.10	223.06	314.16	233.84	290.28	524.12	324.94	513.34	838.28
1961-62	104.60	335.22	439.82	379.70	667.07	1046.77	484.30	1002.29	1486.59
1966-67	100.20	731.78	831.98	730.13	1577.33	2307.46	830.33	2309.11	3139.44
1971-72 (Revised)	105.30	1356.59	1461.89	1147.56	2849.44	3997.00	1252.86	4206.23	5458.89

* Excludes revenue from export duty.

TABLE 2

Per Capita tax burden on Agricultural and Non-agricultural sectors

Year	Agricultural Sector							Non-agricultural Sector						
	Per Capita income (Rupees)	Per Capita direct taxes (Rupees)	Per Capita indirect taxes (Rupees)	Total Per capita direct and indirect taxes (Rupees)	3 as percentage of 2	4 as percentage of 2	5 as percentage of 2	Per Capita income (Rupees)	Per Capita direct taxes (Rupees)	Per Capita indirect taxes (Rupees)	Total per Capita direct and indirect taxes (Rupees)	10 as percentage of 9	11 as percentage of 9	12 as percentage of 9
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1951-52	199.7	2.1	6.5	9.3	1.0	3.2	4.2	464.3	19.3	20.4	39.7	4.1	4.3	8.4
1956-57	176.6	3.2	8.0	11.2	1.8	4.5	6.3	571.1	19.7	24.4	44.1	3.4	4.2	7.6
1961-62	226.0	3.5	11.0	14.5	1.5	4.8	6.3	592.5	28.4	49.9	78.3	4.8	8.4	13.2
1966-67	351.5	2.9	21.4	24.3	0.8	6.0	6.8	775.2	47.5	102.1	149.6	6.1	13.2	19.3
1971-72 (Revised)	373.0	2.8	35.7	38.5	0.7	9.5	10.2	1043.8	66.2	164.3	230.5	6.3	15.7	22.0

TABLE 3

Tax Burden on Agricultural and Non-agricultural Sectors

Agricultural Sector

Year	Direct taxes from 'A' as percentage of income of 'A'	Indirect taxes from 'A' as percentage of income of 'A'	Total direct and indirect taxes from 'A' as percentage of income of 'A'	Direct taxes from 'A' as percentage of total tax revenue of Union and State Governments	Indirect taxes from 'A' as percentage of total tax revenue of Union and State Governments	Total direct and indirect taxes from 'A' as percentage of total tax revenue of Union and State Governments	Per Capita direct taxes from 'A' as percentage of per capita income of 'A'	Per Capita indirect taxes from 'A' as percentage of per capita income of 'A'	Total per capita direct and indirect taxes from 'A' as percentage of per capita income of 'A'
1	2	3	4	5	6	7	8	9	10
1951-52	1.0	3.2	4.2	8.0	25.2	33.2	1.0	3.2	4.2
1956-57	1.8	4.5	6.3	10.8	26.6	37.4	1.8	4.5	6.3
1961-62	1.5	4.8	6.3	7.0	22.5	29.5	1.5	4.8	6.3
1966-67	0.8	6.0	6.8	3.1	23.3	26.4	0.8	6.0	6.8
1971-72 (Revised)	0.7	9.5	10.2	1.9	24.8	26.7	0.7	9.5	10.2

Non-Agricultural Sector

Year	Direct taxes from 'N' as percentage of income of 'N'	Indirect taxes from 'N' as percentage of income of 'N'	Total direct and indirect taxes as percentage of income of 'N'	Direct taxes from 'N' as percentage of total tax revenue of Union and State Governments	Indirect taxes from 'N' as percentage of total tax revenue of Union and State Governments	Total direct and indirect taxes as percentages of total tax revenue of Union and State Governments	Per Capita direct taxes from 'N' as percentage of per capita income of 'N'	Per Capita indirect taxes from 'N' as percentage of per capita income of 'N'	Total per Capita direct and indirect taxes from 'N' as percentage of per capita income of 'N'
	11	12	13	14	15	16	17	18	19
1951-52	4.1	4.3	8.4	32.5	34.3	66.8	4.1	4.3	8.4
1956-57	3.4	4.2	7.6	27.9	34.7	62.6	3.4	4.2	7.6
1961-62	4.8	8.4	13.2	25.5	45.0	70.5	4.8	8.4	13.2
1966-67	6.1	13.2	19.3	23.2	50.4	73.6	6.1	13.2	19.3
1971-72 (Revised)	6.3	15.7	22.0	21.0	52.3	73.3	6.3	15.7	22.0

TABLE 4

Average Rate of Taxation for Agricultural and Non-Agricultural Sectors

Year	Agricultural Sector			Non-Agricultural Sector		
	Total taxes (Crores of Rupees) T	Total income (crores of Rupees) Y	$\frac{T}{Y}$ 100	Total taxes (crores of Rupees) T	Total income (Crores of Rupees) Y	$\frac{T}{Y}$ 100
1951-52	215.67	5020	4.2	430.88	5080	8.4
1961-62	439.82	6960	6.3	1046.77	7910	13.2
1971-72 (Revised)	1461.89	14197	10.2	3997.00	18101	22.0

TABLE 5

Marginal rate of Taxation for Agricultural and Non-agricultural sectors

Year	Agricultural				
	Total taxes (crores of Rupees)	$T_2—T_1$ (Crores of Rupees)	Total income (crores of Rupees)	$Y_2—Y_1$ (crores of Rupees)	$\frac{T_2—T_1}{Y_2—Y_1}$ 100
1951-52	215.67	—	5020	—	—
1961-62	439.82	224.15	6960	1940	11.5
1971-72 (Revised)	1461.89	1022.07	14197	7237	14.1

Year	Non-Agricultural				
	Total taxes (Crores of rupees)	$T_2—T_1$ (crores of rupees)	Total income (crores of rupees)	$Y_2—Y_1$ (crores of rupees)	$\frac{T_2—T_1}{Y_2—Y_1}$ 100
1951-52	430.88	—	5080	—	—
1961-62	1046.77	615.89	7910	2830	21.7
1971-72 (Revised)	3997.00	2950.23	18101	10191	28.9

THE TAX TREATMENT OF DIVIDENDS IN CANADA

EDWIN C. HARRIS *:

THE 1971 "TAX REFORM"

The tax reform process in Canada consumed almost a full decade. It commenced in 1962 with the appointment by the federal government of a Royal Commission on Taxation (the "Carter Commission") and culminated with the introduction of a new Income Tax Act effective as of the beginning of 1972. In view of the large number of amendments and further reforms that have already been implemented since the new Act came into effect, and the still larger number that is anticipated in the near future, many commentators feel that the tax reform process is still continuing.

The Royal Commission rendered its monumental report early in 1967. The Report was widely discussed both in Canada and elsewhere, and the stress that it placed on the fundamental principles of tax equity and neutrality were generally admired. Many of its recommendations, however, proved on detailed critical examination not to be practical measures of tax reform for Canada. [1] Subsequently, in late 1969, the federal government issued a White Paper entitled Proposals for tax Reform, which drew upon but differed substantially from the proposals of the Carter Report. Many of the White Paper proposals also stirred vigorous criticism, and some of them proved to be impracticable. [2]

Having drawn what benefit it could from the studies and public debate on tax reform, the government presented its new legislation to Parliament in June 1971. After some technical amendments had been made to the bill, it was passed late in the year and came into effect on January 1, 1972. As just indicated, many subsequent amendments have already been made to the Act. The new Act differs in many respects from the White Paper proposals and only bears slight residual resemblances to the Carter recommendations. Many commentators feel that it is euphemistic for the government to describe the new legislation as "tax reform", since it has not solved any of the four main problems that led to the appointment of the Royal Commission -

1. Surplus stripping;
2. Associated corporations;
3. The untenable distinctions between capital gains and ordinary income; and
4. The ineligibility of some legitimate business expenses for full deduction, sooner or later.

As well, most of the artificialities and rigidities of the former Act that distorted the measurement of business income for tax purposes remain unchanged.

Capital gains are now taxed, but on a special basis. One-half of net capital gains is included in computing income. There are severe limitations, however, on the right of a taxpayer to deduct net capital losses. As will be more fully explained later, a degree of integration of corporate and

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1. See Harris, *What Should Canada Do with the Carter Report?*, XXI *Bulletin* 531 (1967).
2. See Harris, *Tax Reform in Canada - Stage II*, XXIV *Bulletin* 179 (1970).

individual taxes is achieved for investment income earned by a private corporation and for a limited amount of active business income earned by a Canadian-controlled private corporation. Some serious problems relating to the distribution of corporate surpluses remain, but an attempt has been made to facilitate the distribution of corporate surpluses that were on hand at the end of 1971. Substantially revised rules have been enacted relating to income earned on Canadian investments in other countries; but the implementation of these rules has been delayed, and it is expected that the rules, as now written, will be considerably modified before they come into force. Several other changes of a technical or procedural nature have also been implemented.

This article is confined to a survey discussion of the treatment of dividends under the new Canadian income tax law. While it will thus deal with only one aspect of the Canadian "tax reform", the discussion necessarily touches upon many of the important changes, since the elements of the new tax system are closely interrelated. [3]

THE TAX UNIT

The government rejected the Carter Commission's proposal that the basic tax units should be the family and the unattached individual and that corporations should be treated simply as intermediaries for their shareholders. The new law gives a greater degree of recognition to the intermediary nature of certain corporations, but the basic tax units remain the individual and the corporation.

The tax treatment of a corporation and of its shareholders depends, to some extent, on the classification of the corporation. A resident corporation may be a "public" corporation, a "private" corporation, or neither. The third, or residual, class, however, is taxed in much the same way as a public corporation, and its separate status can be ignored for purposes of this discussion. A resident corporation is a "private" corporation if it is not a public corporation and is not directly or indirectly controlled by one or more public corporations. A resident corporation is a "public" corporation if

1. Any of its shares are listed on a Canadian stock exchange; or
2. It had a certain minimum number of shareholders holding a certain minimum value of shares and representing a certain minimum degree of distribution of its shares among the public and either
   a. It has elected to be classified as a public corporation, or
   b. The Department of National Revenue has designated it as a public corporation.

Similarly, when a corporation that qualified as a public corporation falls below a lower minimum number of shareholders holding a minimum value of shares and representing a lower minimum degree of distribution of its shares among the public, it may either elect, or be designated by the Department, to cease to be a public corporation.

The lower rate of corporate tax that applies to a certain amount of Canadian active business income is available only to a "Canadian-controlled private corporation". To qualify, a corporation must be a "Ca-

3. For an overview of the new Canadian income tax system, see Peterson, *Canadian Taxation of Nonresidents,* 12 Colum. J. Transnat'l L. 213 (1973).

nadian corporation" — *i.e.,* resident in Canada and either incorporated in Canada or continuously resident since June 18, 1971 — as well as a private corporation, and, in addition, it must not be controlled by one or more nonresidents, either alone or in combination with one or more public corporations.

Special tax treatment is accorded to dividends received from a "taxable Canadian corporation". This is any Canadian corporation, as defined in the preceding paragraph, that was not exempt from tax at the time that the dividend was paid or was deemed to have been paid.

CORPORATE SURPLUS

Detailed rules are provided for classifying the surpluses of a corporation at the end of 1971. These surpluses, consisting of 1971 undistributed income on hand, tax-paid undistributed surplus on hand, and 1971 capital surplus on hand (which, if negative in amount, is called "paid-up capital deficiency"), when combined with the corporation's paid-up capital at the end of 1971, make up its "tax equity" — *i.e.,* the excess of the total assets of the corporation, computed on a tax basis, over its total liabilities at that time.

In general, 1971 undistributed income on hand represents the accumulated retained taxable earnings of the corporation, after tax, for its taxation years 1950 to 1971 inclusive, to the extent that the opportunity was not taken, under the provisions of the former Act, to render those retained earnings tax-paid by electing to pay a special 15% tax on them. Any such earnings that were rendered tax-paid and were still retained, after tax, by the corporation at the end of 1971 would be classified as tax-paid undistributed surplus on hand.

The residual portion of total tax equity not represented by the total of paid-up capital, 1971 undistributed income on hand, and tax-paid undistributed surplus on hand is called 1971 capital surplus on hand. If the result is negative, it is called paid-up capital deficiency. In general, this account consists of retained earnings from before 1950, net retained capital gains and other non-taxable gains, and shareholder contributions that did not increase paid-up capital, minus assets — such as goodwill — on hand at the end of 1971 that were not recognized for tax purposes.

1971 undistributed income on hand can be reduced only where the corporation makes one or more elections, after 1971, to pay a special 15% tax on part or all of it. The remaining 85%, on which the tax has been paid, is added to the corporation's tax-paid undistributed surplus on hand and may be distributed, in a special way, in the form of one or more nontaxable dividends. 1971 capital surplus on hand can be distributed in a special way, without further tax, in the form of one or more nontaxable dividends after all 1971 undistributed income on hand has been rendered tax-paid and after the tax-paid undistributed surplus on hand has first been distributed.

In general, the paid-up capital of a corporation may be returned, in whole or in part, tax-free to its shareholders on the redemption of shares, on any other reduction of capital, or on the winding up of the corporation. If, however, there is a paid-up capital deficiency, the tax value of the paid-up capital is considered to be impaired to that extent. Only the net amount, if any, remaining after subtracting the paid-up capital deficiency

from the paid-up capital (which net amount is called the "paid-up capital limit") is available for tax-free distribution to the shareholders. Any distribution in excess of this amount will be deemed to be a dividend.

The amount of a corporation's 1971 capital surplus on hand may change as a result of events that occur after 1971. The corporation may receive additional amounts of this surplus in the form of dividends paid from the 1971 capital surplus on hand of another corporation whose shares it holds; and, of course, its 1971 capital surplus on hand is reduced by any special nontaxable dividends that it pays from that surplus. In addition, any capital gains that had accrued on its assets as of the end of 1971 and that were subsequently realized would be added, and any accrued capital losses that were subsequently realized would be subtracted, in computing its 1971 capital surplus on hand after the time of realization.

Similarly, any capital losses that had accrued on a corporation's assets as of the end of 1971 and that were subsequently realized would be added, and any accrued capital gains that were subsequently realized would be subtracted, in computing the corporation's paid-up capital deficiency, if it has one, after the time of realization. In addition, a paid-up capital deficiency can be created or added to as a result of certain post-1971 events where the corporation issues more in paid-up capital and other consideration than the tax value of assets received in exchange. Any dividends that the corporation is deemed to have paid as a result of having a paid-up capital deficiency will reduce the amount of that deficiency for purposes of future computations.

No provision is made for rendering post-1971 after-tax corporate income tax-paid. Consequently, in general, these retained earnings can only be distributed to shareholders as taxable dividends or taxable deemed dividends. One-half of a corporation's post-1971 capital gains and of similar gains on the disposition of goodwill and all mortality gains on life insurance policies (as in the case of any taxpayer) are tax-free to the corporation. In the case of a private corporation, these untaxed post-1971 gains are credited to a "capital dividend account", from which they may be distributed tax-free to the shareholders in the form of capital dividends. No comparable right is given to public corporations.

Because the framers of the Act intended that all distributions of post-1971 after-tax corporate income be classified as taxable dividends and because the effective rates of individual tax on such dividends are higher than those on capital gains (for a top-bracket taxpayer, depending on the province, this differential is approximately 17 percentage points), steps have been taken to prevent taxpayers from converting taxable dividends into capital gains. For this purpose, both the specific and the general rules of the former Act designed to counteract "surplus stripping" have been carried over to, and indeed have been extended in, the present Act.

TYPES OF DIVIDENDS

We have seen that special dividends paid by a corporation out of its tax-paid undistributed surplus on hand and out of its 1971 capital surplus on hand are received tax-free by the shareholders. The amount of these special dividends paid out of pre-1972 surpluses, however, reduces the

tax basis (called technically the "adjusted cost base") of the recipient's shares. Consequently the payment of these dividends may increase the ultimate capital gain, or reduce the ultimate capital loss, when the shares are disposed of (or where they are deemed to be disposed of, as on the owner's death). Capital dividends paid by a private corporation out of its capital dividend account are also not taxable to the recipient shareholders; but, unlike special dividends paid out of pre-1972 surpluses, capital dividends do not reduce the adjusted cost base of the recipients' shares.

Apart from special cases such as capital gains dividends paid by a mutual fund corporation or by a nonresident-owned investment corporation, which we shall not consider here, any other dividend paid by a corporation is classified as an ordinary taxable dividend.

Several events may give rise to a "deemed dividend" — *e.g.*, certain dispositions by a corporation on winding up, the redemption of its shares, or the reduction of its capital, to the extent that these distributions exceed the corporation's paid-up capital limit. If the appropriate election is made, a deemed dividend can qualify as one or another of the special nontaxable dividends. Otherwise it is treated as an ordinary taxable dividend.

EFFECT OF DIVIDENDS ON THE PAYING CORPORATION

Special nontaxable dividends paid by a corporation out of its tax-paid undistributed surplus on hand, 1971 capital surplus on hand, or capital dividend account simply reduce the surplus account out of which they are paid. Generally speaking, no special post-1971 surplus account is maintained for a public corporation, so that the effect of taxable dividends on its surplus need not be recorded in a special account. In the case of a private corporation, taxable dividends are considered to be paid first out of its accumulated post-1971 investment income, if any, and then out of its accumulated active business earnings. The latter is not a separate account, however.

Where applicable, a private corporation will maintain an account for the refundable portion of the taxes that it has paid on its post-1971 investment income. This account (known technically as "refundable dividend tax on hand") consists of the special 1/3 tax that it must pay on taxable portfolio dividends that it receives from certain other corporations and on taxable dividends paid out of the investment earnings of controlled private corporations, plus 25% (being slightly more than half the total corporate tax paid) of its nondividend investment income. This latter income includes the taxable half of any net capital gains and income from any non-active business. These refundable taxes will be refunded to the private corporation at a rate of $1 for every $3 of taxable dividends that it pays. These rules, when combined with the tax treatment of taxable dividends in the hands of Canadian individual shareholders, achieve a rough integration of corporate and individual taxes for these shareholders with respect to corporate investment income. The initial imposition of the full rate of corporate tax (which is 49% for 1973) on the nondividend investment earnings of such a corporation and of a special 1/3 tax on its dividend investment income (which is generally free of the ordinary corporate tax) ensures that the individual shareholders do not achieve a significant

postponement of tax by reinvesting these earnings in the private corporation.

Once a Canadian-controlled private corporation has paid sufficient taxable dividends to exhaust its accumulated post-1971 investment earnings together with the resulting refunded taxes, further taxable dividends will reduce, by 4/3 of their amount, the private corporation's "cumulative deduction account", if any. This account represents the extent to which the private corporation has cumulatively earned and retained a portion of the $400,000 total taxable income that it may so earn and retain, after 1971, before exhausting its right to the special "small business" corporate rate of 25% (20% in the case of manufacturing or processing profits) on up to $50,000 annually of Canadian active business earnings. These dividends, therefore, have the effect of restoring a right to further use of the low rate of tax. Again, to the extent that corporate earnings have been taxed at the low rate, the mechanism for taxing taxable dividends paid out of these accumulated earnings to Canadian resident individual shareholders achieves substantial integration of corporate and individual taxation with respect to these earnings.

The earnings of a public corporation, as well as the active business earnings of a private corporation that do not qualify for the low rate of corporate tax, will not be completely integrated, even in the hands of a Canadian resident individual shareholder. The total corporate taxes and individual taxes payable on these earnings after they have been distributed will, in general, exceed the individual tax that such a shareholder would have paid if he had received these earnings directly.

One of the specific provisions of the former Act designed to prevent "surplus stripping" identified as "designated surplus" the accumulated earnings of a corporation at the time that its control was acquired by another corporation. The present Act, like the former Act but with differences of detail, seeks to prevent the use of designated surplus, tax-free, to pay for the shares of the acquired corporation. Where such a corporation pays a taxable dividend out of its designated surplus to a nonresident corporation, a nonresident-owned investment corporation, or an exempt taxpayer, the paying corporation is subject to a special tax of 15% in the first two cases and of $33\frac{1}{3}\%$ in the third case. A special tax is also payable on a dividend paid out of designated surplus to a taxable resident corporation; but in that case the special tax is paid by the recipient and will be considered in the next section.

EFFECT OF DIVIDENDS ON THE SHAREHOLDER

We have seen that nontaxable dividends paid by a corporation out of its pre-1972 surplus (*i.e.*, based on its tax-paid undistributed surplus on hand or its 1971 capital surplus on hand) have the effect of reducing the adjusted cost base (*i.e.*, tax basis) of the shares in question in the hands of the recipient shareholder. This rule applies whether the shareholder is an individual or a corporation. We have also seen that nontaxable capital dividends paid by a private corporation do not affect the adjusted cost base of the shares in question, whether the shareholder is an individual or a corporation. All of these nontaxable dividends are excluded from the computation of the recipients' income. The treatment of taxable dividends, on the other hand, differs depending on

whether the recipient shareholder is an individual or a corporation.

All taxpayers, whether individuals or corporations, must include, in the computation of their income, the amount of taxable dividends that they receive from corporations resident in Canada. Where the recipient is a corporation and the payer is a taxable Canadian corporation, however, an equivalent amount is deducted from income in computing the recipient's taxable income. As a result of this in-and-out computation, these intercorporate dividends are not subject to ordinary corporate tax in the hands of the recipient corporation. [4]

Nevertheless, in some cases a special tax may be payable on these dividends by a recipient private corporation. If a taxable dividend is received from another corporation that the recipient private corporation (either by itself or in combination with one or more affiliated persons) does not control, it is treated as investment income. Accordingly the recipient corporation must pay a special 1/3 tax on these dividends. This tax becomes part of that corporation's "refundable dividend tax on hand". As previously explained, this tax will be refunded to the corporation when it pays an equivalent amount of dividends to its shareholders — *i.e.,* at a rate of 1/3 of the amount of taxable dividends that it pays. The special 1/3 refundable tax is also payable on taxable dividends received by one private corporation from another private corporation that it controls (either alone or in combination with one or more affiliated persons) equal to the recipient's portion of any dividend refund that the payer corporation receives as a result of paying the dividend. In other words, if the dividend is paid out of the accumulated investment earnings of a controlled private corporation, its status as investment income is preserved in the hands of the recipient controlling private corporation, so that the refund of refundable tax that is paid to the payer corporation is balanced by an appropriate payment of refundable tax by the recipient.

To the extent that a resident corporation receives a taxable dividend from a resident corporation controlled by it (either alone or in combination with one or more affiliated persons) and the dividend is not paid out of accumulated investment earnings but is paid out of "designated surplus", the recipient corporation must pay a special nonrefundable tax equal to 25% of the amount of the dividend that has been paid out of designated surplus. This special tax has been considered necessary to prevent the use of tax-free intercorporate dividends to convert surplus that would otherwise be distributable only as taxable dividends into capital gains, which would be taxable at lower effective rates.

Where an individual receives dividends from taxable Canadian corporations, not only must he include the amount of the dividends in the computation of his income, but he must gross up these dividends by 1/3 of their amount, thereby including 4/3 of the dividends in the computation of his income. Unlike a corporate recipient, he cannot make any deduction for these dividends in computing his taxable income; but he is entitled to a credit in computing his tax. The credit takes the

4. The fact that the dividends have been included in computing income may have some incidental implications. For example, it would increase the maximum deductible charitable contributions that the recipient may make in the year in question, since this maximum depends on income rather than *taxable* income.

form of a deduction against the federal tax that he would otherwise pay equal to 4/5 of the gross-up, which is equivalent to 1/5 of the grossed-up dividends. Since, in nine of the ten provinces, the provincial individual income tax is computed as a percentage of the net federal tax, the credit has the further effect of reducing the provincial tax that is payable. This mechanism can be illustrated as follows.

Assume that a Canadian resident individual, whose marginal federal tax rate is 43% [5] and who resides in a province that imposes provincial individual income tax at a rate of 30.5% [6] of the federal tax, receives a taxable dividend of $300.00 from a taxable Canadian corporation.

Amount of taxable dividend	$300.00
Gross-up by 1/3	100.00
Include in computing income	$400.00
Initial federal tax at 43%	$172.00
Less credit — 1/5 of $400.00	80.00
Net federal tax on the dividend	$ 92.00
Provincial tax on the dividend — 30.5% of $92.00	28.06
Total federal and provincial tax	$120.06

This represents an effective rate of 40.02% on the dividend. If the dividend had not been eligible for the gross-up and credit, the tax on it would have been $168.35, for an effective rate of 56.11%.

The gross-up and credit mechanism achieves an approximate integration of corporate and individual tax for resident shareholders of taxable Canadian private corporations in the case of distributions of investment income and of active business earnings that have qualified for the "small business" corporate rate of 25%. Where the private corporation's active business earnings have also qualified for a lower corporate rate as being Canadian manufacturing or processing profits (*i.e.*, a rate of 20%), the result would be even better for the individual shareholders than full integration.

DIVIDENDS PAID TO A NONRESIDENT SHAREHOLDER

A nontaxable dividend paid to a nonresident shareholder by a resident corporation out of pre-1972 surplus (*i.e.*, based on its tax-paid undistributed surplus on hand or its 1971 capital surplus on hand) is not subject to Canadian withholding tax. If the shares of the payer corporation constitute "taxable Canadian property" in the hands of the nonresident shareholder, however, their disposition for a capital gain would be subject to Canadian tax, and so the resulting reduction in the adjusted cost base of the shares may be significant. The shares will be taxable Canadian property if they are not shares of a public corporation or, even if they are, if at any time within the five years preceding their disposition the nonresident shareholder (either alone or in combination with one or more affiliated persons) owned at least 25% of any class of that corporation's issued shares. The shares may also be taxable Canadian property if the nonresident was previously a resident and, on ceasing to be resident, elected to postpone paying the Canadian "departure tax" on accrued capital gains on those shares by designating them as taxable Canadian property.

As we have seen, nontaxable capital dividends paid by a private corporation do not reduce the adjusted cost base of the

5. At 1973 rates, this would apply to a taxable income range between $ 39,000 and $ 60,000.

6. This rate applies in Ontario and British Columbia.

shares in question. This rule applies even if the shares are held by a nonresident: by definition, the shares will be taxable Canadian property. These capital dividends, however, are subject to Canadian withholding tax, and so are all taxable dividends, including those that were paid out of designated surplus to a nonresident corporation and that were therefore subject to the special 15% tax imposed on the paying corporation.

For any capital dividend or taxable dividend paid by a resident corporation to a nonresident shareholder before 1976, the rate of withholding tax is 15% unless the corporation has "a degree of Canadian ownership",[7] in which case the rate is 10%. These same rates will presumably apply after 1975 where the shareholder resides in a country with which Canada concludes a new tax treaty before that time. For shareholders resident in other countries, the post-1975 withholding tax will be 25% and 20% respectively.

DIVIDENDS FROM NONRESIDENT CORPORATIONS

The rules for computing the Canadian tax that is payable on dividends received, or deemed to be received, by a Canadian resident from a nonresident corporation are extremely complex and can only be touched upon here. In any event, the most important changes in this area are not to take effect until taxation years commencing after 1974, and it is expected that substantial amendments will be made before then in the rules as now written.

The new rules make important distinctions between the earnings of a Canadian resident on foreign portfolio investments and his earnings from and through a "foreign affiliate". A nonresident corporation is a foreign affiliate if a Canadian resident (either alone or in combination with one or more affiliate persons) controls it, holds (directly or indirectly) at least 25% of its voting shares, or holds (directly or indirectly) at least 50% of its equity shares. A resident may elect to have a nonresident corporation classified as his foreign affiliate if he (either alone or in combination with one or more affiliated persons) holds (directly or indirectly) less than 25% but at least 5% of its voting shares.

In general, when the new rules come into effect a Canadian resident will be currently taxed on his share of any passive earnings of his foreign affiliate, including inter-affiliate dividends, even if these earnings are not currently remitted to him in the form of dividends. He will also be taxable on dividends paid to him by his foreign affiliate out of its active business earnings, when paid, but with a right to claim credit for the underlying foreign tax; but if the active business earnings had their source, and the foreign affiliate was incorporated, in a country with which Canada has concluded a comprehensive tax treaty, dividends paid from these earnings will be exempt in the hands of a resident corporation.

Dividends received by a Canadian resident individual or corporation from a nonresident corporation that is not a foreign affiliate of the recipient are included (without gross-up) in computing the recipient's income. They are not deductible in computing a recipient corporation's taxable income and are not eligible for dividend tax credit in the hands of an indi-

7. See Harris, *Canadian Taxation of Branches and Subsidiaries of Foreign Enterprises,* XIX Bulletin 441 (1965).

vidual recipient. Consequently they bear full Canadian tax; but they are eligible for a foreign tax credit for foreign withholding tax (though not underlying corporate tax) imposed on the dividend, up to the amount of the Canadian tax that would otherwise be payable on the dividend. In the case of a resident individual who receives dividends from a foreign corporation after 1975, any foreign withholding tax in excess of 15% is not eligible for the foreign tax credit but will be allowed instead as a deduction in computing the recipient's income.

EXPOSE DES MOTIFS

Convention fiscale franco-tchécoslovaque de 1er janvier 1973

(Projet de Loi No. 853, Assemblée Nationale 1973-1974)

(Official explanation to the French-Czechoslovak Tax Treaty of June 1, 1973. See also Supplement A 1974)

Mesdames, Messieurs,

Après des conventions préliminaires qui se sont déroulées à Paris en février 1970, des négociations ont été engagées à Prague, au mois de mai suivant, en vue de la conclusion d'une convention fiscale entre la France et la Tchécoslovaquie. Ces négociations ont permis d'aboutir à un accord qui a été signé à Paris le 1er juin 1973.

Bien que le système économique tchécoslovaque repose sur la planification et le contrôle de l'ensemble des activités économiques, il fonctionne dans une structure juridique qui n'est pas entièrement nouvelle. C'est ainsi que les entreprises peuvent être soumises à des régimes juridiques différents. La plupart des entreprises anciennes ont conservé le régime des sociétés par actions bien que toutes les actions soient devenues propriété de l'Etat. Les entreprises nouvelles sont appelées entreprises nationales. D'autres ont la forme de coopératives. En outre, subsistent certaines formes privées d'activité.

Le système fiscal tchécoslovaque comporte des impôts sur les personnes morales et des impôts sur les personnes physiques.

Les personnes morales tchécoslovaques sont soumises à un prélèvement sur les bénéfices, un prélèvement sur la fortune, un prélèvement sur le montant total des salaires ainsi qu'à des prélèvements supplémentaires qui sont indiqués plus loin:

— le prélèvement sur les bénéfices est assis sur le bénéfice net. Le taux normal est de 75%. Il est réduit à 50% pour les entreprises d'énergie électrique, de matériel de construction et d'alimentation; à 60% pour les entreprises minières et gazières et à 65% pour les entreprises de construction. Pour les banques, le taux est porté à 85%. Pour les entreprises exerçant une activité commerciale, les entreprises de transports routiers et aériens, de recherche scientifique et les établissements thermaux, le taux varie de 25 à 75% selon la rentabilité;

— le prélèvement sur la fortune est fonction de la valeur des immeubles, des machines, des équipements, des stocks de matières premières et de produits fabriqués. Le taux est de 5%.

— le prélèvement sur les salaires n'est dû que si les salaires moyens versés au cours d'une année sont supérieurs à ceux de l'année précédente. Le taux est progressif. Par exemple, si les salaires moyens ont augmenté de 3% le taux est de 1,5%; si les salaires ont augmenté de 5%, le taux est de 3,5%. Ce prélèvement fonctionne comme un moyen de réglementation des salaires;

— les autres prélèvements concernent les cotisations d'assurances sociales à la charge de l'employeur (25% du montant des salaires), la possibilité d'imposer un prélèvement sur les amortissements. Des prélèvements supplémentaires peuvent être imposés comme sanctions économiques frap-

pant les bénéfices que l'entreprise a pu réaliser en violant la réglementation des prix ou les règles de sécurité du travail ou en produisant des produits de qualité inférieure.

Les entreprises étrangères sont imposables sur les revenus tirés de l'activité exercée sur le territoire tchécoslovaque ou sur les revenus dont la source est située sur ce territoire.

Les taux sont les suivants:

— 40% sur les redevances pour la concession de licences, de brevets, de procédés ou formules, de marques de fabrique;

— 25% sur les redevances de la propriété intellectuelle;

— 20% sur les redevances versées pour l'usage d'équipements industriels ou scientifiques;

— 25% sur les intérêts;

— 65% sur tous les autres revenus, déduction faite des charges exposées.

Pour les revenus visés ci-dessus, l'impôt est retenu à la source sur le montant brut.

Les personnes physiques sont imposées distinctement et séparément. Elles sont soumises à des impôts de type cédulaire ou à caractère général selon la nature des revenus.

Les salaires et traitements sont passibles de l'impôt sur les salaires prélevé par voie de retenue à la source; le taux varie de 5 à 20% avec certaines majorations ou minorations, selon la situation de famille.

Les revenus provenant de l'activité littéraire et artistique sont passibles d'un impôt cédulaire dont le taux va de 3 à 33% et qui est prélevé par voie de retenue à la source. Pour le calcul de l'impôt, des abattements forfaitaires sont accordés selon la nature de l'activité (60% pour les sculpteurs, 30 à 50% pour les autres arts plastiques . . .).

Les bénéfices provenant de l'exploitation agricole sont passibles de l'impôt agricole qui comprend l'impôt foncier variable selon la nature du terrain et l'impôt sur les bénéfices calculé forfaitairement selon les rendements moyens à l'hectare.

Les autres revenus sont passibles de l'impôt des personnes physiques dont le taux est progressif de 5 à 65% avec majorations ou minorations.

Les relations économiques entre la France et la Tchécoslovaquie sont appelées à se développer, notamment sous la forme de contrats conclus entre sociétés françaises et entreprises tchécoslovaques, soit pour l'exploitation ou la concession de licences ou brevets, soit pour la réalisation de projets communs de construction ou de fabrication.

Dans ces conditions, la convention fiscale permet de préciser le régime d'imposition auquel seront soumises les transactions conclues entre les firmes intéressées.

La convention reprend les dispositions devenues classiques des accords de cette nature conclus par la France avec les autres pays.

Cependant l'accord franco-tchécoslovaque comporte un certain nombre de dispositions particulières sur lesquelles il sera plus spécialement insisté dans les développements qui vont suivre.

Les articles 1 à 5 délimitent le champ d'application de la convention et donnent la définition des principaux termes ou notions (domicile fiscal, établissement stable, etc.) utilisés dans le texte.

A cet égard, on signalera que la notion de résidence habituellement utilisée a été remplacée par elle de «domicile» qui est d'ailleurs plus proche de la terminologie des législations fiscales française et tchécoslovaque.

Par ailleurs, comme cela existe déjà dans les conventions franco-allemande du 21

juillet 1959 et franco-autrichienne du 8 octobre 1959, la contribution des patentes a été ajoutée, du côté français, à la liste des impôts auxquels s'appliquera la convention. Cette disposition, qui aura pour principale conséquence d'exonérer de la contribution des patentes la compagnie aérienne tchécoslovaque «Ceskoslovenska Aerolinee» pour ses installations en France, a été introduite par souci de réciprocité, les compagnies aériennes françaises n'étant soumises à aucune imposition de même nature, en Tchécoslovaquie.

A propos de la définition de l'établissement stable (art. 5), il est généralement prévu qu'une entreprise d'un Etat est considérée comme ayant un établissement stable dans l'autre Etat si elle y a un chantier de construction ou de montage dont la durée dépasse douze mois. La convention franco-tchécoslovaque dispose, au contraire, qu'une entreprise d'un Etat ayant un chantier de construction ou de montage dans l'autre Etat ne sera pas réputée avoir un établissement stable dans cet autre Etat et n'y sera donc pas imposée à raison des activités de ce chantier.

Les articles 6 à 23 posent les règles suivant lesquelles les différentes catégories de revenus seront imposables dans les deux Etats. Parmi ces règles qui vont être succinctement rappelées, seules celles relatives à l'imposition des dividendes, intérêts et redevances méritent un examen plus particulier.

La taxation des revenus immobiliers et agricoles est réservée au pays de la situation des biens qui les produisent. La référence faite, par l'article 6, à la législation fiscale pour définir les biens immobiliers ainsi que les dispositions de l'article 14 concernant l'imposition des gains en capital, permettent à la France d'appliquer sans restriction l'ensemble de sa fiscalité immobilière.

L'article 7 règle l'imposition des bénéfices industriels et commerciaux. Ces revenus sont taxés dans l'Etat où est situé l'établissement stable auquel ces bénéfices sont rattachés. Néanmoins, par dérogation à cette règle, les bénéfices provenant de l'exploitation, en trafic international, de navires ou d'aéronefs, ne sont imposables que dans l'Etat où se trouve le siège de la direction effective de l'entreprise (art. 8).

L'article 9 de la convention traite spécialement des rectifications qui, d'une manière générale, peuvent être apportées à ces bénefices, en cas de transferts indirects de revenus.

En ce qui concerne les dividendes (art. 10), la convention organise un partage du droit d'imposer entre l'Etat de la source du revenu et celui de la résidence de bénéficiaire. L'impôt maximum pouvant être prélevé dans le pays de la source a été fixé à 10%, quel que soit le bénéficiaire des distributions.

It faut enfin remarquer qu'il n'a pas paru utile, étant donné l'organisation économique et sociale de la Tchécoslovaquie et l'état des relations économiques franco-tchécoslovaques, de fixer, dans l'article sur les dividendes, les règles relatives à l'attribution de l'avoir fiscal aux résidents tchécoslovaques, comme nous l'avons fait dans les conventions récemment négociées avec d'autres pays.

L'article 11 fixe le régime auquel sont soumis en France les bénéfices des établissements stables des entreprises tchécoslovaques au regard de la retenue à la source susceptible d'être perçue en vertu de l'article 115 *quinquies* du Code général des impôts.

Pour ce qui est des intérêts, la convention ne prévoit aucune imposition dans le pays de la source. La suppression de la retenue

à la source en Tchécoslovaquie ne peut que faciliter la conclusion de contrats de prêts à des organismes ou entreprises de ce pays.
L'article 13 de la convention autorise l'Etat d'où proviennent les redevances à appliquer son impôt dans la limite de 5% du montant brut des produits. L'impôt sur les redevances ayant leur source en Tchécoslovaquie est ainsi ramené de 40% à 5%. Les redevances provenant de droits d'auteur sont exonérées de tout impôt dans l'Etat de la source; l'impôt tchécoslovaque de 25% est donc ainsi supprimé pour les droits d'auteur, perçus par les personnes domiciliées dans notre pays, en provenance de Tchécoslovaquie.
Les revenus qu'une personne domiciliée dans l'un des deux Etats retire d'une profession libérale ou d'autres activités indépendantes sont imposables dans l'Etat où se trouve la base fixe génératrice de ces revenus (art. 15).
Les articles 16, 18, 19 et 20 fixent les règles d'imposition des salaires, traitements, pensions et rentes.

Sous réserve de la dérogation habituelle concernant les travailleurs en mission temporaire, les traitements, salaires et autres rémunérations du secteur privé, sont, sauf en ce qui concerne les activités exercées à bord d'un navire ou d'un aéronef, imposables en principe dans l'Etat du domicile à moins que l'emploi ne soit exercé dans l'autre Etat (art. 16). Les professionnels du spectacle ainsi que les sportifs sont, quant à eux, pour leurs activités professionnelles, imposables dans l'Etat où ils exercent ces activités (art. 18).
Les pensions, y compris les pensions de Sécurité sociale, ne peuvent supporter l'impôt que dans l'Etat où le bénéficiaire est domicilié (art. 19).
Par dérogation à ces principes et selon une règle bien établie, les rémunérations, y compris les pensions, versées par l'un des Etats contractants ou par une personne morale de droit public de cet Etat, sont imposables dans cet Etat sous réserve que le bénéficiaire ne possède pas la nationalité de l'autre Etat (art. 20).
En vue de faciliter les échanges culturels, il a été jugé utile, d'autre part, d'insérer dans les articles 21 et 22 de la convention franco-tchécoslovaque des dispositions particulières concernant les enseignants et les étudiants.
Comme dans la plupart des conventions fiscales récemment conclues par la France, l'accord prévoit qu'un professeur d'un Etat contractant qui enseigne dans l'autre Etat est, dans certaines limites, exonéré d'impôt dans cet autre Etat.
A propos des étudiants, la convention reprend les règles habituelles exonérant les sommes en provenance de l'étranger, perçues par les intéressés, pour satisfaire leurs besoins, et complète ces dispositions en prévoyant que les étudiants d'un Etat, qui effectuent des stages dans l'autre Etat, sont exonérés sous certaines réserves dans l'Etat de résidence, à raison de la rémunération reçue au titre de ces stages.

En ce qui concerne les tantièmes et les jetons de présence perçus ès qualités par les membres d'un conseil d'administration ou de surveillance, ils sont, en vertu des dispositions de l'article 17, imposables dans l'Etat où la société débitrice est domiciliée.
Pour ce qui est des éléments du revenu non expressément mentionnés dans la convention, leur imposition est réservée à l'Etat dans lequel le bénéficiaire a son domicile (art. 23).

En raison du prélèvement sur la fortune qui frappe les entreprises tchécoslovaques, l'article 24 de la convention retient les règles communément admises pour l'imposition des différents éléments de la for-

tune.

Les règles relatives à la manière d'éviter la double imposition, incluses à l'article 25, sont, du côté français, tout à fait classiques.

Elles consistent à exonérer en France les revenus dont l'imposition est attribuée à la Tchécoslovaquie par application de la convention et à accorder, pour les autres revenus qui ont supporté un impôt dans cet Etat et dans les limites prévues par la convention, un crédit correspondant à l'impôt tchécoslovaque. Ces dispositions autorisent en outre la France à faire usage de la règle dite du «taux moyen ou effectif» pour tenir compte des revenus exclusivement imposables en Tchécoslovaquie en vue de calculer la charge fiscale afférente aux revenus soumis à l'impôt français en vertu de la convention.

Les règles prévues du côté tchécoslovaque sont identiques aux précédentes.

Enfin, les articles 26 à 33 renferment des clauses diverses concernant:

— l'égalité de traitement fiscal entre nationaux des deux Etats (art. 26);

— la procédure d'entente amiable (art. 27);

— l'échange des renseignements organisé pour favoriser l'application des dispositions conventionnelles (art. 28);

— la situation, au regard de la convention, des fonctionnaires diplomatiques et consulaires (art. 29);

— l'extension éventuelle de la convention aux Territoires français d'Outre-Mer (art. 30);

— les modalités suivant lesquelles la convention entrera en vigueur et pourra être éventuellement dénoncée (art. 32 et 33).

Cette convention éliminera les doubles impositions qui frappent à l'heure actuelle certaines entreprises ayant des activités dans les deux pays. En fixant d'une manière précise le système fiscal applicable aux différents types de transactions réalisées par les entreprises françaises en Tchécoslovaquie, cette convention devrait leur permettre d'étendre leurs activités et assurer ainsi le développement des relations économiques entre les deux pays.

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IX. EXPENDITURE POLICY IN FAVOUR OF AGRICULTURE

The above discussion amply demonstrates that 'A' sector is grossly undertaxed in India and that inadequate taxation of this sector has imposed a heavy tax burden on the 'N' sector. While the 'A' sector has been inadequately taxed the Government has provided various benefits/facilities to the 'A' sector. This is, however, not desirable from the point of view of equity in taxation. The expenditure policy of the Government has been agriculture-oriented which has also relatively improved the economic position of the agriculturists.

The total expenditure on agriculture, community development, irrigation and other related fields formed 31 percent of the total public sector outlay in the First Plan. This percentage declined to 20 in the Second Plan but rose to 21.2 in the Third Plan and has been estimated at 22 in the Fourth Plan. In absolute terms this expenditure increased from Rs. 610 crores in the First Plan to Rs. 950 crores in the Second Plan and further to Rs. 1,378 crores in the Third Plan. It has been estimated at Rs. 2,617 crores in the Fourth Plan. The agriculturists have also benefited due to relatively greater rise in the price of agricultural products. During the period 1951-52 to 1971-72 the price index for all commodities increased by 92 percent as against an increase of 111 percent in the price index of agricultural commodities and an increase of 64 percent in the price index of industrial manufactured commodities. The terms of trade have thus moved in favour of agriculturists as against non-agriculturists. The agricultural sector has also improved its relative economic position due to rise in productivity of land and increase in income. The income of the agricultural sector has increased by 182 percent and agricultural productivity by 58.8 percent during the last two decades.

In addition, the agriculturist is also enjoying certain concessions in the form of cheaper credit facilities, price support scheme, warehousing facilities which he never enjoyed before. It may be emphasised here that the subsidies on agricultural inputs increased from Rs. 7.49 crores in 1963-64 to Rs. 10.33 crores in 1967-68. The concealed subsidy on takavi loans increased from Rs. 0.52 crore in 1957-58 to Rs. 0.98 crore in 1966-67. Besides, the losses on irrigation projects which are borne by the State Exchequer are a kind of subsidies to the agriculturists which have increased from Rs. 19.09 crores in 1960-61 to Rs. 47.96 crores in 1965-66 and further to Rs. 91.18 crores in 1968-69. It may also be emphasised that the Indian farmer compared with other consumers

gets electricity at a concessional rate. [10] In 1966, for instance, the average electricity rate for the agricultural purposes was only 13.25 paisa per k.w.h. as against 15.60 paisa per k.w.h. for industrial purposes. In fact since 1966 an open subsidy is also given on the electricity consumed for the agricultural purposes by the farmer whereever the rate is more than 12 paisa per k.w.h. The overall result has been that the agriculturists have improved their relative economic position considerably and that the tax burden on them has continued to decline.

X. REASONS WHY AGRICULTURE IS UNDERTAXED

To a very large extent the Indian farmers have remained under-taxed due to the fact that under the Indian Constitution the Union Government is prohibited from taxing agricultural land or income — only the State Governments are empowered to tax such land or income. It is however, unfortunate, that the State Governments have hesitated to tax the agriculturists primarily for the reason that this sector can play a decisive role under the right of adult franchise.

The two most important taxes levied on the 'A' sector by the State Government are land revenue and agricultural income-tax. Land revenue is a tax on the net produce. It is inequitable as it provides no exemption limit and is levied at a flat rate on all landholders — both small and large. It has built in rigidities as it does not change with changes in income, output or price. It was the most important source of revenue in the State's tax system during 1952-53 to 1956-57. From 1957-58 land revenue stood next to sales tax and from 1966-67 it has been third in order of fiscal importance in the States' tax system; the first being sales tax and second State excise duty. It may also be emphasised that the yield from land revenue increased by 96 percent in 1971-72 (Revised) as compared to 1951-52 as against and increase of 376 percent in state excise duty, an increase of 1013 percent in sales tax and an increase of 638 percent in revenue from state taxes during te same period. These data amply demonstrate the inflexibility of land revenue in states' tax system. Table 6 shows that land revenue formed 25.9 percent of the revenue from State taxes during the First Plan. This percentage declined to 24.0 in the Second Plan, to 17.0 in the Third Plan and further to 5.7 in 1972-73 (Budget).

The importance of agricultural income tax is also declining in the States' tax system. Table 6 shows that agricultural income tax formed 2 percent of revenue from State taxes during the First Plan. This percentage declined to 1.4 in the Third Plan and further to 0.7 in 1972-73 (Budget); although in absolute terms the yield from this tax increased from Rs. 24.6 crores in the First Plan to Rs. 42.5 crores in the Second Plan and further to Rs. 48.9 crores in the Third Plan. But it should be noted that the increase in the yield during the Three Plans was due to more States imposing it; otherwise in many of the individual States the yield from agricultural income tax has been declining. For instance, in Uttar Pradesh it declined from Rs. 53 lakhs in 1957-58 to Rs. 8 lakhs in 1963-64. During the same period it declined from Rs. 54 lakhs to Rs. 38 lakhs in Mysore and from Rs. 117 lakhs to Rs. 65

10. *Report of the Committee on the Working of the State Electricity Board,* Ministry of Irrigation and Power, New Delhi, Dec. 1964.

lakhs in West Bengal. Since then the yield in these States increased to Rs. 161 lakhs and Rs. 98 lakhs, respectively in 1972-73 (Budget). We may also emphasise here that the yield from agricultural income tax increased by 172 percent in 1971-72 (Revised) as compared to 1951-52 as against an increase of 1013 percent in sales tax, an increase of 475 percent in stamps and registration and an increase of 638 percent in revenue from State taxes. These data clearly demonstrate the declining importance of agricultural income tax and emphasise the prosperity of the agricultural population in general and specially that of the affluent section in the 'A' sector.

One distinguishing feature of the agricultural income tax is that three States, namely Assam, Kerala[11] and Tamil Nadu account for almost 70 percent of the collection where plantation is predominant. The exemption limit for agricultural income tax also varies significantly among the States as is clear from Table 7. In some States it is very high and in others where the size of holding is the basis it differs very significantly. For instance, in West Bengal 75 *Bighas* (25 acres) of cultivable land is the maximum one can possess, which means not a single cultivator would be liable to pay the tax as the exemption limit is 82 *bighas*. In Maharashtra the exemption limit is Rs. 36,000 (almost seven times of the exemption limit provided for Income tax purposes under the Indian Income Tax Act 1961) while in Uttar Pradesh, Kerala, Tamil Nadu and Orissa it is moderate. We may also emphasise here that some major States such as Punjab, that has the highest per capita income, and Gujrat which ranks third in order of per capita income do not levy a tax on agricultural income at all. In addition, Haryana, Andhra Pradesh, Jammu and Kashmir and Madhya Pradesh (except Bhopal) also do not levy this tax at present. Even in States where the tax is levied there is a general feeling that it is inadequately enforced.

Table 8 shows that the State Governments have not imposed direct taxes on the agriculturists adequately. As a result we find that the revenue from direct agricultural taxes formed a small proportion of the total revenue from State taxes during the period 1967-70 and that in most of the States the percentage share of direct agricultural taxes in their total revenue from all taxes is below the average percentages of 11.09 except in five States viz., Andhra Pradesh, Assam, Bihar, Uttar Pradesh and Rajasthan where it is above the average percentage for all the States. It is however unfortunate that the richer States do not necessarily raise a relatively higher percentage in agricultural taxes from their net domestic product. Table 8 shows that the revenue raised by Punjab, Haryana, and West Bengal (whose per capita income is above the all-India average) in direct agricultural taxes from their net domestic product (agriculture) is substantially below the average percentage figure for all the States. The revenue from direct agricultural taxes in Punjab formed only 0.24 percent of its net domestic product (agriculture) although its per capita income is highest in the country. Similarly Haryana and West Bengal (which rank fourth and fifth in order of importance in per capita income, respectively) raised only 0.36 percent and 0.60 percent in direct agricultur-

11. Kerala Government announced its decision on August 1, 1971, to levy plantation tax at a flat rate of Rs .50 per hectare on all holdings of cash crops above one hectare. Hitherto, plantation tax on holdings above 2 hectares was in existance in the State.

al taxes from their net domestic product (agriculture).

It is, however, interesting to note that many of the relatively backward States such as Uttar Pradesh, Rajasthan, Bihar and Madhya Pradesh, whose per capita income is below the All-India average, have raised a relatively higher percentage of their net domestic product (agriculture) in direct agricultural taxes and that their percentage share is greater than the average percentage for all the States. These States have mopped up a relatively higher percentage of their agricultural income in direct agricultural taxes even as compared to many of the relatively richer States. For instance, Rajasthan tops the list that raised 1.34 percent of its agricultural income in direct agricultural taxes which was substantially higher than Punjab (0.24 percent), Haryana (0.36 percent) and West Bengal (0.60 percent) and the corresponding average percentage of 0.94 for all the States as shown in Table 8. These data suggest that the States which have a relatively higher per capita income but raise a relatively smaller percentage of their income in direct agricultural taxes should modify their tax structure suitably by ploughing loopholes in their tax system.

The above discussion amply demonstrates that the State Governments have not taxed the agriculturists adequately and that the 'A' sector of the economy has remained undertaxed for quite some time.

XI. CONCLUSIONS

Given the reliability of the estimates presented above, one can conclude that the 'A' sector of the Indian economy has remained undertaxed as compared to the 'N' sector. We can draw the following conclusions from the above discussion:

(1) The 'A' sector has contributed a relatively smaller percentage of its income in taxes as compared to the 'N' sector. In 1951-52 'A' sector contributed 4.2 percent of its income in taxes as compared to 8.4 percent of the 'N' sector. In 1961-62 this percentage for the 'A' sector increased to 6.3 as against 13.2 for the 'N' sector which means that during the decade 1951-52 to 1961-62 the 'N' sector was taxed almost twice than that of the 'A' sector. The position has remained the same even during the decade 1961-62 to 1971-72 (Revised). In 1971-72 (Revised) 'A' sector contributed 10.2 percent of its income whereas the 'N' sector contributed 22.0 percent of its income in taxes.

The finding that the 'N' sector is taxed almost twice than that of 'A' sector is also evident from the fact that the taxes paid by the 'N' sector formed 66.8 percent of the total tax revenue of the Union and State Governments in 1951-52. This percentage increased to 70.5 in 1961-62 and further to 73.3 in 1971-72 (Revised). On the other hand, the taxes paid by the 'A' sector formed 33.2 percent of the total tax revenue of the Union and State Governments in 1951-52. This percentage declined to 29.5 in 1961-62 and further to 26.7 in 1971-72 (Revised).

(2) The burden of direct taxes has also been relatively greater on the 'N' sector. Direct taxes paid by the 'A' sector formed 1.0 percent of its income in 1951-52. However, this percentage increased to 1.5 in 1961-62 but declined to 0.7 in 1971-72 (Revised). On the other hand, the direct taxes paid by the 'N' sector formed 4.1 percent of its income in 1951-52. This percentage increased to 4.8 in 1961-62 which means that during these years 'N' sector was contributing almost three times in direct taxes as compared to the 'A' sec-

tor. However this disparity further increased and in 1971-72 (Revised) the 'N' sector contributed 6.3 percent of its income in direct taxes which was nine times than that of the 'A' sector.

That 'N' sector is sharing a relatively greater burden of direct taxes is also evident from the fact that the direct taxes paid by this sector formed 32.5 percent of the total tax revenue of the Union and State Governments in 1951-52. However, this percentage declined to 25.5 in 1961-62 and further to 21.0 in 1971-72 (Revised). On the other hand, the direct taxes paid by the 'A' sector formed 8.0 percent of the total tax revenue of the Union and State Governments in 1951-52. This percentage declined to 7.0 in 1961-62 and further to 1.9 in 1971-72 (Revised). Thus the direct taxes paid by the 'A' sector formed a relatively much smaller percentage of the total tax revenue of the Union and State Governments as compared to the corresponding percentage share of the 'N' sector.

(3) The 'N' sector has contributed a relatively higher percentage of its income in indirect taxes also. In 1951-52 indirect taxes paid by the 'N' sector formed 4.3 percent of its income as compared to the corresponding percentage of 3.2 for the 'A' sector. In 1961-62 the percentage share of indirect taxes in the income of 'N' sector increased to 8.4 as against 4.8 of the 'A' sector. The contribution of the 'N' sector further increased to 15.7 percent of its income in indirect taxes in 1971-72 (Revised) as against 9.5 percent of the 'A' sector. Thus throughout the period the 'N' sector was bearing a relatively greater burden of indirect taxes.

The indirect taxes paid by the 'A' sector formed 25.2 percent of the total tax revenue of the Union and State Governments in 1951-52. However this percentage declined to 22.5 in 1961-62 but rose to 24.8 in 1971-72 (Revised). As against this, the indirect taxes paid by the 'N' sector formed 34.3 percent of the total tax revenue of the Union and State Governments in 1951-52. This percentage increased to 45.0 in 1961-62 and further to 52.3 in 1971-72 (Revised).

(4) The per capita tax burden has also been relatively much higher for the 'N' sector as compared to the 'A' sector. The per capita tax burden of the 'A' sector in 1951-52 was Rs. 9.3 as against Rs. 39.7 for the 'N' sector — the per capita tax burden on the 'N' sector was 4 times higher than that of the 'A' sector during the year. In 1961-62 the per capita tax burden of the 'A' sector increased to Rs. 14.5 as against Rs. 78.3 of the 'N' sector — the per capita tax burden on the 'N' sector was, therefore, 5 times higher as compared to the 'A' sector. In 1971-72 (Revised) the per capita tax burden of the 'A' sector was Rs. 38.5 as against Rs. 230.5 of the 'N' sector — the per capita tax burden on the 'N' sector was, thus, 6 times higher than that of the 'A' sector during the year.

The per capita taxes of the 'A' sector also formed a relatively smaller proportion of its per capita income. The per capita taxes of the 'A' sector formed 4.2 percent of its per capita income in 1951-52. This percentage increased to 6.3 in 1961-62 and further to 10.2 in 1971-72 (Revised). As against this, the per capita taxes paid by the 'N' sector formed 8.4 percent of its per capita income in 1951-52. This percentage increased to 13.2 in 1961-62 and further to 22.0 in 1971-72 (Revised). These data clearly show that the per capita tax burden on the 'N' sector is almost twice than that of the 'A' sector.

(5) The burden of direct taxes per capita is much lower on the 'A' sector as compared to the 'N' sector. There has been only a marginal increase in the per capita direct taxes paid by the 'A' sector while the per capita direct taxes paid by the 'N' sector have recorded a sharp rise during the last two decades. The per capita direct taxes paid by the 'A' sector increased from Rs. 2.1 in 1951-52 to Rs. 3.5 in 1961-62 but declined to Rs. 2.8 in 1971-72 (Revised) whereas the per capita direct taxes of the 'N' sector increased from Rs. 19.3 in 1951-52 to Rs. 28.4 in 1961-62 and further to Rs. 66.2 in 1971-72 (Revised). These data make it clear that in 1951-52 'N' sector was bearing 9.1 times greater burden of per capita direct taxes as compared to the 'A' sector. In 1961-62 also the 'N' sector was paying 8.1 times greater in per capita direct taxes and again 23.6 times greater in 1971-72 (Revised) as compared to the per capita direct taxes paid by the 'A' sector during these years. These data amply justify the fact that the 'A' sector in the Indian economy has remained very much undertaxed.

In view of what has been stated above it is clear that the burden of per capita direct taxes on the 'A' sector has been relatively much lower as compared to the 'N' sector throughout the period 1951-52 to 1971-72 (Revised). However the disparity that exists in the per capita incomes of the 'A' and 'N' sectors does not justify the disparity that exists in the burden of per capita direct taxes for both the sectors. Table 2 shows that in 1951-52 the per capita income of the 'N' sector was 2.3 times greater than that of the 'A' sector — but the 'N' sector was carrying 9.1 times greater load of per capita direct taxes. Similarly in 1961-62 the 'N' sector was bearing 8.1 times greater burden of per capita direct taxes while its per capita income was only 2.6 times greater than that of the 'A' sector. In fact the disparity in the burden of per capita direct taxes between the 'A' and 'N' sector shas increased and we find that in 1971-72 (Revised) 'N' sector was bearing 23.6 times greater burden of per capita direct taxes whereas its per capita income was only 2.7 times greater than that of the 'A' sector.

That burden of the per capita direct taxes is lower on the 'A' sector as compared to the 'N' sector is also evident from the fact that in 1951-52 the per capita direct taxes paid by the 'A' sector formed 1.0 percent of its per capita income. This percentage increased to 1.5 in 1961-62 but declined to 0.7 in 1971-72 (Revised). As against this the per capita direct taxes paid by the 'N' sector formed 4.1 percent of its per capita income in 1951-52. This percentage increased to 4.8 in 1961-62 and further to 6.3 in 1971-72 (Revised).

(6) The burden of per capita indirect taxes is also relatively greater on the 'N' sector. The per capita indirect taxes paid by the 'A' sector increased from Rs. 6.5 in 1951-52 to Rs. 11.0 in 1961-62 and further to Rs. 35.7 in 1971-72 (Revised). As against this the per capita indirect taxes paid by the 'N' sector increased from Rs. 20.4 to Rs. 49.9 and further to 164.3 respectively during the same years. During the decade 1951-52 to 1961-62 the per capita indirect taxes paid by the 'A' sector increased by 69.2 percent and again by 214.5 percent during the decade 1961-62 to 1971-72 (Revised). As against this the per capita indirect taxes paid by 'N' sector increased by 144.6 percent and 229.2 percent respectively, during the decades 1951-52 to 1961-62 and 1961-62 to 1971-72 (Revised). These data clearly show that the 'N' sector carried relatively a

greater tax load of indirect taxes during the two decades.

'N' sector's bearing a greater burden of per capita indirect taxes is also evident from the fact that the per capita indirect taxes paid by this sector formed 4.3 percent of its per capita income in 1951-52. This percentage rose to 8.4 in 1961-62 and further to 15.7 in 1971-72 (Revised). Against this, the per capita indirect taxes paid by the 'A' sector formed 3.2 percent of its per capita income in 1951-52. This percentage increased to 4.8 in 1961-62 and further to 9.5 in 1971-72 (Revised). Thus it is clear that the 'A' sector is contributing a relatively much smaller percentage of its per capita income in per capita indirect taxes as compared to the 'N' sector.

(7) The 'N' sector is also bearing a greater burden of additional taxation. The 'N' sector contributed 21.7 percent and 28.9 percent of its additional income during the decade 1951-52 to 1961-62 and 1961-62 to 1971-72 (Revised), respectively. As against this the 'A' sector contributed 11.5 percent and 14.1 percent of its additional income in taxes during the two decades, respectively. These data clearly show that 'N' sector is carrying double the burden of additional taxation as compared to 'A' sector. As a result we find that the marginal rate of taxation during the decade 1951-52 to 1961-62 was a little less than twice and exactly twice during the decade 1961-62 to 1971-72 (Revised) on the 'N' sector as compared to 'A' sector.

The average tax rate has also been relatively higher for the 'N' sector. 'A' sector paid 4.2 percent of its income in taxes in 1951-52 whereas the 'N' sector paid 8.4 percent of its income in taxes. The percentage of income raised through taxes from 'A' sector increased to 6.3 in 1961-62 and further to 10.2 in 1971-72 (Revised). The corresponding percentage figures for the 'N' sector were 13.2 and 22.0, respectively. These data show that throughout the period 1951-52 to 1971-72 (Revised) the Government has raised in taxes almost double from the income of 'N' sector as compared to the 'A' sector. As a result we find that the average tax rate for the 'N' sector in 1951-52 was 8.4 as against 4.2 for the 'A' sector. The same position continued in 1961-62 and 1971-72 (Revised). The average tax rate for the 'A' sector stood at 6.3 in 1961-62 and 10.2 in 1971-72 (Revised) as against 13.2 and 22.0, respectively for the 'N' sector during the same years.

There is, however, one serious limitation from which the conclusions of this study suffer. The data used above ignored the taxes "concealed" in the non-tax policies of the Government which are borne by the Indian agriculturists. But then the present study also ignores the "concealed" subsidies that are given to agriculturists. And on balance we find that the tax burden on the 'A' sector has been relatively much less as compared to the 'N' sector. In fact, 'A' sector has remained considerably undertaxed throughout the period 1951-52 to 1971-72 (Revised).

In view of what has been stated above it is felt desirable that steps should be taken to raise the fiscal contribution of 'A' sector so that it may be taxed adequately.[12] It is however a difficult problem of the Indian tax system as the State Governments have failed in taking measures to

12. Regarding various suggestions to tax the agricultural sector see, P. K. Bhargava, Taxation of Agriculture - The Indian case, *Bulletin for International Fiscal Documentation,* August 1972, pp. 322-24.

raise the fiscal contribution of the 'A' sector. It is high time that all the State Governments should arrive at a general consensus regarding agricultural taxation policy, so that suitable steps may be taken to tax the agriculturists. There are great disparities among the States and each State has its own problems and peculiarities; uniformity in any sphere is neither desirable nor should it be achieved. However, a broad uniformity in matters relating to agricultural tax policy has become urgent in the various States of India as that would enable States Governments to frame a suitable tax policy to tax agriculturists keeping in view there own needs and objectives.

XII. REMEDIES

It is a happy augury that the Government of India appointed a Committee on Taxation of Agricultural Wealth and Income, under the Chairmanship of Dr. K. N. Raj, on February 24, 1972. The Committee was asked to examine the question of taxation of agricultural wealth and income from all aspects. The Committee submitted its report on October 31, 1972 and it has suggested agricultural holdings tax (in place of land revenue) which is supposed to fulfill many of the canons of taxation namely equity, elasticity and progressivity. But if past experience is any guide it is very doubtful if it will work. During the past three decades, eleven States that enacted various levies to tax the agriculturists did not touch the ordinary farmer but confined to commercial plantation crops such as coffee, tea and rubber. It is doubtful if Dr. Raj is justified in assuming that the agricultural holdings tax will yield a sum of Rs. 150 to 200 crores, specially in view of the fact that most of the State Governments are opposed to collect even a small amount through the imposition of betterment levy.

In India as also in other backward countries of the world it is very difficult for the farmers to maintain accounts because most of them are illiterate. The Raj Committee, therefore, tries to solve the problem by eschewing the word income altogether. It has instead suggested a tax on the size of the farmer's operational holding with a view to provide solutions to all those problems that arise when a farmer is asked to specify his net income. The amount which a farmer will pay under the agricultural holdings tax will be based not on the actual productivity of his operational holdings but what is deemed to be its productivity which means that each assessee will pay tax on what he ought to earn rather that what he actually earns. Such a basis of tax no doubt solves the various problems relating to maintenance of accounts but its practical significance becomes all the more doubtful when equity considerations are applied to it.

It may be emphasized here that no state Government, with the exception of Haryana, has implemented the recommendation of Raj Committee for imposing an Agricultural Holdings Tax.

In addition there are some practical difficulties in implementing the agricultural holdings tax which the Raj Committee seems to have ignored completely. To begin with it may be emphasised that the committee did not consider it necessary to specify any exemption limit, even for the small farmers, from this tax while non-agriculturists earning upto Rs. 5,000 are exempt from the payment of income tax. The committee seems to be in favour of sacrificing the principle of equity if comparison is made between non-agriculturists

with income upto Rs. 5,000 and their counterparts in rural areas.

Apart from this, a completely objective norm can be based only on the average performance of the average farmer in each tract. This will be much below the higher yields achieved by the progressive farmers. The very objective of taxing the rich farmers to whom the Raj Committee seeks to tax, would be defeated because their actual earnings would be very much above the income on which they will pay the tax. On the other hand, there will be many farmers whose yields would be below the average farmer resulting into greater tax burden on them. At this point the committee seems to compromise the notions of equity and progressivity. The principles of equity and progressivity would be further violated in case a farmer has his land in two or more than two States because his tax liability would increase if his entire land was taxed by one State Government.

The Committee has suggested that the schedule of ratable value of land per hectare under different crops should be revised every year taking into account the crop yields of the preceding ten years, the harvest prices of preceding three years and any revision that may be made from time to time in the scale of deduction to be made an account of the cost of cultivation of different crops. Such as exercise would involve a lot of administrative work and a very high cost in money terms to the States' fisc which the committee has ignored completely. Even the Agricultural Prices Commission does not have comprehensive data on the regional cost of production per quintal even for two major cereal crops. Dr. Raj is mistaken if he thinks that the cost of production for different crops in each tract/district could be pronounced without much difficulty.

As pointed out above, the Committee has suggested agricultural holdings tax on 'operational holdings'. By operational holdings it means the net area cultivated by a family, after excluding the land leased out and including the land that it leases in. The Committee seems to believe that in its scheme there would be no tax evasion because the tax on land is not on its ownership but on the income that it is deemed to produce. If an assessee transfers land among the members of his family (wife and minor children) it is understandable that there would be no tax evasion because they are all part of the same assessment unit. But if he can prove that he has transferred a part of his land to some of his relatives or other outsiders, would he be not able to evade the tax? And would it not be difficult to determine the irrigated and unirrigated area in an assessee's operational holding? It may be mentioned that it would not be difficult for an assessee to manipulate in that direction because for this work the assistance of village *Patwari* would be necessary whose integrity can be easily compromised. If an assessee succeeds in doing that then the ratable value of his operational holding would be considerably reduced for the tax purposes.

The above discussion makes it clear that there would be various difficulties in implementing the agricultural holdings tax. The Committee would have done a better job by recommending a surcharge on land revenue on progressive scale rising from 50 per cent to 300 per cent on land holdings above 5 acres. As a measure of fiscal reform, the committee should have suggested abolition of land revenue on holdings of 2.5 acres or less. In addition, no

surcharge should have been proposed on holdings of five acres and below. This arrangement would not have been opposed by the agriculturists as more than 70 percent of the households have holdings below five acres. [13] As a result of the abolition of land revenue on land holdings upto 2.5 acres the loss to the States' fisc would have been meagre and could have been more than made up by a graduated surcharge on land revenue. In addition, the States would have saved something as there would have been no additional cost of collecting the surcharge as it could have been collected along with land revenue.

Above all, it would have, at least, guaranteed the State Governments more or less the same amount which the Raj Committee proposes to raise through agricultural holdings tax with all the practical difficulties enumerated above.

Finally, it may be emphasized that the Committee did a fine job by recommending the "partial integration" of agricultural and non-agricultural incomes as it will help in keeping the conversion of black money into white. Following this recommendation of the Committee, the Finance Act 1973 provided that from the assessment year 1974-75 the agricultural income of an assessee would be taken into account in determining the tax on his non-agricultural income. This would only be done if the taxpayer has non-agricultural income exceeeding the minimum exemption limit of Rs. 5,000. It may be emphasized here that the scheme of "partial integration" would be relatively more effective in states where the agricultural income tax is levied as the data for agricultural income would be readily available. However, in states such as Punjab, Haryana, Indhra Pradesh, Jammu and Kashmir, Madhya Pradesh, Gujarat and Rajasthan where the tax is not levied, agricultural income would have to be determined first for the purpose of "partial integration". This would involve a lot of work for the Income Tax Officers and may delay the disposal of assessments.

13. See Table 9.

TABLE 6

Land Revenue And Agricultural Income-Tax in Total Revenue from State Taxes

(Crores of Rupees)

	Land Revenue	Agricultural Income Tax	Total Revenue from State Taxes	1 as percentage of 3	2 as percentage of (3)
	1	2	3	4	
First Plan (1.4.1951 to 31.3.1956)	326.7	24.6	1257.1	25.9	2.0
Second Plan (1.4.1956 to 31.3.1961)	455.0	42.5	1896.9	24.0	2.0
Third Plan (1.4.1961 to 31.3.1966)	570.3	48.9	3339.9	17.0	1.4
1972-73 (Budget)	106.3	13.4	1853.2	5.7	0.7

TABLE 7

Rates of agricultural income tax in India

(Rates of levy in NP. per rupee of Agricultural Income)

States		Bihar	Assam	West Bengal	Orissa	Uttar Pradesh	Kerala	Madras	Mysore	Madhya Pradesh (Bhopal)	Maha-rashtra	Jammu & Kashmir
Exemption Limit	Rs.	3,000	3,000	3,000	5,000	3,600	3,600	3,600	3,500	3,000	36,000	3,000
On the first	1,500	Nil	Nil	Nil			Nil		Nil	Nil		Nil
On the first	1,800					Nil						
On the first	3,000				Nil							
On the first	3,600							Nil				
On the next	1,400							5				
On the next	2,000				3							
On the next	3,200					5						
On the next	3,500	5	4	5			5		3	6		
On the next	2,500		8									
On the next	2,500		12									
On the next	2,500		15									
On the next	2,500		19									
On the next	5,000	11	24	8	6	10	11	15	6	9		
On the next	5,000	16		12	9		18	20	9	9		
On the next	5,000	22		19	16			25	12	19		
On the next	5,000				22			30	15	19		
On the next	5,000				29							
On the next	5,000				36							
On the next	5,000				44							
On the next	7,000											8
On the next	10,000					25			18			11
On the next	10,000					40						
On the next	15,000				50				21			
On the next	15,000				62							
On the next	15,000				69							
On the next	15,000				72							
On the next	15,000				75							
On the next	30,000		30									20
On the next	50,000		34						25			
On Balance		25	38	25	78	60	25	45	40	25	50	25 (Flat rate)

Notes: a. In the States of Assam, West Bengal, Kerala, Madras and Madhya Pradesh, the rates are applicable to individuals, Hindu undivided families, firms other associations of persons, i.e., excluding companies. In other States the rates are applicable to all assessees.

b. The table indicates that the initial tax-free slab next to the exemption limit varies from Rs. 1,500—Rs. 3,600, with the exemption of Maharashtra which imposes a flat rate of 50 nP/rupee above Rs. 36,000.

TABLE 8

Direct Taxes on Agriculture as percentage of States total Agricultural Income and States' total tax revenue for the period 1967-70
(Crores of Rupees)

State	Net domestic product (Ag.) at current prices	Total State tax revenue	Total Direct Agricultural tax	4 as percentage to 2	4 as percentage to 3
1	2	3	4	5	6
Andhra Pradesh	3576	289.93	46.13	1.29	15.91
Assam	1503	75.38	18.52	1.23	24.57
Bihar	3118	215.68	29.68	0.95	13.76
Gujrat	2242	239.79	22.88	1.02	9.54
Haryana	1413	99.23	5.08	0.36	5.12
Himachal Pradesh	308	—	—	—	—
Jammu & Kashmir	362	17.48	1.88	0.52	10.76
Kerala	1753	171.07	14.92	0.85	8.72
Madhya Pradesh	2927	213.32	23.03	0.79	10.80
Maharashtra	3211	572.19	36.99	1.15	6.46
Mysore	2524	226.95	24.69	0.98	10.88
Orissa	2098	77.74	5.10	0.24	4.88
Punjab	2233	192.24	5.44	0.24	6.56
Rajasthan	1914	148.81	25.56	1.34	17.18
Tamil Nadu	2467	346.52	30.90	1.25	8.92
Uttar Pradesh	7574	397.82	88.94	1.17	22.36
West Bengal	3713	341.57	22.26	0.60	6.52
Total	42951	3626.03	402.90	0.94	11.09

Notes: 1. Total State tax revenue does not include the share of the States in Central taxes.
2. Direct agricultural tax includes agricultural-Income-tax, land revenue, Surcharge and cess on Sugar Cane, purchase tax on Sugar cane, Surcharge on cash crops and Tobacco duties.

TABLE 9

Distribution of Area Operated and the Households by Size Classes

Size of holdings	Total area operated		No. of households	
	Area (lakh) acres	Percentage	Total No. (in ,000)	Percentage
1	2	3	4	5
1. Below 2.5 acres	216	6.67	41524	57.6
2. Over 2.5 but not exceeding 5 acres	391	12.08	11606	16.1
3. Over 5 but not exceeding 7.5 acres	352	10.87	6488	9.0
4. Over 7.5 but not exceeding 10 acres	294	9.08	3466	4.8
5. Over 10 but not exceeding 15 acres	446	13.77	3911	5.4
6. Over 15 but not exceeding 20 acres	304	9.39	1826	2.5
7. Over 20 but not exceeding 25 acres	232	7.17	1088	1.5
8. Over 25 acres	1003	30.97	2143	3.0
Total	3238	100.00	72052	100.0

Note: (i) Area operated represents all lands used wholly or partly for agricultural production and operated by the persons, alone or with the assistance of others, without regard to title, size, or location.

(ii) A household is a group of persons who usually live together and take their meals from a common kitchen.

Source: National Sample Survey, 17th Round.

ANNEXURE 1

Per Capita Income of Agricultural and Non-Agricultural Sectors

Year	Agricultural Sector			Non-agricultural Sector		
	Agricultural income (Crores of rupees) Ya.	Population (in crores) Pa.	Per Capita income (in Rupees) Ya/Pa.	Income other than agricultural income (crores of rupees) Yna	Population (in Crores) Pna	Per Capita income (In rupees) Yna/Pna
1951-52	5020	25.13	199.7	5080	10.94	464.3
1956-57	4890	27.68	176.6	6780	11.87	571.1
1961-62	6960	30.35	226.0	7910	13.35	592.5
1966-67	12011	34.17	351.5	11892	15.34	775.2
1971-72 (Revised)	14197*	37.98	373.0	18101*	17.34	1043.8

* The figures relate to the year 1970-71 and are provisional.

ANNEXURE 2

Per Capita Monthly expenditure of Rural and Urban Areas

(Rupees)

	Rural	Urban
1. Cereals	2.76	5.54
2. Milk and Milk Products	0.19	1.32
3. Ghee and Butter	0.21	0.61
4. Pulses	0.36	0.65
5. Sugar	0.44	0.75
6. Salt	0.6	0.4
7. Spices	0.35	0.49
8. Tobacco	0.32	0.51
9. Drugs	0.8	0.7
10. Fuel and Light	0.32	1.37
11. Cotton Clothing	1.59	1.75
12. Bedding	0.06	0.06
13. Amusements	0.07	0.25
14. Medicine	0.25	0.49
15. Ornaments	0.14	0.08
16. Domestic Utensils	0.08	0.05
17. Footwear	0.11	0.15
18. Toilets	0.16	0.39
19. Conveyance	0.20	0.58
20. Sundry goods	0.14	0.32
21. Oils	0.36	0.63
22. Tea	0.10	0.23
23. Coffee (powder)	0.02	0.07
24. Kerosine	0.16	0.24
25. Matches	0.04	0.08
26. Country Liquor	0.05	0.04
27. Coak and Coal	0.01	0.06
28. Toilet Soap	0.02	0.10
29. Cinema	0.02	0.21
30. Railway	0.07	0.22

ANNEXURE 3

Percentage share of Agricultural Sector in Different Taxes

Year	State excise duty	Extertain-ment tax	Sales Tax	Sales tax on Motor spirit	Motor Vehicle tax	Tax on pas-sengers and goods	Electricity duty	Other taxes and duties*
1	2	3	4	5	6	7	8	9
1951-52	74	17.8	40	44	44	44	4.3	69.7
1956-57	74	17.8	40	44	44	44	4.7	69.7
1961-62	74	17.8	40	44	44	44	5.2	69.5
1966-67	73	17.2	39	43	43	43	7.5	69.5
1971-72 (Revised)	73	17.2	39	43	43	43	8.0	68.7

* Comprise tax on prize competitions, betting tax, cinematograph tax, show tax, tax on raw jute, tobacco duties, surcharge and cess on sugarcane, purchase tax on sugarcane, etc.; from 1969-70 cinematograph tax and show tax are included under entertainment tax.

ANNEXURE 4

Percentage Share of the Agricultural Sector in Various Commodities subject to Union duties of

Year	Kerosin	Sugar	Match	Tobacco	Coffee	Tea	Cotton Clothing, Cotton yarn, Woolen Clothing & Woolen yarn	Motor Spirit and Tyre and Tube	Foot-wear	Soap	Coal-cess	Salt
1951-52	60	57	53	58	40	49	67	44	—	—	—	—
1956-57	60	57	53	58	40	49	67	44	62	31	13	—
1961-62	60	57	53	58	—	49	67	44	—	31	13	77
1966-67	59	56	52	57	—	48	66	43	—	30	12	76
1971-72 (Revised)	59	56	52	57	—	48	66	43	—	30	12	76

Me. MAX HUBERT BROCHIER / JEAN PIERRE ALLAVENA:

DE LA TAXATION DES PROFITS IMMOBILIERS REALISES PAR LES PARTICULIERS EN FRANCE

DE LA TAXATION DES PROFITS IMMOBILIERS REALISES EN FRANCE PAR LES SOCIETES ETRANGERES

Les lois des 15 mars et 19 décembre 1963 et la loi du 29 juin 1971 constituent le fondement de la fiscalité immobilière.
Actuellement la loi du 19 décembre 1963 réglemente les plus-values réalisées lors de la cession de terrains à bâtir, et les profits de lotissement ainsi que les profits résultant des ventes occasionnelles d'immeubles acquis ou construits moins de cinq ans auparavant dans une intention spéculative.
Les profits de construction eux, sont réglementés d'une part par l'article 28 de la loi du 15 mars 1963 et par la loi du 29 juin 1971.

I. *La taxation des profits provenant des opérations de lotissement:*

Les profits réalisés par les personnes qui procèdent au lotissement et à la vente de terrains leur appartenant, entrent dans la catégorie des bénéfices industriels et commerciaux. La vente de terrains par fractions ne peut être liée à une opération de lotissement que dans la mesure où il y a eu procédure régulière de lotissement.
Cependant «sont exonérés à condition de ne pas être réalisés par des professionnels, les bénéfices ayant leur source dans des opérations de lotissement portant sur des terrains de faible étendue, effectuées sans travaux préalables et réalisées selon la procèdure simplifiée visée par le décret du 28 juillet 1959». Il est nécessaire pour que cette éxonération ait lieu que les terrains aient été acquis par succession ou donation — partage remontant à plus de trois ans au moment de l'opération, et qu'il soit expressement fait mention de la procédure simplifiée dans l'arrêté préfectoral autorisant l'opération.
Si de manière générale, les profits de lotissement sont considérés comme des bénéfices industriels et commerciaux, certains profits bénéficient de dispositions spéciales en ce qui concerne la détermination du gain imposable.

Profits visés:

1) lotissement de terrains acquis avant le 1er janvier 1940 et demeurés en exploitation agricole.
2) lotissement de terrains provenant de succession ou de donation-partage remontant à plus de trois ans et effectués suivant la procédure normale.
3) lotissement de terrains reçus par donation simple mais ayant fait l'objet d'une procédure normale de lotissement.
4) lotissements autres que ceux visés ci-dessus mais réalisés suivant la procédure simplifiée.

Dans tous ces cas, le profit imposable est calculé par différence entre le prix de

vente des terrains lotis et le prix de revient corrigé.
Le prix de vente doit comprendre toutes les sommes et indemnités mentionnées dans l'acte de vente au profit du vendeur.
Le prix de revient corrigé comprend le prix d'acquisition du terrain augmenté des frais d'acquisition qui sont soit évalués à 25% du prix, soit pris en considération pour leur montant réel prouvé s'il est supérieur au forfait. Le total de ces deux éléments est majoré de 3% par année écoulée depuis l'acquisition du bien. L'ensemble de ces trois éléments est réévalué selon les coefficients prévus en matière de révision des bilans.
Cependant, lorsque les terrains ont été acquis par succession ou donation-partage, le prix d'acquisition est la valeur vénale au jour de la mutation à titre gratuit. A ce chiffre ainsi obtenu sont ajoutés les frais occasionnés par les opérations de lotissement et de vente, par exemple le coût des travaux d'aménagement et de viabilité, sans aucune réévaluation.
Lorsque l'acquisition du bien se situe avant le 1er janvier 1950, le prix de revient peut être fixé sur demande de l'intéressé de la manière suivante: 30% de la fraction du prix de cession se rapportant au terrain dans son état au jour de l'acquisition auquel s'ajoutera le coût réel non revalorisé des impenses et travaux.
Jusqu'en 1969 le prix de revient total ne pouvait être supérieur à 30% du prix global de cession. Depuis lors, cette règle n'est plus appliquée systématiquement, le redevable pouvant justifier le prix de cession.

II. *La taxation des plus-values réalisées à l'occasion de la cession de terrains à bâtir et biens assimilés:*

Les plus-values réalisées à l'occasion de la vente de terrains à bâtir sont passibles de l'impôt sur le revenu.
On considère comme terrain à bâtir, les terrains nus ou recouverts de bâtiments destinés à être démolis. Sont assimilés à cette catégorie, les immeubles inachevés et les surélévations d'immeubles préexistants et les supportant. Par contre ne sont pas considérés automatiquement comme terrains à bâtir les terrains ayant fait l'objet d'expropriation en vue de l'édification d'ouvrages tels que des routes, ponts, cimetières ou lignes électriques.
Cette présomption irréfragable ne jouera qu'à la condition que l'acquéreur ait pris l'engagement de construire, même si cet engagement n'est pas tenu par celui — ci car c'est au moment de la mutation qu'on apprécie la vocation d'un terrain à être bâti. Par contre si l'acquéreur n'a pas pris cet engagement, la taxe sur la valeur ajoutée n'est pas perçue lors de la mutation, elle le sera si l'intéressé entreprend des travaux de construction dans le délai de prescription qui est de quatre ans, éventuellement prorogé.

Terrains présumés «à bâtir» quelle que soit leur situation au regard de la T.V.A.:

1) Terrains réputés insuffisamment bâtis, c'est le cas lorsque les bâtiments représentent une superficie développée inférieure à 15% à la contenance cadastrale du terrain.
2) Terrains recouverts de bâtiments destinés à être démolis, c'est à dire, des bâtiments dont la valeur est inférieure à 30% de la valeur du terrain ou de l'indemnité d'expropriation (25% dans les villes de plus de 200.000 habitants).
3) Terrains à usage agricole ou forestier ou grevés d'une servitude publique non aedificandi lorsque leur prix de

cession ou l'indemnité d'expropriation excède 25 F le m² pour les vignobles d'appellation contrôlée et les cultures florales, 8 F le m² pour les cultures fruitières et maraichères, 7 F le m² pour les terrains produisant des vins délimités de qualité supérieure, 4 F le m² pour les vignobles ordinaires, 3 F le m² pour les autres terrains agricoles. En ce qui concerne les terrains grevés d'une servitude publique non aedificandi le prix de vente ne doit pas excéder 8 F le m².

4) Cession d'actions ou de parts de sociétés en copropriété dotées de la «transparence fiscale» dans la mesure où ces titres sont représentatifs de terrains à bâtir ou assimilés.
5) Cession d'actions ou parts de sociétés, même «non transparentes», dont l'actif est principalement constitué par des terrains à bâtir et assimilés.

Par ailleurs, ne sont pas considérés comme cessions de terrains à bâtir, les cessions gratuites de terrains classés à des collectivités publiques, à l'Etat, aux communes, et à certains établissements publics. Il s'agit en l'espèce de l'échange de terrains classés comme espace boisé acquis depuis cinq ans à titre onéreux contre un terrain à bâtir ou en échange d'une partie de ce terrain contre une autorisation de bâtir sur la portion conservée par le cédant.

La plus-value est alors constituée par la différence entre le prix de cession et le prix d'acquisition.

Le prix de cession considéré est celui indiqué dans l'acte déduction faite, le cas échéant, des commissions de vente supportées par le vendeur et de l'indemnité d'éviction versée au locataire par le propriétaire cédant.

Lorsque la plus-value résulte d'une indemnité d'expropriation, l'indemnité à retenir comprend, l'indemnité principale et les indemnités accessoires à l'exclusion de celles représentant le caractére de revenus imposables; (il s'agira par exemple d'une indemnité perçue pour récoltes non levées et de celles représentant pour l'exproprié les frais de réinstallation comme l'indemnité de déménagement).

Le prix d'acquisition quant à lui, s'entend, lorsqu'il s'agit d'un bien acquis à titre onéreux de celui indiqué dans l'acte. Toutefois, lorsque le bien a été acquis moyennant le payement d'une rente viagère, le prix d'acquisition est celui constitué par la somme des arrérages qui ont été effectivement versées au crédirentier jusqu'à son décés.

Signalons que lorsque le bien a été acquis par succession quelle que soit la date à laquelle celle-ci a été ouverte, ou donation-partage remontant à plus de trois ans avant la cession, ou par donation ayant acquis date certaine avant le 1er septembre 1963, c'est la valeur vénale du bien au jour de la mutation à titre gratuit qu'il faut prendre en considération. Au contraire, si le bien a été acquis par donation-partage remontant à moins de trois ans ou par donation ayant date certaine depuis le 1er septembre 1963, c'est le prix pour lequel le bien avait été acquis à titre onéreux par le donateur ou ses auteurs qui sera pris en considération.

Ce prix ainsi déterminé sera majoré des frais d'acquisition et impenses. Cette majoration peut être déterminée de manière forfaitaire (25% du prix d'acquisition) ou constituer le montant réel des impenses et frais d'acquisition à condition d'en apporter la justification et de n'avoir pu les déduire du revenu imposable.

La somme ainsi obtenue est majorée de 3% pour chaque année écoulée depuis l'entrée du bien dans le patrimoine du

redevable ou dans celui de ses auteurs. Ce montant est alors réévalué en faisant application des coefficients applicables fixés pour les immobilisations par l'article 21 de l'annexe III du Code Général des Impôts; ainsi si le bien a été acquis en 1914 le coefficient est de 243, mais si le bien a été acquis en 1950, il ne sera plus que de 1,6.

Cependant, si l'acquisition du bien a eu lieu avant le 1er janvier 1950, la plus-value peut, si le contribuable le demande, être fixée forfaitairement à 70% du prix de cession ou de l'indemnité d'expropriation.

Les plus-values ainsi constatées ne sont imposables qu'à la condition d'avoir un montant supérieur à 50.000 F. Lorsque ce montant est compris entre 50.000 et 100.000 F, il est diminué d'une décote égale à la différence entre 100.000 et le total des plus-values réalisées. Cependant, un même contribuable ne pourra bénéficier de l'abattement ou de la décote s'il en a déjà bénéficié au titre de l'une des cinq années précédant celle de la cession. La plus-value ainsi déterminée est imposable à 50% de son montant si le bien cédé avait été acquis par donation-partage ou par succession, et de 70% si ce bien avait été acquis d'une autre manière à titre onéreux. Ces pourcentages sont ramenés respectivement à 40 et 60% lorsque la plus-value est dégagée à l'occasion d'une cession à titre onéreux à l'Etat ou à une collectivité publique ou à une collectivité locale ou à l'occasion d'une expropriation.

III. *Taxation des profits occasionnels réalisés lors de la cession d'immeubles acquis ou construits depuis moins de cinq ans*

C'est l'article 35 — A du Code Général des Impôts qui soumet les profits spéculatifs réalisés à titre occasionnel par des non-professionnels dans le cadre de la gestion de leur patrimoine privé à l'impôt sur le revenu, lors de la cession d'immeubles acquis ou construits depuis moins de cinq ans. Ainsi les plus-values réalisées doivent l'avoir été dans le cadre d'une cession à titre onéreux, ce qui exclut les plus-values résultant d'une expropriation et celles constatées à l'occasion d'une succession ou d'une donation.

Les plus-values doivent avoir été dégagées, lors de la cession d'immeubles, de terrains non bâtis, des droits immobiliers ou mobiliers concernant les immeubles acquis depuis moins de cinq ans; sont également visées par les textes, les plus-values dégagées lors de la cession d'actions ou parts et obligations convertibles de sociétés dont l'actif est constitué principalement de terrains à bâtir et biens assimilés, et des sociétés civiles immobilières de toute nature «non transparentes» dont le patrimoine est composé essentiellement par des immeubles. Ne sont pas concernées par la Loi, les plus-values réalisées lors de la cession de terrains à usage agricole ou forestier lorsque les circonstances permettent d'apprécier qu'il ne s'agit pas de la vente d'un terrain à bâtir.

Si l'immeuble a été occupé personnellement depuis l'acquisition par le cédant à titre de résidence principale et que la cession soit motivée par un changement de résidence du redevable ou une meilleure utilisation familiale, l'absence d'intention spéculative est présumée selon la loi.

Le cédant peut également démontrer l'absence d'intention spéculative, mais le Conseil d'Etat se montre rigoureux dans l'appréciation de l'absence d'intention spéculative, par exemple lorsque la cession

aura été faite pour permettre de régler les frais de partage judiciaire.

Le profit imposable est égale à la différence entre le prix de cession effectivement perçu par le cédant (diminution faite des frais spéciaux, courtages et commissions versées) et le prix de revient corrigé par addition des frais d'acquisition (droits de mutation, honoraires versés au notaire, intérêts d'emprunts en vue de l'acquisition du bien dans la mesure où ils n' ont pas été déduits dans les années précédant la cession) et des impenses. Le prix de revient ainsi corrigé est majoré de 3% par année écoulée depuis l'acquisition. Les plus-values ainsi réalisées sont imposables dans l'année de la vente du bien. Il est cependant possible de les faire bénéficier du régime d'échelonnement des revenus exceptionnels, c'est à dire de les fractionner pour atténuer l'effet de la progressivité de l'impôt sur le revenu des personnes physiques.

IV. *Taxation des profits résultant d'opérations de construction d'immeubles*

Sont considérés comme profits de construction, les profits réalisés par les personnes physiques lors de la cession à titre onéreux d'immeubles qu'elles ont construits ou faits construire pour leur propre compte, ou de droits immobiliers s'y rapportant. Du point de vue fiscal, ces profits constituent des bénéfices industriels et commerciaux.

Les profits considérés résultent de la cession à titre onéreux d'immeubles que le cédant a construit ou fait construire pour son propre compte, ce qui implique que le cédant n'est pas le constructeur initial, et que l'acquisition du bien n'a pas été imposée selon un régime fiscal analogue à celui des opérations de vente d'immeubles achevés. Il pourra s'agir également des profits réalisés lors de la cession de droits immobiliers (usufruit, nue-propriété) ou d'actions et parts de sociétés immobilières dotées de la transparence fiscale.

L'imposition de ces profits dépendra de la réalisation d'une double condition:

il faut que les profits ainsi réalisés aient un caractère habituel au sens de l'article 35 - 1 - 1° du Code Général des Impôts et que les immeubles aient été construits dans une intention spéculative, c'est à dire en vue de la vente.

Seront considérés comme opérations occasionnelles, la vente d'un seul logement ou la vente en bloc d'un immeuble et non la vente par appartements.

Dès que l'opération présente un caractère habituel, l'intention spéculative est présumée par l'Administration Fiscale. Il faudra que le cédant apporte la preuve contraire pour être exonéré. N'entrent pas, en principe dans le champ d'application de la taxation, les opérations concernant les immeubles construits depuis plus de 15 ans au moment de la cession. Il en est de même pour les immeubles occupés personnellement par le vendeur ou loués pendant plus de 10 ans. Dans ces cas, il a été jugé que le caractère spéculatif de la vente disparaissait.

A compter du 1er octobre 1970, et seulement dans les cas exceptionnels où l'acte constatant la cession des biens n'est pas soumis à la formalité unique à la Conservation des Hypothèques, le cédant est tenu de produire un certificat émanant de l'inspecteur qui reçoit la déclaration annuelle des revenus, attestant que la cession effectuée a un caractère occasionnel.

Le régime d'imposition des profits de construction est soumis d'une part à la loi du 15 mars 1963 en ce qui concerne les immeubles dont le permis de construire a été délivré avant le 1er janvier

1972, et d'autre part à la loi du 29 juin 1971 pour les immeubles dont le permis de construire a été délivré postérieurement au 1er janvier 1972.

a) *le régime de la loi du 15 mars 1963:*
Le profit imposable visé par la loi est la plus-value réelle déterminée en déduisant du prix de vente de l'immeuble ou des droits immobiliers ou sociaux cédés le prix de revient de ces éléments augmenté de tous les frais et charges se rapportant à l'acquisition et à la cession. Ce profit fait l'objet d'un prélèvement qui a le caractère d'un acompte imputable sur l'impôt sur le revenu exigé ultérieurement.

Le taux du prélèvement varie selon la date d'obtention du permis de construire, si le permis a été obtenu avant le 1er janvier 1966, il est de 15%, s'il a été obtenu du 1er juin 1966 au 31 décembre 1971 le taux est de 25%.

Le prélèvement ainsi effectué aura le caractère libératoire si certaines caractéristiques sont remplies. C'est ainsi que pour les immeubles ayant fait l'objet d'un permis de construire délivré avant le 1er janvier 1966, il faut que

1) le vendeur n'ait pas pour activité le négoce des biens et ne soit pas susceptible d'être imposé au titre de l'article 35 du Code Général des Impôts.
2) le vendeur n'intervienne à aucun autre titre dans les opérations se rattachant à la construction.
3) les plus-values ainsi réalisées ne constituent pas la source normale des revenus de l'intéressé.
4) les plus-values ne proviennent pas d'immeubles inscrits à l'actif d'une entreprise industrielle et commerciale.
5) la cession n'ait pas été précédée de versements d'acomptes.
6) ces immeubles soient affectés à l'habitation pour les 3/4 au moins de leur superficie totale.
7) les immeubles aient été achevés au moment de la cession ou vendus en l'état futur d'achevement sous réserve de remplir certaines conditions particulières.

En ce qui concerne les immeubles dont le permis de construire a été délivré entre le 1er janvier 1966 et le 1er janvier 1972, le prélèvement sera considéré comme libératoire quelle que soit l'activité professionnelle des redevables, mais ces plus-values doivent découler d'opérations de placement effectuées dans le cadre de la gestion de leur patrimoine privé, et non dans le cadre d'une activité professionnelle.

De plus, en cas de prélèvement libératoire, la plus-value imposable sera calculée suivant un régime de faveur, les conditions de calcul étant alors analogues à celles prévues pour les plus-values de cession de terrains à bâtir.

b) *Le régime de la loi du 29 juin 1971:*
Le régime institué par la loi du 29 juin 1971 s'applique de plein droit aux profits réalisés jusqu'au 31 décembre 1981 à l'occasion de la cession d'immeubles pour lesquels la délivrance du permis de construire ou la déclaration en tenant lieu est postérieure au 31 décembre 1971. Par contre pour les profits réalisés à l'occasion de la cession d'immeubles dont le permis de construire a été obtenue entre le 1er juin 1966 et le 31 décembre 1971 le contribuable a la possibilité de choisir le régime antérieur. Mais l'engagement écrit qu'il prend est alors irrévocable.

Le taux de prélèvement est porté à 30% mais pour être libératoire deux conditions sont seulement exigées: les immeubles qui

ont fait l'objet de la cession doivent être affectés à l'habitation pour les 3/4 au moins de la superficie totale, et ils doivent être achevés au moment de la cession.

Ce prélèvement libératoire de 30% ne s'applique que lorsque les profits de construction n'excéderont pas un montant de 400.000 F apprécié sur une période de quatre ans. Ce plafond sera apprécié année par année en fonction de la période quadriennale de référence; cependant le contribuable peut utiliser la totalité du crédit la première année.

V. *Cas particulier: La taxation des profits réalisés lors de la vente d'immeubles reçus en contrepartie de la cession d'un terrain à bâtir*

L'acquéreur du terrain aura seul la qualité de constructeur, lorsque la vente du terrain aura été faite moyennant un prix converti pour tout ou partie en l'obligation pour l'acquéreur de remettre au vendeur des locaux édifiés sur ce terrain.

Il en sera de même, lorsque le vendeur aura cédé une fraction indivise d'un terrain moyennant soit un prix converti en l'obligation de remettre au vendeur à concurrence des droits conservés par lui sur le terrain, des locaux à édifier sur celui-ci; soit l'obligation pour l'acquéreur de construire sur le terrain indivis des locaux correspondant aux droits du vendeur. Les profits réalisés par le vendeur lors de la cession des immeubles reçus n'ont pas le caractère de profits de construction. Ils relèvent alors des plus-values occasionnelles spéculatives dans l'hypothèse où la cession a eu lieu moins de cinq ans après la date du contrat de vente du terrain.

Dans ce cas: le prix de cession sera déterminé selon la formule adoptée dans l'acte, s'il s'agit d'un échange le prix du terrain est fixé à la valeur réelle du bien acquis en contrepartie du bien cédé majoré éventuellement de la soulte reçue; Si la cession est consentie moyennant un prix en espèces immédiatement converti en obligation d'édifier des locaux, le prix fixé doit être retenu.

Par contre seront réputés des profits de construction, les profits réalisés à l'occasion de la vente d'une fraction divise d'un terrain moyennant un prix converti en l'obligation pour l'acquéreur de construire des locaux pour le compte du vendeur sur la fraction divise du terrain conservé par celui-ci, et à l'occasion de la vente d'un terrain moyennant un prix converti en l'obligation pour l'acquéreur de construire des locaux pour le compte du vendeur sur un autre terrain appartenant à celui-ci, car dans ces deux cas le vendeur du terrain est réputé avoir fait construire pour son propre compte les immeubles livrés.

VI. *Taxation des profits immobiliers réalisés en France par les sociétés étrangères*

A. *Le droit commun:* Un taux de prélèvement de 50% est perçu à l'occasion:

1) des profits résultant d'opérations de lotissement
2) des plus-values réalisées sur des immeubles bâtis ou non, cédés moins de cinq ans après leur acquisition,
3) les plus-values obtenus à l'occasion de la cession de terrains à bâtir.

Cette réglementation est applicable aux sociétés étrangères, c'est à dire aux sociétés dont le siège social est hors de France, et qui «n'exercent pas une activité industrielle et commerciale dans un établissement stable en France».

B. *La taxation concernant les profits réalisés lors d'opérations de construction*

1) *le régime de la loi du 15 mars 1963*
Comme pour les profits réalisés par les particuliers, le taux de prélèvement est de 15% si le permis de construire a été obtenu avant le 1er janvier 1966, il est de 25% s'il a été obtenu du 1er juin 1966 au 31 décembre 1971.
Cependant, le caractère accessoire de ces opérations par rapport à l'activité principale est la condition sine qua non, pour que ces sociétés soient imposables selon ce régime.

2) *le régime de la loi du 29 juin 1971:*
Comme pour les particuliers, et les sociétés françaises qui ne sont pas soumises à l'impôt sur les sociétés, le taux de prélèvement est de 30%.
Ce taux est applicable quels que soient la forme et l'objet de la société étrangère. Néanmoins, cette société devra remplir trois conditions:

a) elle ne doit pas avoir d'établissement en France
b) le lieu de sa principale activité doit être à l'étranger
c) «elle ne doit pas dépendre ou être contrôlée de manière directe ou indirecte par des personnes physiques résidant en France ou des personnes morales ayant leur siège en France».

Notons que ce taux est libératoire de toute autre imposition et que la limite de 400.000 F ne joue pas.
Si la société ne répond pas à ces caractéristiques, c'est le taux de prélèvement de 50% qui est alors applicable.

Conclusion: Telle est la réglementation en vigueur de la Fiscalité Immobilière qui reste un domaine bien complexe dans ses applications pratiques.
Nous avons tâché ici même d'en tracer les grandes lignes en ce qui concerne la taxation des profits immobiliers réalisés par les particuliers en France, sujet qui est d'une grande actualité.

DEVELOPMENTS IN INTERNATIONAL TAX LAW

EMERGENCY WINDFALL PROFITS TAX

The following is a Treasury explanation of the proposal for imposing a temporary emergency tax on windfall profits of crude oil producers, which was presented to Congress on December 19, 1973, by President Nixon.

We recommend that the Congress enact an Emergency Windfall Profits Tax, applied at graduated rates and designed to recapture the windfall profits that would otherwise be realized over the next year or so by the producers of oil. The tax is described in detail below.

Background. A scarcity of crude oil, abruptly worsened by the embargo of the Arab oil producing nations, has driven up dramatically the price of crude petroleum in the free world market.

Crude oil prices in the near future will exceed what is required to bring forth the production which will eventually satisfy demand. The proposed Emergency Windfall Profits Tax would apply to that excess. In the long run, if the demand for oil is going to be larger and we must therefore turn to higher cost sources, prices must rise some reasonable amount above present levels. If the United States is to become self-sufficient, we must learn to live within our own resources. Nothing we can do will increase the amount of oil in the ground in the United States, but there is much we can do to expand U.S. production. There is much oil in the ground which we have located and drilled for, but which we make no attempt to get up because the cost of getting it up is not justified by the price it will bring. It is estimated that primary recovery — obtaining the oil by natural flow or by pumping from a given pool — yields something like one-third of the oil in a pool. Making the remainder available requires much more expensive processes, and will not occur to the extent needed until prices make those processes economically feasible. Similarly, the oil potentially recoverable from shale in the United States would supply all of our needs for many years, but current price levels do not cover the cost of solving the technological problems of recovering it nor of making the large investments in plants and equipment which would be required to obtain substantial volume from that source.

The immediate problem is how to permit price incentives to operate within a range which is reasonable, without permitting oil producers to retain what is unreasonable.

The windfall element. It will take time to increase substantially the supply of crude in the United States. New reservoirs must be discovered and drilled. Old wells previously uneconomical must be rehabilitated. Processes such as secondary recovery must be put in place. Processes such as shale oil recovery will commence to come on line only over a period of years as producers conclude that they can count

on price levels which make that recovery economic, and then there will be time lags in solving technical problems and building plants.

We believe that supply and demand will come into normal balance — if permitted to operate in normal fashion — over a period of several years. Even moderate price increases will contribute significantly to eliminating shortages. Moderate price increases will bring in more production, thus increasing supply. At the same time, those price increases will cause people to be a little more thrifty. It will cost more to do that extra, unnecessary driving, and it will save more to insulate homes and install storm windows.

However, in the period before that adjustment is completed, the abrupt nature and magnitude of the current shortage could, in a free market, cause the price of crude oil to shoot substantially above the levels required to bring supply and demand into balance over a two to three year period. This produces a "windfall" — a price to producers which is more than producers could have anticipated when investments were made and more than that required to produce all that we can in fact expect to be supplied.

For example, suppose that a price of $ 7 a barrel for crude oil would be sufficient after two or three years to induce increased supplies and to dampen demand, so that shortages would disappear. Such a price would be "the long-term supply price." If in the interim, the price goes to $ 8 or $ 9 a barrel, the excess of the $ 8 or $ 9 price over the long-term supply price is a "windfall" — it is more than the price required to produce all that is in fact being supplied or is likely to be supplied in the next several years. The windfall and the tax would, of course, be even greater if prices should, on a temporary spot basis, shoot to the range of the $ 17 prices paid in some recent foreign auctions.

No one knows exactly what the long-term supply price is, as no one can predict the future that clearly. Our best estimate is that it would be in the neighborhood of $ 7 per barrel within the next few years. In terms of gasoline prices, such a figure represents an increase from present levels of less than 10 cents a gallon. (A convenient rule of thumb is that each dollar of increase in the price of crude oil increases gasoline prices by 2½ cents per gallon.)

Likewise, no one knows what level the price of crude would reach in de next few months if it were freed from all controls. If prices were freed, we could expect erratic behavior for several weeks, after which the price might settle in the $ 8 to $ 9 range, and that thereafter the price would decline gradually to the lower long-term supply price. *

Some windfall profits have been made during the past few months and have contributed to the sharply increased over-all reported profits of oil producers. Those windfall profits can be expected to in-

* Under our present two tier system of price control, more than 80 percent of our domestic supply ("old oil") is controlled at a price level far below the market, and the remainder ("new oil") is not controlled at all. This means that normal market pressures are concentrated on less than 20 percent of the total production. Thus, in the event supply restrictions by exporting countries were to force oil prices to an $ 8 or $ 9 average price, the price of "new oil" might well go to $ 20 or more per barrel. This high price of "new oil," averaged with the controlled prices of "old oil" would yield an average price of $ 8-$ 9. As the proportion of "new oil" in the total increased, its price would decline. Thus, if all oil were uncontrolled, the average price of $ 8-$ 9 would prevail for all.

crease further in the next few months as prices move up.

Emergency Windfall Profits Tax. The nation is faced with a problem which can be solved only if everyone contributes to the solution.

In the face of large and imminent windfall profits, we therefore propose an Emergency Windfall Profits Tax on the producers of oil.

In designing the tax, we have tried:

1) To design the tax not only to capture future windfalls, but also to make up in some degree for windfalls which have occurred in the past.

2) To avoid a heavy tax on that part of the return to producers which is necessary to obtain increased production. It would be self-defeating to take away the profit which is needed to increase production and thus to eliminate shortages.

3) To phase out the windfall tax as the windfall disappears, and to place a definite time limit on the duration of the tax. Windfalls are by their nature temporary for the reasons cited. A normal free market will eliminate windfalls, given time. Unless the tax is permitted to phase out as the windfall disappears, it would continue to tax those profits which are necessary to induce greater supplies. The tax would then not reduce the return to producers; it would serve only to keep prices to consumers higher than otherwise would prevail.

Description of Emergency Windfall Profits Tax

1. *Summary of Tax.* An "Emergency Windfall Profits" tax at graduated rates will be imposed on the sale of a barrel of crude petroleum at a price in excess of a specified base price per barrel. The tax will apply only to the excess over the base price and will be imposed on and collected from the producer of crude.

2. *General Explanation.* A. *Base price: excess taxable.* Each producer's base price will be the ceiling price on December 1, 1973, under regulations § 150.353 of the Cost of Living Council for domestic crude petroleum of that grade and location. That ceiling price is the posted field price on May 15, 1973, plus 35 cents. With the exception of crude petroleum produced abroad, these base prices and the tax, will apply to all crude sold after the date of enactment whether or not it was subject to the ceiling price (including "new crude petroleum" within the meaning of § 150-354 of those regulations). In the case of new fields or production for which no ceiling price was applicable or determined on December 1, 1973, the base price will be determined by reference to ceiling prices on that date for crude of comparable grade and location.

The application of the tax to the excess of the selling price over the producer's base price per barrel is illustrated by the following example which reflects the base price of a hypothetical taxpayer and a hypothetical increase in that price:

(1) Actual Selling Price	*(2) Taxpayer's Base Price (CLC Ceiling Price)*	*(3) Taxable Amount*
$ 5.00 per/bbl.	$ 4.00 per/bbl.	$ 1.00 per/bbl.

On these facts, the tax would be computed as follows:

Column 1 ($5) – Column 2 ($4) = Column 3 ($1) × Rate

Where there is no sale of crude, as in the case of an integrated producer, a comparable result will be achieved by applying the tax to the excess of the value at the field over the base price. This value will be determined by reference to comparable field selling prices and is the value used by the producer for the purpose of calculating his percentage depletion deduction under the Federal income tax.

The producer will also pay Federal income tax on the balance of the selling price after he deducts the Windfall Profits Tax and his other expenses.

B. *Rate of tax.* The rates of tax applicable to the excess selling price will range from 10% to 85%, under the following graduated rate schedule:

Amount Taxable ($)	*Bracket Rate* (%)	*Bracket Tax* ($)	*Cumulative Tax* ($)
0— .50	0	0	0
.51— .75	10	2½¢	2½¢
.76—1.10	20	7 ¢	9½¢
1.11—1.70	30	18 ¢	27½¢
1.71—2.50	50	40 ¢	67½¢
2.51—over	85		

In accordance with regulations prescribed by the Secretary of the Treasury, the top level of the lowest bracket (initially 0 to $0.50) will be automatically adjusted upward in the uniform percentage required to make the 10 percent rate of tax applicable after 36 months only to amounts in excess of the expected average long-run supply price of about $7 per barrel. Each higher bracket will be adjusted upward to apply to a constant number of cents per barrel in price above the next lower bracket.

The use of graduated rates of tax in combination with a scheduled upward adjustment of the brackets accomplishes three major purposes of the tax as part of the solution to the current energy situation.

— First, the graduated rates impose very high rates of tax on extraordinary price increases and "windfall" profits which are attributable more to an externally induced shortage in crude supplies than to long-run market conditions, but impose a lesser amount of tax on relatively small increases above the artificially low ceiling price of May 15, 1973.

— Second, the automatic upward adjustment of the tax brackets recognizes both the temporary nature of current shortage and the expected gradual increase in crude petroleum price over time due to ordinary rates of inflation and the anticipated long-run increase in demand. Most importantly, the adjustment of the brackets, and the phase-out of the tax that it implies, permits the market to eliminate the shortage by calling forth an increase in supply as rapidly as possible consistent with not permitting the accumulation of "windfall" profits in the short run.

— Third, as supplies are increased in response to higher after-tax profits, the concurrent disappearance of the tax will

permit consumer prices of petroleum to be no more, nor less, than the costs of bringing forth a steady supply of oil. If the tax were not phased out as after-tax prices received by producers return to long-run supply levels, the tax would cause prices to consumers to be higher than they otherwise would be.

C. *Collection and imposition.* It is contemplated that the tax will be collected and remitted as follows:

The tax will be imposed on the producer at the time of sale of the crude or at the end of the month in which produced if not sold. It is contemplated that the tax will be collected and remitted on a monthly basis as follows:

(i) The purchaser will collect the tax from the producer by withholding the tax from the sales price and will remit by the 15th day following the end of each month the tax due on all crude petroleum purchased during the preceding month.

(ii) In the case of crude produced but not sold, as in the case of an integrated producer, the tax will be paid by the producer by the 15th day following the end of the month.

Sales of crude petroleum are with few exceptions made to refineries. Since there are fewer than 200 refineries, as compared to many thousands of producers and royalty owners, collection of the tax in this manner will facilitate compliance and administration.

D. *Computation of percentage depletion.* For purposes of computing percentage depletion under § 613 of the Code, gross income from oil and gas wells will be reduced by the amount of the applicable Windfall Profits Tax.

E. *Duration of the tax.* Because the period of extraordinary profits is expected to be limited in duration, it is important that Congress reconsider the tax after several years of experience. In order to facilitate that recommendation, the tax will by its terms expire 60 months after the date of enactment unless otherwise extended.

APPENDIX A:

ENERGY DEVELOPMENT TRUST FUND

All or part of the receipts from the Emergency Windfall Profits Tax could be allocated to an Energy Development Trust Fund to be administered by the Secretary of the Treasury. The Trust Fund would provide capital for the Energy Development Bank which would provide loans for the development and conservation of domestic energy sources with the goal of soon becoming independent of foreign supplies. In effect, the purpose of the Trust Fund would be to accelerate the rate of technological change in the energy section of the economy.

The Energy Development Bank would assist in financing projects for the development of energy supplies which cannot be undertaken as private commercial projects because of large capital requirements, uncertainties of commercial success, etc.

The Bank's Board of Directors would consist of five persons appointed by the President with the advice and consent of the Congress. Directors would serve full time for terms of five years (staggered). Board members would be selected on the basis of demonstrated ability in banking and finance, science, and energy production and management. The Federal Energy Administrator would be Chairman of the Board, *ex officio.*

An Advisory Board of nine persons, including representatives of labor, consumer

and educational interests, and of other government agencies, would be constituted to review progress and performance of the Bank at predetermined intervals. Advisory Board members would be appointed by the President and serve for terms of three years (staggered).

The authority of the Bank would include:

- Direct loans to finance novel or long-range projects for the development of increased domestic energy supplies.
- Direct loans to finance projects for the conservation and protection of the environment in the production of increased domestic energy supplies.
- Price guarantees for energy supplies produced by supported projects.
- Reinsurance of risks from environmental hazards created by supported projects.

The Bank would have complete discretion as to the terms of the credits extended and should not be expected to produce current profits or avoid losses. However, it should be sufficiently staffed to allow it to discriminate intelligently in favor of those projects which have the greatest merit.

APPENDIX B: "PLOWBACK"

If an Emergency Windfall Profits Tax is enacted, Congress may wish to consider the desirability of refunding or otherwise forgiving all or a part of the tax if the taxpayer "plows back" his profit into some energy producing investment.

A number of Congressmen and writers on economic subjects have discussed a plowback concept. Bills introduced by Senator Gravel and by Senator McGovern and Representative Aspin contain such provisions.

In assessing such a proposal, Congress would wish to consider the following aspects.

Mechanics: refund, credit or deduction. Two mechanics to implement a plowback have been suggested: (i) a deduction against the tax base (the amount of windfall profit) for qualifying expenditures and (ii) a refund or credit of the windfall tax equal to qualifying expenditures. The basic considerations and problems are common to each approach. The tax refund or credit approach would be the appropriate mechanism to use in conjunction with the proposed Emergency Windfall Profits Tax, since, for simplicity of administration, the tax will be collected by the first purchaser of the crude oil who will not have information on qualifying expenditures made by the oil producer.

A system for a tax refund or credit based upon qualifying expenditures would require a definition of qualifying expenditures and a fast, simple procedure for obtaining a refund or credit, in order that the refund or credit might supply the cash for the investments desired.

A relatively fast and simple procedure for obtaining a refund or credit would be for the producer to file a refund claim (for any period not shorter than one month) consisting of a statement of qualifying expenditures made during that period together with copies of receipts from the purchasers of the oil for the taxes paid during that period.

Definition of qualifying expenditures. Defining qualifying expenditures requires decisions as to the types and amounts of expenditures to be encouraged. Most proposals to date would cover not only expenditures for additional oil discovery and production, but research and development of alternate energy sources as well. It is doubtful whether in the next three to five years (when shortages are likely to be more critical) new energy sources other

than oil could become available in significant amounts at competitive prices. Accordingly, it might be appropriate to vary the amount of incentive among different types of expenditures to give more incentive to those which produce more immediately useable energy supplies. Arguably, the credit for qualifying expenditures should be confined to those expenditures in excess of existing levels if the credit is to provide maximum incentive for additional expenditures. It would be necessary, in such a case, to choose some historical base level of expenditures and give a credit only for the excess amounts. Inequities for some taxpayers would occur in the selection of a historical base and new producers would have an advantage in that they have no base.

Carryovers and carrybacks. A carryover and carryback of expenditures for some relatively short period, such as one year, would even out monthly fluctuations in qualifying expenditures. A long carryover or carryback period would be inadvisable because it would provide less incentive for immediate expenditure increases which would produce more immediate supplies.

Procedural complexity. The principal complexities in the refund mechanism will occur where the oil is sold by the operator on behalf of many fractional interest holders. Each interest holder will have to be furnished a receipt by the operator for his share of the tax paid. However, since the operator currently provides on a monthly basis information of the same basic type and remits sales proceeds monthly, no insurmountable problems are foreseen.

Effect on producer profits. A plowback system will, of course, return windfall profits to producers, since the tax refund will have the effect of increasing income and the qualifying expenditures will largely be capitalized rather than deducted currently.

Incentive effects. An increase in the price of crude oil might itself provide sufficient incentive to develop all of the energy supplies that could reasonably be required or expected in the next several years. In that case, the tax refund would not provide the desired incentive. In addition, the effect of the plowback is to give a preference to energy investments made by oil producers over energy investments made by others. It is probably true, on the other hand, that the expenditures most effective in the short term to increase energy supplies will be those for exploration and development of oil supplies, so that this preference may not be of great concern. [Treasury Dept. Release S-340, 12-19-73.]

C. E. E.

Résolution du Conseil

du 17 décembre 1973

concernant la politique industrielle

LE CONSEIL DES COMMUNAUTES EUROPEENNES,

vu la déclaration, du 21 octobre 1972, des chefs d'Etat ou de gouvernement des Etats membres de la Communauté élargie et en particulier son point 7,

vu la communication de la Commission, du 3 mai 1973, relative au programme de politique industrielle et technologique,

convient d'adopter le calendrier exposé ci-après pour réaliser une première tranche du programme d'action prévu par la déclaration de la conférence de Paris.

Ce calendrier revêt un caractère évolutif et est susceptible d'être modifié par le Conseil, sur proposition de la Commission, pour tenir compte des changements de priorité qui pourraient s'avérer nécessaires en cours d'exécution.

La Commission saisira la Conseil chaque fois qu'il s'avérera que, d'après les éléments dont elle dispose, le calendrier pourrait ne pas être tenu.

La Commission saisira le Conseil chaque sur l'exécution du programme d'action.

1. *Elimination des entraves techniques aux échanges de denrées alimentaires et de produits industriels*

LE CONSEIL,

vu les résolutions du Conseil, du 28 mai 1969, en matière d'élimination des entraves techniques aux échanges et l'accord des représentants des gouvernements des Etats membres, réunis au sein du Conseil, du 28 mai 1969, concernant le statu quo et l'information de la Commission en matière d'élimination des entraves techniques aux échanges ainsi que la résolution du Conseil, du 21 mai 1973, portant complément au programme général de 1969,

a) *en ce qui concerne les denrées alimentaires*

— prend acte du calendrier proposé par la Commission et figurant à l'annexe 1, les délais qui y sont indiqués se substituant à ceux décidés antérieurement par le Conseil dans ce domaine,

— s'engage à tout mettre en œuvre pour statuer sur les propositions énumérées à cette annexe, selon le rythme qui y est prévu,

— souligne l'importance des questions de caractère général, telles que matériaux en contact avec les denrées alimentaires, étiquetage, solvants, aliments surgelés, arômes et essences; invite en conséquence la Commission à lui transmettre aussitôt que possible les propositions y afférentes et convient d'accorder la priorité à l'examen de ces propositions,

— charge le comité des représentants permanents de prendre toutes les dispositions pratiques appropriées pour permettre la réalisation de ce programme;

b) *en ce qui concerne les produits industriels*

— prend acte du calendrier proposé par la Commission et figurant à l'annexe 2, les délais qui y sont indiqués se substituant à ceux décidés antérieurement par le Conseil dans les domaines de l'élimination des entraves techniques aux échanges et de l'environnement,
— invite la Commission à présenter des propositions de directives selon le schéma indiqué à l'annexe 2 c) à f), mis à jour le cas échéant sur la base des rapports annuels de la Commission,
— s'engage à statuer, d'une part, sur les propositions de directives déjà soumises par la Commission et figurant à l'annexe 2 a) et b) avant les dates qui y sont indiquées et, d'autre part, sur les propositions de directives mentionnées à l'annexe 2 c) à f), selon le rythme qui y est prévu,
— charge le comité des représentants permanents de prendre toutes les dispositions pratiques appropriées pour permettre la réalisation de ce programme.

2. *Ouverture progressive et effective des marchés publics*

Le Conseil statuera aussitôt que possible, et au plus tard avant le 1er janvier 1975, sur le projet de directive, du 15 mars 1971, portant coordination des procédures de passation des marchés publics de fourniture.

3. *Elimination des barrières fiscales qui s'opposent au rapprochement des entreprises*

Le Conseil statuera si possible:
— avant le 1er janvier 1975 sur la proposition de directive concernant le régime fiscal commun applicable aux sociétés mères et filiales d'Etats membrés différents,
— avant le 1er janvier 1976 sur la proposition de directive concernant le régime fiscal commun applicable aux fusions, scissions et apports d'actif intervenant entre sociétés d'Etats membres différents.

4. *Elimination des barrières juridiques qui s'opposent au rapprochement des entreprises*

Le Conseil convient d'entamer l'examen de la proposition de règlement portant statut de la société anonyme européenne dès que la Commission aura présenté sa proposition révisée à la suite des avis émis par l'Assemblée et le Comité économique et social et de mettre tout en œuvre pour que cet examen soit achevé dans les meilleurs délais. Il convient d'entamer l'examen de la proposition de directive concernant la structure des sociétés anonymes dès que les avis demandés auront été rendus.

Le Conseil statuera:
— avant le 1er janvier 1975 sur la proposition de directive concernant la constitution et le capital des sociétés anonymes,
— avant le 1er juillet 1975 sur la proposition de directive concernant les fusions internes des sociétés anonymes,
— avant le 1er janvier 1976 sur la proposition de directive concernant les comptes annuels des sociétés de capitaux des Etats membres,
— dans les meilleurs délais sur la proposition que la Commission s'est engagée à lui soumettre au sujet de l'instauration d'un groupement européen de coopération.

5. *Promotion à l'échelle européenne d'entreprises concurrentielles de technologie avancée*

Le Conseil statuera si possible avant le 1er juillet 1974, sur les projets suivants qui lui ont été proposés par la Commission:

— projet de règlement relatif à la création d'entreprises communes dans le champ d'application du traité instituant la Communauté économique européenne,

— projet de règlement relatif à la mise en œuvre de contrats communautaires de développement industriel.

Le Conseil arrêtera des premières décisions, sur la base des propositions contenues dans les communications présentées par la Commission:

— avant le 31 mars 1974 pour le secteur de l'aéronautique,

— avant le 1er octobre 1974 pour le secteur de l'informatique.

6. *Mutation et reconversion de certaines branches industrielles*

Le Conseil statuera sur les propositions contenues dans les communications présentées par la Commission:

— avant le 1er juillet 1974 pour les chantiers navals,

— si possible dans les neuf mois qui suivent la réception de la proposition de la Commission pour le secteur du papier [1].

7. *Elaboration des dispositions de nature à garantir que les concentrations intéressant les entreprises établies dans la Communauté soient en harmonie avec les objectifs économiques et sociaux communautaires et le maintien d'une concurrence loyale aussi bien dans le marché commun que sur les marchés tiers conformément aux dispositions des traités.*

LE CONSEIL,

— statuera avant le 1er janvier 1975 sur la proposition de règlement concernant le contrôle des concentrations,

— procédera aussitôt que possible, et au plus tard avant le 1er mai 1974, à un débat sur le problème de développement des sociétés multinationales, sur la base de la communication de la Commission.

8. *Mesures concernant les exportations, notamment en matière d'assurance-crédit*

Plusieurs propositions de règlements ou de directives présentées par la Commission et concernant tant la politique commerciale que la politique industrielle de la Communauté étant encore en cours d'examen, le Conseil établira avant le 1er juillet 1974, pour les propositions qu'il n'aura pas adoptées avant cette date, une liste de priorités et un calendrier des décisions à prendre.

9. *Approvisionnement en matières premières, notamment en métaux non ferreux*

Le Conseil statuera dans les meilleurs délais sur les propositions que la Commission s'engage à lui soumettre, dans le courant du premier semestre 1974, en ce qui concerne l'approvisionnement en matières premières, notamment en métaux non ferreux.

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1. Pour ce secteur, la Commission fera des propositions avant le 1er avril 1974.

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* * * ARTICLES * * *

RENÉ GOFFIN:

TAXATION OF RENDERING OF INTERNATIONAL SERVICES IN RESPECT OF V.A.T.

BELGIAN SYSTEM*

INTRODUCTION

In order to be subject to V.A.T., a provision of services must satisfy three conditions; it must:

1. be a provision within the meaning of law;
2. be effected by a taxpayer in the exercise of his professional activity;
3. take place in the country.

Each of these conditions form the subject of a Part of our report.

PART I — SERVICES SUBJECT TO V.A.T.

The law does not recognise zero rating; it enumerates exhaustively the services subject to taxation and those which escape the same.

A. *Enumeration of taxable services*

These services are enumerated in articles 18 to 20 of the Code; they are:

— material or intellectual work;
— making personnel available;
— mandate;
— rental of movable property; transfer of the right of enjoyment of such property;
— assignment or grant of clientele and undertaking not to exercise professional activity;
— assignment or grant of a sales or purchase monopoly or the right to exercise a professional activity;
— assignment or grant of a patent, trade mark, brand, copyright, industrial model or design or other similar rights;
— parking areas;
— storage of goods;
— supply of accommodation by hotel operators;
— supply of food and beverage to be consumed on the spot;
— grant of right of access to a cultural sports or recreation installation and grant of the right to use the same;
— lease of safes;
— banking and financial services, excluding transfers of securities or money;
— services by radio broadcasting, television broadcasting and telecommunication undertakings;
— finance-leasing of industrial buildings or commercial buildings known as "real property leasing";
— requisition of services by the public authorities;
— execution of real property work for oneself;
— intervention by commission agents or

* Paper prepared for the Anglo-Belgo-Luxembourg tax seminar organized by the International Fiscal Association in London on May 4 and 5, 1973.

assimilated intermediaries in the supply of services enumerated above.

In view of the limited nature of the legal enumeration, any provision not expressly referred to will therefore escape taxation. However, the legislature decided to enumerate the services which it is exempting from the V.A.T. system: we give them in chapter B below.

B. *Enumeration of exempted services*

The enumeration forms the subject of article 44 of the Code.

The persons providing these services are not subject to V.A.T. for the operations which they carry out in the exercise of these activities; it follows:

— that the services which they render are not subject to the tax;
— that the parties concerned do not have the possibility of deducting the taxes which they had incurred "upstream" (input tax).

The services referred to in article 44 may be classified into three categories:

1. *Services exempted by reason of the capacity of the party rendering the same:*

These are:

— those of notaries, advocates or court process servers;
— doctors, veterinary surgeons and persons exercising a paramedical occupation.

2. *Services exempted for social or cultural reasons*

These are:

— services by treatment establishments (hospitals, clinics, transport by ambulance etc.);
— family assistance services;
— services by rest homes for aged persons and institutions for youth;
— services by physical education establishments and sports installations;
— teaching services;
— services of teaching establishments, boarding schools and residential colleges;
— vocational guidance services;
— rental of books or records;
— services supplied by libraries and reading rooms;
— operation of museums, monuments, prepared parks and sites;
— services by lecturers, artistes and sports professionals;
— organisation of various spectacles.

3. *Other services*

These are:

— publishing contracts;
— deposits of funds and credit operations;
— brokerage services or mandates in respect of insurances, exchange etc.

PART II: THE CAPACITY OF THE PARTY RENDERING SERVICES

In order that the service may be subject to tax, it is necessary:

1. that the party be a *taxpayer,* that is to say, a "person whose activity consists in carrying out in a habitual and independent manner, principally or as a supplement, with or without hope of gain, deliveries of goods or the provision of services referred to in the Code". (Code, article 4).
2. that the service has been rendered in the *exercise of his professional activity.*

It follows from the foregoing that a service, even expressly subject to V.A.T., will not attract tax if it is the work:

— of a non-taxpayer;
— of a taxpayer from the moment when the service is completely unrelated to his normal activity.

*
* *

Could the capacity of a taxpayer be claimed and even imposed on a foreigner?

The reply is in the affirmative.
As soon as a person exercises abroad an activity of a taxpayer within the meaning of Belgian law, he is treated for the occasional operation which he may carry out in Belgium as the taxpayer exercising his activity in the country. The foreign taxpayer may effect the deduction of the taxes which in Belgium have been attracted by the goods and services used to carry out the occasional operation.
How will the capacity of taxpayer be recognised or imposed on him?
If the foreign taxpayer has an establishment in Belgium, he will be automatically subject to the ordinary law system.
In the absence of an establishment, he will be under the obligation of arranging for a *representative holding responsibility,* domiciled in the country to be approved and the representative will substitute him in the exercise of his right to deduction, the payment of the tax and the accomplishment of his fiscal obligations.
(Insofar as concerns the definition of the notion of "establishment", see: Part III, Chapter A, subsection 3.)

PART III: THE PLACE OF PROVISION OF SERVICES

Article 21 of the Code puts forward three criteria in this connection:

— the first relates to the provisions of services in general (see Chapter A)
— the second relates to transport (see Chapter B)
— the third is devoted to action by brokers (see Chapter C)

A. *Provisions of services in general*

The legal provision.
"The provision of service takes place in the country when the service is used therein".
(Article 21 sub-section 1)
But after having formulated this principle, the legislator entrusts to the Executive Authority, the duty of determining insofar as concerns the services which the latter designates, what must be considered to be the use of the service within the country.
The legislator preferred, over a general definition likely to cause difficulties in application, to have recourse to the formula of enumeration, a pragmatic solution by default to satisfy juridical orthodoxy.
However, the enumeration could not cover all instances; this is why the Code takes the care to accompany the rule by a presumption as follows: "Save for evidence to the contrary, the service is presumed to be used in the country as soon as one of the parties to the contract is established therein".

The regulatory provisions. Royal Decree No. 5
This decree distinguishes three cases:
— the case where the service relates to an *asset* located within the country;
(see sub-section 1 hereunder)
— the case where the *performance* or the *enjoyment* takes place within the country;
(see sub-section 2 hereunder)

— that of the establishment of the party receiving the services in *other cases*. (see sub-section 3 hereunder)

Sub-section 1. *The criterion of position of the asset*

The following works are considered as services used within the country when the asset, movable or immovable, which they concern, is *situate in Belgium.*

a) *the work relating to what is a real property by nature*

(N.B. The following are real properties by nature: land also buildings and constructions forming an integral part with the soil, including appliances which are integral with these constructions and which are intended to complete the same. It follows that fiscally, real property by use, that is to say movable property which the owner attaches to immovable property for the exercise of his use, will not be considered as real property by nature).

By work relating to real property by nature, we must understand:

— any work of a construction, transformation, cleaning and demolition of all or part of a real property by nature;
— any operation comprising *at one and the same time* the supply of a movable asset and its fitting in an immovable property by nature, in such a manner that this asset becomes immovable by nature; (lift; doors; water, gas and electricity pipes; air conditioning, etc.)
— any study or control work which arises from the usual activity of architects, surveyors and engineers, aimed at coordination of the performance of real property work.

b) *the leasing of an industrial or commercial building forming the subject of a finance-leasing contract (real property leasing);*
c) *the renting of safes;*
d) *the making available to a user, by the operator of a parking area or garage, of a place for vehicles;*
e) *the custody of movable property;*
f) *the supply of furnished accommodation and the supply of food and beverage intended to be consumed on the spot;*
g) *the grant of right to enter cultural sports or recreation installations and the grant of the right to use the same.*

Since the geographical location of the *assets* to which the work enumerated relates cannot give rise to hesitation, the problem of the *place* of the provision is automatically solved.

Sub-section 2. *The criterion of performance of the service or its enjoyment*

A service cannot be relative to an asset or relative to a non-rentable asset with certainty. This is why the decree enumerates a series of instances where the place of service will be that where the service is carried out materially. These are:

a) the renting of movable property and more generally the assignment of the right of enjoyment of such property (e.g. rental of a car);
b) *work to design* and work of repair, maintenance and cleaning of such assets (e.g. repair of vehicle);
c) *services of radio broadcasting, television broadcasting and telecommunication;*

N.B. These services will be taxable only if they are performed *entirely* in the country. An international telephone communication would not attract the tax.

d) theatrical, choreographical or cinematographic performances, concerts, lectures, circus entertainments, music hall,

cabaret and entertainment;
e) *supply of personal treatment* (e.g. hairdressers, manicurists, etc.)

Sub-section 3. *Criterion applicable in the cases not covered by sub-sections 1 and 2: the place of establishment of the party receiving the service.*

Services *other* than those enumerated in sub-sections 1 and 2 are considered to be used in the country when they are *supplied to a person established in Belgium.*

In order to avoid any uncertainty, the decree takes care to specify that "services which are supplied to a person who, even in the absence of a representation capable of committing him, has a management office in the country, a branch, a factory, a works, a workshop, an agency, a store, an office, a laboratory, a purchase or sales warehouse, a deposit or any other fixed installation, are considered to be supplied to a person established in the country. Howexer, when this service is supplied to a private person who does not use the same for professional activity, this private person is considered as established in the country, if he has a dwelling there".

The place of establishment of the person receiving the service will in particular be conclusive in cases of assignments of patent, manufacturing or sales licences, publicity contracts, market surveys, engineering work which do not relate to real property by nature etc.

B. *Transport services*

Article 21, sub-section 2 of the law specifies that "when transport takes place on Belgian territory and on the territory of one or several other countries, this service is used in the country for the part of the transport which is carried on therein".

Furthermore, Royal Decree No. 5 also considers as services used in the country, services which are incidental to transport carried out in Belgium: such as, for example, towing, piloting, use of ports and airports, loading, discharging, weighing, checking, storage, etc.

But the rule will undergo a substantial variation from the moment when transport is effected both on Belgian territory and on that of one or more other countries. If it is a question of transport of *persons,* the break-down will operate.

Examples: A traveller proceeds by railway from Brussels to Naples, V.A.T. will apply on the cost of the journey from Brussels to the frontier.

However, V.A.T. will not be payable if it is a question of international air or marine transport of persons.

On the other hand, transports of *goods* will escape Belgian V.A.T. on the occasion:
— of exportation to a foreign country;
— of transit through the country;
— of importation into Belgium.

Insofar as concerns importation, the exemption will operate for the transport as far as the place of destination in Belgium of goods originating from abroad. However, it will be observed that the costs of transport (and also incidental costs and any customs duty), must be added to the purchase price if they are not already included for the calculation of the tax applicable to the goods at the time of their introduction into the country.

C. *Provision of brokerage*

Let us say first of all that by "brokers and attorneys" we understand intermediaries whose role is limited to bringing a pur-

chaser and a seller into contact and whose intervention is remunerated by brokerage, that is to say, fixed commission or a percentage of the price of the transaction which will be concluded between the vendor and purchaser. It is therefore important not to assimilate the "broker" to the "commission agent" who acts in his own name but on behalf of his principal and who is fiscally considered as being personally the vendor or purchaser of the goods or service.

The fiscal system of the broker is organised as follows:

"When a broker or attorney ... intervenes in the delivery of goods which takes place abroad, the service of the broker or attorney has not been used in the country". (Code, article 21, sub-section 3.)

Furthermore, the Royal Decree directs that "Services of brokers and attorneys are considered as services used in the country ... when they intervene in deliveries of goods or provisions of services which take place in the country".

But a Royal Decree No. 18 provides an exception to these principles:

"Provisions of services of brokers and attorneys are not considered as used in the country when they take place in a delivery of goods or a provision of services which are exempt or released from tax by virtue of articles 39 or 40 of the Code, or in an assignment of goods which takes place tax free by virtue of article 24, 1 of the Code."

The articles quoted in this provision relate:

— to exportations (article 39)
— deliveries to deposit and transit (article 40)
— importations of goods declared to be in transit or proceeding towards a deposit (article 24. 1).

*
* *

GENERAL APPRECIATION

The system adopted by the Belgian legislator has proved satisfactory; at this moment no serious conflict has arisen in respect of the determination of the place of the services.

It is however correct that by reason of the lack of precision of the Community Directive in this field and the relative liberty which the E.E.C. grants to the member states in the application of its definition, international transactions have sometimes given rise occasionally to double taxation, occasionally to the absence of any tax.

It is time for the Community authorities to decide to settle this point and to lay down a solution to this problem which, in its current imprecise state is generating distortions and diversion of traffic.

KAILASH C. KHANNA:

INDIA: THE FINANCE BILL, 1974

I. PERSONAL INCOME-TAX:

Summary of important proposed changes

1. The rate schedule of income-tax for personal incomes is proposed to be amended as follows:

Income slab	Proposed rate of income-tax
Rs.	
Up to 6,000	Nil
6,001—10,000	12%
10,001—15,000	15%
15,001—20,000	20%
20,001—25,000	30%
25,001—30,000	40%
30,001—50,000	50%
50,001—70,000	60%
Over 70,000	70%

The income-tax calculated on the above rates shall be increased by a surcharge equal to 10 per cent of such income-tax.

It will be seen that the minimum exemption limit is proposed to be raised from the existing Rs. 5,000 to Rs. 6,000 and the maximum marginal rate of income-tax, including surcharge, will be reduced from 97.75 per cent to 77 per cent. The maximum marginal rate will now be applicable on the slab of income over Rs. 70,000 as against Rs. 200,000 under the existing rate schedule.

The proposed rate schedule, when enacted, will apply to salary income earned on or after 1st April, 1974.

2. At present, separate deductions from salary income are allowed in respect of expenditure by an employee on books, tax on professions, travelling for purposes of employment and other expenditure incurred in the performance of duties. It is now proposed to grant a standard deduction "in respect of expenditure incidental to the employment" on the following basis:

(a) where the salary does not exceed Rs. 10,000
20 per cent of the salary

(b) where the salary exceeds Rs. 10,000
Rs. 2,000 plus 10 per cent of the amount by which the salary exceeds Rs. 10,000
or
Rs. 3,500 whichever is less.

However, where the employee is in receipt of a conveyance allowance from the employer or where the employer has provided any conveyance for the use of the employee (otherwise than wholly and exclusively in the performance of his duties) or the employer owns or hires motor cars and the employee is allowed the personal use of such motor car or cars, the aforementioned deduction shall not exceed Rs. 1,000.

The words "expenditure incidental to the employment" may create difficulties of interpretation but it is expected clarification on the lines of the notes to the clauses of the Finance Bill will be issued.

This deduction shall be operative from the

salary income year commencing 1st April, 1974.

3. It is proposed to modify the limits of tax-free gratuity on the following lines:

(a) in respect of employees covered by The Payment of Gratuity Act, 1972, the entire gratuity received under the provisions of sub-sections (2) and (3) of section 4 of that Act will be exempt; and

(b) in other cases, the ceiling limit of the exempt amount of gratuity will be calculated with reference to 20 months' salary or Rs. 30,000 whichever is less. Salary for this purpose shall include dearness allowance, if the terms of employment so provide, but excludes all other allowances and perquisites.

Another proposed change states that if gratuity is received by an employee from two or more employers in the same year, the aggregate amount exempt shall not exceed Rs. 30,000. In cases where an employee who has received any gratuity in any earlier year from his former employer or employers, receives gratuity from his present employer in a later year, the ceiling limit of Rs. 30,000 will be reduced by the amount of gratuity which has been exempted in any earlier year or years.

This change too will be effective from the income year commencing 1st April, 1974, corresponding with the assessment year 1975/76.

4. At present, a recognised provident fund cannot receive by transfer the accumulated balance due and payable to an employee participating in another recognised provident fund. It is now proposed to make a specific provision permitting the transfer of amounts from the individual account of an employee in a recognised provident fund maintained by his former employer and the interest in respect thereof to another recognised provident fund w.e.f. the assessment year 1974/75.

Under the existing provisions, the accumulated balance becoming due and payable to an employee is excluded from his taxable income only if the employee has rendered continuous service with his employer for a period of five years or more. It is now intended to make an amendment to secure that the accumulated balance due and becoming payable to an employee participating in a recognised provident fund will not be included in his taxable income to the extent the amount instead of being paid to the employee is transferred to the credit of his account in any other recognised provident fund. Further, in computing the period of continuous service, the service rendered by the employee with the former employer will also be taken into account. This amendment will be applicable from the income year commencing 1st April, 1974, that is, assessment year 1975/76.

5. A procedural change of significance is proposed. Employees whose salary income, exclusive of the value of perquisites but inclusive of monetary payments, does not exceed Rs. 18,000 need not file a return of total income provided they have no other income except income from dividends, interest on bank deposits, income from Unit Trust, etc. not exceeding in the aggregate Rs. 3,000. This concession is not available to the Director of a company or a substantial shareholder thereof.

6. It is proposed to place the valuation of perquisites of employees on a "more

realistic basis" but details of this proposal are not yet available as these will be notified by an amendment to the Income-tax Rules.

II. WEALTH-TAX

1. The rates of tax on net wealth exceeding Rs. 500,000 are proposed to be increased in the next two slabs — from 2 per cent to 3 per cent where the net wealth exceeds Rs. 500,000 but does not exceed Rs. 1,000,000 and from 3 per cent to 4 per cent where the net wealth exceeds Rs. 1,000,000 but does not exceed Rs. 1,500,000.

2. It is proposed to restrict the exemption in respect of the individual's right or interest in a policy of insurance. This exemption will be available only if the premia are payable over a period of 10 years or more. In cases where the premia are payable over a period of less than 10 years, only a proportionate amount of the value of the individual's right or interest in the policy of insurance will be exempt from wealth-tax.

3. The value of an individual's right to receive annuities purchased by him or purchased by any other person in pursuance of a contract with the individual will be regarded as an "asset" for purposes of wealth-tax irrespective of whether the annuity is commutable or not.

4. The exemption in respect of agricultural land will be linked with the exemption in respect of financial assets like equity shares in companies, units in Unit Trust, bank deposits etc. so that the aggregate amount qualifying for exemption will be limited to Rs. 150,000.

5. The exemption in respect of building owned by a cultivator will be available only if such building is required as a storehouse or for keeping cattle and not as a dwelling house.

The amendments to wealth-tax will be effective from the assessment year 1975/76.

III. CORPORATE TAXATION

1. No change is proposed in the rates of corporation tax or withholding tax.

2. The rate of surtax applicable to chargeable profits in excess of 15 per cent of the capital of the company, computed in accordance with the relevant provisions, is proposed to be increased from 30 per cent to 40 per cent. However, in the case of a widely-held company whose paid up share capital (subscribed and paid for in cash) is not less than 25 per cent of its capital as computed for the purposes of surtax, the aggregate burden of income-tax and surtax shall not exceed 70 per cent of the total income. This limit will not apply in the case of foreign/closely-held companies.

3. It is proposed to modify the Notification issued on 28th May, 1971, which provided for disallowance of development rebate in the case of plant and machinery installed after 31st May, 1974. The necessary modification is intended to secure that development rebate will be admissible in respect of ships acquired and machinery and plant installed after 31st May, 1974, but before 1st June, 1975, if the company had either purchased the ship or machinery and plant or had entered into a contract

for its purchase before 31st December, 1973.

Development rebate will also be admissible in respect of coal-fired boilers or machinery and plant for converting oil-fired boilers into coal-fired boilers, if these are installed before 1st June, 1975.

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TOSHIO MIYATAKE *:

1974 CHANGE OF JAPANESE TAXES

It is an annual event that the Japanese Government amends its tax laws. The time for 1974 amendments has come.

On January 11, 1974, the Cabinet decided on the proposed bill for 1974 tax change which is now discussed in the Diet. From the past experiences, it is expected that the bill will pass the Diet without modification in March or April.

Considerable changes have been proposed for this year. The outline of the proposed bill is as follows (for the purpose of currency conversion, approx. Yen 300 to the U.S. dollar).

I. INCOME TAX (INDIVIDUAL INCOME TAX)

1. *Tax Rate*

Basic tax rates are now changed. This rate change is the third change since the present income tax system was established in 1949. The first was in 1957 and the second in 1968.

If the new tax rate is adopted by the Diet, it will apply to the income accruing April 1, 1974 and thereafter.

Taxable Income (million yen) (over)—(not more than)	Present Tax Rate	Taxable Income (million yen) (over)—(not more than)	New Tax Rate
0 — 0.4	10%	0 — 0.6	10%
0.4 — 0.8	12%	0.6 — 1.2	12%
0.8 — 1.2	14%	1.2 — 1.8	14%
1.2 — 1.6	16%	1.8 — 2.4	16%
1.6 — 2	18%	2.4 — 3	18%
2 — 2.6	21%	3 — 4	21%
2.6 — 3.2	24%	4 — 5	24%
3.2 — 3.8	27%	5 — 6	27%
3.8 — 4.4	30%	6 — 7	30%
4.4 — 5	34%	7 — 8	34%
5 — 6	38%	8 — 10	38%
6 — 7	42%	10 — 12	42%
7 — 9	46%	12 — 15	46%
9 — 12	50%	15 — 20	50%
12 — 20	55%	20 — 30	55%
20 — 40	60%	30 — 40	60%
40 — 60	65%	40 — 60	65%
60 — 80	70%	60 — 80	70%
80	75%	80	75%

* Attorney at law.
Adachi, Henderson, Miyatake & Fujita, Tokyo.

2. *Increase in Personal Deductions*

Basic personal deduction, spouse deduction and dependent deduction are raised from April 1, 1974 as follows:

	Present	*New*
Basic Personal Deduction	Yen 210,000	Yen 240,000
Spouse Deduction	Yen 210,000	Yen 240,000
Dependent Deduction (per dependent)	Yen 160,000	Yen 240,000

3. *Salary Income Deduction*

Under the Income Tax Law, a special deduction is allowed to the class of salary income (emolument received as employee). The amount of this deduction is increased from April 1, 1974 as follows:

(*Present*)

(1) Fixed deduction amount Yen 160,000, and

(2) For the part of salary income exceeding Yen 160,000

Total Salary Income minus Yen 160,000			Deduction
(over)	—	(not more than)	
	—	Yen 1.5 million	20%
Yen 1.5 million	—	Yen 3 million	10%
Yen 3 million	—	Yen 6 million	5%
Yen 6 million			Yen 600,000

Therefore, if the total salary income is Yen 6,160,000 or more, the deduction will hit the ceiling of Yen 760,000.

(*New*)

Total Salary Income			Deduction
(over)	—	(not more than)	
	—	Yen 1.5 million	40%
Yen 1.5 million	—	Yen 3 million	30%
Yen 3 million	—	Yen 6 million	20%
Yen 6 million			10%

Under the new system, there is no ceiling.

4. *Special Deduction for Retirement Allowance*

In Japan, it is a common practice that an employee receives a considerable amount (calculated on the basis of the number of years in employment) of retirement allowance from his employer when he retires from or quits the employment. This retirement allowance is treated favorably, being separated from other types of income and given a special deduction. Special deduction for retirement allowance is raised from April 1, 1974 as follows:

Number of years in Employment	*Deduction*
For the part of 20 years or less	Yen 200,000 per year of employment
For the part of over 20 years	Yen 400,000 per year of employment

II. CORPORATION TAX (CORPORATION INCOME TAX)

Tax rate is changed from May 1, 1974.

(*Present*)

	Undistributed Profits		Distributed Profits	Surtax
	Part not exceeding Yen 3 mil. per year	Over Yen 3 mil.		
Corporations with capital of Yen 100 mil. or less	28%	35%	22%	1.75% (on the income over Yen 3 mil. per year)
Corporations with capital of over Yen 100 mil.	35%	35%	28%	1.75%

(*New*)

	Undistributed Profits		Distributed Profits
	Part not exceeding Yen 7 mil. (Yen 6 mil. May 1, 1974 through April 30, 1975)	Over Yen 7 mil. (Yen 6 mil. May 1, 1974 through April 30, 1975)	
Corporations with capital of Yen 100 mil.	28%	35%	22%
Corporations with capital of over Yen 100 mil.	40%	40%	30% (28% May 1, 1974 through April 30, 1975)

The present surtax is incorporated into the new basic tax rate.

III. OTHERS

There are changes in the Special Taxation Measures Law, the Local Tax and the Stamp Tax Law which are omitted here.

Probleme der Weltwirtschaft

Herausgeber: Deutsches Übersee-Institut

Institut für Allgemeine Übersee-Forschung

Als Broschuren veröffentlicht

F. Böllhoff

Die wirtschaftliche Bedeutung der chemischen Industrie in sektoraler und regionaler Hinsicht

1968. 142 S. DM 20,—
Der Verfasser versucht zu begründen, dass die chemische Industrie ein Schrittmacher wirtschaftlichen Wachstums ist und damit die traditionelle Funktion der Stahlindustrie übernommen hat.

U. C. Brühling

Neuere Entwicklungen im Lagerungsbild der europäischen Eisen- und Stahlindustrie

1969. 198 S. DM 46,—
Die Analyse zeigt strukturelle und quantitative Wandlungen und erklärt sie von der Kostenseite, unter dem Aspekt underschiedlicher Betriebsgrössen und von der Nachfrage her.

W. Eischeid

Neuere Entwicklungen des Eisenbahnbaus in der Weltwirtschaft

1968. 139 S. DM 20,—
Die Arbeit untersucht Anpassungsprozesse in Industrieländern, den Wandel der Eisenbahnen in den sich entwickelnden industriellen Ballungsräumen und Ansätze zu funktionsfähigem Eisenbahnverkehr in Entwicklungsländern.

B. Engels

Spielregeln der internationalen Zahlungsbilanzpolitik

1969. 186 S. DM 32,—
Der Verfasser versucht, in der Zahlungsbilanzpolitik der Zehnergruppe Gemeinsamkeiten festzustellen: Intensitäten im Zahlungsbilanzausgleich, alternative monetäre Verhaltensweisen, reale Anpassung und regionale Konstellationen.

K. Frentrup

Die ökonomische Bedeutung des internationalen Tourismus für die Entwicklungsländer

1969. 134 S. DM 34,—
Der Verfasser versucht eine Erklärung des rapiden Wachstums dieses Fremdenverkehrszweiges sowie eine Wertung unter den Gesichtspunkten wirtschaftspolitischer Ziele in den Entwicklungsländern.

D. Friedrichs

Theorie und Praxis multipler Wechselkurse in der Entwicklungspolitik

1969. 146 S. DM 34,—
Der Verfasser untersucht die Wirkungen auf Zahlungsbilanz, Produktion und Einkommensverteilung, auf Inflationsraten und Staatseinnahmen. Er kommt aus theoretischer und empirischer Sicht zu einem kritischen Urteil.

H.-J. Harborth

Neue Industriezentren an der weltwirtschaftlichen Peripherie

1967. 80 S. DM 12,—
Die Arbeit zeigt, dass und in welchen Räumen sich ein Vorgang wie die Ausrichtung Südostasiens auf Japan wiederholen wird. Damit gibt sie eine langfristige Orientierungshilfe für Entwicklungspolitik und Aussenwirtschaft.

P. Müller

Die Bedeutung der Industrialisierung unterentwickelter Länder für den deutschen Industrieexport

1968. 144 S. DM 20,—
Die Arbeit zeigt typische Wandlungen des Importbedarfs im Verlauf von Industrialisierungsprozessen und gelangt nach sektoraler und regionaler Analyse zu einer optimistischen Prognose für die deutsche Exportwirtschaft.

R. Stuchtey

Die Beurteilung des Aufbaus nationaler Handelsflotten in unterentwickelten Ländern

1968. 141 S. DM 19,—
Das relativ starke Wachstum dieser Flotten wird dargestellt und beurteilt anhand der zugrundeliegenden Zielvorstellungen: Countervailing Power, Trade-Follows-Flag, Kostenvorteile, Zahlungsbilanz, Wachstum und Autarkie.

H.-G. Voigt

Probleme der weltwirtschaftlichen Kooperation

1969. 184 S. DM 46,—
Diese Analyse der Interdependenz von Wirtschaftswachstum und internationaler Arbeitsteilung versucht, die Widersprüchlichkeit und den mangelnden Realitätsbezug in den Ansätzen der Wachstums- und Aussenhandelstheorie gegenüber dem Problem der Faktorallokation zu überwinden.

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LUC DE WULF*:

TAXATION AND INCOME DISTRIBUTION IN LEBANON**

Until recently it was implicitly assumed that economic growth in developing countries would gradually narrow down the income inequalities that are typical to their early stages of development. This generalization of some early tentative conclusions arrived at by Simon Kuznets [1] probably have contributed to what was the "conventional wisdom" of the '50s and '60s. Growing income inequalities in countries that experienced favorable economic growth during the last decade so has proven this "wisdom" to be oversimplistic, if not false altogether. Growth cannot be solely relied upon to reduce these inequalities so that more attention must be given to policies especially designed to rectify the income distribution. Fiscal policy is one of those policies.

This paper will briefly report on the results of some empirical research on the taxation in Lebanon and will draw tentative conclusions with respect to its effect on income distribution. The main data used in these investigations are tax revenues over the 1952-69 period and the Family Budget Sample Survey for 1966. Given the nature of the problem and the state of the arts in this field the results must be cautiously interpreted and the reader should be warned that the quantitative results are tendencies rather than precise quantifications of known phenomena.

Over the period considered, total government budget revenues increased from LL 124 million to LL 602, which represents about a 380 per cent increase. During the same period NNP was estimated to have increased by 150 per cent, (from LL 1624 million in 1952 to LL 4112 in 1969 — see Table A-1), or by about less than half the increase in budgetary revenues. The share of NNP channeled through the government thus increased from 7 per cent in 1952 to 14 per cent in 1969; substantially increasing the impact of government revenue on the economy and potentially on the distribution of revenues. In such a dynamic setting some valuable insight into the income distributional role of the government revenues may be shed by answering the following three questions:

a. What was the relative growth performance of the various elements of government revenues?
b. Is *this* differential growth of revenues

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* The author is an official of the International Monetary Fund. However, the views expressed in this article are entirely his own and do not necessarily reflect of IMF.

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1. Simon Kuznets, "Quantitative Aspects of the Economic Growth of Nations: VIII, Distribution of Income by Size," *Economic Development and Cultural Change*, Vol. XI (January 1969), pp. 1-29.

explainable by the responsiveness of the tax bases to the process of economic growth or by other automatic or discretionary changes?

c. How do the different taxes rank with respect to their impact on the distribution of income?

The following three sections attempt to answer each of these questions and section four discusses the conclusions these results seem to permit.

I

Using a double logarithmic regression equation of the type Log T = a + b Log Y where T is government revenue and Y represents NNP, it is possible to estimate b, the elasticity coefficient for total government revenue, for the total tax revenu or for individual taxes. This coefficient indicates by how many percentage points a specific revenue source increases with a one percentage point increase in income. But tax revenue increases sometimes lag income increases and the correct specification of the above-mentioned relation should take such a lag into account. This was done for the income tax and the tax on built on property. The introduction of lags in the estimates of the coefficients of other taxes, while sometimes defensible, did not improve the quality of the estimates and were therefore omitted.

TABLE 1. *Lebanon: Elasticity Coefficients of Budget Revenue 1952-1969*

Type of Revenue	Elasticity Coefficient	t-values[1])	DWS	R^2	Method of Estimation[3])
Total government revenue	1.34	6.51	2.40	.71	c
Total tax revenue	1.30	5.25	1.66	.78	c
Total non-tax revenue	2.08	8.34	1.75	.97	a
Direct tax revenue	2.16	25.28	1.34	.97	a
Indirect tax revenue	1.16	7.59	1.81	.77	c
Income tax	1.97	16.87	1.18[2])	.94	a
Built-on property tax	2.79	14.80	1.38	.92	a
Inheritance tax	2.64	6.37	1.61	.69	a
Private vehicles tax	2.73	16.14	.70[2])	.93	b
Land registration tax	2.64	3.95	1.72	.48	b
Stamp duties	2.04	31.21	1.66	.98	a
Gasoline tax	1.83	7.82	2.09	.78	c
Liquor tax	1.03	2.99	1.06[2])	.34	b
Tobacco tax	.97	5.38	1.87	.63	c
Import duties	1.43	7.49	1.98	.76	c

1) All t-values are reliable at the 1 per cent level of confidence.

2) The DWS shows inconclusive autocorrelation of the residuals.

3) The unmodified double logarithmic equation is referred to by (a); where autocorrelation problems existed with the (a) specification, the double log equation on the first difference of both the dependent and the independent variables was estimated, this constitutes estimation type (b). In those cases where autoregression problems still existed the autoregressive structure of the disturbances was built into the equation; this is referred to as estimation type (c).

Table 1 gives the elasticity coefficients as estimated for the 1952-69 Lebanese budgets. [2] The elasticity coefficient of total revenue was found to be 1.34, reflecting its considerable growth during this whole period. Total tax revenue that in 1968 was 81 per cent of total budget revenue, grew at a somewhat slower rate than total revenues, the shortfall being made up by a higher elasticity coefficient for the nontax revenue. Direct tax revenue was found to have a higher than average elasticity coefficient (2.16 versus 1.34), illustrating the fact that its relative share in the total revenue increased during the 1952-69 period from 15 per cent to 21 per cent of the direct taxes. Only the elasticity of the income tax fell below the elasticity of the direct taxes. Indirect taxes, which contributed around 75 per cent of total tax revenues in 1969, were found to yield an elasticity coefficient of 1.16, which is considerably less than the average. This is explained by the low elasticities of the tobacco and liquor taxes (.97 and 1.03) while the elasticity of import duties is only slightly higher than the total average tax elasticity (1.43 versus 1.30). Table 1 gives thus a fairly complete picture of what revenue sources have contributed most to the considerable increase of the total revenues of the Lebanese budget over the period considered.

II

For the purpose at hand it would be interesting to further analyse the reasons for the increase of these different revenues. A simple method to do so is to break down the elasticity formula into the elasticity of the tax base with regard to income and the income elasticity with regard to the base. Following Musgrave, [3] the formula used is then:

$$E_T = \frac{\Delta T}{T} / \frac{\Delta Y}{Y} = \frac{\Delta T}{T} / \frac{\Delta B}{B} \cdot \frac{\Delta B}{B} / \frac{\Delta Y}{Y} = E_t \, E_b$$

Where T is tax revenues, B the tax base and Y income,

E_T is the tax revenue elasticity with respect to changes in income,

E_t is the tax revenue elasticity with regard to the tax base,

E_b is the tax base elasticity with regard to income.

A breakdown of E_T in E_t and E_b thus should enable us to detect whether the increase of particular tax revenues were to the underlying progressive rate structure and statutory changes (E_t) or to base elasticities (E_b). Unfortunately data shortcomings only allowed this exercise to be performed for four taxes. The results are reported in Table 2 (page 154).

While these results are not very satisfactory from a computational point of view, they do convey the idea that the variations in E_T are more due to E_b than to E_t. The income elasticity of demand for the taxed products thus explains a larger share of E_T than the underlying rate structure of the taxes considered. This can be seen from the fact that the E_t estimates do not differ widely from 1. Only in the case of the private vehicle tax can it be said that the income elasticity on the base has contributed positively to its overall revenue elasticity of larger than one. This is explained by the greater relative importance of the private tourist cars

2. Appendix A outlines the method used to obtain a continuous series for net National Product over the 1952-69 period.

3. Richard A. Musgrave, *The Theory of Public Finance* (New York: McGraw Hill, 1959), pp. 506-07.

TABLE 2. *Lebanon: Base Elasticities and Income Elasticity on Base for Selected Taxes* [1])

	Elasticity Coefficient	t-values	DWS	R^2	Method of Estimation [2])
1. Base Elasticities					
Private vehicles	2.81	8.68	1.95	.81	c
Petroleum products	.94	3.74	1.69	.45	b
Tobacco	.26	1.11	2.33	.07	c
Imports	1.15	2.65	2.41	.29	b
2. Income Elasticity on Base					
Private vehicles tax	1.12	35.73	1.22	.98	a
Tax on petroleum products	.96	2.69	1.46	.30	c
Tobacco	.79	1.99	1.71	.19	c
Customs duties	1.04	25.29	2.10	.97	a

1) Sources: The bases for the private vehicles tax, the tax on petroleum products, and the tobacco tax were obtained from *Recueil des Statistiques Libanaises* 1963 and 1969, Ministère du Plan, Direction Centrale de la Statistique. The value of imports as published in the *Recueil des Statistiques* was adjusted to account for the artificially high exchange rate used for the Lebanese pound. This adjustment took into account the difference between the official exchange rate and the free market rate for the various years. The tax revenue data are obtained from the *Closed Accounts* for the respective years, as published by the Ministry of Finance.
2) See footnote number 3 at the bottom of Table 1.

in the total amount of motor vehicles registered in 1969 as compared with 1952 and by the higher registration fees for these cars. The E_b estimate on the other hand, varies widely between 0.26 for tobacco and 2.81 for private vehicles hinting at various demand elasticities or at the increase of consumption of non taxed products (the case of smuggled tobacco perhaps).

III

Now that we acquired a better idea of how different taxes contributed to the increase in government revenue, we would like to know which taxes are progressive, proportional or regressive. It is often considered that this would enable us to evaluate the overall rate graduation of the tax structure and combined with earlier provided results, would tell us more about the evolution of the impact of taxes on the income distribution over the 1952-69 period.

In previous papers [4] we have issued strong doubts as to whether incidence studies

4. R. M. Bird and L. De Wulf, "Taxation and Income Distribution in Latin America: A Critical Review of Empirical Studies," International Monetary Fund *Staff Papers*, Vol. XX (November 1973) pp. 639-682. Luc De Wulf, "Fiscal Incidence Studies in Developing Countries Survey and Critique", unpublished paper.

which attempt to estimate the overall rate graduation of the tax system are interesting and possible. It is not the place here to reiterate the reasons which lead us to take up this position, suffice to say that our objection was mainly founded on the aggregative nature of the exercise and on the basic shortcomings of tax incidence theory and available data. Concentrating in this exercise on the incidence of the various taxes taken separately we believe that the results are conceptually more valid than if we were to aggregate them. Yet it should be kept in mind that the other two shortcomings (tax incidence theory itself and data used) were such that the results are by no means definite. We believe, however, that they are useful when cautiously interpreted.

The computations reported on in Table 3 are based on the 1968 tax legislation and tax revenue, on one hand, and on a 1966 consumer survey for families of Beirut city.[5] Appendix B gives the interested reader further details on the methodology adopted to arrive at these results. The income classes used in this study are such that more than half of the families in Lebanon belong to the lowest income class and that the families belonging to the two highest income classes represent only a small fraction of the total population. The study thus does not distinguish between the poor and the very poor but concentrates on the tax incidence at the upper end of the income scale. This may be regrettable but constitutes one of the limitations imposed by the data.

Indirect taxes are frequently suspected to have a regressive impact on income distribution. This a priori judgment finds its justification in the fact that indirect taxes are levied on consumption and that the average propensity to consume decreases with increasing income. Table 3, however, indicates that the taxes on gasoline products and that certain import duties are really progressive. Tobacco taxes are found to be proportional, mainly due to the low taxes on domesticallly produced tobacco that is mainly consumed by lower income families. The other indirect taxes tend to be proportional; foremost among these taxes are the customs duties on food products. The taxes on income are usuallly considered as the tax instrument that is most appropriate to provide some progression to the overall tax system. Table 3 shows that this goal is not fully attained in Lebanon. The taxes on wages and salaries exempt families with income of less than LL 6,000 and show only little progression for the other income classes. The modest role taxes on wages and salaries play in the overall tax structure preclude it to play any substantial redistributive role. The moderate progression (highest marginal rate is 10 per cent) of this tax contributes to this result. Taxes on immovable capital and from built-on property are somewhat more progressive; this results from the assumed concentration of asset holding. Taxes from business income for whom the tax incidence theory is least satisfactory, are proportional if they are assumed to burden the consumer of those products (estimate A) and are progressive to the extent that capital owners bear the burden of that tax. This is illustrated by estimate B, where one third of these taxes were assumed to be borne by capital owners, and two thirds were assumed to be shifted forward. The taxes on cars and court fees were the only other taxes that were found to have a progressive impact on income.

5. République Libanaise, Ministère du Plan, *Family Budget Example Survey for 1966* (Beirut, 1971). (In Arabic)

TABLE 3. *Tax Payments by Income Group*
(In per cent of expenditures)

Taxes	Expenditure Classes					
	Less than 6,000	6,001 to 12,000	12,001 to 18,000	18,001 to 24,000	24,001 to 30,000	Over 30,000
1. *Indirect Taxes*						
Liquor Tax	0.03	0.03	0.03	0.04	0.03	0.03
Inflammables	1.82	2.52	3.11	3.31	3.54	3.36
Final use	0.34	1.00	1.55	1.73	1.94	1.73
Intermediary	1.48	1.52	1.56	1.58	1.60	1.63
Entertainment tax	0.03	0.052	0.07	0.09	0.08	0.01
Salt tax	0.004	0.003	0.001	0.001	0.0001	0.0005
Cement tax	0.29	0.21	0.16	0.14	0.12	0.10
Tobacco tax	1.33	1.52	1.73	1.55	1.13	0.84
Domestic	0.63	0.39	0.22	0.14	0.01	—
Imports	0.70	1.13	1.51	1.41	1.12	0.84
Customs duties	2.70	4.53	6.98	8.59	11.02	11.63
Food	0.22	0.21	0.26	0.31	0.27	0.29
Textiles	0.18	0.28	0.37	0.82	0.64	0.36
Miscellaneous	0.88	2.35	4.42	5.34	7.90	8.46
Intermediary	1.42	1.69	1.93	2.12	2.21	2.52
2. *Direct Taxes*						
Income taxes on:						
Wages and salaries	—	0.57	0.88	0.94	0.75	0.96
Tax on income from immovable capital and built-on property	—	0.39	0.91	0.91	0.94	1.15
Income from business [1] A	1.5	1.52	1.52	1.52	1.52	1.51
B	1.0	1.00	1.50	2.01	2.31	2.73
Land registration fees	—	0.55	0.56	0.57	0.58	0.65
Stamp duties	0.44	0.45	0.45	0.46	0.47	0.27
Taxes on cars and court fees	0.12	0.46	0.77	0.98	1.06	1.36

1) Estimate A assumes full forward shifting of this tax while estimate B assumes two thirds forward shifting and one third nonshifting.

IV

Some conclusion with respect to the income distributional effects of the tax structure should now be possible. From the results given in Table 2 we had hoped to learn whether the revenue elasticity of the four taxes analysed there could be explained by the progressive nature of the respective taxes, by discretionary rate increases or by more than proportional increase in the tax base. While the results were not very conclusive they suggested that the tax on inflammables and on imports was proportional, the tax on tobacco regressive and the tax on private vehicles progressive. Due to the limitations of the data the analysis reported in Table 2 was limited to four taxes. The tax incidence data reported in Table 3 pertains only to 1968, yet from the analysis of the tax legislation and from discussions with tax officials it was learnt that during the 1952-69 period no serious changes were made to the tax structure. The tax incidence estimates of 1968 can thus be used as fair approximations for the incidence of these taxes over the period here considered. The results on tax incidence being obtained from a consumption survey of Beiruti families, pertain strictly spoken only to the Beiruti population, and by extension to the population of the other urban centers. The tentative conclusions, thus, must be restrictively interpreted.

An inspection of Table 1 and Table 3 shows that the taxes with the highest elasticity also are progressive taxes (tax on built-on property and private vehicles tax) and that the tax with the lowest elasticity is also the only regressive tax from which significant revenue is obtained. In between these extremes are the different other taxes; the most important of which are the progressive import duties which are found to be only slightly more elastic than the overall revenue elasticity. Although from the tax incidence estimates based on our urban consumption pattern we would have expected this tax to have contributed seriously to the overall tax progression. This expectation was not borne out by the other estimates. If it had been possible to estimate elasticity coefficients for the different subcategories of customs duties given in Table 3 more reliable conclusions would have been possible, but unfortunately the revenue statistics were not compiled in such a disaggregated form.

The inheritance tax was greatly elastic and on an a priori basis can be expected to have contributed to progressivity over time, the small revenue involved certainly prevented it to play an important role.

The only other tax that is found to have contributed significantly to progression over time was the tax on petroleum products and more specifically that sold for final use.

The tentative conclusions obtained from a careful interpretation of the statistics on government revenue over the 1952-69 period are that: (1) the revenue system of 1968 contains a certain number of progressive direct and indirect taxes. In case the authorities want to use the tax structure as a policy instrument to redistribute income they should concentrate their efforts on the taxes for which a progressive pattern is found. This could be done through rate changes or by its improving upon the administration of these taxes; (2) the tax burden has tended to be distributed somewhat more progressively in 1969 as compared with 1952. The tax rate structure itself and the evolutions of the composition of the final demand was responsible for this evolution.

Appendix A

Net National Product, 1952-69

The 1950-58 national accounts constructed by Prof. A. Y. Badre and published in a revised form in the *Mediterranean Development Project, Lebanon: Country Report (FAO Rome, 1959)*, are the earliest ones available for Lebanon. For the years 1959-62 some national accounts were assembled by the American Embassy in Beirut, while the 1961-64 data were mentioned in the *Explanatory Notes on the 1966 Budget Proposal* (in Arabic, p. 7). It is only since 1964 that National Income data were systematically collected and published by the Ministry of Planning, General Directorate of Statistics.

The methods used in the construction of these statistics are not consistent and there was a 40 per cent difference between the two estimates of NNP for 1964. Nevertheless a continuous NNP series was required for the purpose of this study. The 1964-69 data constructed by the Ministry of Planning was retained and the pre-1964 data were calculated by computing the pre-1964 annual growth rates implied in the statistics for those years which were then used to adjust 1964 NNP data back to 1952.

TABLE A-1.
Lebanon: Net National Product 1952-69

Year	NNP	Year	NNP
1952	1,624	1961	2,505
1953	1,780	1962	2,616
1954	1,819	1963	2,736
1955	1,990	1964	2,861
1956	2,052	1965	3,154
1957	2,170	1966	3,460
1958	1,934	1967	3,442
1959	2,294	1968	3,862
1960	2,450	1969	4,112[1])

1) At the moment these computations were made the 1969 figure was preliminary.

Appendix B

Methodological notes on Tax Incidence Estimates

The Family Budget Sample Survey for 1966 was used as the basic data source with respect to the consumption pattern of the families of the six expenditure classes. This pattern was needed to estimate the burden of certain taxes. *Indirect taxes* were assumed to be fully shifted forward and thus to burden the taxpayers in proportion to their consumption of the taxed products. While different individual families within one expenditure group may consume different amounts of the taxed products and thus may bear significantly different tax burdens, (e.g. smokers versus non smokers) we were interested in average tax burdens only and thus relied on the average consumption patterns for the different income classes. Consumption data given in the budget sample survey were used to estimate the tax burden arising from the tobacco, salt, liquor and inflammables purchased for final use. Data on the per unit taxes were obtained from legislative sources; for tobacco it was estimated that 62 per cent of the sale price of the imported cigarettes and 2 per cent of the domestically produced cigarettes constitute taxes (or monopoly profits). The taxes on petroleum products used for intermediary use were assumed to increase the prices of consumer goods and were distributed proportionately to total consumption. Information on rent (imputed or actually paid rent) was used as a base to

distribute the burden of the cement tax. The budget sample survey provided for relatively few products the information required to distinguish between the consumption of imported and domestically produced products so that the allocation of the burden of customs duties was based on informed estimates and proxies. In the estimation procedures account was taken as to whether the imports were made for final or intermediary use and whether the products were imported from Arab League countries (and thus paid lower import duties) or from third countries.

With respect to *direct taxes* the data problems were more serious. Using the piecemeal information available and checking this with informed authorities in the field of taxation it was possible to explicate the assumptions with respect to taxed income in the various expenditure classes (Table B-1).

TABLE B-1. *Lebanon: Taxed Income by Expenditure Class*

(In per cent of expenditures by expenditure class)

Expenditure classes	Wages and Salaries	Income from immovable capital and from built-on property
Less than 6,000	5	0
6,001—12,000	50	5
12,001—18,000	40	10
18,001—24,000	30	10
24,001—30,000	20	10
Over 30,000	10	10

Account was taken of the tendency of businessmen to have commercial profits taxed as income from wages and salaries. This tax liability, however, is treated here as business income tax. Taxes on wages and salaries, from immovable capital and from built-on property, is assumed unshifted.

Taxes on Income from businesses was assumed shifted forward to the consumer (estimate A) and alternatively was assumed shifted forward for two thirds and unshifted for the other third (estimate B). The unshifted portion of the tax burden was allocated to the fourth quartile or the four highest expenditure classes here considered. The preference for the shifting assumptions, where consumers absorb the largest part of the business tax in the form of higher consumer prices, is made in light of the non-perfect competitive, non monopoly business environment in Lebanon, which enables businessmen to safeguard their profit position regardless of the tax. As any assumption with respect to the shifting of business profit taxes is bound to raise objections, two alternative assumptions were used, thus illustrating the sensitivity of the results to different assumptions. Stamp duties were assumed to be distributed in proportion to consumption expenditures minus rent and registration fees were assumed not to burden the lowest income classes and were distributed to the other families in proportion to consumption expenditures. Data on payment of taxes on cars (traffic fees and registration fees) were obtained from the budget sample survey; their burden was distributed accordingly.

DEVELOPMENTS IN INTERNATIONAL TAX LAW

U.S.A.: INTEREST EQUALIZATION TAX

The following is an addendum to the article "The United States Interest Equalization Tax" by Richard D. Pomp which appeared in the January, 1974 issue of the BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION.

Addendum

In Executive Order No. 11754, President Nixon reduced the IET rates. The new rates apply to acquisitions made after December 31, 1973.

If the period remaining to maturity is:	The rate of tax as a percentage of actual value is:
At least 1 year, but less than 1¼ years	0.26 percent
At least 1¼ years, but less than 1½ years	0.33 percent
At least 1½ years, but less than 1¾ years	0.38 percent
At least 1¾ years, but less than 2¼ years	0.46 percent
At least 2¼ years, but less than 2¾ years	0.58 percent
At least 2¾ years, but less than 3½ years	0.69 percent
At least 3½ years, but less than 4½ years	0.89 percent
At least 4½ years, but less than 5½ years	1.09 percent
At least 5½ years, but less than 6½ years	1.28 percent
At least 6½ years, but less than 7½ years	1.45 percent
At least 7½ years, but less than 8½ years	1.63 percent
At least 8½ years, but less than 9½ years	1.78 percent
At least 9½ years, but less than 10½ years	1.93 percent
At least 10½ years, but less than 11½ years	2.08 percent
At least 11½ years, but less than 13½ years	2.28 percent
At least 13½ years, but less than 16½ years	2.58 percent
At least 16½ years, but less than 18½ years	2.84 percent
At least 18½ years, but less than 21½ years	3.06 percent
At least 21½ years, but less than 23½ years	3.26 percent
At least 23½ years, but less than 26½ years	3.44 percent
At least 26½ years, but less than 28½ years	3.59 percent
28½ years or more	3.75 percent

The tax on the acquisition of foreign stock is 3.75% of the stock's actual value; thus stock is treated as long-term debt.

On January 29, 1974, the rates were further reduced to zero percent.

GERMANY

Ruling with respect to the Exemption from German VAT of Certain Publicity Activities Performed for Nonresident Principals [1]

Steuerfreie Werbung oder Öffentlichkeitsarbeit für ausländische Auftraggeber (§ 8 Abs. 1 Nr. 11 UStG) [2]

Durch das Steueränderungsgesetz 1973 ist die Steuerfreiheit für Leistungen für ausländische Auftraggeber (§ 8 UStG) durch Anfügung einer Nummer 11 in Absatz 1 erweitert worden. Hiernach sind die üblicherweise und ausschliesslich der Werbung oder der Öffentlichkeitsarbeit dienenden sonstigen Leistungen für ausländische Auftraggeber von der Umsatzsteuer befreit. Nach ausdrücklicher Bestimmung sind jedoch diese Leistungen nicht befreit, wenn sie überwiegend für Leistungen der in § 4 Nr. 8 bis 12 UStG bezeichneten Art Ausgeführt werden.

Unter Bezugnahme auf die Erörterung mit den obersten Finanzbehörden der Länder gilt zu der neuen Steuerbefreiung folgendes:

I. *Werbeleistungen*

(1) Unter dem Begriff „Leistungen, die der Werbung dienen", sind die Leistungen zu verstehen, die — unmittelbar oder mittelbar — bei den Werbeadressaten den Entschluss zum Erwerb von Gegenständen oder zur Inanspruchnahme von sonstigen Leistungen auslösen sollen. Unter den Begriff fallen auch die Leistungen, die — unmittelbar oder mittelbar — bei den Werbeadressaten ein bestimmtes ausserwirtschaftliches (z. B. politisches, soziales, religiöses usw.) Verhalten herbeiführen sollen. Zu den Leistungen, die der Werbung dienen, gehören insbesondere:

1. die Werbeberatung. Hierbei handelt es sich um die Unterrichtung über die Möglichkeiten der Werbung.
2. die Werbevorbereitung und die Werbeplanung. Bei ihr handelt es sich um die Erforschung und Planung der Grundlagen für einen Werbeeinsatz, z. B. die Markterkundung, die Verbraucheranalyse, die Erforschung von Konsumgewohnheiten, die Entwicklung einer Marktstrategie und die Entwicklung von Werbekonzeptionen.
3. die Werbegestaltung. Hierzu rechnen die graphische Arbeit, die Abfassung von Werbetexten und die vorbereitenden Arbeiten für die Film-, Funk- und Fernsehproduktion.
4. die Werbemittelherstellung. Hierzu gehört die Herstellung oder Beschaffung der Unterlagen, die für die Werbung notwendig sind (z. B. Reinzeichnungen und Tiefdruckvorlagen für Anzeigen, Prospekte, Plakate usw., Druckstöcke, Bild- und Tonträger) einschliesslich der Überwachung der Herstellungsvorgänge.

1. This ruling will be discussed in the English language in the April issue of EUROPEAN TAXATION.
2. Bundessteuerblatt 1973, Teil I, Seite 739.

5. die Werbemittlung. Der Begriff umfasst die Auftragsabwicklung in dem Bereich, in dem die Werbeeinsätze erfolgen sollen, z. B. die Erteilung von Anzeigenaufträgen an die Verleger von Zeitungen, Zeitschriften, Fachblättern und Adressbüchern sowie die Erteilung von Werbeaufträgen an Funk- und Fernsehanstalten und an sonstige Unternehmer, die Werbung durchführen.
6. die Durchführung von Werbung. Hierzu gehören insbesondere die Aufnahme von Werbeanzeigen in Zeitungen, Zeitschriften, Fachblättern, auf Bild- und Tonträgern und in Adressbüchern, die sonstige Adresswerbung (z. B. Zusatzeintragungen oder hervorgehobene Eintragungen), die Beiheftung, Beifügung oder Verteilung von Prospekten oder sonstige Formen der Direktwerbung, das Anbringen von Werbeplakaten und Werbetexten an Anschlagstellen, Verkehrsmitteln usw., das Abspielen von Werbefilmen in Filmtheatern oder die Ausstrahlung von Werbesendungen im Fernsehen oder Rundfunk, die ihm Rahmen von Messen und Ausstellungen erbrachten Werbeleistungen (z. B. die Überlassung von Standflächen, die Einrichtung und Gestaltung von Messeständen oder die Beförderung von Ausstellungsgegenständen).

(2) Die in Absatz 1 bezeichneten Leistungen sind nur insoweit steuerfrei, als es sich um sonstige Leistungen handelt. Lieferungen fallen nicht unter die Neuregelung. Für sie kann jedoch die Steuerfreiheit für Ausfuhrlieferungen (§ 4 Nr. 1, § 6 UStG) in Betracht kommen. Sind bei einem umsatzsteuerrechtlich einheitlich zu beurteilenden Werbeumsatz sowohl Elemente einer Lieferung als auch Elemente einer sonstigen Leistung enthalten, so ist die Frage, ob eine Lieferung oder eine sonstige Leistung vorliegt, nach dem wesentlichen Inhalt des Leistungsaustausches zu entscheiden.

(3) Die Steuerfreiheit setzt weiter voraus, dass die sonstigen Leistungen üblicherweise und ausschliesslich der Werbung dienen. Es kann grundsätzlich davon ausgegangen werden, dass diese Voraussetzungen bei den in Absatz 1 bezeichneten Leistungen erfüllt sind. Die Voraussetzung der Ausschliesslichkeit liegt jedoch bei sonstigen Leistungen, die im Rahmen von Messen und Ausstellungen erbracht werden, nur dann vor, wenn bei den Messen und Ausstellungen die ausstellenden Unternehmer nach den Teilnahmebedingungen der Veranstalter keine Lieferungen und sonstigen Leistungen an Ort und Stelle ausführen dürfen. Die Abgabe von Kostproben zum Verzehr an Ort und Stelle, auch wenn die Abgabe gegen Entgelt erfolgt, ist hierbei als unschädlich anzusehen. Ferner wird die Voraussetzung der Ausschliesslichkeit nicht dadurch ausgeschlossen, dass der ausstellende Unternehmer Verträge über Lieferungen oder sonstige Leistungen abschliesst, die erst nach Abschluss der Messe oder Ausstellung ausgeführt werden.

II. *Leistungen der Öffentlichkeitsarbeit*

Unter Leistungen, die der Öffentlichkeitsarbeit dienen, sind die Leistungen zu verstehen, durch die Verständnis, Wohlwollen und Vertrauen erreicht oder erhalten werden sollen. Es handelt sich hierbei in der Regel um die Unterrichtung der Öffentlichkeit über die Zielsetzungen, Leistungen und die soziale Aufgeschlossenheit

staatlicher oder privater Stellen. Die Ausführungen in Abschnitt I über die begünstigten Leistungen gelten entsprechend.

III. *Ausländische Auftraggeber*

Ausländische Auftraggeber im Sinne des § 8 UStG sind Auftraggeber, die die für den ausländischen Abnehmer bei Ausfuhrlieferungen geforderten Voraussetzungen (§ 6 Abs. 1 Nr. 1 UStG) erfüllen. Sind diese Voraussetzungen bei ausländischen Werbungsmittlern oder Werbeagenturen oder bei entsprechenden ausländischen Unternehmern der Öffentlichkeitsarbeit erfüllt, so sind die genannten Unternehmer auch in den Fällen ausländische Auftraggeber, in denen ihre eigenen sonstigen Leistungen nach § 3 Abs. 10 Satz 2 UStG als im Inland ausgeführt gelten.

Beispiel 1:
Ein Unternehmer in Wien beauftragt einen dort ansässigen Werbungsmittler mit der Vermittlung eines Anzeigenauftrags an eine deutsche Zeitung.
Die Leistung des Werbungsmittlers gilt nach § 3 Abs. 10 Satz 2 UStG als im Inland ausgeführt. Gleichwohl ist der Werbungsmittler gegenüber der deutschen Zeitung ausländischer Auftraggeber. Die Leistung der deutschen Zeitung fällt deshalb unter die Steuerbefreiung des § 8 Abs. 1 Nr. 11 UStG. Das gleiche gilt für die Leistung des Werbungsmittlers an seinen Auftraggeber in Wien.

IV. *Buchmässiger Nachweis*

Nach § 8 Abs. 4 UStG ist für die Steuerfreiheit erforderlich, dass die Voraussetzungen buchmässig nachgewiesen sind. Ausländische Werbungsmittler, Werbeagenturen und Unternehmer der Öffentlichkeitsarbeit, deren sonstige Leistungen nach § 3 Abs. 10 Satz 2 UStG als im Inland ausgeführt gelten, können in aller Regel den gesetzlich vorgeschriebenen buchmässigen Nachweis nicht im Bundesgebiet erbringen. In diesen Fällen ist zur Vermeidung von Unbilligkeiten das Fehlen des buchmässigen Nachweises im Inland nicht zu beanstanden. Unberührt hiervon bleibt, dass die ausländischen Unternehmer in Zweifelsfällen die Voraussetzungen der Steuerfreiheit auf Verlangen des Finanzamts glaubhaft zu machen haben.

V. *Ausnahmen*

Nach ausdrücklicher Bestimmung gilt die Steuerbefreiung nicht, wenn die jeweilige der Werbung oder der Öffentlichkeitsarbeit dienende Leistung überwiegend für Leistungen der in § 4 Nr. 8 bis 12 UStG bezeichneten Art ausgeführt wird.
Unter „Leistungen der in § 4 Nr. 8 bis 12 UStG bezeichneten Art" fallen folgende Leistungen:

1. Leistungen, die bei ihrer Ausführung tatsächlich nach den bezeichneten Vorschriften steuerfrei sind.

   Beispiel 2:
   Ein ausländischer Bauunternehmer hat im Inland Wohngebäude errichtet. Durch Anzeigen in inländischen Zeitungen bietet er diese Gebäude zum Verkauf an. Die späteren Lieferungen der Gebäude sind nach § 4 Nr. 9 a UStG steuerfrei.
   Die Werbeleistung der deutschen Zeitung ist steuerpflichtig.

2. Leistungen, bei denen nach § 9 UStG auf die bezeichneten Steuerbefreiungen verzichtet worden ist.

Beispiel 3:
Sachverhalt wie im Beispiel 2, jedoch mit der Abweichungen, dass der ausländische Bauunternehmer für die späteren Lieferungen der Gebäude auf die Steuerbefreiung verzichtet.
Die Werbeleistung der deutschen Zeitung ist auch hier steuerpflichtig.

3. Leistungen, die zwar in den bezeichneten Vorschriften genannt sind, aber nicht unter das Umsatzsteuergesetz fallen.

Beispiel 4:
Sachverhalt wie im Beispiel 2, jedoch mit der Abweichung, dass die Wohngebäude im Ausland errichtet worden sind. Die späteren Lieferungen der Wohngebäude sind nicht steuerbar.
Gleichwohl ist auch in diesem Fall die Werbeleistung der deutschen Zeitung steuerpflichtig.

VI. *Anwendungszeitpunkt*

Nach § 27 Abs. 9 UStG ist die neue Steuerbefreiung auf Umsätze anzuwenden, die nach dem 30. Juni 1973 ausgeführt werden.

AUSTRALIAN BRANCH OF IFA

1. At the November 1973 meeting Mr Kevin Burges, LLM presented a dissertation on "The claim to Tax".

2. At the March 1974 meeting Mr Thomas Magney LLB presented a dissertation on "Company Taxation in Singapore".

3. The Australian Branch of IFA is collaborating with the Taxation Institute of Australia to present the international paper at their Third National Convention to be held between 14th and 18th April, 1975. The Convention is to be held at the Wrest Point Hotel Casino, Hobart, Tasmania and a number of social activities are planned to supplement the technical programme.
me.
The subjects tentatively chosen for the Congress are: —

— The Taxation Experiences in Developed and Developing Countries.
(This subject is the responsibility of IFA Australia which is arranging for two IFA U.S.A. members to speak on the topic).
— Current Taxation Reform.
— The Administration of Taxation — Objectives and Appeals.
— The Use of Trusts and Corporations in Current Tax Planning.
— Taxation and Australian Territories.
— The Taxation Consequences of Short-Term Capital Gains.
— Current Taxation Incentives for Primary Industry.
— The Problems of Taxation and Old Age.

Although the programme is primarily concerned with Australian Taxation, overseas participants would be welcome to attend. The working language will be English.

Preliminary enquiries may be directed to:

The Secretary
Taxation Institute of Australia
13-15 O'Connell Street
SYDNEY NSW 2000
Australia

4. Mr Charles J. Berg, O.B.E., who has been Honorary Secretary of the Australian Branch since its formation in 1958, and is Australian Correspondent to the "Bulletin", was awarded "das Verdienstkreuz des Verdienstordens der Bundesrepublik Deutschland" in September, 1973.

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* * * ARTICLES * * *

JOSEPH KAUFFMAN *:

STRUCTURE DE L'IMPÔT SUR LES SOCIÉTÉS DANS LE GRAND-DUCHÉ DE LUXEMBOURG

1. Sont considérées du point de vue fiscal comme sociétés de capitaux la société anonyme, la société à responsabilité limitée et la société en commandite par actions. Les bénéfices de ces sociétés sont soumis à l'impôt sur les sociétés — dénommé au Luxembourg «impôt sur le revenu des collectivités» (I.R.C.) — perçu au profit de l'Etat et à l'impôt commercial établi sur le bénéfice, perçu au profit de la commune sur le territoire de laquelle la société a son siège ou exploite un établissement.

En dehors des sociétés de capitaux, d'autres organismes collectifs sont aussi soumis à l'I.R.C., comme par exemple les sociétés coopératives, mais ces cas peuvent être négligés dans le cadre de la présente étude.

Par opposition aux sociétés de capitaux, les entreprises commerciales individuelles ou collectives (indivisions sans personnalité juridique ou sociétés de personnes) sont assujetties directement dans le chef de l'exploitant ou des coexploitants, à l'impôt progressif sur le revenu des personnes physiques. Quant à l'impôt commercial sur le bénéfice, il est prélevé directement sur les entreprises individuelles et collectives. Il y a donc une nette séparation entre l'I.R.C. et l'impôt progressif sur le revenu des personnes physiques. La loi détermine impérativement les entreprises qui tombent sous l'application de l'un ou de l'autre de ces deux impôts. Aucune option n'est ouverte aux contribuables pour choisir l'un ou l'autre régime.

2. L'I.R.C. est conçu d'après le système dit classique. Les bénéfices sont ainsi imposés à un taux uniforme, qu'ils soient distribués ou mis en réserve.

a) *Situation d'une société résidente du Luxembourg*

Les taux sont aménagés comme suit:

20% lorsque le bénéfice imposable ne dépasse pas 400 000,— francs,

80 000,— francs plus 50% du bénéfice dépassant 400 000,— francs lorsque le bénéfice imposable est compris entre 400 000,— et 600 000,— francs,

30% lorsque le bénéfice imposable est compris entre 600 000,— et 1 000 000,— francs,

300 000,— francs plus 72% du revenu dépassant 1 000 000,— francs, lorsque le bénéfice imposable est compris entre 1 000 000,— et 1 313 000,— francs,

40% lorsque le bénéfice imposable dépasse 1 313 000,— francs.

Les bénéfices distribués par la société sont frappés d'une retenue de 15%.

Les actionnaires résidents du Luxembourg sont imposés à l'impôt progressif ou à l'I.R.C. à raison du dividende brut, retenue comprise, mais cette retenue est déduite de leur impôt personnel. (Impôt progressif

* Conseiller d'Etat, Luxembourg.

** Contribution aux travaux de droit fiscal comparé et de droit fiscal communautaire du colloque anglo-belgo-luxembourgeois des 4 et 5 mai 1973 à Londres.

ou I.R.C.). Ils ne disposent d'aucun allégement tel que l'avoir fiscal ou le crédit d'impôt, en raison de l'I.R.C. subi par la société sur le bénéfice distribué.
Les actionnaires non résidents du Luxembourg ne sont soumis qu'à la retenue de 15%. Le traitement ultérieur des dividendes recueillis par les non résidents dépend de la législation fiscale de leur Etat de résidence et de la convention conclue le cas échéant par celui-ci et le Luxembourg. (Voir pour le régime des sociétés mères et filiales (Schachtelprivileg) ci-après sub 3.)

b) *Situation d'une société non résidente du Luxembourg*
Une société de capitaux résidente à l'étranger, n'est assujettie à l'I.R.C. qu'en raison du bénéfice produit par un établissement stable qu'elle entretient sur le territoire du Grand-Duché de Luxembourg. Le taux applicable est en principe de 40%. Toutefois, lorsque la somme du bénéfice indigène et des bénéfices réalisés à l'étranger est inférieure à 1 313 000,— francs, l'impôt est fixé sur demande du contribuable au taux de l'impôt correspondant d'après le tarif indiqué sub a) ci-dessus à la somme du bénéfice indigène et des bénéfices étrangers.
Le bénéfice réalisé par l'établissement stable d'une société étrangère peut être transféré à celle-ci et distribué à ses actionnaires, sans subir au Luxembourg la retenue de 15% applicable aux dividendes répartis par les sociétés résidentes du Luxembourg.

3. *Régime des sociétés mères et filiales*

A. Entre sociétés résidentes du Luxembourg

a) La société mère est définie comme une société de capitaux résidente, pleinement imposable (c'est-à-dire non Holding) ayant détenu depuis le début de son exercice d'exploitation une participation directe de 25% au moins dans le capital d'une autre société de capitaux résidente et pleinement imposable.
b) Le régime consiste dans l'exemption complète de la société mère en ce qui concerne les dividendes reçus de la société filiale. Celle-ci est dispensée d'appliquer la retenue de 15%. L'exemption s'applique également au boni de liquidation versé par la filiale lors de sa liquidation.
c) L'exonération ne vaut que dans la mesure où les dividendes proviennent de titres de participation qui ont été la propriété ininterrompue de la société mère pendant une période de douze mois au moins précédant la clôture de l'exercice d'exploitation au cours duquel les dividendes ont été encaissés.

B. Entre une société mère résidente et une société filiale étrangère

a) Définition de la société mère
aa) Selon le droit interne est traitée comme société mère
— d'abord celle qui remplit les conditions indiquées sub Aa) ci-dessus, étant précisé que la société filiale étrangère doit être, dans son pays de résidence, pleinement imposable à un impôt correspondant à l'I.R.C. luxembourgeois;
— de plus, aux participations cumulées de plusieurs sociétés résidentes, atteignant au moins 25% du capital de la société non résidente, lorsque l'une des sociétés possède dans chacune des autres sociétés résidentes une participa-

tion de plus de 50%.

bb) La convention de double imposition conclue le 24 mai 1967 entre le Royaume-Uni et le Luxembourg réduit le taux de la retenue anglaise sur dividendes, lorsque le bénéficiaire est une société résidente du Luxembourg contrôlant directement au moins 25% des droits de vote dans la société anglaise qui paie les dividendes (Art. X 2a). Cette définition répond donc en substance aux critères prévalant en droit interne (V. 3.Aa) mais ne s'étend pas aux participations cumulées mentionnées sub 3 B aa.

cc) L'art. 10 de la convention de double imposition conclue le 17 septembre 1970 entre la Belgique et le Luxembourg reconnaît la qualité de société mère aux deux situations décrites sub B aa) ci-dessus, en y ajoutant une troisième hypothèse, à savoir le cas où respectivement la participation et les participations cumulées n'atteignent pas 25% du capital de la filiale, mais ont comporté un prix d'acquisition d'au moins 250 millions de francs.

b) Etendue de l'exemption

aa) En droit interne les dividendes nets obtenus d'une filiale étrangère par une société mère résidente sont exonérés à moitié de l'I.R.C. Une retenue éventuellement pratiquée à l'étranger n'est pas imputable sur l'impôt luxembourgeois.

bb) Selon la convention précitée entre le Royaume-Uni et le Luxembourg, ces dividendes sont entièrement exonérés auprès de la société mère luxembourgeoise. De plus, le Royaume-Uni abaisse son taux de retenue de 15% à 5%.

cc) La convention belgo-luxembourgeoise précitée prévoit également l'exemption complète des dividendes auprès de la société mère luxembourgeoise. La retenue applicable auprès de la société filiale belge est ramenée de 20% à 10%.

c) Conditions de durée de la participation

aa) Pour le droit interne il convient de se reporter aux indications sub 3 Aa et c.

bb) La convention anglo-luxembourgeoise ne prévoit aucune condition de durée.

cc) Selon la convention belgo-luxembourgeoise (art. 10 § 2a) il suffit que la participation ait été détenue depuis le début de son exercice social par la société mère.

d) L'art 166 (5) de la loi du 4 décembre 1967 concernant l'impôt sur le revenu dispose que lorsqu'une convention de double imposition prévoit une atténuation de l'imposition des revenus d'une participation, la réduction d'impôt résultant du droit interne (c'est-à-dire exemption de moitié) n'est accordée, au titre d'un exercice déterminé que dans la mesure où elle dépasse la réduction résultant des stipulations de la convention.

C. Entre une société filiale résidente du Luxembourg et une société mère étrangère

Le traitement fiscal des dividendes d'origine luxembourgeoise perçus par une so-

ciété étrangère dépend du droit interne de l'Etat de résidence de la société étrangère, modifié le cas échéant par une convention de double imposition.

Les prétentions fiscales du Luxembourg se limitent à la perception d'une retenue à la source, selon les modalités ci-après.

a) Selon le droit interne, la retenue est de 15% dans tous les cas.

b) Dans les relations avec le Royaume-Uni, la retenue luxembourgeoise est abaissée à 5%, lorsque la société anglaise bénéficiaire des dividendes a la qualité de société mère de la société luxembourgeoise selon la définition donnée sub B bb.

c) Dans les relations avec la Belgique, la retenue est ramenée à 10% lorsque la société belge bénéficiaire des dividendes a la qualité de société mère de la société luxembourgeoise selon la définition donnée sub B cc.

4. *Etablissement stable exploité à l'étranger par une société résidente du Luxembourg*

a) Selon la loi interne, les bénéfices produits par un tel établissement stable sont exonérés de l'I.R.C. à concurrence de la moitié.

L'assiette imposable est égale à la moitié du bénéfice net, après déduction de l'impôt étranger. Il n'y a donc pas d'imputation de l'impôt étranger sur l'impôt luxembourgeois.

D'autre part, la perte subie par un tel établissement n'est déductible ou reportable au Luxembourg que pour moitié.

b) Dans toutes les conventions de double imposition conclues par le Luxembourg, les bénéfices produits par un établissement stable exploité à l'étranger par un résident du Luxembourg sont entièrement affranchis des impôts luxembourgeois sur le revenu. Tel est entre autres la solution retenue dans les conventions conclues avec le Royaume-Uni et avec la Belgique.

Corrélativement, les pertes subies par ces établissements stables ne sont ni déductibles ni reportables de l'assiette imposable au Luxembourg.

5. *Détermination du bénéfice imposable au titre de l'I.R.C.*

a) En principe, le bénéfice est constitué par la différence entre l'actif net investi à la fin et l'actif net investi au début de l'exercice, augmentée des prélèvements personnels et diminuée des suppléments d'apports effectués pendant l'exercice. S'agissant de sociétés de capitaux, il faut entendre par «prélèvements personnels» les dividendes distribués et par «suppléments d'apports» les augmentations de capital, y compris les primes éventuelles.

Bien entendu les éléments qui concourent à former la différence constituant le bénéfice doivent être évalués conformément aux prescriptions de la loi fiscale.

De plus, certains revenus sont exonérés et quelques ordres de dépenses ne peuvent être déduites, le tout en vertu de la loi ou de conventions de double imposition.

Nous allons donner ci-après des indications sur les principales règles d'évaluation, ainsi que sur les éléments de bénéfice exonérés et les dépenses non admises en déduction.

b) Principales règles d'évaluation:

La règle générale est que l'actif net in-

vesti au début de l'exercice doit être égal et identique à l'actif net investi à la fin de l'exercice précédent.

aa) Les gains et les pertes en capital constituent en principe un élément positif ou négatif du bénéfice.
Toutefois les gains réalisés par la cession d'un bien de l'immobilisé, notamment les bâtiments, les terrains et les participations, peuvent être fiscalement immunisés au moyen du report, dans un certain délai, de la plus-value sur un bien de remplacement.
Nous renvoyons à notre rapport sur «Profits occasionnels et Gains en Capital selon la législation fiscale du Grand-Duché de Luxembourg» présenté aux Journées d'Etudes anglo-belgo-luxembourgeoises en avril 1972 à Bruxelles.

bb) L'amortissement normal des biens amortissables de l'immobilisé doit se traduire par une dotation annuelle à charge du compte de profits et pertes.
Une dotation annuelle omise sciemment ne peut plus être récupérée ultérieurement.
L'ensemble des amortissements ne peut pas dépasser le prix d'acquisition ou de revient du bien considéré.
La dotation annuelle peut être calculée d'après la mtéhode linéaire ou, sauf pour les bâtiments, d'après la méthode dégressive. Le taux dégressif est invariable et ne peut excéder ni 20% du prix d'acquisition ou de revient, ni le double du taux de l'amortissement linéaire applicable au cas particulier.
Les principaux taux linéaires pratiqués sont de
2% pour les maisons d'habitation et de bureau
3% pour les bâtiments industriels
8 à 12% pour les machines et installations techniques,
16% pour l'outillage mobile et le mobilier de bureau,
25% pour le matériel roulant.
Un bien dont le prix d'acquisition n'excède pas 15 000,— francs peut être entièrement amorti au cours du premier exercice.
Lorsqu'à la fin d'un exercice la valeur réelle d'une immobilisation se situe en-dessous de la valeur correspondant au prix d'acquisition, diminué des amortissements normaux pratiqués jusqu'à cette époque, il peut être opéré un amortissement extraordinaire couvrant la différence.

cc) Les biens non amortissables de l'immobilisé (terrains, participations) ainsi que les stocks de matières premières, de demi-produits et de marchandises et autres biens circulants sont à estimer à leur prix d'acquisition, sauf à tenir compte d'une moins-value éventuelle.
En ce qui concerne les biens circulants, l'inscription de la valeur réelle, si elle s'avère inférieure au prix d'acquisition, est obligatoire.

b) Revenus exonérés

aa) Les dividendes bénéficiant du régime des sociétés mères et filiales dans la mesure indiquée sub 3.

bb) Les bénéfices produits par un établissement stable exploité à l'étranger dans la mesure indiquée sub 4.

cc) Les autres revenus, pour lesquels le Luxembourg a renoncé à son droit d'imposition en vertu d'une convention, par exemple les revenus immobiliers provenant de l'étranger.

dd) Le gain net résultant d'une remise totale ou partielle de dettes consentie en vue de l'assainissement de l'entreprise.

ee) Les subventions publiques. Toutefois, les biens acquis au moyen de subventions publiques sont à évaluer, notamment pour les besoins de l'amortissement, à leur prix d'acquisition diminué de la subvention.

ff) Un projet de loi prevoit que les entreprises qui, au cours des dix années à compter de 1972 installeront au Grand-Duché des établissements nouveaux ou introduiront des fabrications nouvelles reconnues comme particulièrement aptes à contribuer à l'amélioration structurelle de l'entreprise ou à une meilleure répartition géographique des activités économiques, bénéficieront pendant huit années de l'exemption d'un quart du bénéfice provenant des nouveaux établissements ou des nouvelles fabrications. Le projet impose certaines conditions et prévoit l'institution d'un plafond que l'atténuation fiscale ne pourra pas globalement excéder.

c) Dépenses non déductibles

En principe, toutes les dépenses courantes d'exploitation sont déductibles, y compris les intérêts passifs de toute espèce. La loi ne se préoccupe pas de la question si une dépense est utile ou opportune.

De même peuvent être constituées par le débit du résultat des provisions destinées à faire face à une charge certaine, encore indéterminée quant à son montant, ou à un risque sérieux. Ne sont pas susceptibles d'être défalquées du résultat, les dépenses ci-après:

aa) Les dépenses qui sont en connexion avec un revenu exonéré.

bb) Les tantièmes et rémunérations analogues versés aux membres du conseil d'administration, aux commissaires ou aux membres de collèges similaires.

cc) Les libéralités, dons et subventions; toutefois, peuvent venir en déduction les sommes allouées à titre libéral à certaines institutions publiques et privées d'intérêt général, dans la mesure où elles ne dépassent pas 5% du total des revenus nets, ni un plafond de 5 millions de francs par an.

dd) Les amendes pénales et administratives.

ee) L'I.R.C. lui-même, l'impôt sur la fortune, la taxe d'abonnement et le droit de succession.

ff) Les provisions destinées à égaliser les résultats de différents exercices ou à couvrir des charges simplement prévisibles, comme par exemple des réparations différées.

gg) Les dépenses constituant des dividendes occultes, déguisés par exemple sous la forme d'intérêts ou de redevances injustifiés ou excessifs.

hh) Les bénéfices déplacés vers une autre entreprise dépendante de la société résidente ou exerçant un contrôle sur celle-ci ou appartenant au même groupe, et notam-

ment une société mère, filiale ou soeur établie à l'étranger ou un établissement stable exploité à l'étranger. Ainsi l'Administration peut rectifier les comptes faussés par des conditions acceptées ou imposées entre ces entreprises qui diffèrent de celles qui seraient conclues entre des entreprises indépendantes.

6. *Bonification d'impôt*

Une législation transitoire tend à favoriser l'investissement en accordant des bonifications qui sont directement déductibles de l'impôt sur le revenu.

a) Une première bonification est égale à 9% de l'investissement complémentaire en biens amortissables corporels autres que les bâtiments effectués au cours des exercises 1972 à 1974.
On est en présence d'un investissement complémentaire lorsque la valeur qu'accuse l'ensemble des biens amortissables corporels autres que les bâtiments à la fin de l'exercice est supérieure à la valeur la plus élevée que ces mêmes biens ont eue lors de la clôture des exercices postérieurs au 31 décembre 1961.

b) Une seconde bonification est égale à 3% des investissements spécifiés sub a, réalisés au cours des exercices 1972 à 1974, à condition que ces biens aient une durée normale d'utilisation supérieure à huit années. Pour la première tranche d'investissement jusqu'à concurrence de 2 millions de francs, le taux de la bonification est de 6%.

c) Les bonifications signalées sub a et b peuvent être cumulées.

7. *Impôt commercial sur le bénéfice*

a) Cet impôt, perçu au profit des communes sur le territoire desquels un établissement industriel ou commercial est exploité, vient s'ajouter à l'impôt sur le revenu.
Lorsqu'une entreprise exploite plusieurs établissements situés sur le territoire de différentes communes ou lorsqu'un établissement s'étend sur le territoire de différentes communes, l'Administration centrale procède à une ventilation des bénéfices entre les communes intéressées.

b) L'assiette est en principe déterminée selon les règles applicables à l'I.R.C. (V. No 5).
Le bénéfice établi pour les besoins de l'I.R.C. subit cependant certaines corrections vers le haut et vers le bas.
Ainsi doivent être ajoutés au bénéfice notamment les intérêts débiteurs correspondant à des capitaux empruntés en vue d'un renforcement durable de l'entreprise. On attache en général ce caractère à des emprunts dont la durée dépasse un an.
Le but de cette disposition est de traiter sur un même pied les entreprises financées par des capitaux propres et celles qui recourent à des capitaux d'emprunt.
Par contre, on déduit un montant égal à 10% des valeurs unitaires des immeubles de l'entreprise. La raison de cette mesure est d'éviter une double taxation des immeubles déjà frappés de l'impôt foncier.
Les valeurs unitaires sont fixées par l'Administration selon certaines règles dépassées depuis longtemps par l'évolution des prix. On peut affirmer que les valeurs unitaires ne constituent normalement que 10% des valeurs réelles.

c) Le calcul de l'impôt se fait en deux

temps.
On applique au bénéfice imposable un taux de base uniforme qui est de 4%. Ensuite la commune participante applique à la tranche qui lui revient un coefficient qui peut varier suivant les années et suivant les communes.
Toutefois, en fait, un coefficient de 250% est largement pratiqué, ce qui porte le taux final de l'impôt à 4% × 250% = 10%.

d) L'impôt commercial étant déductible, les taux cumulés de l'I.R.C. et de l'impôt commercial sur le bénéfice équivalent normalement à une charge globale déterminée comme suit:

Bénéfice imposable:		100,00
Impôt commercial: $\frac{100 \times 10}{110} =$		9,09
Assiette de l'I.R.C.		90,91
I.R.C. $\frac{90{,}91 \times 40}{100} =$		36,36
Bénéfice net		54,55
Impôt commercial	9,09	
I.R.C.	36,36	45,45
		100,00

8. *Données succinctes sur les autres impôts frappant les sociétés de capitaux*

a) Impôts annuels
   aa) Impôt sur la fortune
   Assiette: Fortune nette réelle au 1er janvier, revisée en principe tous les trois ans. Les immeubles y sont comptés pour leur valeur unitaire.
   Le taux est de 0,5% l'an.
   Cet impôt n'est pas déductible du bénéfice imposable.
   bb) Impôt commercial sur les capitaux d'exploitation
   Assiette: la même que pour l'impôt sur la fortune, sous réserve de l'addition des emprunts de plus d'un an et de la déduction des valeurs unitaires des immeubles.
   Taux: en général 0,5% l'an.
   Impôt déductible.
   cc) Impôt sur le total des salaires
   Assiette: Somme des traitements et salaires payés.
   Taux: en général 1,2%.
   Impôt déductible.
   dd) Impôt foncier.
   Assiette: valeur unitaire.
   Le taux s'établit comme suit:
   Taux de base: 0,1% de la valeur unitaire multiplié par le coefficient communal qui varie généralement selon la catégorie des immeubles entre 100% et 400%.
   Un taux de l'ordre de 300 à 350% est souvent fixé pour les immeubles industriels, ce qui établit l'impôt y relatif entre 3% et 3,5% de la valeur unitaire.
   Impôt déductible.
   ee) La taxe d'abonnement
   Assiette: Valeur de toutes les actions, parts et obligations émises par la société, calculée d'après le cours de bourse moyen de l'année précédente, et à défaut, selon une estimation.
   Taux: 0,36%.
   Cette taxe constitue un forfait qui libère les transactions effectives sur titres luxembourgeois de tout impôt de mutation.
   La taxe, censée payée pour compte des porteurs des titres, n'est pas déductible.

b) Impôts prélevés occasionnellement
   aa) Le droit d'apport de 1% sur les

biens et sommes mis en société, soit lors de la constitution, soit lors d'une augmentation de capital.
Impôt déductible.

bb) Le droit de mutation sur les ventes d'immeubles, lequel est normalement à charge de l'acheteur.
Assiette: Prix ou valeur vénale réelle supérieure au prix.
Taux: 6% plus un additionnel de 3% sur les immeubles situés sur le territoire de la Ville de Luxembourg.
Du point de vue comptable, ce droit s'ajoute au prix d'acquisition.

cc) Le droit de transcription de 1% sur les achats d'immeubles. Pour le surplus, voir les règles énoncées sub bb).

dd) La taxe sur la valeur ajoutée
Taux normal: 10%.
Taux réduit: 5%.

ee) Droits d'accise et de douane
Pour mémoire.

ff) Droits d'enregistrement autres que le droit d'apport et le droit de mutation
Pour mémoire.

9. *Régime spécial des sociétés Holding*

a) Est admise au régime «Holding» toute société luxembourgeoise qui a pour objet exclusif la prise de participations, sous quelque forme que ce soit, dans d'autres entreprises luxembourgeoises ou étrangères et la gestion ainsi que la mise en valeur de ces participations, de manière qu'elle n'ait pas d'activité industrielle propre et qu'elle ne tienne pas un établissement commercial ouvert au public. On admet qu'une société Holding peut aussi détenir des brevets, à condition de ne les exploiter que sous forme de licences accordées à des tiers.

b) La société Holding est exonérée de tout impôt sur le revenu et sur la fortune; elle est dispensée par ailleurs de la retenue de 15% sur les dividendes qu'elle distribue et de la retenue de 5% sur les intérêts d'obligations qu'elle paie.
Par contre, elle subit les retenues à la source sur les dividendes et intérêts qu'elle encaisse, qu'ils soient d'origine luxembourgeoise ou étrangère.
Les contribuables résidents sont taxables sur les produits sociaux ou tantièmes qu'ils retirent d'une société Holding.

c) Les sociétés Holding sont assujetties au droit d'apport spécifié sub 7. b aa) au taux normal de 1% et à la taxe d'abonnement spécifiée sub 7 a ee) au taux réduit de 0,16%.
Les impôts autres que ceux établis sur le revenu et sur la fortune leur sont également applicables.

10. *Appréciation de l'I.R.C. luxembourgeois dans une vue communautaire*

A. Régime ordinaire applicable aux sociétés non Holding

a) Dans les relations du Luxembourg avec les Etats ayant aussi le système classique, l'aménagement d'une convention bilatérale préventive de la double imposition est relativement simple. Le taux de retenue sur dividendes est limité des deux côtes à 15% en général et à 5% (parfois 10% ou 2,5%), en ce qui concerne les dividendes de participation.
D'autre part, l'exemption des dividendes de participation auprès de la société

mère est étendue aux dividendes provenant de l'autre Etat contractant.

b) Ces solutions devraient être améliorées tant sur le plan interne que sur le plan conventionnel par une définition plus libérale de la société participante. Le taux de participation exigé devrait se situer nettement en-dessous de celui de 25% prévu dans la convention modèle de l'OCDE.

D'autre part, la logique du système commanderait que l'Etat de la source renonçât à toute retenue sur les dividendes de participation ou, à défaut, que la retenue maintenue à un faible taux, pût être imputée sur celle qui frappe la redistribution des dividendes par la société participante.

c) Il paraît difficile de trouver des solutions cohérentes et équilibrées pour éliminer la double imposition des dividendes entre un Etat pratiquant le système classique et un Etat dont la législation comporte l'avoir fiscal, à moins qu'on le refuse aux non-résidents, ce qui serait à la fois simple et discriminatoire.

Il est vrai qu'un avenant du 8 septembre 1970 apporté à la convention de double imposition conclue le 1er avril 1958 entre la France et le Luxembourg étend le bénéfice de l'avoir fiscal français, sous déduction d'une retenue de 15% sur le dividende brut augmenté dudit avoir fiscal, aux résidents luxembourgeois autres que les sociétés mères.

c) Il est de loin préférable que la structure de l'impôt sur les sociétés soit fondamentalement la même dans tous les Etats membres de la C.E.E.

Le choix paraît se limiter au système classique et au système de l'avoir fiscal.

Le système classique présente entre autres le double avantage de simplifier la recherche de solutions préventives de la double imposition et de ne pas défavoriser l'autofinancement.

Le grand défaut de ce système est de comporter une double charge fiscale à l'égard des bénéfices distribués. On pourrait remédier dans une certaine mesure à cet inconvénient en prévoyant des atténuations, en ce qui concerne l'imposition personnelle des associés.

Le système de l'avoir fiscal présente en substance les qualités et les défauts inverses de ceux du système classique.

Si l'avoir fiscal devait se généraliser dans la C.E.E., il faudrait recommander

d'une part, que les taux applicables aux bénéfices mis en réserve ne soient pas excessifs,

d'autre part, que dans les relations intracommunautaires, l'avoir fiscal puisse être transmis à travers la société participante, aux actionnaires de celle-ci.

B. Régime Holding

Les sociétés Holding luxembourgeoises sont exclues du bénéfice des conventions de double imposition conclues par le Luxembourg. C'est dire qu'elles ne profitent pas des allégements normalement prévus en ce qui concerne les retenues sur les dividendes et intérêts qu'elles encaissent.

Dans l'hypothèse où des taux de retenue unifiés seraient introduits dans les Etats membres de la C.E.E. et rendus obligatoires pour toutes les sociétés résidentes de ces Etats, les sociétés Holding pourraient légitimement demander à être admises au bénéfice des conventions de double imposition. L'institution d'une retenue en

aval serait alors dans une certaine mesure compensée par l'abolition ou l'atténuation des retenues subies en amont.

Le fait que ces sociétés ne sont pas assujetties à l'impôt sur le revenu ne devrait pas y former obstacle, car l'exemption des dividendes qui constituent de loin les principaux revenus «Holding», n'est qu'une application intégrale du principe «ne bis in idem» que d'autres Etats membres ont aussi consacré dans leurs législations fiscales.

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FRANCE

Information Memo of the Minister of Economic Affairs and Finance of March 11, 1974 on the repression of tax fraud

I. LES RESULTATS OBTENUS

Le nombre et le produit des vérifications de toutes sortes a plus que doublé en quatre ans (1969-1973).

a) *Le nombre des vérifications*
En 1969, 22.829 vérifications de comptabilité ont été terminées, contre 45.950 en 1973, auxquelles s'ajoutent 11.268 vérifications de situations personnelles. Le rythme de vérification des contribuables exerçant une activité industrielle, commerciale ou libérale et relevant d'un régime de déclaration contrôlée est ainsi passé d'une fois tous les 25 ans à une fois tous les 11 ans environ.

b) *Le produit des vérifications*
Le produit des vérifications de comptabilité était en 1969 de 1,18 milliard de F; il s'est élevé en 1973 à 2,95 milliards de F. Le montant moyen des rappels d'impôts par vérification est passé dans la même période de 52.000 F à 64.000 F.

c) *L'orientation du contrôle fiscal*
Le contrôle fiscal est dirigé en priorité vers la destruction des réseaux de fraude organisés. Un effort particulier a été accompli récemment dans le secteur immobilier. Une vaste opération de contrôle fiscal a été entreprise en 1973 par les services dépendant des différentes Directions des vérifications de la région parisienne. Elle consiste en vérifications de comptabilité de sociétés et en examens de situations fiscales de personnes physiques effectuant des opérations immobilières. Ces contrôles ont révélé d'importants réseaux de fraude fiscale se caractérisant pour l'essentiel, soit par l'intervention de facturiers de complaisance, sois par l'interposition de sociétés «écran». Ce dernier procédé, beaucoup plus élaboré, permet de dissimuler les profits réalisés et d'en assurer la distribution occulte.
La répression pénale de la fraude a été simultanément intensifiée.
Le nombre des plaintes déposées par l'administration fiscale est passé de 64 en 1969, à 551 en 1973, pour un montant total des droits fraudés de 413 millions de francs.
En ce qui concerne particulièrement les réseaux de fraude immobilière évoqués ci-dessus, neuf plaintes ont d'ores et déjà été déposées; le montant des droits fraudés s'élève à 163 millions de francs (98 au titre des plaintes déposées en 1973, 74 au titre de celles déposées en 1974). Sept des personnes visées par ces plaintes ont été placées sous mandat de dépôt.
Pour l'instruction des plaintes, une coordination étroite a été instaurée entre magistrats du Parquet et services fiscaux.
Les tribunaux ont rendu, en 1973, 195 décisions et prononcé 298 condamnations, dont 185 sont définitives.
Ces résultats, en très sensible augmentation par rapport à 1972, traduisent à la fois l'accroissement du nombre des plaintes déposées au cours des deux dernières années et la diminution de la durée des procédures.

II. LES ORIENTATIONS RETENUES

M. Valéry Giscard d'Estaing a confirmé au Directeur général des Impôts le but assigné en 1969 aux services fiscaux: l'élimination de la fraude comme phénomène social. Pour atteindre, dans un délai raisonnable, cet objectif, les principes suivants doivent être appliqués:

— isoler le fraudeur dans la société, en le distinguant bien de la grande masse des contribuables de bonne foi;
— utiliser la technique de l'exemplarité en recherchant systématiquement les plus gros fraudeurs et en les poursuivant en justice.

L'application de ces principes conduira:

— à poursuivre sans relâche l'effort du contrôle fiscal. L'objectif assigné à l'administration fiscale est d'abaisser progressivement la périodicité moyenne de vérification des entreprises et des contribuables les plus importants dont les revenus ne sont pas déclarés par des tiers. Les moyens du service seront adaptés en conséquence;
— maintenir scrupuleusement le respect des procédures et des garanties prévues par la loi. M. Valéry Giscard d'Estaing a donc prescrit *l'établissement d'une charte du contribuable vérifié rappelant l'ensemble des droits et des devoirs tant des contribuables vérifiés que des agents chargés des vérifications. Cette charte sera adressée à chacun des Inspecteurs des Impôts et rendue publique dans les mois qui viennent. Elle sera remise au début des opérations de vérifications au contribuable concerné.*

UNITED KINGDOM

Budget Speech 1974

On March 27, 1974 the Chancellor of the Exchequer pronounced his Budget Speech. Some of the highlights are reproduced below.

I. INDIRECT TAXATION

"I deal first with indirect taxation. Here my aim is to help pay the cost of reducing the price of the more essential goods by increasing the tax on the less essential. The previous Government abolished purchase tax, with its separate rates, in favour of the Value Added Tax with its single positive rate of 10 per cent.

"In this form, it suffers from a major disadvantage. Any increase in the standard rate of 10 per cent. would push up the cost of living for the average person by raising prices across the whole range of taxable goods and services, essential and less essential alike. For this reason I do not propose any change in the standard rate of VAT.

However, *although I am not altering the standard rate of VAT,* I am proposing some changes in the coverage of the tax. Many Members on both sides of the House have always argued that it is inexcusable to charge VAT on essential aids for the disabled, such as kidney machines and invalid chairs; and on protective clothing, such as miners' and quarrymen's helmets and safety boots.

"I agree, and shall be bringing forward an Order to zero-rate these classes of goods as soon as possible. The consequent loss of revenue will be very small.

"I have considered giving similar help to charities by zero-rating them. But there are many difficulties, not least how to define what most of us would regard as genuine charities. Charitable status has been much abused in recent years. So I must renounce that option now.

"However, most charities will benefit from some of the proposals which I shall be announcing later.

"I now pass to the Customs and Excise revenue duties — those on alcoholic drinks, tobacco and hydrocarbon oils for example. These are not levied as a percentage of price, like VAT. They are specific sums levied on given quantities of the goods concerned, and these sums have not been increased since 1969, although prices generally have increased greatly.

"In other circumstances I would be tempted at least to restore the real value of the revenue duties to what it was five years ago and I believe most people would regard this as highly reasonable in present circumstances. This would have increased Government revenue by about £1,450m. in a full year — enough to cover the whole cost of all the Government's expenditure proposals — pensions, food subsidies, and housing — the lot.

"But to do so now would produce a substantial net rise in the retail price index which would add to the pressure on the threshold provisions of the Stage Three we have inherited. I must therefore resign myself to a more limited objective.

"So far as oils are concerned, I recognise that because of the increases in world prices, the cost of all petroleum products has risen sharply.

"Nevertheless, I believe that there is a good case for increasing the total taxation of road fuel, both to help conserve our supplies of oil and to reduce the pressure on our road system and to make life more tolerable in our towns and countryside. This will help te secure the economic use of scarce resources and so contribute towards achieving one of my main aims.

"However, I appreciate that a straight increase in the revenue duty on petrol and derv would increase commercial transport costs and this would give a further upwards push to prices in general. I therefore propose that *the standard rate of value added tax should apply to petrol and other road fuels from April 1*. The normal VAT provisions for deducting input tax will apply to the VAT on road fuel purchased by all commercial and industrial undertakings registered for the tax, and neither industrial costs nor bus fares should therefore be effected by the increase.

"As with hydrocarbon oils, so the rates of duties on alcoholic drinks and tobacco have not been raised since 1969. Indeed, when VAT was applied to these goods, the rates of revenue duty were abated by such amounts as were necessary to ensure that the total tax burden, through duty and VAT was not, on average, increased.

"I consider that a greater contribution should now be sought from these goods. I therefore propose that the duty on spirits should be raised by such an amount as would increase the total tax burden (including the consequential VAT effect) by the equivalent of 20p a standard bottle of whisky or gin of average strength and proportionately for other spirits.

"I also propose to increase the tax burden (including VAT) on all wines including British wines by the equivalent of 10p a bottle on average. I think it appropriate that the same increase should apply to light table wines, consumption of which has been increasing rapidly, as to fortified wines.

"In normal circumstances I would have preferred not to change the duty on beer. But times are not normal and I am sure that beer drinkers will accept that they too must make a further contribution. I therefore propose to increase the tax burden (including VAT) on beer by the equivalent of 1p a pint on average.

"In the case of the tobacco duty, too, I believe an increase is justified. Consumption has been rising steadily and, while I do not necessarily subscribe to the principle that the consumption of tobacco products should be curbed by fiscal means, I proposed to increase the duty by such an amount as will increase the total tax burden (including VAT) on cigarettes by an average of 5p a packet of 20.

"I have carefully considered whether I can seek a contribution from the betting duties. I have concluded that an increase in the rate of duty on on-course betting would not be in the best interests of racing and would not be justified. The same considerations do not, however, apply to off-course betting and I propose to increase the rate of duty from 6 per cent. to 7½ per cent.

"I also propose to increase the rate of pool betting duty from 33⅓ per cent. to 40 per cent. I estimate that these changes, which will effectively operate from the end of this month, will yield £30m. in a full year.

II. TAXATION OF WEALTH

"Before describing my direct tax proposals, I should outline very briefly the Govern-

ment's position on a tax credit system.

"We believe that there are serious drawbacks to the tax credit scheme proposed by the previous Administration. We have not taken any decision against the principle of a negative income tax, which was the subject of considerable study under the previous Labour Government.

Firstly, this Government intends to introduce an annual wealth tax on the rich. Such a tax is an accepted feature of many other countries' taxation systems. But it will be a new departure in this country, and I believe it should be introduced only after a thorough public discussion about the precise form it should take, the rate at which it is levied, and its relationship with other forms of taxation.

"My first step towards this reform will, therefore, be the publication of a Green Paper during the summer.

"Secondly, I intend to take measures to close the loopholes which prevent the estate duty from performing the role assigned to it. Nothing is more offensive to the vast majority of ordinary taxpayers, most of whom are subject to PAYE, than the knowledge that people far better off than themselves are avoiding taxation by exploiting loopholes in the existing law.

"If the existing estate duty operated effectively, the great concentrations of private wealth would already have been broken up, and with them many of the unfair advantages enjoyed by generation after generation of the heirs and relatives of wealthy men. In practice, however, the estate duty has always been a largely avoidable — indeed a voluntary — tax. In particular, it does not bite on transfers of wealth made long enough before death to fall outside the charge. My first priority is to remedy its defects.

"The U.S., Australia, Canada and most of Western Europe have found it necessary to reinforce their estate duties or inheritance taxes with gift taxes levied either on the donor or donee. *I therefore propose to introduce this year in my second Finance Bill a tax on lifetime gifts* (that is, any transactions containing an element of bounty and including gifts in settlement) which will mesh in with the existing estate duty so as effectively to replace it with a comprehensive tax on all transmissions of personal wealth.

Since the estate duty is charged on the testator's property, and not on the donee's receipts, it follows that the new associated tax on gratuitous transfers of capital during life should fall on the donor — as it does in the U.S., but the rates will not necessarily be as high as in the estate duty.

"The estate duty in its present form has been part of our tax system since the reign of Queen Victoria. We may argue from time to time about the precise rates at which estate duty is levied, but I cannot believe that any Members can reasonably complain if I now take steps to see that a tax which has been on the Statute Book for nearly 80 years is at last made effective.

"The new tax will take effect from to-day and will include provision for a charge, falling on trustees, on capital taken out of a settlement and on changes in beneficial interests in possession under a settlement.

"I recognise that to some, who may be affected by these new tax proposals and who are unfamiliar with the way they operate in other western countries, they may seem revolutionary in the extreme. I can assure them that while I am determined to ensure that the new taxes will be effective instruments for redistributing wealth as a means to greater justice and equality in our society, I am concerned that they should operate fairly on those affected and

I will listen to any reasonable representations which will help me to secure this end.

"I come now to a series of other measures which are designed to prevent individuals or groups from escaping taxation which the community as a whole undoubtedly believes should be paid.

First, the taxation of land and property development — where I think the whole House agrees action is long overdue.

"In the Gracious Speech it was said that proposals would be prepared for bringing into public ownership land required for development. Work on these proposals is pressing forward but it will take some time to carry the necessary legislation through. In the meantime, I propose to continue with the proposal announced on December 17 for charging as income certain capital gains arising from the disposal of land and building with development value or potential.

"It would not be right that disposals of land made since December 17 which will have taken into account this proposal, should not bear the impact of the tax changes proposed. The necessary legislation will be included in the Finance Bill. It will, I fear, be lengthy and complex, but I hope I can count on co-operation in its passage from all parties in the Opposition.

"In preparing our proposals for bringing development land into public ownership, we shall of course have to consider their relationship with the tax system in general and with these last proposals in particular.

"The proposals announced on December 17 had a second aspect, namely, that the first letting of a non-residential development should be treated as a disposal for the purposes of tax on capital gains.

"I propose to implement this proposal, since it is already well prepared. I made it clear after the December proposals were announced that I did not regard them as adequately dealing with the gains made from property development. I have not changed my view, and will be considering in the coming year what further action is required.

"Second, surrender of qualifying life assurance policies. A number of artificial schemes have been devised for the partial or complete surrender of a policy's value, with the effect that the policy holder is entitled to claim tax relief in respect of an amount of premiums greatly exceeding his actual net outlay on the policy concerned.

"Once more, after full consultation with the Life Office Association I have decided to introduce arrangements whereby in defined circumstances the amounts to be surrendered to the policy holders are reduced by the whole or a part of the tax relief which the policy holders have been entitled to claim in respect of those policies.

"The necessary legislation will also be included in my second Finance Bill. It will apply to surrenders of bonuses in the same way as other surrenders in respect of life policies, and will apply to all policies taken out after to-day.

"Third, Friendly Societies. These societies have traditionally existed to provide relatively modest cover against needs arising from (for example) sickness, old age and death; and their income has been exempted from tax accordingly.

"Recently, the Inland Revenue have become aware of attempts to use the Friendly Societys' exemption as a cover to build up tax-free funds on behalf of wealthy investors. I regard this as a particularly blatant form of tax avoidance.

"After full consultation with the Friendly Societies Liaison Committee — and I should emphasise that societies represented

on the Committee have not been involved in transactions of this kind — I have decided to introduce in the Finance Bill measures to secure that the Friendly Society tax exemptions are denied forthwith to the bodies organising these schemes and that a tax charge is made on any gain accruing after today and realised by an individual on encashment of his investment.

"I also propose to reverse the previous Government's legislation on *share option and incentive schemes.* As we made clear when we were in Opposition, we have always regarded the benefits to directors and employees under schemes of this kind as part of the pay for the job, and it follows that such benefits ought to be taxed in the same way as normal remuneration, instead of being liable simply at capital gains tax rates.

"Legislation will, therefore, be included in the Finance Bill to impose full income tax liability on benefits from all share option and incentive schemes, that is including the employee own-as-you-earn scheme as well as the so-called executive schemes.

"The legislation will have immediate effect, and, in the case of share options, the charge will apply to all options exercised after to-day.

"Another measure of the last Labour Government which our predecessors reversed was *the provision under which a child's investment income was aggregated for tax purposes with that of the child's parent.* When in Opposition, we made it clear that we regarded aggregation as socially just, and that we would restore the position when we returned to power. This, I now propose to do.

"But because of the preparatory work required, aggregation cannot commence until April 1975, and the necessary provisions will therefore be included in my second Finance Bill.

III. FOREIGN INCOME

"I now turn to the subject of taxation of foreign income — a subject which aroused great public interest during the so-called Lonrho affair last spring.

"It has been the law for many years that, where a man goes overseas to do a job, and all the duties of the job are carried out abroad, then the earnings from the job are taxable on what is called the "remittance basis" — that is, if and when they are brought back to this country. This was, perhaps, a reasonable approach before the days of air travel and multinational companies. But under modern conditions these provisions can be, and are, used by U.K. residents to avoid their proper tax liabilities.

"My proposals will apply from the start of the 1974-75 tax year. They are as follows:

"First, the remittance basis will in general cease to apply to earnings by U.K. residents from overseas employments, trades and professions, and the basis of taxation wil be changed instead to the income arising from overseas employment, irrespective of the amount remitted. But, because of the special considerations applying to incomes of this kind, the tax assessment will be limited to 90 per cent. of the full amount of the income.

"In this way we shall recognise the special importance to the U.K. economy of this income, and the expenses which are often incurred in earning it, and at the same time, we shall ensure that the individuals concerned do not escape tax. The same treatment will apply to pensions from overseas received by U.K. residents. They will

pay on the full amount, subject to the 10 per cent. reduction.

The Chief Secretary will later announce somewhat *similar proposals applying to foreigners temporarily working in Britain* whose employer is resident abroad. Obviously they are not in quite the same position as persons who live here on a permanent basis and they will be assessed to tax on half of their earnings.

IV. TAX AVOIDANCE

"Last December the previous Government announced its intention of stopping a new avoidance device concerned with the purchase of deposits of money in a way that gets round last year's legislation on the exploitation of certificates of deposit. I propose to carry this intention through and the Finance Bill will contain the necessary provisions.

"My attention has also been drawn to a defect in the existing capital gains tax provisions dealing with depreciatory transactions within groups of companies. This defect will be put right with effect from to-day.

"The avoidance of tax is by no means a prerogative of the wealthy. It is rightly resented wherever it takes place. I shall therefore be proposing some measures relating to the so-called 'lump' in the building industry.

"Their purpose is to tighten up the operation of the existing tax deduction scheme until we can bring in more substantial measures.

"I believe that the series of measures for reducing tax avoidance which I have just described will be heartily welcomed by the overwhelming majority of citizens at all income levels who regularly pay the full tax due on their incomes.

"In the long run, effective measures against tax avoidance may enable us so to enlarge the base on which tax is levied that increases in the rates of tax may be unnecessary. Meanwhile, I hope that what I have already proposed will make it easier for those concerned to carry the additional burdens I must now describe.

V. CORPORATION TAX

"Now for Corporation Tax. Companies have in general been doing rather better in the last year or two, and profits last year reached a very high level. There was, in fact, a significant increase in the share of total national income going to companies.

"In these circumstances, it is only right that companies should bear their share of the cost of putting the economy back on course.

"I propose, therefore, *first that the Corporation Tax rate for the financial year 1973 should be 52 per cent.*, a little above the rate of 50 per cent, which I think has been generally expected; and *secondly, that companies should be asked somewhat to accelerate the payment of a proportion of the corporation tax for the next year.*

"This acceleration will work on the following lines. As from April 1, when they pay their advance Corporation Tax on distributions, they will have to make an additional payment of a half of that sum. This extra amount will then be set off against their Corporation Tax liability on their profits for their accounting years ending in 1974-75.

"I propose that small companies shall be charged at a rate of 42 per cent. Building societies, Co-operative societies and housing associations will remain chargeable at their present rate of 40 per cent.

"I must deal here also with the rate of

tax on gains accruing to companies. The law now provides for a fraction only of capital gains to be included in a company's taxable profits, so that the effective rate on gains is less than the rate applied to income. I propose that this effective rate for the financial year 1973 shall be 30 per cent.

"I propose also to continue for the financial year 1973 the effective Corporation Tax rate of 15 per cent. on gains going to investment and unit trusts to match the credit given last year on gains made on a sale by unit-holders.

"The oil companies present a special problem so far as their profits are concerned, and particularly as to the question of how to ensure that profits from North Sea oil bear their proper weight of Corporation Tax.

"My predecessor announced in his Budget last year that he proposed to follow the recommendations of the 1973 report of the Public Accounts Committee and introduce legislation this year.

"This legislation would enable administered prices to be prescribed for oil for U.K. tax purposes, and would ensure that oil companies' accumulated losses cannot be set against profits of the Continental Shelf.

"On a later occasion it was stated that the Conservative Government had decided not to meet another point made by the Public Accounts Committee in relation to group relief for capital allowances on investment unconnected with the North Sea.

"It is clear that there will have to be legislation affecting, among other things, the tax treatment of oil company losses and the computation of their profits for tax purposes. However, though I do not necessarily reject my predecessor's approach, I am, of course, not bound by it and I shall want to consider this matter as a whole, in the context of the Government's proposals to ensure that the public derive an adequate share of the very large profits flowing from the Continental Shelf and to remedy existing shortcomings in the tax treatment of oil companies.

"These are major issues requiring more than three weeks consideration. I shall, therefore, not be bringing forward proposals on this matter in this Budget, but, when I do, I will ensure, as was intended by the Rt. Hon Member for Altrincham and Sale [1] that the Exchequer does not suffer from the delay, and my proposals will deal comprehensively both with the accumulated losses up to December 31, 1972 and with liabilities accruing from January 1, 1973 onwards.

VI. INTEREST ON OVERPAYMENT OF TAX

"I now turn to a minor, but important, aspect of tax administration. I share the view which has been gathering force in recent years, that a taxpayer is entitled to some compensation by way of interest when repayments of income-tax due to him are unduly delayed through no fault of his own.

"The administrative difficulties are very great. Nevertheless, the second Finance Bill will include provision for a necessarily simplified scheme of compensation when tax repayments to individuals are delayed in circumstances of this kind beyond April 5 in the year following the year of assessment.

"There will also be provision for payment

1. Mr. Barber the former Chancellor of the Exchequer.

of interest on overpayments of estate duty and the new tax on gratuitous transfers of capital.

"Conversely, the Bill will also include new measures to encourage the prompt payment of tax due to the Exchequer.

VII. INDIVIDUAL INCOME TAX

"One of the worst consequences of inflation has been to force more and more of the worse-off into paying higher tax because their money incomes have increased although their real earnings have risen very much less.

"To relieve those at the bottom of the scale, I therefore propose to increase the main tax allowances and so to put up the threshold for income tax. The personal allowance for single people will go up by £30, and that for married couples by £90. I am proposing a substantially higher increase in the married allowance because this has, in recent years been falling behind in comparison with the single allowance. I also propose to increase the income tax child allowance. This is the only way open to me of giving early help to the great majority of families since it is not administratively possible to introduce family allowances, or some form of child credit for the first child in the immediate future.

"The increase for child allowances will be £40 at each of the three rates. The total cost of these changes in allowances will be 513m. in 1974-75 (£654m. in a full year). The number of taxpayers relieved from income tax in the coming year, as a result of these changes in tax allowances, will be 1½ million (including earning wives).

"I propose to give further help to the worse-off in relation to age exemption. Successive Governments have increased the age exemption limit to take account of increases in National Insurance retirement pensions, to avoid a pensioner being brought into tax liability simply by reason of the pension increase. I propose to follow this practice, and the increases in age exemption income limits required as a result of the Government's proposals on the pension front will be fairly substantial ones.

The age exemption income limit for a single person will be increased by £85, from £700 to £785, and for married couples by £130, from £1,000 to £1,130. The marginal fraction, by which the relief is withdrawn when a pensioner's income slightly exceeds these limits, will have to be increased slightly, in order to avoid an unreasonably wide marginal band. It will go up from 50 per cent. to 55 per cent. The cost of these changes will be £18m. in 1974-75 (£30m. in a full year).

"Now the news which some may find less agreeable. The raising of the tax threshold, the cost of the improved pensions and other benefits falling on the Exchequer, and the actions we are taking on food subsidies, and housing, make it inevitable that I should increase the revenue from tax on incomes.

"I will deal first with the proposal made by my predecessor last December for a surcharge on surtax for 1972-73. The arrangements for imposing this surcharge were already in train when we came to power, and I propose to carry out my predecessor's intentions, with one exception.

"This is the exemption for the elderly. We see no justification for excusing the wealthy man from payment of the surcharge simply because he has stopped working — or indeed when he is still earning vast sums — because he is over 65. It will therefore apply, on the lines announced by my predecessor, but to all tax-

payers irrespective of their age.

"My next proposal is for a change in the structure of the rate schedule.

"At present we have a very wide basic rate band of £5,000 taxable income, and the rate of tax then jumps by 10 per cent. to the next band of liability. After this point, the successive bands of liability increase by 5 per cent. steps.

"I propose to reduce the width of the basic rate band, and at the same time to make the progression more smooth, by inserting a new band below the first of the higher rate bands. This band of income will be taxed at a rate 5 percentage points above the basic rate, and will be £500 wide.

"In other words, it will start at £4,500 taxable income. This change by itself will bring in £12 million additional revenue in a full year.

"A second structural change relates to the investment income surcharge. At present, the rate of this is 15 per cent., and it is levied on investment incomes above £2,000.

"We made it clear when we were in Opposition that we though this starting point unjustifiably high, and I now propose to reduce this to £1,000 investment income. The rate of surcharge on the slice of income from £1,000 to £2,000 will be 10 per cent.

"The starting point for the elderly, that is people over 65, will however be £1,500, and they will pay surcharge at the rate of 10 per cent. on the slice of income from £1,500 to £2,000. This change will bring in about £40 million in a full year.

"Before coming to the rates of income-tax, I must refer to one other proposal — which will not be unexepected."

"In 1969, my Rt. Hon. Friend who is now Home Secretary took measures to curb excessive personal borrowing by withdrawing the tax relief on interest for private borrowings except for specified purposes. These measures were cancelled by the Rt. Hon. Gentleman the Member for Altrincham and Sale in 1972.

"We have never wavered in our belief that my Rt. Hon. Friend's legislation was right, and I believe that the experience of the last two years has proved our case. It is obvious nonsense for the Exchequer to subsidise inessential borrowing at any time, let alone in the current state of the economy.

"In the last two years it has been a factor in the excessive growth of the money supply. I therefore propose to include in the Finance Bill provisions broadly reintroducing the 1969 legislation, but with two material differences.

The first relates to tax relief on mortgage interest paid by owner-occupiers. At the present moment when there is a universal shortage of housing for ordinary families, there can be no justification for giving tax subsidies for the provision of luxury houses or second homes.

"I propose, therefore, that in future an owner-occupier will be entitled to relief only for a loan to acquire or improve his principal place of residence, and the relief will be limited to the interest on a mortgage up to £25,000.

"This is a generous limit — indeed, some may think it overgenerous — but on practical grounds we need a single limit for the whole country and one that can reasonably be expected to stand for some time.

"The other difference from the 1969 legislation relates to interest on overdrafts. In 1969 relief was allowed on overdraft interest so far as it related to qualifying purposes.

"This was an easy condition to take advantage of, and I propose, therefore, that

this time there should be no relief for interest on overdraft facilities. If a loan is to qualify for relief it must be tied to a particular qualifying purpose.

"The new conditions for relief will apply to all loans taken out after to-day. Interest on existing loans will continue to qualify for relief as at present for a period of six years with the exception of overdraf interest. This will qualify for relief up to the end of 1974-75.

"I estimate the tax yield from these proposals at £20m. in 1974-75 and £100m. in a full year.

"Finally, I turn to the rates of income tax. As I have already made clear, I require to raise from the taxpayer a substantial amount of additional revenue for the coming year.

"In order to bring in the necessary sum, *I propose to increase the basic rate of income tax by 3p in the pound.*[2] This increase in the basic rate will have two consequences. The first is an increase in the rate of Advance Corporation Tax, which will be adjusted to keep in step.

"The second will be a change in the family allowance deduction, more commonly known as claw-back. This is necessary, or the amount recovered through tax would be greater than the addition to family allowances to which the deduction relates.

"The change here will be from £60 deduction to a £52 deduction. The higher rates of income tax — and that includes the intermediate band, 5 per cent. above the basic rate, which I have just announced — will also be increased by 3p in the £, with the exception of the highest rate of all.

"This rate, at present 75 per cent., will be increased to 83 per cent., that is, there will be an increase of 5 percentage points over and above the general 5 per cent. increase. The result of this will be that for the biggest investment incomes, the rate of tax will be significantly higher than in 1970-1971. It will become 98 per cent., that is a top rate of 83 per cent. plus 15 per cent. investment income surcharge.

"The higher tax deductions will take effect from the week beginning May 4. This is the earliest date by which the new tax tables can be printed and distributed to employers.

"I recognise that this unavoidable lapse of time before the new tax rates can be brought into effect will mean that employees will have to face heavier PAYE deductions in the first week of the new rates, since the tax for that week will include the back tax due at the new rates from the beginning of the income tax year.

"But this effect will be cushioned by the increases in the single and married allowances, which will also take effect at that time. The result will be that extra tax will only be paid that week by people earning more than £17.75 per week, if single, or £34 if married. Below these points the level of tax deduction will in fact drop.

"It will take rather longer for tax offices to make the PAYE coding changes needed to give effect to the increased child allowances. These will come into operation generally in the week starting July 20.

"I estimate that the changes in the rates of income-tax which I am proposing will yield £778m. in 1974-75 and £954m. in a full year."

"The composite rate charged for building societies in the coming year will as usual, be determined by the changes taking place in the rates of tax and the taxable incomes of their depositors. Taken by itself, how-

2. From 30% to 33%.

ever, an increase in the basic rate of income-tax tends to result in a smaller increase in the composite rate.

"Second, the building societies will benefit from their exemption from the general increase in the rate of corporation tax, and from the ending of the tax advantage on guaranteed income bonds. I recognise that all this falls short of a solution to the problems which the building societies now face, but I hope the House will welcome it as a step in the right direction.

"I can now sum up the effect of my proposals.

"Leaving aside the increase in pensions, which is largely matched by higher contributions in the normal way, and the rise in nationalised industry prices, which is needed to offset the higher costs of the industries, the net increase in expenditure which I have announced amounts to a little under £700m. in 1974-75.

"The increase in taxation is, however nearly £1,400m. — that is, twice as much. Thus, the effect of my proposals is to reduce the public sector borrowing requirement by £700m., and to bring it down to a little over £2,700 m. I have thus achieved the target I set myself — a reduction of £1,500m. on the figure of over £4,250m. for 1973-74.

In terms of demand for resources, I expect my proposals to have a mildly restraining effect, so that by the end of the year demand may be running at about £200m. lower than would otherwise have been the case. As this is a little less than one-third of 1 per cent. of the likely GDP at that time, these Budget proposals are thus broadly neutral.

"I estimate that, on this basis, output in the final quarter of this year will have recovered to a level some 2½ per cent. higher than a year earlier. This should secure a rate of growth which will let us take full advantage of our export opportunities and foster the confidence necessary for industrial investment.

"In social terms, my proposals will involve a significant redistribution of income. For a married man with two children under 11, the tax threshold is raised from about £21.50 a week to nearly £25.00 a week. If he is on £30 a week, his net take-home pay will rise by about 85p a week. Indeed up to £54 a week, which is well above average earnings, all married men with two children will find that the burden of their income tax and National Insurance contributions will be reduced to some extent.

"On the other hand, a man in similar circumstances earning £200 a week will pay nearly £4 a week more tax, and a man earning £1,000 a week with £10,000 investment income will pay just over £74 a week more.

CHART I

New Income Tax Table

£		
0— 4,500	33%	(basic rate)
4,500— 5,000	38%	
5,000— 6,000	43%	
6,000— 7,000	48%	
7,000— 8,000	53%	
8,000—10,000	58%	
10,000—12,000	63%	
12,000—15,000	68%	
15,000—20,000	73%	
over 20,000	83%	

CHART II

Income Tax Burden 1973-74

Income	Single persons income all earned	Married persons income all earned	Married persons all investment income
£ 1,500	18.1%	14.5%	14.3%
£ 2,000	21.1%	18.4%	18.4%
£ 2,500	22.9%	20.7%	23.7%
£ 3,000	24.1%	22.3%	27.3%
£ 4,000	25.5%	24.2%	31.7%
£ 5,000	26.4%	25.4%	34.4%
£ 10,000	36.2%	35.2%	47.2%
£ 50,000	65.3%	63.0%	79.4%
£100,000	70.2%	70.0%	84.7%

CHART III

Income Tax Burden 1974-75

Income	Single persons income all earned	Married persons income all earned	Married persons all investment income
£ 1,500	19.3%	14.0%	17.3%
£ 2,000	22.7%	18.7%	23.7%
£ 2,500	24.8%	21.6%	28.6%
£ 3,000	26.1%	23.5%	31.8%
£ 4,000	27.8%	25.9%	35.9%
£ 5,000	28.9%	27.3%	38.3%
£ 10,000	39.1%	37.7%	50.7%
£ 50,000	71.2%	70.8%	85.4%
£100,000	77.1%	76.9%	91.7%

UNITED STATES

Revenue Ruling 74-92 concerning the container method of ocean transportation under the German-United States Tax Treaty

The Internal Revenue Service has been requested to define the scope of activities that the Service deems to be included within the exemption contained in Article V of the United States-Federal Republic of Germany Income Tax Convention (Convention), TIAS 3133, 1955-I C. B. 635, with respect to shipping companies using the container method of ocean transportation.

Article V of the Convention provides that profits derived by an enterprise of one of the contracting States from the operation of ships or aircraft, shall be exempt from tax by the other State.

Under the authority granted by Article XIX(2) of the Convention the competent authority of the Internal Revenue Service and the German Federal Minister for Economy and Finance have agreed pursuant to an exchange of letters to interpret the phrase "operation of ships" as that phrase is used in Article V of the Convention in the following manner:

In view of the fact that shipping companies are utilizing the "container" method of ocean transportation, certain ancillary activities connected with container transportation would be included within the provisions applicable to the operation of ships in international traffic.

The specific activities of the shipping company to be included are the following:

1. Providing the containers and special under-carriage for transportation to the port of departure and on board the ship during the ocean transportation;
2. Transferring the containers from the under-carriage or from railway carriages on board the ship;
3. Transportation on board ship;
4. Unloading the containers on special under-carriage or railway carriages in the port of destination;
5. Providing the containers and special under-carriages for transportation from the port of destination to the customer.

Income from the above activities will be treated as income from the "operation of ships," as that term is used in Article V of the Convention, provided that no special charge is imposed on the customer for the ancillary activities mentioned in items 1 and 5 above.

Accordingly, the United States will grant a reciprocal tax exemption to those German shipping enterprises covered under the Convention engaged in such ancillary activities.

* * * IFA NEWS * * *

USA BRANCH

Educational activities during 1973

The educational activities of the USA Branch are conducted by the Scientific and Educational Committee of the Branch and by its Regional Committees. These meetings are very well attended and generate an enormous enthusiasm, indicating that, despite the plethora of meetings sponsored by other organizations, our specialized meetings fill an important need.

Because of the number of our meetings held during 1973, the list set forth below reflects merely the subjects and the speakers or the chairmen of the longer sessions. (Unless otherwise identified, the persons named below are members of the USA Branch.)

1. *Meetings arranged by the Scientific and Educational Committee* (Co-Chairmen: James G. O'Brien and Arthur M. Hayes)

February 2, 1973, New York City
Joint all-day meeting of USA and Canadian Branches
Subject: The Negotiation of a new United States-Canadian Tax Treaty — A discussion of the issues in light of the recent Canadian Tax Reform Act.
Co-Chairmen: David R. Tillinghast
Philip F. Vineberg
(Phillips & Vineberg, Montreal)

December 5, 1973, New York City
Subject: Current Developments in German Taxes
Speaker: Dr. Jakob Strobl
(Strobl, Killius & Vorbrugg, Munich)

2. *Meetings arranged by Regional Committees*

Western Regional Committee (Chairman: Francis J. Walsh)
January 19, 1973, San Francisco
Subject: Recent Judicial Developments in the § 482 Area
Speaker: Claude Hogan
April 6, 1973, Los Angeles
Subject: New Treaty Developments
Speaker: Nathan N. Gordon
May 24-25, 1973, Mexico City
Joint Meeting of USA and Mexican Branches
Co-Chairmen: Dr. Roberto Casas (Mexico)
Francis J. Walsh

Mid-Atlantic Regional Committee (Chairman: Chester C. Hilinski)
January 23, 1973, Philadelphia
Subject: Tax Consequences of Changes in Foreign Exchanges Rates
Speaker: Edward D. Ryan
Law; Tax Problems in
September 18, 1973, Philadelphia
Subject: Changes in the U.K. Tax Law; Tax Problems in U.K.'s entry into the EEC; Pending U.K. Treaty Negotiations.
Speaker: Mark H. Sheldon

Washington Regional Committee (Chairman: Mitchell Rogovin)
May 10, 1973, Washington
Subject: The Current Controversy Over U.S. Taxation of Foreign Income.
Speaker: John S. Nolan

3. *Annual Meeting,* November 16, 1973
Assistant Secretary of the Treasury Frederic W. Hickman, our guest of honor and speaker, delivered an address on "The Tax Systems of Eastern Europe, Application to U.S. Business". This was published in the February, 1974 issue of the Journal of Taxation.

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GERMANY

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by K. Bette. Published by Forkel Verlag, Stuttgart, 1973. 127 pp. Forkel-Reihe Recht und Steuern.
Study of the legal aspects of factoring under German law in comparison to other methods of debt claims financing.

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DIE FREIEN BERUFE IM STEUERRECHT,

by W. Schick. Published by Verlag Otto Schmidt, Cologne, 1973. 18 + 198 pp., DM 38.00.
Study designed primarily for a detailed consideration of the taxation aspects under German tax law arising from the activities of a free profession, with reference to literature, statute and case law.

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STEUERLICHE FOLGEN DER BETRIEBSVERÄUSSERUNG UND BETRIEBSAUFGABE; VERÄUSSERUNG, UNENTGELTLICHE ÜBERTRAGUNG, VERLEGUNG, STILLEGUNG, ÄNDERUNG DER RECHTSFORM,

2nd revised edition, by O. Sauer. Published by Erich Schmidt Verlag, Bielefeld, 1973. 247 pp. Grundlagen und Praxis des Steuerrechts, 11.
Study of the taxation consequences arising from alienation, liquidation and transformation of a business into another entity, with reference to case law and literature.

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WP-VERZEICHNIS 1973; UMFASSEND WIRTSCHAFTSPRÜFER UND WIRTSCHAFTSPRÜFUNGSGESELLSCHAFTEN, SOWIE VEREIDIGTE BUCHPRÜFER UND BUCHPRÜFUNGSGESELLSCHAFTEN.

Published by IdW-Verlag, Düsseldorf, 1973. 64 + 977 pp., DM 38.00. 1973 publication of registered and assimilated accountants, listed in alphabetical order and by region.

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SETTING INTERCORPORATE PRICING POLICIES.

Published by the Business International Corporation, New York, 1973. 95 pp.
Research report concerned with how international companies can approach the task of establishing consistent and managerially effective corporate transfer pricing policies and the procedures for worldwide operations.

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TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES,

4th report. Published in New York, 1973. 206 pp., $8.00.
Report containing papers prepared for the fourth meeting of the Ad Hoc Group of Experts of the United Nations held in Geneva from 4 to 15 December 1972 on royalties, dividends, exchange of information, tax sparing and alternative measures.

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IRELAND

OUTLINE OF THE PRINCIPAL INCOME TAX AND CORPORATION PROFITS TAX RELIEFS FOR THE YEAR 1973-74 HAVING SPECIAL IMPORTANCE IN RELATION TO INDUSTRIAL PRODUCTION.

Published by the Revenue Commissioners, Dublin, 1973. 4 pp. Leaflet No. 4.
Survey of the main relief provisions in Irish income tax law, including depreciation allowances and relief for exports, activities on Shannon Airport, etc.

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ITALY

ACCANTONAMENTI ED ONERI DIVERSI: LORO DEDUCIBILITÀ ALLA LUCE DELLE NUOVE NORME,

by A. Fantozzi. Published by the Banco di Roma, Rome, 1973. 23 pp. Convegno di studi sul tema: il reddito d'impresa, 10/12 dicembre 1973. The deductibility of expenses and provisions.

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COMPONENTI STRAORDINARIE; SOPRAVVENIENZE PASSIVE E PERDITE; GLI ADEMPIMENTI: NORME GENERALI DI CONTABILIZZAZIONE,

by E. Ardito. Published by the Banco di Roma, Rome, 1973. 31 pp. Convegno di studi sul tema: il reddito d'impresa, 10/12 dicembre 1973.
The influence of losses and capital depreciation on business profits.

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GLI ATTIVI CIRCOLANTI: VALUTAZIONE RIMANENZE DI MAGAZZINO E TITOLI; I LAVORI IN CORSO,

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The valuation of inventory.

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Study of valuation and depreciation of business assets.

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GLI OBBLIGHI DEL CONTRIBUENTE: LA DICHIARAZIONE; SUA NATURA GIURIDICA E CONTENUTO FORMALE,

by E. Grassi. Published by the Banco di Roma, Rome, 1973. 20 pp. Convegno di studi sul tema: il reddito d'impresa, 10/12 dicembre 1973.
The nature of the income tax return and the obligations of the taxpayers in this respect is dealt with here.

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Special report providing basic information on air pollution control in Japan. Various comprehensive measures taken by the central and local governments to prevent such pollution and to provide a better and more healthful living environment for the people are covered.

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BELASTINGEN; INKOMSTENBELASTING, VERMOGENSBELASTING, VENNOOTSCHAPSBELASTING,

by A. J. van Soest. 12th ed. by P. den Boer, F. W. G. M. van Brunschot and J. van Soets. Published by S. Gouda Quint—D. Brouwer & Zn., Arnhem, 1974. 436 pp., Hf 39.75.
Introductory textbook explaining the Netherlands individual income tax, net wealth tax and corporate income tax laws, including a text of statutes and reference to case law.

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DE BELASTINGKRANT 1974.

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Informative guide for filing 1973 individual income tax returns.

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HET BELASTING-ABC 1974,

4th edition. Published by Bonaventura, Amsterdam, 1973. 112 pp., Hf 4.90.
Guide providing information for filing 1973 individual income tax returns.

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NEW ZEALAND

LAND AND INCOME TAX HANDBOOK,

4th revised edition by T. F. Paul. Published by Butterworths, Wellington, 1972. 8 + 358 pp., £2.80.
Handbook explaining the land tax, individual income tax and corporate income tax, as well as the PAYE system and payroll tax. Double taxation agreements are discussed. The material

is updated as of the Land and Income Tax Amendment Act 1971.

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NORWAY

NØKKELEN TIL SELVANGIVELSEN FOR 1973,

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1973 individual income tax guide.

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PHILIPPINES

WHERE DOES YOUR TAX MONEY GO IN THE NEW SOCIETY? IT GOES BACK TO YOU IN THE FORM OF ESSENTIAL SERVICES.

Published by the Bureau of Internal Revenue, Manila, 1973. 22 pp.
Illustrated booklet clarifying the purposes of tax payment.

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DIE SPANISCHE WIRTSCHAFT; WIRTSCHAFTSPOTENTIAL UND ENTWICKLUNGSMÖGLICHKEITEN.

Published by the Deutsch Handelskammer für Spanien, Barcelona, 1973. 20 pp., DM 10.00.
Booklet providing information on the Spanish economy in the past, present, and future.

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STEUERRECHT IN SPANIEN,

by G. Frübeck. Published by Verlag Neue Wirtschafts-Briefe, Herne, 1973. 112 pp., DM 21.00.
Monograph explaining the taxes imposed in Spain. Investment policy of foreign investment in Spain with an emphasis on the German investors is dealt with as well as the double taxation treaty between Germany and Spain.

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SWEDEN

ÖVERSYN AV MERVÄRDESKATTEN.
Del I: materiella regler. Published by Finansdepartmentet, Stockholm, 1973. 8 + 241 pp.
First part of a report prepared by an expert committee surveying the Swedish turnover tax on value added as far as the taxable events are concerned. References to the provisions in other European countries and recommendations are made.

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SWITZERLAND

DER INNERKANTONALE FINANZAUSGLEICH,

by H. Hauser. Published by Paul Haupt, Bern, 1971. 227 pp., Sfr./DM 56. Schriftenreihe „Finanzwirtschaft und Finanzrecht", 3.
Study of the innercantonal fiscal relations.

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STEUERENTLASTUNGEN AUF GRUND VON DOPPELBESTEUERUNGSABKOMMEN FÜR DIVIDENDEN, ZINSEN, LIZENZGEBÜHREN, UND PRIVATE PENSIONEN UND RENTEN; ÜBERSICHTEN, WEGLEITUNGEN, FORMULARE.

Published by Eidg. Steuerverwaltung, Bern, 1973. 177 pp., Sfr. 8.00.
Survey of tax relief by virtue of double taxation treaties with respect to dividends, interests, royalties and private pensions and rents, including an explanatory note and forms. The same publication is available in French.

Library International Bureau of
Fiscal Documentation no. B 7750

SWITZERLAND/GERMANY

DOPPELBESTEUERUNGSABKOMMEN DEUTSCHLAND—SCHWEIZ NEBST ZUSÄTZEN UND AUSSENSTEUERGESETZ; HANDAUSGABE

Published by Handelskammer Deutschland-Schweiz, Zürich, 1973. 61 pp.
Text of the double taxation treaty between Germany and Switzerland of August 11, 1971, as well as the law against tax avoidance and other by-laws related to the subject matter. The present

publication is a reprint from a loose-leaf work by H. J. Meyer-Marsilius and D. Hangarter.

Library International Bureau of Fiscal Documentation no. B 7756

UNITED KINGDOM

BRITISH TAX GUIDE.

Published by Commerce Clearing House, Inc., Chicago, 1970. 3 vols.
Loose-leaf publication in three volumes designed for use by firms and tax advisers in the United States and Canada with interest in the United Kingdom income tax system. Vol. 1 contains explanations based on the official law, regulations, with reference to case law and illustrative examples. Vols. 2 and 3 contain texts of statutes, regulations and circulars.

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COMPANY LAW REFORM; PRESENTED TO PARLIAMENT BY THE SECRETARY OF STATE FOR TRADE AND INDUSTRY BY COMMAND OF HER MAJESTY, JULY 1973.

Published by Her Majesty's Stationery Office, London, 1973. 22 pp., 16 p. Cmnd. 5391.
White paper on the reform of company law with considerations to be affected by the developing policies of the EEC. The government intends to publish later this year a separate Green paper which will discuss proposals for the closer involvement of employees in company affairs.

Library International Bureau of Fiscal Documentation no. B 7833

DYMOND'S DEATH DUTIES,

15th edition by R. K. Johns, and R. R. Greenfield. Published by Oyez Publishing, Ltd., London, 1973. 2 vols., £25.00.
Handbook explaining the estate duty law as of January 31, 1973, with reference to case law. Volume I contains an explanatory text; volume II contains a text of statutes, etc. The editions will be kept up-to-date by the periodical issue of supplements.

Library International Bureau of Fiscal Documentation no. B 7797

ELEMENT OF THE LAW OF INCOME AND CAPITAL GAINS TAXATION,

9th edition by C. N. Beattie. Published by Stevens & Sons, London, 1970. 32 + 326 pp., £3.15.
General survey of the United Kingdom income tax, corporation tax and capital gains tax designed as an introductory text.

Library International Bureau of Fiscal Documentation no. B 7348

PRACTICAL TAX SAVING,

2nd edition, by J. A. Nelson-Jones and B. Smith. Published by Butterworths, London, 1973. 26 + 317 pp., £3.80.
Work which confines itself to transactions and situations which confront businesses, their proprietors and employees. The law is stated as of September 1, 1973.

Library International Bureau of Fiscal Documentation no. B 7764

TAXATION KEY TO CORPORATION TAX; FINANCE ACT 1973 EDITION,

5th edition by T. L. A. Graham and P. E. Hughes. Published by the Taxation Publishing Company, Ltd., London, 1973. 317 pp., £2.40.
Annual guide to corporation tax law, explained as of the amendments made by the Finance Act 1973, with full reference to imputation system, distributions and close companies.

Library International Bureau of Fiscal Documentation no. B 7840

THE TAX CREDIT SCHEME AND THE REDISTRIBUTION OF INCOME,

by A. B. Atkinson. Published by the Institute for Fiscal Studies, London, 1973. 10 + 90 pp., £1.50. Publication No. 9.
Study concerned with the objectives of the introduction of the negative income tax proposal contained in the tax credit system papers.

Library International Bureau of Fiscal Documentation no. B 7769

UNITED KINGDOM/EEC

BRITISH TAXATION AND THE COMMON MARKET; A VOLUME OF ESSAYS WITH CONTRIBUTIONS BY J. DODSWORTH, TH. GEORGAKOPOULOS AND K. SCHNEIDER,

by D. Dosser. Published by Charles Knight & Co., London, 1973. 10 + 180 pp., £3.80.
Several essays by experts discussing the various implications which tax harmonization may have for the United Kingdom on the value added tax system, the activity in the field of excise duties,

and the conflict between the Commission's philosophy and British intentions over the corporation tax.

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INDIVIDUALS' FILLED-IN TAX RETURN FORMS, 1974 EDITION; INCLUDING SAMPLE FILLED-IN FORMS, RATE TABLES, WORK SHEETS, CHECK LISTS.

Published by Commerce Clearing House, Inc., Chicago, 1973. 96 pp., $2.00.
Guide for the preparation of 1973 individual income tax returns.

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NEW MEXICO PROPERTY TAXES AND THE 20-MILL LIMITATION; A REPORT TO THE TAX STUDY COMMITTEE AND THE LEGISLATIVE SCHOOL STUDY COMMITTEE IN RESPONSE TO SENATE MEMORIAL 22 OF THE THIRTIETH LEGISLATURE SECOND SESSION, 1972,

by E. B. Gill. Published by the New Mexico Legislative Council Service, Santa Fe, 1973. 8 + 126 pp.

Report presenting a study of an appropriate method of allocating the revenue of the property tax to school districts, municipalities, counties and other political subdivisions.

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Fiscal Documentation no. B 7870

PATHWAYS TO TAX REFORM; THE CONCEPT OF TAX EXPENDITURES,

by S. S. Surrey. Published by the Harvard University Press, Cambridge (Mass.), 1973. 14 + 418 pp., $12.00.
Study of tax expenditures which involve governmental financial assistance given through the tax system rather than through direct methods of the regular budget, i.e. direct aid as a new vehicle for providing for tax reform.

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Fiscal Documentation no. B 7894

STOCK VALUES AND DIVIDENDS FOR 1974 TAX PURPOSES.

Published by Commerce Clearing House, Inc., Chicago, 1974. 175 pp., $4.00.
This book presents stock values and dividends for use in the preparation of state and local personal property tax and federal and state income tax returns.

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* * * ARTICLES * * *

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THE RELEVANCE TO THE EEC OF THE NEW U.K. CORPORATION TAX SYSTEM AND A COMPARISON WITH THE BELGIAN AND LUXEMBOURG COMPANY TAX SYSTEMS*

INTRODUCTORY NOTE

This paper was prepared on 12th February, 1973. The provisions of the Finance Act 1973 and the proposals in the Budget of 26th March 1974 affect some of the points in it and it might be helpful to mention these. It should be noted that matters shown below as effective from 1974 depend on the Budget proposals becoming law.

From 1st April, 1974 the rate of corporation tax is to be 52% and the ACT will be 33/67ths of the dividend (not 3/7ths). In addition, companies will be liable to make an additional payment equal to one half of the ACT due on distributions. Both the ACT and the additional payment will be available for set-off against the mainstream corporation tax. If the additional payment exceeds the mainstream tax it will be refunded in due course.

The basic rate of personal tax is 33% from 1st April, 1974 and an individual receiving a dividend will only get a repayment of tax credit where his own rate of tax is less than 33%.

The Finance Act 1973 allows a parent company to surrender its ACT to a subsidiary company. This is designed to get over the problem mentioned in paragraph 2 (e). It enables unrelieved foreign tax credit (which cannot be carried forward) to be transformed into surplus ACT which can be carried forward and set-off against future mainstream liabilities.

Stamp duty has been altered to fit in with Common Market rules. With effect from 1st August, 1973 it is charged at 1% of capital contributions to companies. From 1st May, 1974 it is proposed to increase the transfer duty on land and buildings to 2% but to exempt transfers up to £15,000.

The Finance Act 1973 introduced rules about the territorial extension of the charge to income tax, corporation tax and capital gains tax. This was designed to tax profits from North Sea oil and gas operations.

1. INTRODUCTION

This paper examines the new U.K. tax system and looks at some of the considerations to be taken into account by an EEC controlled corporation carrying on business in the U.K. or contemplating so doing.

It outlines the new U.K. corporation tax and compares the position when trading through a branch of a foreign company with the position where operations are conducted through a separate U.K. resident company.

* Paper prepared for the Anglo-Belgian-Luxembourg tax seminar organized by the International Fiscal Association in London on May 4 and 5, 1973.

The paper then describes the measurement of taxable profit for corporation tax purposes and goes on to summarise the various other U.K. taxes imposed on companies, the rates of such taxes and their basis of measurement.

Lastly, mention is made of the various forms of relief for trading and capital losses and double taxation relief.

2. THE NEW U.K. CORPORATION TAX SYSTEM

(a) *U.K. Resident Companies*

The essential feature of the new tax system is that U.K. resident shareholders of a U.K. resident company are entitled to a credit for part of the U.K. corporation tax suffered on the profits out of which dividends are paid. The mechanics of the tax system ensure that the company always pays corporation tax of an amount not less than the excess of the tax credit given to its shareholders over the tax credits on any dividends it has received from other U.K. companies. In these respects the new U.K. system has much in common with the Belgian and French tax systems.

The main elements of the new system are:

(i) A company is subject to corporation tax at 50% [1] on all its taxable profits.

(ii) The U.K. recipient of a dividend is entitled to a tax credit equal to 3/7ths of the actual dividend. For an individual this might therefore result (eventually) in a repayment of tax where his own top tax rate is less than 30%. Where the recipient of the dividend is a U.K. company, it can pass on the credit to which it is entitled when paying dividends to its own shareholders.

(iii) The 50% payable by the company is collected in two stages:

(aa) Soon after making distributions to its shareholders it is required to make to the Inland Revenue an advance payment of corporation tax (known as ACT) of an amount equal to 3/7ths of the dividends or other qualifying distribution. (This is equivalent to the credit given to the shareholder, i.e. 30% of the gross dividend). The ACT is paid on account of the corporation tax liability of the accounting period during which the dividend was paid.

(bb) The balance of the company's corporation tax liability on its income for that accounting period. This is payable nine months after the end of the accounting period or later in respect of many long established companies. This balance (known as "Mainstream Corporation tax") is arrived at by deducting from the full amount of the liability that part of the ACT which can be set off against such liability. In a normal case, the full amount of the ACT can be set off but there are many cases where the ACT can be only partly relieved in this way.

This problem is explained more fully in paragraph 2(d). Where the ACT cannot be fully relieved against corporation tax on the profits of the accounting period in which the dividend distribution is made, the unrelieved amount can be carried forward indefinitely or back two

1. It should be noted that the actual rate of tax is fixed in arrear and, therefore, is not yet known but is widely expected to be 50%. Companies making profits below £25,000 will be subject to tax at a lower rate. This lower rate has been ignored in all illustrations contained in this paper.

years (but not before 1.4.73) to be set against corporation tax liabilities of those periods. This could give rise to a repayment of corporation tax paid in an earlier year.

(b) *U.K. Tax position of a U.K. branch of a foreign company*

Where U.K. trading operations are carried on by a U.K. branch of a foreign corporation, the U.K. branch will suffer U.K. corporation tax at 50% of its taxable profits. There will be no credit given to the shareholders in respect of distributions by the company even if such shareholders are resident in the U.K. (This does not, of course, affect the right of a U.K. company shareholder holding 10% of the votes in the foreign company to get double taxation relief in respect of the corporation tax borne on the profits out of which the dividend is paid).

(c) *U.K. tax position of foreign parent*

A foreign company receiving dividends from a U.K. company will be subject to U.K. tax in accordance with the provisions of the Double Taxation Agreement between its country and the U.K. The existing Double Taxation Agreements, to which the U.K. is a party, are being renegotiated, and at the time of writing this paper, none have yet been amended. In the meantime, S.87 (5) FA. 1972 provides that no U.K. income tax will be withheld from dividends paid after 5.4.73. This means that the foreign parent will receive dividends from a U.K. company which has suffered 50% corporation tax on its profits and, like U.K. resident shareholders, has paid its tax liabilities in two instalments (see 2(a)) but, where the position differs, is that a non-resident shareholder will not be entitled to the U.K. tax credit which is given to his U.K. counterpart. It seems likely that this loss of tax credit will be modified in some of the Double Taxation Agreements now being revised and we can perhaps expect to see provisions similar to those in the existing France/U.K. treaty where U.K. residents can, in certain circumstances, obtain the benefit of the avoir fiscal and accordingly claim a repayment of French tax in so far as the avoir fiscal exceeds the French dividend withholding tax on the grossed up dividends (i.e. on the actual dividend plus avoir fiscal). For example, let us suppose that the new U.K./Belgium provisions will give appropriate Belgian shareholders the benefit of the 30% tax credit which is to be given to U.K. shareholders but specifies that there will be a U.K. withholding tax of 15%. The position will be as follows: —

Profit of U.K. Resident Company	1,000
U.K. Corporation Tax	500
Net, paid as dividend	500
Dividend received	500
Credit 3/7ths of dividend	214
Gross dividend	714
U.K. income tax at 15% withheld	107
Credit received	— 214
Repayment from U.K. Revenue	107
Cash Income of shareholder: —	
Net dividend from company	500
Repayment from U.K. Revenue	107
	607

(d) *ACT available for set-off*

A U.K. company which pays little or no foreign tax, which has a full tax charge on its profits (e.g. the tax payable has not been greatly reduced by depreciation deductions for tax purposes which are greatly in excess of book depreciation), which

has not made substantial capital gains and which has a conservative distribution policy can expect to be able to set-off all its ACT against its corporation tax liability. The company which does not fit into this category, and there are likely to be a large number, can expect to find that it is restricted in the amount of its ACT which it can set off. As previously stated, the amount which cannot be fully relieved can be carried back two years or forward indefinitely in order to obtain relief. Where the ACT relief is restricted the company's tax rate on its taxable income in any year could, of course exceed 50%.
The restrictions for set-off are as follows: —

(i) ACT cannot be set against corporation tax payable on Capital Gains (see 2(f) about the taxation of capital gains), e.g.

Trading Profits	600
Capital Gains	400
	1,000
Corporation tax: 50% of 840*	420
Dividend	580
ACT payable	249
Less maximum set-off against corporation tax — (30% of 600)	180
Unrelieved ACT	69

*Only 3/5ths of the Capital Gain is subject to Corporation Tax (see para. (f) for further details).

Corporation Tax paid	
ACT	249
Mainstream (420—180)	240
	489

(ii) The amount of ACT which may be set-off is limited to the amount which together with the distribution to which it relates absorbs the amount of trading income (i.e. excluding Capital Gains) which is subjected to U.K. corporation tax, e.g.

Book profit on trading	2,000
Because of free depreciation for tax, taxable profit	1,000
Corporation tax — 50% of 1,000	500
Net profit distributed	1,500
ACT payable 3/7ths x 1,500	643
Less Maximum set-off against corporation tax — (30% of 1,000)	300
Unrelieved ACT	343

Corporation tax paid	
ACT	643
Mainstream: 500—300	200
	843

(iii) The restriction in (ii) above can be particularly severe in respect of U.K. companies which pay substantial amounts of foreign tax and little or no U.K. tax. This is because the ACT must be set-off against U.K. corporation tax before reduction by foreign tax credits. This produces excess foreign tax credits which are unrelieved and (because they cannot be carried forward) are therefore lost, rather than excess ACT which although unrelieved in any particular year can be carried back for immediate relief or carried forward for future relief. (This is explained more fully in the next para.) e.g.

Foreign profit before tax		900
Foreign tax @ 50%		450
Net foreign income		450
U.K. profit before tax	100	
U.K. tax	50	
		50
Net profit distributed		500
ACT payable 3/7ths x 500		214
Less Set-off against corporation tax on: —		
(a) *U.K. profits* 30% x 100	30	
(b) *Foreign profit* (Max. 30% x 900 = 270) Balance of ACT (being lower)	184	214
Unrelieved		Nil
U.K. corporation tax paid		
ACT	214	
Balance: 50—30	20	
		234
Foreign tax paid		450
		684

(e) *The Interaction of ACT and Double Tax Relief*

The previous paragraph outlines the adverse position of companies with foreign taxed income which have to set off ACT against U.K. income before Double Taxation Relief. To give some measure of relief in circumstances such as these, the company is allowed to set ACT off first against U.K. income and then, in steps, against foreign income BEFORE Double Tax Relief which has suffered the lowest rate of foreign tax. This enables a greater off-set of ACT and, therefore, a smaller immediate liability to corporation tax and, in appropriate cases, can be advantageous. However, since the setting-off of ACT is treated as reducing the effective rate of U.K. tax on any income, this could very often mean that having to set ACT against foreign income has the effect of producing excess unrelieved foreign tax rather than excess ACT available for future relief. In the previous illustration we see that the whole of the ACT has been treated as set off against corporation tax, although 184 of it cannot in fact produce any current or future reduction in U.K. tax cost. All it does is increase the unrelieved foreign tax viz:

Foreign income		900
U.K. tax @ 50%	450	
— ACT set-off	184	
	266	
Less Foreign tax credit	266	
	Nil	
Excess Foreign tax unrelieved		184

It can be seen from these illustrations that the company which pays a reduced amount of U.K. corporation tax because if suffers high rates of foreign tax is in a worse position than a company which has its tax bill reduced because of high tax depreciation allowances. Both pay the same high amount of ACT but the former company has no surplus ACT to carry forward for future relief. This is a complicated point and is perhaps best explained by a further illustration:

U.K. trading profits before tax	100	
Foreign interest (before foreign tax of 30)	300	
Foreign branch profit (before foreign tax of 240)	600	
		1,000

Foreign tax (30+240)		270
Dividend paid		500
ACT payable: 3/7ths x 500		214
Less Maximum set-off against U.K. Corporation tax: —		
(1) Against tax on U.K. profits 30% of 100	30	
(2) Against foreign interest 30% of 300	90	
(3) Against foreign branch profits; maximum 30% of 600 = 180, but restricted to balance of ACT	94	
	—	214
Unrelieved ACT		Nil
Calculation of Mainstream Corporation Tax		
(1) *On U.K. profits*		
100 @ 50%	50	
Less ACT set-off	30	
		20
(2) *On foreign interest*		
300 @ 50%	150	
Less ACT set-off	90	
	60	
Less DTR	30	
		30
(3) *On foreign profits*		
600 @ 50%	300	
Less ACT set-off	94	
	206	
Less foreign tax 240 unrelieved 34	206	
		Nil
		50
Total U.K. tax paid: 214 + 50		264

(f) *Capital Gains*

Under the new system of corporation tax it is expected that only 60% of a company's capital gains will be included in its total profits for the purpose of corporation tax. This means that a company will, in effect, be taxed at 30% on its capital gains. Capital losses cannot be set against trading profits — they can only be set against capital gains of the same or subsequent years. Great care has to be taken to ensure that loans qualify for capital losses if the loan becomes worthless. Generally the loan must be on security, under a deed and transferrable to be absolutely safe. Any ACT payable cannot be set off against the corporation tax on capital gains.

(g) *Special Provision relating to Close Companies*

A close company is one which, very broadly, is directly or indirectly controlled by 5 or fewer persons. The definition of "control" is very wide.

There are many additional tax provisions which are designed to prevent tax avoidance by the shareholders in these companies.

The new tax system has the effect of increasing the tax cost in these companies much more than in the larger companies. This is because they are invariably low distributors and are thus affected more by the increase in the rate from 40% to 50% than by the reduced cost of dividends under the new system. To give some relief it is intended that companies with profits not exceeding £ 15,000 per annum will be taxed at 40%; this lower rate will not apply where an organisation has split its trade into separate companies — the £ 15,000 being divided by the number of companies in the group. Another effect of

the increased rate (for those companies with profits exceeding £15,000) is that it is less desirable than hitherto to retain profits in the company and accordingly the close company tax rules have been somewhat eased.

3. CORPORATE STRUCTURE CONSIDERATIONS

(a) *Where there is an existing U.K. subsidiary company*

Where the corporation already has a subsidiary company in the U.K. it might well be useful to be able to consolidate the results of the two companies for tax purposes. e.g. the existing subsidiary company might be quite profitable whereas the new company could perhaps be expected to make losses for a few years before becoming profitable. Losses could well arise for tax purposes because of the high first year tax depreciation allowances. In order to get immediate tax relief in respect of such tax losses, the new activity could be undertaken by the existing subsidiary company, or alternatively, the new activity could be carried out by a separate company which is a subsidiary of the existing U.K. subsidiary company. This would establish a "group" for U.K. tax purposes thus enabling the losses of one company to be set off against the profits of the other. There is no U.K. corporation tax on the dividends paid by a U.K. subsidiary company to its U.K. parent. Even the ACT can be avoided if the two companies make an election to the Inspector of Taxes. If both U.K. companies are direct subsidiaries of a non-resident company then the profits or losses of the two companies cannot be consolidated for tax purposes.

(b) *Where there are subsidiaries in other EEC countries*

Assuming the parent organisation is a Belgian company, there could be circumstances when it would be beneficial for it to hold its shares in a U.K. subsidiary via, for instance, its French or Dutch companies.

As I said before, most of the double taxation agreements with the U.K. are being re-negotiated so the circumstances ruling at the time the decision is required must be carefully observed. One of course also has to consider the taxation of dividend income from the U.K. in the hands of a French or Dutch company, and the taxation position of the onward transmission of that dividend income to the Belgian parent company. It could be that the income does not have to flow back to Belgium but can instead be re-invested say from the Netherlands.

(c) *Tax Haven Parents or Head Offices*

If a company resident in a tax haven has a branch in the U.K., then the branch will be taxed on the basis already explained (see para. 2(b)). Where the tax payer will lose out in a position like this is that there will never, as far as one can see, be a tax treaty between a tax haven country and the U.K. In these circumstances the U.K. Revenue Authorities are more likely to scrutinise carefully the trading income of the U.K. branch of the tax haven company.

4. MEASUREMENT OF TAXABLE PROFIT FOR CORPORATION TAX

(a) *Comparison with Belgium and Luxembourg tax systems*

The U.K. system differs from the Belgian

and Luxembourg systems on the following important points: —

(i) There is usually no limit on the rate of interest deductible (see (f) below).

(ii) Depreciation in the Accounts can be (and usually is) widely different from that used for tax purposes (See (b) below).

(iii) Foreign income taxes are invariably allowed as a credit against U.K. tax rather than as an expense.

(iv) Donations and payments to Charities and Educational bodies are not normally deductible.

(v) When calculating the allowable bad debt provision, there is no overall restriction to a percentage of profit as seems to be the case in Belgium.

(vi) No deduction can be claimed for a provision for future expenditure or the repair of industrial buildings or other depreciable assets. The accounts of a company will often provide for such expenditure but no tax allowance can be given in respect thereof.

(vii) Most entertaining expenses are disallowable.

(viii) Tax relief in respect of losses is very much wider in the U.K. than in Belgium (See 6 below).

(ix) No depreciation deduction can be claimed in respect of buildings which are not industrial buildings, or in respect of assets such as investments, goodwill etc.

(x) No allowance is given for company formation expenses, cost of issuing new share capital etc.

(b) *Tax Depreciation*

Depreciation allowances for U.K. tax purposes are called "Capital allowances". This general term embraces first year allowances, annual writing down allowances and balancing allowances. A withdrawal of excess depreciation allowed when an asset is sold is known as a Balancing Charge. A Balancing Charge thus only claws back depreciation over-allowed, so that if an asset is sold at a price in excess of its original cost, there would be a Capital Gain on such excess (taxed at 30% instead of 50%).

The first year allowances are now 100% of the expenditure on plant and machinery (including commercial vehicles) during the accounting period. The taxpayer can disclaim all or part of the first year allowances if he so wishes — in which case the 25% annual writing down allowance (declining basis) will be given. The first year allowance is given even if the asset is not in use at the end of the accounting period whereas the asset must be in use for the annual allowance to be given. Manoeuvres within a group designed to produce first year allowances on assets owned by associated companies are prevented by a rule which stops first year allowances being given on second hand plant and machinery purchased from related companies. First year allowances cannot be claimed in respect of motor cars, but the 25% annual writing down allowance is available in this case.

A Balancing Allowance is given where, on the disposal or scrapping of an asset, its depreciated tax value exceeds the proceeds of sale.

Balancing Allowances and Balancing Charges are not given in respect of disposals after 27.10.70. in respect of assets which were part of a pool of assets. In such case the sale proceeds are merely deducted from the total value of the pool. Capital Expenditure on Industrial Buildings qualifies for an Initial Allowance

of 40% together with annual allowance of 4% (straight line).

(c) *Deductible expenses*
In general all expenses incurred wholly and exclusively for the purpose of the business of the company are deductible. Apart from the recalculation of fixed asset depreciation (as described in (b) above) the main expenses which are not deductible relate to entertaining, charitable donations, company formation costs, and expenditure which is correctly regarded as capital expenditure. Charges in the Profit and Loss Account for reserves and provisions will also be disallowed except in the case of provisions for liabilities known to exist at the Balance Sheet date, but the amount of which cannot be determined precisely. Disallowances can also be made by the tax inspector to the extent that costs are inflated (or income is reduced) under certain transactions with associated companies. This applies in particular, where the effect is to reduce U.K. taxable income by effectively transferring profits to non-residents.
Where a foreign company has a branch in the U.K. then care must also be taken with expenses charged by the Head Office to the branch — clearly the Inspector of Taxes will be looking at such items fairly closely. It could make things easier if the company did not carry out any other activities and charges to the U.K. branch were made by some other non-resident subsidiary rather than by the Head Office. The double taxation treaties between the U.K. and the non-resident's country will have to be examined carefully to ensure the best overall results are obtained for the group. (It could be that certain types of trading activity can be carried out in the U.K. without actually attracting U.K. tax. This is, of course, only of real value if, by escaping U.K. tax, the foreign company concerned does not suffer the same or larger amounts of tax elsewhere. Naturally, great care would have to be taken when establishing this form of operation).

(d) *Reserves and Provisions*
The system of tax free reserves which is common in many European countries does not exist in the U.K. Provisions will only be allowed if they are in respect of known liabilities existing at the year end or for specific provisions for bad or doubtful debts. The transfer of a taxed reserve or provision (which is no longer required) to the credit of Profit and Loss Account will, of course, be tax free.

(e) *Valuation of Trading Stock*
Generally, inventory is valued at cost or net realisable value. What precisely is meant by cost is debatable and usually some agreement is reached with the Inspector as to the correct basis in any particular case. The main point of importance is that the valuation of stock must be on a consistent basis from year to year.

(f) *Interest payable*
Interest payable is normally deductible in full. Disallowances are only likely to arise where the interest is in reality a dividend, or where an excessive sum is paid to an associated company (particularly when that associated company is not resident in the U.K.). It will also be difficult to obtain a deduction for interest charged by a foreign head office to its U.K. branch; in such a case it would be preferable to arrange that the loan advance comes from an associated company rather than via the head office. Interest paid from the U.K. to Belgium will normally be subject to 15% U.K. withholding tax. There would

be no U.K. withholding tax if the interest was paid to a Luxembourg, Dutch or German company. An organisation operating throughout Europe might therefore be able to take this into account when arranging the supply of foreign finance to its U.K. company.

A point worth noting in connection with Eurobond borrowings is that provided the Loan Agreement is carefully drawn up, no U.K. withholding tax is deductible from interest paid to non-residents where the loan money is used for the purposes of the U.K. company's trade carried on abroad and the interest is paid abroad. This concession also applies where the money is used for the purposes of the company's U.K. trade provided the interest is paid abroad in a foreign currency. This provision together with the often more generous double taxation relief provisions of the U.K. make it advantageous to conduct international trading operations through U.K. companies (this must be weighed against the ACT disadvantages, if any, outlined in para. 2(e)).

(g) *Franked Investment Income and Group Income*

Dividends received by companies from other U.K. companies are known as Franked Investment Income. The recipient is not subject to any further taxation thereon and can utilise such income to "cover" its own dividend payments (i.e. no ACT will be due to the extent dividends paid are in effect the re-distribution of dividends received). In a group of companies, allowance is made for subsidiaries to pay dividends to their parent companies gross and without having to account for ACT at the time of payment — these distributions are called group income in the hands of the recipient company.

(h) *Relief for Losses*

The U.K. system of granting relief for tax losses is one of the most generous in the world, although some of the loss reliefs which led to tax avoidance have now been stopped. Briefly trading losses in respect of trades carried on on a commercial basis can be carried forward indefinitely, they can be set against any income of the same or previous accounting period, or they can be set against the profits of any other company in the same group (75% common U.K. ownership) for the same accounting period. Capital losses can only be set against Capital Gains of the same company and of the same or subsequent accounting periods. However, trading losses can be set against capital gains of the same year or of the previous year but not against capital gains of a subsequent year — this applies to the same company or to an associated company under group relief.

5. SUMMARY OF OTHER TAXES

(a) *VAT*

This is the subject of one of the other lectures so it need not be explained here.

(b) *Customs and Excise Duties*

These cover import duties and duties such as mineral oil taxes (known in the U.K. as the hydrocarbon oil duty), duty on tobacco, wines and spirits, etc. — these are broadly similar to duties imposed in the EEC.

(c) *National Insurance*

This is really a payroll tax. The employer and the employee each contribute. The money is used to pay sickness, retirement, unemployment, etc. benefit.

(d) *Stamp Duty*

This is a tax on transactions and is generally very small. The transfer of property, such as land and buildings and shares in companies, is subject to stamp duty at 1% of the value of the property transferred. Stamp Duty is not payable where property is transferred between parent and subsidiary companies provided there is 90% common ownership. There is also no stamp duty on the renouncing of bonus shares or rights issues for a short period after their issue. This is, therefore, frequently a good way to transfer shares in private companies free of stamp duty. The issue of new shares by a company is not subject to stamp duty, although an increase in nominal capital (often a pre-requisite to the issue of new shares) is subject to stamp duty at the rate of 0.5%.

(e) *Real Property Tax*

This tax is known as "General Rate" and is the only material form of "local" taxation in the U.K. The tax is based on the notional annual rental value of U.K. land and buildings (known as Rateable Value). Each district values its properties for rating purposes and imposes a tax at a rate per £ of Rateable Value. If the local authority needs more income it will increase the rates in the £ (the experience of recent years is that this increases each year) but is usually unable to increase the Rateable Value unless the property has been improved in some way. The Rateable Values are themselves increased periodically when the notional annual values are becoming outdated (e.g. there might be an interval of say 15 years between revaluations). These revaluations are done on a country wide basis and are decided upon by the central Government.

6. FOREIGN PROFITS AND DOUBLE TAXATION RELIEF

A U.K. resident company is subject to U.K. tax on its world-wide income. However, the U.K. has a system of double taxation relief which entitles U.K. residents to credit foreign taxes payable on foreign source income or capital gains against the U.K. tax payable on the same income or gains.

Double taxation relief is given separately for each source of income and therefore some U.K. tax could be payable even though the total foreign taxes (from 2 or more sources) exceed the total U.K. tax thereon before double taxation relief e.g.

	Source A: Profit	100	
	Tax	60	
			40
	Source B: Profit	100	
	Tax	40	
			60
			100
U.K. Tax	Source A:		Nil
	Source B: —		
	50% of 100		50
	Less DTR		40
			10

The excess foreign tax on source A cannot be offset against the deficiency of foreign tax in source B. So although the U.K. system of double taxation relief is on the whole quite generous, it is not as good as the U.S. system (and in some cases the French system) which allows this kind of aggregation of foreign taxes. Nor is it as good as the Dutch (and again in some cases the French) system which simply exempts foreign source income which has suffered foreign tax from home country taxation.

Foreign taxes are available for credit against U.K. tax either unilaterally or under the terms of double taxation agreements (which will specify the taxes available for relief). If the U.K. company holds more than 10% of the voting power (or where it held 10% but for reasons beyond its control the holding is reduced below this level), in addition to obtaining relief for any dividend withholding tax, it will be able to claim relief in respect of any foreign tax on the profits out of which the dividend was paid.

For Double Taxation Relief purposes, the rate of foreign tax is calculated by dividing the qualifying foreign taxes by the net profit before tax. Thus the foreign tax rate is affected by such things as accelerated tax depreciation not provided for in the books, tax free reserves, etc.

7. CONCLUSION

It is difficult to draw up any general conclusions about whether or not it is preferable to operate in the U.K. through a U.K. company or a branch of a foreign company or indeed whether it is preferable to conduct operations in some other country instead of the U.K. It could, for example, be beneficial for capital intensive industry to be established in the U.K. and to reap the advantages of the very generous capital allowances system, or it might be a good idea (because of good double taxation relief) to use a U.K. company as a holding company for conducting operations in other parts of the world. A satisfactory decision can perhaps only be taken by examining each case on its own merits.

TAXATION IN LEBANON: A SUMMARY

LUC DE WULF *:

I. TAXATION ON INCOME AND PROFITS

The income tax in Lebanon is purely schedular, which means that the law distinguishes between different sources of income and applies a distinct tax rate to each one of them without aggregation of these incomes.

1. *Tax on profits from commercial and noncommercial enterprises*

Applies to the profits that arise from occupations, commercial, industrial and vocational establishments, liberal professions and from any business producing income not subject to another income tax.

Partnerships, natural persons and other legal forms of businesses, whether resident in Lebanon or not, are taxed on their income originating in the country.

The *tax base* is the total net receipts of the enterprise minus all charges and expenses necessary for the running of the business, and, within limits, all contributions to officially recognized philanthropic, social, educational, or sport institutions. Corporations, industrial enterprises, banks, exporters and importers, hotels, retail dealers, that employ more than four persons, and some other enterprises are taxed on their real profits as shown in their balance sheets and income statements.

These business documents are required to comply to some — vaguely determined — bookkeeping norms. The tax basis of the enterprises that are not to be taxed on their actual basis but provide sufficiently adequate information on their turnover is determined by applying predetermined coefficients to gross receipts. A list of such coefficients is provided by decree (e.g., 15 per cent for carpet dealers, 50 per cent for architects, 40 per cent for pimps and prostitutes). Those enterprises that do not have dependable accounts of their turnover — mostly small firms — are taxed on their estimated profits. That is determined by a committee whose estimate is based on external indicators.

Table 1 gives the distribution of the number of taxpayers and taxes assessed on actual profits, on profits estimated according to the "turnover" method and simply estimated profits. The data refer to 1967, the only year for which they are available. Table 1 shows that most of the taxes (93 per cent of total) are obtained from those taxpayers assessed on their real profits (33 per cent of total). While the "turnover" method applies to about 43 per cent of the taxpayers, it yields only 6 per cent of the tax assessments. Taxpayers assessed on their "estimated profits" constitute one fourth of all taxpayers but yield less than one per cent of the total profit tax assessments. Great administrative effort seems thus to be devoted to a large number of taxpayers from which only a negligible amount of revenue is obtained.

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TABLE 1.

Income Tax on Profits, Assessment by Type of Assessment, Lebanon, 1967

(Amounts in thousands of Lebanese pounds) [1])

Type of Assessment	Number of Taxpayers		Taxes Assessed Plus Penalties	
	Total	In per cent	Total	In per cent
Real profit	10,165	33.0	45,690	93.3
"Turnover	13,101	42.5	2,869	5.6
Estimated profit	7,543	24.5	387	0.8
Total	30,809	100.0	48,387	100.0

[1]) US $ 1 = LL 2.4 as of February 1974.

For the computation of the tax base, individuals are allowed a dependency allowance of LL 1,500 for a bachelor; of LL 2,400 for a married person without children and LL 3,000 for a married person with children. Individuals taxed on estimated profits are allowed a deduction of LL 2,400 whatever their family status. The *tax rate* differentiates as to whether the enterprise is of a commercial/industrial nature or not. Separate decrees list various activities and professions in either of these categories. The basic tax rate structure is progressive (Table 2). In addition to this tax two surcharges are levied. First, a 15 per cent surcharge is levied for the municipal budgets. Secondly, a reconstruction surcharge of 3 per cent is imposed when the amount of tax exceeds LL 1,000, and is due on the whole tax amount.

Table 3 gives the breakdown of tax assessments for 1967 by type of taxpayer. Individuals, while constituting the overwhelming majority of the taxpayers (97 per cent) yield only one fourth of total tax assessments with average tax assessments of LL 381. Assessments on the national and foreign corporations, on the other hand, who make up only 1.7 per cent of the total population of taxpayers constitute about 75 per cent of the profits tax.

Exemptions for companies promoting industrial development

Industrial enterprises, established in the country between the beginning of 1961 and the end of 1967 are exempted from taxation of their profits for a period of six years. To qualify for the exemption the enterprises should (1) have an investment of at least LL 1 million, (2) anticipate a payroll of at least LL 200,000 (excluding the excess in individual salaries over LL 15,000), (3) manufacture products that were not produced in Lebanon prior to January 1, 1971. The conditions stated under (1) and (2) shall be reduced by 50 per cent, and the exemption period raised to ten years, should the new industry be established in a region that the Government wishes to develop.

2. *Taxes on wages, salaries, and pensions*

Income tax is to be paid on wages, salaries and pensions paid to individuals, whether resident or not. The income base includes remuneration, prizes, bonuses and benefits in cash or in kind. Deductions for dependents are the same as for the business profit tax, i.e., LL 1,500 for a bachelor; LL 2,400 for a married individual and LL 3,000 for a married individual with children. Dayworkers are allowed a deduction of LL 8 irrespective of their family status. Other allowable deductions include the contribution to pension funds, the allowances paid to cover the expenses incurred in the process of earning the income and the family allowances payable under the Social Security Law.

Several categories of remuneration are exempted from the income tax. Among

TABLE 2.

Tax Rates on Profits from Industrial, Commercial and Non-Commercial Occupations

Income Bracket	Industrial and Commercial Occupations	Non-Commercial Occupations
Under 5,000	5	4
5,001 to 15,000	7	5
15,001 to 25,000	9	7
25,001 to 35,000	13	10
35,001 to 50,000	17	13
50,001 to 75,000	22	17
75,001 to 100,000	27	22
100,001 to 250,000	32	27
250,001 to 750,000	37	32
750,001 and over	42	37

those are the remunerations of clergymen, salaries of the military staff, wages of agricultural laborers, domestic servants, nursing personnel and servants of hospitals, orphanages, asylums.

An inspection of Table 4 which gives the marginal tax rates applicable on wages and salaries, indicates that the prevailing rates are moderate and much below the rates applied on business profits. Hence many businessmen prefer their incomes to be taxed as wages and salaries rather than as business profits. They often make the necessary arrangements to that effect.

Taxes assessed on wages and salaries amounted in 1967 to about LL 9.7 million, or less than 20 per cent of the taxes assessed on business profits.

TABLE 3.

Income Tax on Profits. Assessments by Category of Taxpayers, Lebanon, 1967.

Type of Taxpayers	Taxpayers		Taxes Assessed Plus Penalties		Average Tax
	Total	Per cent	Total	Per cent	Assessed
Individuals	29,895	96.9	12,253	25.1	381
Foreign corporations	161	0.5	16,114	32.9	88,753
National corporations	365	1.2	19,962	40.8	52,671
Non Residents	424	1.4	616	1.2	270
Total	30,809	100.0	48,947	100.0	1.473

TABLE 4.

Tax Rates on Wages, Salaries and Pensions

Income Bracket	Marginal Tax Rate
Less than 4,800	2
4,801 to 8,400	3
8,401 to 12,000	4
12,001 to 24,000	5
24,001 to 36,000	6
36,001 to 48,000	9
48,001 to 60,000	12
60,001 to 75,000	15
75,001 to 90,000	18
90,001 and over	21

3. *Tax on movable capital*

A 10 per cent tax, plus a 3 per cent surcharge on taxes exceeding LL 1,000 and due on the whole amount of the tax, is due on following sources of income.

i. Income from shares.

ii. Directors' remunerations taken from the profits.

iii. Amounts payable to shareholders for attending general meetings.

iv. Funds taken from the reserve or profits for the redemption of shares before the cessation of business.

v. Reserve funds and profits distributed as free shares or otherwise.
vi. Interest on and income from bonds and loans issued by the State, Municipalities, public and private bodies and establishments, and companies.
vii. Prizes and allowances payable to creditors and bond bearers.
viii. Interest on and income from secured debts.
ix. Interest on and income from civil loans and preferential and ordinary debts, unless arising from commercial transactions.
x. Interest on and income from securities, cash deposits and current accounts.
xi. Income from foreign shares and bonds.

Exemptions are, however, provided for a certain number of incomes, the most important of which are:

i. Dividends on shares of Lebanese joint stock companies and all other sums distributed, if paid out of profits already subjected to the tax on business profits.
ii. Amounts refunded to creditors and shareholders, if taken from other than the profit and loss account or the reserve fund.
iii. Interest on saving accounts at banks. (Only individuals and non-profit institutions are allowed to have saving accounts).
iv. Income from Lebanese Treasury bonds.

The amount of taxes collected from this source has always been very limited.

II. PROPERTY TAX

This tax is due on the total net income arising from buildings, constructions and lands considered by the law as buildings. The net income is obtained by deducting some operational costs from the rental income shown in the rental contract that must be registered in the municipality concerned. The administration determines the rental income in those cases where no rental contract is available or where the rent mentioned is considered to be understated or where the owner occupies the property himself. Buildings owned by the State, municipalities, public institutions or diplomatic missions are exempted from this tax. Places of worship, cemeteries and buildings of nonprofit organizations are also exempted.

The tax liability is computed by taking 8 per cent of the net yearly revenue of each building. In addition to this proportional tax, a progressive tax is levied on any amount of the yearly net total revenue of all built up property owned by one assessee in Lebanon that exceeds LL 20,000. The progressive rate is as follows:

On income from	
20,001 to 50,000	3 per cent
50,001 to 100,000	5 per cent
100,001 to 200,000	8 per cent
200,001 to 400,000	11 per cent
400,001 and over	15 per cent

In addition, a municipal tax is levied in the amount of 3 per cent of the net taxable income plus 10 per cent surcharge on the progressive tax. Furthermore, a reconstruction tax is due, which amounts to 3 per cent of the tax when the amount of the tax exceeds LL 1,000, and is due on the whole amount of the tax.

III. COMMODITY TAXATION

a. *Taxation of internationally traded commodities*

The revenue raising function of customs

duties appears to have been historically its only function. It is still of utmost importance (about 40 per cent of total current budget tax revenue over the period 1970 -72, see Appendix), yet, in recent year, they have increasingly been used to protect local industry.

Most customs duties are ad valorem; where specific rates are used they are frequently accompanied by a minimum ad valorem rate. Exemption from customs duties is provided for strict essentials, raw materials, and machinery. The structure of the customs duty consists of ordinary duties, maximum duties and conventional duties. Maximum duties are set at twice the rate of the ordinary duty, with the provision that they must be not less than 25 per cent of the value of the imported product. They were, until recently, only applicable to imports from Japan.

Conventional rates and provisions for some custom exemptions are set by trade agreements. A certain number of bilateral agreements, in addition to the multilateral agreement with countries from the Arab League, are in effect. These conventional rates are lower than the ordinary rates which apply to imports from all other countries. The rates of the customs duties undergo frequent changes.

b. *Selective excise taxes*

Lebanon does not have a general sales tax and, in addition to its customs duties, taxes only tobacco, alcoholic beverages, petroleum products, salt, and cement.

Tobacco products are imported and/or produced by the "Regie Co-Interesse des Tabacs et Tombacs" which operates under a monopoly granted by the Government. The original Regie concession ended in 1966, and a special agreement now regulates its operation. Recently the export of domestically grown tobacco was a losing operation for the Regie, which has to make up for these losses with the profits from producing and selling cigarettes. In these circumstances, no exact tax rates on both imported and domestically produced cigarettes are available. For 1969, this tax was estimated as 62 per cent and 25 per cent of the selling price of imported and domestically produced cigarettes respectively.

Taxes on *petroleum products* are payable by the importer or the refineries, and are comparable with those levied in Western Europe.

Excise taxes on *alcoholic beverages, cement,* and *salt* are moderate and constitute only minor revenue sources.

IV. OTHER TAXES

a. *Succession and gift taxes*

A duty payable on all rights and property, movable and immovable, devolving to others by way of will, inheritance, gift or any other manner without payment of a consideration equivalent to the real value of the right or property devolved. This duty is payable on all property in Lebanon thus transferred to a Lebanese or foreigner, on all property outside Lebanon transferred to a Lebanese residing in Lebanon or to a foreigner residing in Lebanon, unless an agreement exists between Lebanon and the country concerned to prevent double taxation.

The taxable base is reduced by LL 25,000 for descendants, spouses and parents, by LL 10,000 for descendants (other than parents), brothers and sisters, and by LL 5,000 for other heirs. Gifts not exceeding LL 1,000 are exempted from the gift tax if given to individuals. This exemption is LL 10,000 for grants to nonprofit institutions.

The tax rates for gifts and successions are identical. They are progressive and vary with the degree of kinship between the donor and donee or between the descendant and the heir. The rates, for instance, range between 3 per cent and 12 per cent for transfers between descendants and spouses, between 6 per cent and 24 per cent for transfers between parents, and between 35 per cent and 50 per cent for transfers between not related assessees. In addition, a 10 per cent surcharge is levied for the benefit of the municipal budgets.

b. *Stamp duty*
A stamp duty is payable on deeds and writings as specified by various decrees. The amount of the duty varies with the nature of the deed and/or the amount mentioned.

V. SOCIAL SECURITY CONTRIBUTIONS

The contributions to finance the operations of the social security in Lebanon are calculated as a percentage share of the wages and salaries of the employees.

a. *End of service indemnity scheme*
Contributions are payable by the employer and constitute 8.5 per cent of the total emoluments of the employee (including overtime, benefits in kind and bonuses).

b. *Family allowances scheme*
Contributions are payable by the employer and constitute 7.5 per cent of the total emoluments of the employee. In small vocational establishments, the monthly rate is LL 6 per worker. The family allowances paid by this scheme are LL 15 for the wife, and range between LL 10 and LL 45 for between one and five children. Allowances are limited to five children.

c. *Health scheme*
Contributions are payable both by the employer (5.5 per cent of total emoluments) and by the employee (1.5 per cent of total emoluments). The maximum amount of an employee's income in respect of which contributions are payable is LL 9,000 per annum, LL 750 per month, LL 175 per week or LL 25 per day.

SOURCES

1. Raja, S. Himadeh, *The Fiscal System of Lebanon* (Khayat: Beirut, 1961). It is to some extent outdated but gives a good overview of the whole fiscal system — revenue trends as well as expenditure trends.

2. *Fiscal Guide on Lebanon.* Compiled as of October 1, 1973 by SABA & Co, Beirut, Lebanon. Excellent and detailed up-to-date survey of the direct tax system.

APPENDIX

Revenue of the General Budget, Lebanon, 1970-72

Nature of the Tax	Amounts in Millions of Lebanese Pounds			In Per Cent of Total		
	1970	1971	1972	1970	1971	1972
Tax on income and profits	78.0	82.1	88.2	15.5	13.6	12.4
Property tax	47.9	56.3	50.7	9.5	9.4	7.1
Import duties	189.4	250.1	305.7	37.6	41.6	43.0
Selective excise taxes	92.4	98.4	124.0	18.4	16.4	17.5
of which gasoline	(64.5)	(73.6)	(78.9)	(12.8)	(12.2)	(11.1)
tobacco	(18.9)	(15.5)	(32.8)	(3.8)	(2.6)	(4.7)
cement	(5.1)	(4.9)	(8.1)	(1.0)	(0.8)	(1.1)
alcoholic beverages	(2.0)	(2.2)	(2.2)	(0.4)	(0.4)	(0.3)
other	(1.9)	(2.2)	(2.0)	(0.4)	(0.4)	(0.3)
Succession and gift tax	8.5	5.6	5.7	1.7	0.9	0.8
Stamp duty and registration fees	69.6	88.1	108.9	13.8	14.6	15.3
Other taxes	17.7	21.2	27.3	3.5	3.5	3.9
Total tax revenue	503.6	601.8	710.5	100.0	100.0	100.0

Source: Lebanon, Ministry of Finance, Closed Accounts for the years 1970 tot 1972.

Y. C. JAO *:

STREAMLINING HONG KONG'S TAX SYSTEM

Two years ago the present writer, in an article in this Bulletin, reviewed Hong Kong's tax system, and analyzed the trends in tax revenue. [1] Although the salient features of this system — the adherence to "schedular taxes" and "source principle", the exemption of a wide range of income and wealth from taxation, and a relatively low standard tax rate — remain unchanged, there have been since then a number of adjustments and reforms designed to make the tax system more efficient and easier to administer. This article summarizes these changes, and evaluates their economic significance.

CHANGES AND ADJUSTMENTS IN THE TAX SYSTEM

(1) *Personal Allowances*

As mentioned in my previous article, although the basic allowances for the taxpayer and his spouse and children remained unchanged, additional allowances for dependent parents, working wife, and taxpayers within the lowest income brackets were granted in 1970. In 1973, the Inland Revenue Ordinance was amended to provide for a package of adjustments that included (a) an increase in personal allowances for the taxpayer and his wife from HK $ 7,000 to HK $ 10,000 each; [2] (b) an increase in allowance for the first child from HK $ 2,000 to HK $ 3,000, and of the maximum allowance for dependent children from HK $ 9,500 to HK $ 10,500; (c) cancellation of lower income relief, selective allowances for working wives and dependent parents, and life assurance premium payments; (d) extension of child relief to parents of children of any age not employable due to mental or physical incapacity, and for whom medical certificates are produced. The main justification for these adjustments was that the former lower income relief had the effect of relieving twice as many single persons (who did not really need it) as married persons in the net chargeable income bracket. An increase in the personal allowances would be more effective, as it would relieve the burden of more married taxpayers, and result in a saving of administrative time and effort. A similar reasoning applied to the abolition of special allowance for the working wife, since the non-working wife, who performs the household drudgery, should also be entitled to relief. In addition to personal allowances, a maximum allowance of 10% may be deducted from taxable income for charitable donations.

(2) *Tax Rates*

As also described in the previous article, in 1972 the sliding scale for Salaries Tax and those taxpayers who chose personal assessment was changed in such a way that the marginal rates were reduced, and the

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1. Y. C. Jao, "Recent Changes and Trends in Hong Kong's Taxation", *Bulletin for International Fiscal Documentation,* Vol. XXVI, July 1972.

2. Since February 13, 1973, the Hong Kong dollar has been pegged to the U.S. dollar at the central rate of US $ 1 = HK $ 5.085.

maximum rate would not be reached until the 12th step of income increment. In 1973, this scale was again revised, but in the opposite direction. The marginal rate was increased from 2.5% to 5% per income increment, but the number of platforms before the maximum rate of 30% applied was reduced from 11 to 5. The total tax payable, however, is still subject to the maximum limit of 15% standard rate on gross income less expenses and charitable donations. This is shown in the following table.

TABLE I

Sliding Scale for Salaries Tax and Personal Assessment

(in Hong Kong dollars)

Old Scale

2.5%	(on the 1st $ 5,000)
5 %	(on the next $ 5,000)
7.5%	(-do-)
10 %	(-do-)
12.5%	(-do-)
15 %	(-do-)
17.5%	(-do-)
20 %	(-do-)
22.5%	(-do-)
25 %	(-do-)
27.5%	(-do-)
30 %	(on the remainder)

New Scale

5%	(on the 1st $ 10,000)
10%	(on the next $ 10,000)
15%	(-do-)
20%	(-do-)
25%	(-do-)
30%	(on the remainder)

(both subject to a maximum average rate of 15% on gross income less approved expenses and charitable expenses, but before personal allowances are deducted)

There are two kinds of tax on real property, namely property tax and "rates". The former, levied on the assessed capital value of the property at the standard rate of 15%, used to be applied to non-owner occupied properties in the urban areas only, and not the suburban areas known as the New Territories. As a result of the rapid development of these areas, the government decided to introduce property tax in these areas as well with effect from April 1, 1974. Concomitantly, the "rates" in the New Territories, which are a kind of tax for local services such as police, water, street lighting, fire prevention etc., have also been raised from 11% to 15% of the annual letting value of real property. Thus, the New Territories are now placed on an equal footing with the urban areas as far as property taxation is concerned. However, a grace period of four years is allowed for the newly rateable areas, during which the previous rate of 11% will continue to apply. As from the current 1974-75 fiscal year, the "rates" will also be collected from public housing estates leased to low-income groups.

There is also a sliding scale for estate duty, which used to range from 5% to 40%. The maximum marginal rate has however been successively reduced since 1967 to only 15% (equivalent to the standard rate) at present. Recently, the exemption limit for the estate duty has been further raised from HK $ 200,000 to HK $ 300,000.

(3) *Interest Withholding Tax*

The interest withholding tax, charged at the standard rate of 15% on interest derived from bank deposits, remains not only controversial, but also has wider implications for Hong Kong's position as a financial centre. In 1968, the Bank of

America together with a few other international banks, sought to establish an international deposit market in offshore currencies in Asia. Hong Kong was the first choice, because of its free exchange market and excellent financial infrastructure. The only snag was that the Hong Kong Government was unwilling to remove its 15% withholding tax on interest earned by non-residents. In contrast, the Singapore Government, in its conscious efforts to promote the city-state as a regional financial centre, grabbed the opportunity with both hands, and went out of its way to accommodate the promotors of the market by abolishing the withholding interest tax on non-residents. Thus at the end of 1968, several international banks were able to offer Asian Currency Unit (ACU) facilities, popularly known as the Asian Dollar Market, in Singapore. This market is, of course, an extension or counterpart of the much larger Euro-dollar market, the mechanics of operations being generally the same, with only slight local modifications. Understandably, the Hong Kong banking community has not been happy with this loss to Singapore, and pressure has been mounting for a similar removal of the withholding tax. In 1973 the Hong Kong Government, through its Financial Secretary, announced that it was prepared to abolish the tax, provided that the banks wishing to handle ACU operations set up separate departments or subsidiaries, which would be subject to certain regulations, including a standard 15% tax on net profits. This proposal did not prove attractive to the bankers for two reasons. First, the 15% profits tax on the ACU operations is still higher than the corresponding rate in Singapore, which was cut from 40% to 10% in 1972. Second, the multinational banks that handle offshore currency business have found that they can evade profits tax anyway by what is known as the "memorandum account" method, i.e., the use of dummy accounts that route transactions through tax havens, which are not recorded on their books in the host country, in this case Hong Kong. This means that neither the deposits nor the loans come within the territorial source criterion of the Hong Kong Inland Revenue Ordinance. These banks are therefore no longer interested in setting up an "official" Asian Dollar Market in Hong Kong unless the abolition of the interest withholding tax is unconditional, i.e., with no additional proviso that their ACU operations will be subject to a profits tax. The Hong Kong Government remains, however, adamant on its original proposal. Thus there is an impasse between the government and the financial community on this issue, and unless it can somehow be resolved, Hong Kong must continue to concede to Singapore the centre of the Asian Dollar Market, which has reportedly reached US $ 5 billion at present.

(4) *User Charges*

Like other cities, Hong Kong is faced with ever increasing demand for urban services of all kinds ranging from transportation to entertainment. Until very recently, this demand has not created any serious fiscal problem for the government, due mainly to its conservative policy and comfortable surplus accumulated over the years. Accelerating inflation has, however, caused a sharp spiralling of the costs of public services. Moreover, Hong Kong, with an area of less than four hundred square miles but a population of more than four million, is increasingly inflicted with the familiar urban problems of congestion and pollution. The government is

therefore making a review of all existing fees and charges to meet the growing expenses. One activity which has already felt the impact of higher charges is motoring. At the end of 1973, there were some 203,000 motor vehicles, of which nearly 130,000 were private cars. Despite huge efforts to build more roads and flyovers, traffic congestion has shown no sign of alleviation. The problem has indeed become so acute that the government has in principle approved a plan to construct subways that will cost some US $ 1,000 million. A higher sumptuary tax on motoring, particularly in the present context of oil crisis, is therefore inevitable. In March 1974, the government announced sharp increases in license fees for private cars, goods vehicles and public light buses. For private cars, there is now a sliding scale according to capacity. Thus, for cars below 1,000 c.c., the annual fee is HK $ 350, while for cars of over 4,500 c.c., it is HK $ 1,500. Public light buses are now uniformly licensed at HK $ 5,000 a year, as against HK $ 3,000 formerly. The first registration tax on imported cars has been raised from 10% to 15%. To round off the deterrent effect, driving license fee has been quintupled, and parking charge more than doubled.

(5) *Depreciation Allowances*

Hong Kong's economy is highly export-oriented, with over 83% of its manufactured products destined for overseas markets, particularly markets in the advanced countries. Export performance in turn depends significantly on capital expenditure on plant, machinery and equipment, which now accounts for about 12% of the national income. To stimulate further capital formation in the export-oriented manufacturing sector, the initial allowance has now been increased from 20% to 25% of the value of the capital asset. In addition, the Board of Inland Revenue has revised its table of depreciation rates with effect from April 1, 1974. Briefly, the basic rate has been increased from 10% to 15% on reducing values. Exceptions to this general rule have also been greatly simplified. Thus the annual rates for tankers and other ships have been raised from 7% and 6% respectively to 10%, while the annual rates for textiles and plastics have been both raised to 20%, a rate that hitherto was enjoyed by the electronics industry only.

(6) *Other Taxes and Duties*

Several relatively minor taxes and duties have been abolished during the past two years. These include import duty on heavy fuel oil and furnace oil, stamp duty on specified documents (e.g., conveyances of low-valued properties, receipts, bills of lading, insurance policies, charitable transfers, student loan documents etc.), and entertainment tax. However, the *ad valorem* stamp duty on share transactions was raised from 0.2% to 0.4% on each note in 1973. This change was made with the supplementary objective of curbing speculation, then rampant on the stock market. Duties on intoxicating liquors and tobacco, assessed on a specific rather than *ad valorem* basis, were increased by 25% in 1974.

MEASURES TO IMPROVE EFFICIENCY

Measures that have been taken, or are currently under consideration, for improving the efficiency of tax collection and administration, may be discussed under two categories. One category relates to the simplification of procedure so as to save

the time and efforts of both the administrators and taxpayers. The other is concerned with stopping loopholes which are used for evading taxation.

Prior to 1972, tax payable for the current year was assessed on the basis of income or profits earned in the preceding year. This system was both artificial and cumbersome. The Inland Revenue Ordinance Review Committee in its 1968 Report therefore recommended a change to the current year basis. This change-over has been in force for salaries tax, interest tax, and property tax since April 1, 1973, but for a number of reasons, not for profits tax. It is now proposed that further simplifications of procedure will be made, and the formal conversion of profits tax to the current year assessment will not be effected until April 1, 1975. Ultimately it is hoped that the pay-as-you-earn principle (PAYE) will be implemented in full for all taxes.

The more important area in which greater efficiency can be made is the plugging of loopholes in the existing system. As is well known, Hong Kong adheres to the "source principle" of taxation, under which only income arising in or derived from the Colony is subject to taxation. This has given risen to certain abuses. Business firms with permanent establishments in Hong Kong but with world-wide connections can arrange their transactions in such a way that the income earned can be attributed to sources outside Hong Kong and thus escape business profits tax. This can be done by setting up dummy subsidiaries in tax havens, or by means of a variety of "back to back" arrangements, such as re-invoicing, agency agreements, servicing agreements etc. We have already referred to the case of various multinational financial institutions which use the "memorandum account" method to escape Hong Kong profits tax in their offshore currency dealings. Another flagrant example is the shipping companies, all of which are registered in tax havens such as Liberia and Panama. In fact, however, their business is managed and conducted in Hong Kong by their "agency companies". By this device, only the profits earned on their "commission" (which represent a trivial proportion of their real profits) are subject to the Hong Kong profits tax. Since these companies make use of and enjoy Hong Kong's infrastructure and other facilities, there is no justification for their tax evasion. The revenue loss over the years has been substantial because of the prolonged shipping boom. Another pertinent fact is that Hong Kong is fast becoming an important shipping centre. It is estimated that in a few years' time, Hong Kong interests will own, operate or finance in excess of 30 deadweight tons of merchant shipping. The government has accordingly announced that the Inland Revenue Ordinance will be amended specifically to deal with this type of tax evasion.

Another relatively minor measure to discourage outstanding arrears is to provide that a further surcharge of 10% may be added to any amount (including the initial surcharge of 5%) in default six months after the due date. The original surcharge has been found inadequate, because in a period of accelerating inflation, defaulters find it cheaper to delay payment deliberately for as long as possible rather than realize their assets or borrow at the market rate of interest.

FUTURE DEVELOPMENTS

In his Budget Speech on February 27, 1974, the Financial Secretary of Hong

Kong expatiated at length on the need to raise additional revenue to meet the projected capital expenditures on housing, education, social and public services in the government's ambitious 10-year programme amounting to some HK $ 24,945 million (at 1974 prices). He strongly hinted that the standard tax rate, which has been fixed at 15% since 1966, and public utilities rates, such as rail fares and water charges, may have to be raised. Some observers have detected a note of inconsistency in that, while emphasizing the need to widen the tax base, he has during the past two years abolished a number of taxes and duties, which though trivial individually, do add up to a not insignificant sum. While the increased depreciation allowance on machinery and plant may be justified in view of their favourable effects on the industrial sector, the generous treatment given to taxpayers liable to Estate Duty (successive reduction of the maximum rate over the years, and now higher exemption limit) is difficult to defend, since apart from the purely fiscal consideration, it also offends the modern conception of distributional justice. The streamlining of the Hong Kong tax system has not altered the fact that the system is biased towards entrepreneurial activity and economic growth, to the neglect of an equitable distribution of income and wealth.

FRANCE

Projet de Loi sur la suppression de la patente et l'institution de la taxe professionnelle

France will in the near future replace its present business tax (contribution des patentes) by a new tax (taxe professionnelle). This tax reform is part of the modernization of the French local tax system. It should be emphasized that the French business tax may constitute a tax burden which is often underestimated by foreign enterprises investing or doing business in France.

EXPOSE GENERAL DES MOTIFS

Poursuivant leur oeuvre de modernisation des structures de notre pays, les pouvoirs publics ont entrepris de donner un nouveau visage à la fiscalité locale.

Le premier volet de cette rénovation a été adopté par le Parlement: il s'agit de la loi no 73-1229 du 31 décembre 1973, fixant les bases de la taxe foncière sur les propriétés bâties, de la taxe foncière sur les propriétés non bâties et de la taxe d'habitation.

Dans cette réforme d'ensemble, le remplacement de la patente occupe une place à part, et le Gouvernement a exposé, lors des débats parlementaires de l'automne 1973, les raisons qui ont conduit à lui consacrer un projet de loi distinct:

— la nécessité d'un débat plus approfondi que pour les autres impôts directs locaux, puisqu'il s'agit de la pièce la plus complexe, et la plus controversée, du dispositif actuel;

— le fait que les valeurs locatives des immeubles, qui viennent d'être révisées, ne constituent que l'un des éléments des bases de la patente;

— les inconvénients qu'aurait comporté l'accumulation sur une même année des transferts de charge relatifs à la réforme des quatre impôts.

Conformément aux perspectives ainsi tracées, le Gouvernement dépose à présent le projet relatif au remplacement de la patente.

Cet exposé générale traite successivement:

— des critiques adressées à la patente;
— du choix de la nouvelle ressource locale;
— des modalités relatives à ses taux, et à son affectation;
— de l'équilibre d'ensemble de la fiscalité directe locale.

I. LES CRITIQUES ADRESSEES A LA PATENTE

La patente est le moyen par lequel les entreprises industrielles ou commerciales, ainsi que les prestataires de services, participent au financement des charges locales. En 1973, son produit a été de 10,1 milliards de F, soit 29% des ressources fiscales des collectivités locales. [1]

Le base de cet impôt comprend trois éléments, considérés comme des indices de la capacité contributive de l'entreprise:

— la valeur locative des locaux et des équipements utilisés;

1. Y compris le versement représentatif de taxe sur les salaires (V.R.T.S.).

— un montant variable en fonction du nombre de salariés;
— une somme forfaitaire jouant un rôle d'ajustement.

Ces éléments sont affectés de coefficients qui diffèrent d'une profession à l'autre, et forment un «tarif des patentes» à 1 650 rubriques. Ils sont ensuite additionnés pour chaque contribuable, et les taux résultant des votes du conseil municipal et du conseil général sont appliqués à leur somme.

Les défauts de cet impôt ont été recensés en 1970 par la Commission d'étude de la patente, réunie à l'initiative du ministre de l'économie et des finances, et composée principalement de représentants des collectivités locales et des patentés [2]. Il n'est pas inutile de rappeler l'essentiel de cette analyse.

Outre les critiques relatives au poids de la patente — et qui semblent le lot de tout impôt direct — trois catégories de griefs peuvent être distinguées:

1° Les uns ne tiennent pas au système lui-même, mais à son vieillissement.

En effet, les valeurs locatives retenues pour le calcul de l'impôt ne sont pas les valeurs actuelles, mais les prix auxquels les locaux ou les équipements des entreprises étaient susceptibles d'être loués en 1947 ou en 1948. Afin de maintenir un minimum d'homogénéité en dépit du renouvellement des moyens de production, les services fiscaux doivent reconstituer la valeur locative qu'auraient eue les équipements et bâtiments nouveaux, s'ils avaient existé au lendemain de la dernière guerre. Cette règle est évidemment cause d'anomalies, et plus encore d'obscurité.

Quant au tarif, document de 140 pages, dont l'objet est de moduler les trois éléments de la patente de façon que son poids moyen soit relativement constant d'un secteur de l'économie à l'autre, il résulte pour l'essentiel de travaux effectués entre 1938 et 1944. La variété des situations a rendu difficile sa mise à jour; par exemple, la baisse de rentabilité du petit commerce et de l'artisanat rural, n'ayant pu être prise en compte de manière détaillée dans le tarif, a dû faire l'objet d'une mesure législative forfaitaire, réduisant de 15% puis, à compter de 1974, de 20%, les bases d'imposition des détaillants et artisans employant moins de trois salariés.

2° D'autres critiques tiennent au caractère indiciaire de la patente. La base de la taxe ne dépend pas de la rentabilité propre à chaque entreprise mais, sous les réserves qui viennent d'être indiquées, de la rentabilité moyenne des entreprises de la même branche employant le même effectif et utilisant des installations d'importance comparable. Les fluctuations de bénéfices tenant à la conjoncture nationale et locale, à l'état de santé de l'exploitant, ou encore à des travaux d'urbanisme restent sans incidence sur la patente exigible, tant que le contribuable continue de mettre en oeuvre les mêmes moyens. Mais il faut noter qu'en contrepartie les collectivités locales sont assurées de ressources stables.

L'un des indices retenus peut d'ailleurs paraître discutable en soi: un calcul fondé sur le nombre de salariés met en effet sur pied d'égalité, du point de vue de la capacité contributive de l'entreprise, les travailleurs non qualifiés, les techniciens et les cadres; il défavorise donc les activités dites de main-d'oeuvre par rapport à celles qui emploient un personnel de haut niveau. Le caractère indiciaire de la patente a également pour conséquence la faible pro-

2. Rapport publié en septembre 1970 par l'Imprimerie nationale et le service de l'Information du Ministère de l'Économie et des Finances.

gression de son assiette, entre deux révisions, et donc la nécessité, pour les collectivités locales, de relever presque chaque année le taux applicable à cet impôt comme d'ailleurs aux trois autres contributions.

3° Enfin, les disparités considérables des niveaux d'imposition suivant les communes sont sans doute pour beaucoup dans la défaveur que connaît la patente. La diversité des matières imposables et des besoins communaux engendre en effet de grandes inégalités de pression fiscale. Ainsi, les taux de l'impôt varient:

— dans un intervalle de 1 à 3,7 pour les départements;

— dans un intervalle de 1 à 30 pour les communes.

Certaines localités, bénéficiant de la présence d'un établissement exceptionnel sur leur territoire, peuvent maintenir leur pression fiscale à un niveau modique, tant sur les entreprises que sur les habitants, alors que leurs voisines, où résident souvent les salariés de l'établissement en cause, se voient contraintes de tirer le maximum de rendement d'un potential fiscal modeste.

En somme, l'on peut reprocher à la patente, non seulement de perturber les conditions de la concurrence, mais aussi de causer, par contrecoup, des disparités entre habitants de communes différentes.

Quelles sont les réponses possibles à ces critiques?

II. LE CHOIX DE LA NOUVELLE RESSOURCE LOCALE

A. *Les solutions impraticables*

Ainsi que l'ont montré les travaux de la Commission d'étude de la patente, les «solutions-miracles» imaginées parfois pour remplacer cet impôt se révèlent fort décevantes à l'analyse.

1° Un impôt sur le *chiffre d'affaires* ressusciterait la taxe locale supprimée le 31 décembre 1967. Il serait directement contraire aux engagements européens de la France, pénaliserait le commerce par rapport aux autres activités, avantagerait les grandes firmes intégrées par rapport aux petites et moyennes entreprises.

2° *Une majoration de la T.V.A.* au profit des collectivités locales accroîtrait les écarts importants de taux qui subsistent entre la France et ses principaux partenaires, alors que l'harmonisation européenne commande au contraire de les réduire.

Taux de T.V.A.	France	R.F.A.	Royaume-Uni	Italie	Belgique	Pays-Bas
majoré	33,33	—	—	18	25	—
normal	20	11	10	12	18	16
intermédiaire	17,6	—	—	—	15	—
réduit	7,0	5,5	—	6	6	4

Après l'effort de rapprochement particulièrement important qui s'est traduit notamment par l'abaissement du taux normal et du taux réduit à compter du 1er janvier 1973, une telle mesure marquerait pour le moins quelque incohérence. Elle renforcerait dans notre fiscalité, la prépondérance de l'impôt indirect, qu'il est au contraire souhaitable d'atténuer.

Il serait à craindre, en second lieu, que beaucoup d'agents économiques ne répercutent simplement la majoration de la T.V.A. sur leurs prix, sans tenir compte de l'avantage que la disparition de la patente leur procurerait d'autre part. Les différences qui se produiraient inévitable-

ment, au niveau individuel, entre la charge supplémentaire et la charge supprimée, rendraient très difficile, pour ne pas dire impossible, la prévention d'un tel phénomène.

La formule évoquée impliquerait, de surcroît, l'assujettissement de l'ensemble des professions libérales à la T.V.A., puisque celles-ci sont actuellement redevables de la patente.

3° Un impôt local assis exclusivement sur les *bénéfices* ferait double emploi avec les impôts d'État assis sur la même base. Il constituerait pour les collectivités une ressource particulièrement instable.

Ces trois approches présentent en outre des défauts communs:

a. L'abandon, dans une large mesure, de la localisation de l'impôt, étant donné que le chiffre d'affaires, la valeur ajoutée et le bénéfice d'une entreprise s'apprécient au niveau du siège social; le produit recouvré devrait sans doute être affecté à un fonds commun, qui le répartirait entre les collectivités; mais les impôts dont celles-ci conserveraient la maîtrise ne représenteraient plus alors que 30% environ du total de leurs ressources fiscales et du versement représentatif de taxe sur les salaires (V.R.T.S.).

b. De tels impôts risqueraient au surplus de faire la part trop belle à la fraude; certains procédés sont déjà utilisés par des contribuables indélicats pour se soustraire à la fois à la T.V.A. et à l'impôt sur les bénéfices; il n'est pas souhaitable de rendre la fiscalité locale elle aussi vulnérable à de telles pratiques.

Cette difficulté de remplacer la patente par un impôt de type entièrement différent s'explique par des qualités très réelles, qui constituent dans une certaine mesure l'envers de ses défauts:

— la patente est un impôt aisé à localiser;

— elle ne se prête guère à la dissimulation;

— sous réserve du vieillissement des bases, et des disparités locales de taux, elle peut encourager indirectement la bonne gestion, car les entreprises qui utilisent leurs moyens de production mieux que la moyenne acquittent une patente relativement moindre.

A l'étranger d'ailleurs, et notamment en Allemagne fédérale et en Grande-Bretagne, la fiscalité locale reste constituée pour l'essentiel d'impôts indiciaires.

Ce sont ces considérations qui ont conduit le Gouvernement, ainsi qu'il l'a exposé lors des débats parlementaires d'automne, à proposer un impôt fondé pour partie sur des données indiciaires, et pour partie sur des données comptables.

B. *La formule proposée*

En effet, les caractéristiques essentielles de l'entreprise — la force de travail utilisée et les capitaux investis — actuellement prises en compte par des indices, peuvent également l'être d'après leur traduction comptable.

Ainsi, la force de travail sera mieux représentée par la masse salariale — qui tient compte du niveau de qualification — que par le simple effectif des salariés. Cette méthode aura en outre l'avantage de mettre un terme aux difficultés de dénombrement causées par le travail à temps partiel et les fluctuations de l'emploi.

La question appelle une réponse plus nuancée dans le cas des capitaux mis en oeuvre, qui apparaissent, eux, au travers de plusieurs postes du compte d'exploitation:

— la price en compte des frais financiers et des amortissements pour leur montant comptable serait source de disparités, en raison de la variété des modes de finance-

ment et aux particularités de la législation. Celle-ci, inspirée de préoccupations économiques, n'a pas été conçue dans la perspective d'un impôt local, et une taxation des amortissements pénaliserait les entreprises dynamiques. En revanche, la révision des propriétés bâties permet justement de disposer d'un bon indice des moyens matériels de production utilisés: les valeurs locatives industrielles notamment ont été calculées de manière à couvrir à la fois l'usure des biens et le loyer du capital qu'ils représentent;

— l'inclusion du bénéfice net dans les bases du nouvel impôt donnera à celui-ci un caractère plus personnel. Ainsi, la charge se trouvera automatiquement allégée en cas de mauvaises affaires. Mais, sous peine de renoncer aux bons côtés du système indiciaire et de supprimer indûment la contribution de certaines entreprises aux charges locales, le montant â retenir ne devra jamais être négatif ou nul. Une innovation importante sera au contraire introduite: la prise en compte d'un bénéfice minimal, calculé par rapport aux deux autres composantes de l'impôt.

Le texte du project retient donc trois éléments, qui constitueraient la base de la nouvelle ressource:

— la masse salariale;

— la valeur locative des locaux et des outillages;

— le bénéfice net, ou à défaut un minimum de bénéfice.

L'étude effectuée sur un échantillon pondéré de mille entreprises a toutefois montré que ces données ne pouvaient être purement et simplement additionnées:

a. Il est proposé (art. 11) d'affecter au préalable la masse salariale d'un coefficient 0,5 de façon que l'importance relative de cet élément dans l'ensemble des bases ne diffère pas sensiblement de la réalité économique.

Structure des bases de la taxe
(avant application d'une limite d'exonération)

(En pourcentage du total)	Sans pondération	Les salaires étant affectés d'un coefficient 0,5
Salaires	63	46
Valeurs locatives	15	22
Bénéfice net	22	32
	100	100

b. Afin de traiter de manière homogène les entreprises constituées sous forme sociétaire et les entreprises individuelles, les salaires der dirigeants de sociétés seront, pour la mise en oeuvre de la pondération qui vient d'être indiquée, assimilés à des bénéfices;

c. Enfin, la consolidation de la situation favorable dont bénéficient, sous le régime de la patente, les petits artisans exerçant une activité de fabrication ou de réparation nécessite l'institution en leur faveur d'un abattement de 50% sur les bases. Bien entendu, ceux qui n'emploient aucun ouvrier demeureront exonérés.

La situation des différentes catégories d'entreprises au regard de cette réforme des bases apparaît dans le tableau suivant, résultant du même échantillon [3]:

3. Les anciennes bases retenues sont les bases actuelles effectives, après, s'il y a lieu, abattement forfaitaire de 20% dans le cas des petits salariés.
Pour les besoins de cette comparaison, les bases de patente ont été exprimés « dans la même monnaie » que les nouvelles bases, c'est-à-dire qu'elles ont été multipliées par le coefficient moyen d'augmentation.

	Pourcentage de variation des bases (Avant application d'une limite d'exonération)
Industrie	+14
Artisanat et petites entreprises industrielles [4] . .	—20
Commerce de détail . .	—34
Professions non commerciales	+10
Ensemble	0

Le phénomène saillant est la réduction relative des bases des petites entreprises. Les variations effectives des cotisations ne correspondront pas exactement à ces pourcentages, en raison:
— de la variété des situations à l'intérieur de chaque catégorie;
— de la croissance des besoins locaux d'une année sur l'autre;
— du fait que l'impôt proposé demeure dans un cadre local, et que les transferts de charges s'effectueront dans ce cadre.
La nouvelle ressource locale prendra le nom de taxe professionnelle.

III. LES TAUX ET L'AFFECTATION DE LA TAXE PROFESSIONNELLE

Les dispositions relatives aux taux de la taxe et à son affectation visent à concilier trois objectifs:
— le maintien du caractère local de la ressource;
— l'introduction, au profit des collectivités locales, d'une possibilité de choix entre ressources fiscales différentes;
— la réduction des écarts géographiques de taux.

A. *Les bénéficiaires de la ressource*

1° Conformément à l'article 1er de la loi de modernisation des bases de la fiscalité directe locale, la taxe professionnelle sera levée tant au profit des communes que des départements.
S'agissant d'un impôt dont les bases ne sont plus que partiellement indiciaires, l'option prise pose un problème de localisation des bases des entreprises à établissements multiples. En effet:
— le bénéfice fiscal se détermine au niveau du siège social, et non au niveau de chaque établissement;
— les valeurs locatives des outillages et équipements devront être directement tirées du bilan; or beaucoup d'entreprises ne sont pas en mesure de procéder à une ventilation géographique des éléments de ce bilan.
L'article 13 du projet résout cette difficulté de la manière la plus commode pour les entreprises: les bases non susceptibles d'être localisées seront réparties entre les différents établissements au prorata des bases d'imposition retenues l'année précédente pour chacun d'eux. Des modalités de répartition plus forfaitaires pourront être envisagées dans le cas des entreprises à établissements très nombreux.

. . .

2° Les principales taxes additionnelles à la patente sont reconduites dans le cadre de la taxe professionnelle:
— les taxes régionales et la taxe spéciale d'équipement du district de Paris;
— la contribution pour frais de chambres de commerce.

B. *La détermination des taux*

1° *En 1975,* les collectivités et organismes bénéficiaires de la taxe professionnelle et des taxes additionnelles ne pourront en

4. Entreprises de construction, de fabrication, de réparation ou de services employant moins de dix salariés.

déterminer eux-mêmes le taux, car le montant des nouvelles bases ne sera pas encore connu au moment du vote des budgets. Il est donc proposé (article 21) de reconduire pour 1975 la procédure adoptée pour 1974, suivant laquelle les collectivités et organismes votent un produit, dont les taux sont déduits le moment venu.

. . .

Cette méthode permettra de constater, dans le courant du second semestre de 1975, l'ensemble des pressions fiscales locales, après mise en oeuvre des nouvelles bases d'imposition.

2° *A partir de 1976,* il est prévu (article 17) que les collectivités et organismes bénéficiaires en fixeront le taux, indépendamment de celui des trois autres impôts directs locaux, mais sous deux réserves:

a. Afin d'éviter que cette possibilité de choix ouverte aux municipalités et aux conseils généraux ne se traduise par des à-coups trop sensibles pour les contribuables, le taux ne pourra varier, dans un sens ou dans l'autre, de plus d'un cinquième chaque année.

Si par exemple le taux de taxe professionnelle atteint 2% dans une commune en 1975, celle-ci pourra fixer son taux de 1976 entre 1,6 et 2,4.

b. En vue de réduire, en second lieu, les disparités de taux entre contribuables, le taux ne pourra dépasser le double de la moyenne nationale constatée en 1975, ni être inférieur à la moitié de cette moyenne. Celle-ci sera calculée de manière distincte, pour les communes d'une part, pour les départements d'autre part.

Toutefois, les collectivités dont le taux de 1975 se trouvera en dehors de ces limites auront quatre ans pour s'y conformer.

Tout en mettant un terme à certaines situations difficilement supportables, ce dispositif ne devrait pas bouleverser le financement des collectivités locales. En effet, suivant les calculs effectués — simplement indicatifs il est vrai, puisque fondés sur les taux actuels de patente — 7% des communes seulement représentant 7% de la population, se trouveront dans l'obligation d'abaisser leur pression fiscale sur les redevables de la taxe professionnelle. Au demeurant, la période transitoire de quatre ans prévue en faveur de ces collectivités leur permettra sans doute, dans la majorité des cas, de se conformer à la nouvelle règle sans réduire leur recettes de taxe professionnelle en valeur absolue, puisqu'elles bénéficieront chaque année de la progression de l'assiette de cette taxe.

Une variante pourrait consister, si le Parlement le souhaitait, à se référer à des moyennes départementales, et non plus nationales, pour la fixation du maximum et du minimum. Les écarts de pression fiscale les plus sensibles sont en effet les écarts entre proches voisins, et ce sont eux qu'il convient d'atténuer en priorité.

C. *Mécanismes particuliers*

Deux mécanismes particuliers méritent d'être signalés:

1° Le premier (article 19) concerne les *communes à potentiel fiscal exceptionnel,* et notamment les petites communes dotées d'établissements industriels importants.

Afin d'améliorer la répartition géographique de ces ressources, conformément aux recommendations de la Commission d'étude de la patente, il est prévu que les communes concernées abandonneront à un fonds départemental le produit de l'imposition d'une partie de leur potentiel. Cette partie est définie comme la fraction excédant le double de la moyenne nationale par habitant — ce qui laisserait subsister en faveur de ces communes une grande part de leur avantage actuel. Cette

redistribution serait d'ailleurs assortie de modalités transitoires.

Les ressources du fonds départemental seraient employées au profit des communes défavorisées, dans des conditions fixées par le conseil général.

2° L'autre particularité (article 20) concerne les avantages fiscaux accordés au titre de l'*aménagement du territoire,* et répond aux obligations européennes de la France.

Les exonérations actuelles, dont le montant n'est connu qu'après coup, devront être remplacées par un crédit d'impôt chiffré d'avance, que les entreprises pourront alors comptabiliser dans leurs programmes financiers. Ces aides au développement régional devraient donc devenir plus incitatives.

Le nouveau régime entrera en vigueur lorsque les partenaires de la France auront eux aussi pris des mesures faisant apparaître d'emblée le montant des avantages.

IV. L'EQUILIBRE GENERAL DE LA FISCALITE DIRECTE LOCALE

Les dispositions qui viennent d'être résumées aboutiront, à compter de 1976, à dégager deux masses sensiblement équivalentes, dont les collectivités locales fixeront librement le montant:

— la taxe professionnelle, sous réserve des précautions qui ont été indiquées;

— la taxe d'habitation et les deux taxes foncières, établies à des taux différents mais liés entre eux.

L'aboutissement logique de la réforme serait d'unifier les taux applicables à ces trois dernières taxes, qui présentent la caractéristique commune d'être déterminées d'après des valeurs locatives immobilières. Cet objectif ne peut toutefois être atteint qu'à moyen terme, pour deux raisons:

— un rapprochement immédiat des taux perturberait le mécanisme d'échelonnement des transferts de charges en matière de taxe d'habitation, qui vient d'être mis en vigueur, et doit fonctionner jusqu'en 1978;

— compte tenu des particularités de la dernière révision, les bases d'imposition retenues pour les propriétés non bâties ne sont pas encore véritablement comparables à celles des propriétés bâties.

Aussi est-il proposé (article 21):

— de maintenir les clefs de répartition entre les trois taxes pour 1976 et 1977;

— de les supprimer ensuite en cinq ans, de façon à obtenir un taux unique en 1982, dans chaque collectivité.

Après le vote de la loi modernisant les bases de la fiscalité directe locale, le dépôt du projet de loi sur le remplacement de la patente confirme la volonté de rénovation qui anime les pouvoirs publics. Le Gouvernement a entrepris cette tâche avec le souci de doter notre pays d'une fiscalité directe locale digne de ses réalisations dans d'autres domaines, tout en sauvegardant ce qui demeure valable dans le legs du passé. En s'associant à cette reconstruction, ainsi qu'il l'a fait lors des débats de l'automne 1973, le Parlement montrera très certainement sa volonté d'innover dans le réalisme et de promouvoir l'équité.

FRANCE

Information Memo of the Minister of Economic Affairs and Finance of March 11, 1974 on the publication of income of taxpayers

La Direction Générale des Impôts va assurer en 1974 la publicité des impositions afférentes aux revenus de l'année 1972 et mises en recouvrement du 1er janvier 1972 au 30 avril 1974 (cf. C.G.I., art. 243; Ann. III, art. 49 *septies* à 49 *septies* E). Une note, ci-après reproduite, du Ministère de l'Economie et des Finances a exposé les conditions dans lesquelles va se dérouler cette opération, conditions qui sont conformes aux dispositions expressément prévues par la loi.

I. LES RENSEIGNEMENTS SOUMIS A PUBLICITE

Les listes des contribuables assujettis à l'impôt sur le revenu comporteront, en face de l'indication du domicile du contribuable, les renseignements suivants:

— nom, prénom et adresse du contribuable;
— nombre de parts correspondant à sa situation de famille;
— montant de l'impôt sur le revenu supporté par le contribuable.

Ce montant tiendra compte:

— de l'impôt dû en principal, après application du barème et, éventuellement, de la décote et de la minoration dégressive;
— du montant de l'impôt dû à un taux proportionnel sur certaines plus-values de cession (plus-values à long terme, plus-values de cession de droits sociaux, plus-values réalisées dans le cadre d'une exploitation agricole ou de l'exercice d'une profession non commerciale, plus-values immobilières réalisées dans certaines conditions).

En outre, le Ministre de l'Economie et des Finances a décidé, pour répondre à certaines préoccupations largement exprimées, de permettre aux contribuables de demander par écrit à la Direction des services fiscaux, sans formalité autre que la production des justifications nécessaires, d'ajouter sur la liste le montant des prélèvements libératoires qu'ils ont acquittés en matière de fiscalité immobilière et de produits de placements à revenu fixe.

Les contribuables ayant plusieurs résidences, établissements ou exploitations, peuvent demander, en souscrivant leur déclaration de revenus, que leur nom soit communiqué aux Directions départementales des services fiscaux dont dépendent ces résidences, établissements ou exploitations. A l'adresse en cause, leur nom sera alors suivi de la mention: «Imposé à . . .».

Pour les revenus de l'année 1972, il est admis que la demande de publicité mentionnée à l'alinéa précédent puisse être faite jusqu'au 30 avril 1974.

II. MISE EN ŒUVRE DE LA PUBLICITE

Les listes seront, d'une part, mises à la disposition des contribuables dans les Directions des services fiscaux, d'autre part communiquées aux Commissions communales des Impôts directs.

A. *Mise à la disposition des contribuables*

Sous réserve de la période pendant laquelle

elles seront soumises aux commissions communales des impôts directs, les listes des contribuables imposés sur leurs revenus de l'année 1972 seront à la disposition des contribuables à la Direction des services fiscaux du lieu d'imposition du 1er juin 1974 au 31 décembre 1976.

a) *Personnes pouvant consulter les listes*
Seules peuvent consulter les listes les personnes relevant au regard de l'impôt sur le revenu, de la compétence territoriale de la Direction des Services fiscaux qui détient ces listes.

b) *Modalités de la consultation*
Les demandeurs devront justifier de leur identité et de leur domicile.
Les listes étant dressées dans l'ordre topographique dans les villes et dans l'ordre alphabétique dans les communes rurales, les demandeurs pourront se faire aider dans leurs recherches par l'agent des Impôts. Ils ne pourront pas demander la reproduction photographique de ces listes.

B. *Communication à la commission communale des impôts directs*
Les listes seront soumises, pour avis, à la Commission communale des impôts directs lors de la tournée de recensement effectuée chaque année par l'Administration fiscale. Pendant cette période qui ne devrait pas excéder un mois, les listes ne pourront donc être consultées à la Direction.

III. SANCTIONS

Le législateur a entendu réprimer tout usage abusif des renseignements ainsi publiés. Aussi a-t-il interdit la divulgation des listes ou de toute indication se rapportant à ces listes et visant des personnes nommément désignées. Les contrevenants s'exposent:
— sur le plan pénal, à une amende de 3.600 F à 18.000 F et à une peine d'emprisonnement de un à cinq ans, ou à l'une de ces deux peines;
— sur le plan fiscal, à une amende égale au montant des impôts divulgués.

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Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne.

I deeply regret to announce that

Miss Cila Hoogkamp

quietly passed away on June 13th, 1974

Jan H. Christiaanse
Secretary General of
the International
Fiscal Association

Cila Hoogkamp †

The recent tragic death of miss Cila Hoogkamp has been a terrible loss to IFA. Far too few members of IFA realise how much work on their behalf is carried out in Rotterdam and it is doubtful whether the average member realises how few people are available to help Professor Christiaanse in carrying out his duties as Secretary General. Cila Hoogkamp was the soldier who defended the gap. On her fell many of the jobs of liaison and translation which are so important in a voluntary society like IFA, comprised as it is of members in many countries, many of them prima donnas, and most of them enmeshed in their particular problems. She was a good administrator and an admirable liaison officer and because of her Dutch phlegm capable of dealing with all the irascible correspondents (including myself) from many countries.

She was helpful, she was efficient, she was unobtrusive.

Cila Hoogkamp did a marvellous job. She was the person who carried the oil can to lubricate difficult situations. We shall miss her badly. We remember her as the helpful efficient secretary, always willing, always able. R.I.P.

Alun G. Davies
Vice President of IFA

Cila Hoogkamp †

On 13th June, 1974, the I.F.A. suffered a severe loss. On that day, Cila Hoogkamp, who had been secretary to the I.F.A.'s Secretary General since 1968, passed away aged 52 after a long illness. All those who, as members of the Executive Committee, the General Council, the Permanent Scientific Committee or the I.F.A.'s many **ad hoc** committees, or as participants at the annual congresses held in Rotterdam, Brussels, Washington, Madrid and Lausanne, had the benefit of her assistance and effective co-operation, will feel Miss Hoogkamp's death as a personal loss. She was always present even if she remained in the background. She was personally involved in all I.F.A.'s affairs and felt heavily responsible for them.

Cila Hoogkamp was a very conscientious person, who insisted on keeping deadlines, on getting things organised, and, generally, on making the I.F.A.'s wheels turn smoothly. Those who had the privilege of working closely with her knew how thoroughly devoted she was to the I.F.A. and all that our association stands for.

The staff of the International Bureau of Fiscal Documentation wishes to express its feeling of deep regret at her death and will remember Miss Hoogkamp and her work with sincere gratitude.

J. van Hoorn Jr.

Managing Director of the
International Bureau of
Fiscal Documentation

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Dr. JAKOB STROBL *:

BEITRAG ZUR STEUERLICHEN BEHANDLUNG VON TRANSAKTIONEN ZWISCHEN VERBUNDENEN UNTERNEHMEN IN DER BUNDESREPUBLIK DEUTSCHLAND

Nach unserer Erfahrung bestehen sowohl Unterschiede von Gewicht bei der Anwendung des „arm's length" Grundsatzes durch die verschiedenen Finanzbehörden als auch bei den Methoden, die zur Ermittlung einer angemessenen Gegenleistung bei Transaktionen zwischen verbundenen Unternehmen führen sollen. Mit dem vorliegenden Beitrag wird der Versuch unternommen, die deutsche Regelung auf diesem Gebiet zu erläutern mit Schwerpunkt auf der Darstellung der Praxis der Betriebsprüfung und unseren dabei gewonnenen Erfahrungen. Der Aufsatz wendet sich in erster Linie an Steuerfachleute ausserhalb Deutschlands. Bei den Literaturhinweisen wurde nach Möglichkeit vorzugsweise Schrifttum zitiert, insbesondere in englischer Sprache, das für den ausländischen Leser erreichbar ist.

I. "DEALING AT ARM'S LENGTH" IM DEUTSCHEN STEUERRECHT

1. *Der Begriff des „dealing at arm's length"*

a) *Definition in den DBA*

Das Prinzip des „dealing at arm's length" — wie in Art. 9 für rechtlich selbständige verbundene Unternehmen und in Art 7 OECD Musterabkommen für unselbständige Betriebstätten niedergelegt — hat in die meisten Doppelbesteuerungsabkommen Eingang gefunden, die von der Bundesrepublik Deutschland abgeschlossen wurden. Es ist ebenfalls in Art. III des deutsch-englischen DBA enthalten und hat folgenden Wortlaut:

„..... übt ein Unternehmen eines der Gebiete in dem anderen Gebiet eine gewerbliche Tätigkeit durch eine dort gelegene Betriebstätte aus, so sind dieser Betriebstätte die gewerblichen Gewinne zuzurechnen, die sie in diesem anderen Gebiet als unabhängiges Unternehmen mit gleicher oder ähnlicher Tätigkeit unter gleichen oder ähnlichen Bedingungen und unabhängig von dem Unternehmen dessen Betriebstätte sie ist, hätte erzielen können ....."

Dieser Grundsatz ist auch auf Transaktionen zwischen Muttergesellschaft und ihrer Tochtergesellschaft anwendbar. [1]

b) § *1 AStG*

Die Berichtigung von konzerninternen Verrechnungspreisen ist auch nach innerstaatlichen Bestimmungen des deutschen Steuerrechts möglich. Das neue deutsche Aussensteuergesetz (AStG) trat 1972 in Kraft und bezweckt die steuerliche Regulierung für den Gesamtbereich der Auslandsbeziehungen inländischer Steuerpflichtiger. § 1 dieses Gesetzes sieht un-

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Der Artikel beruht auf einem Referat, das der Verfasser am 29. März 1974 bei einer gemeinschaftlichen Veranstaltung der britischen und deutschen IFA-Gruppe in Hamburg gehalten hat.

1. Vgl. entsprechende Klausel in Art. III des deutsch-amerikanischen DBA, kommentiert in Debatin-Walter „Handbook on the U.S.-German Tax Convention", International Bureau of Fiscal Documentation.

beschadet anderer Vorschriften vor, dass das Einkommen des Steuerpflichtigen berichtigt werden kann, falls es im Rahmen internationaler Geschäftsbeziehungen mit einer nahestehenden Person als Folge einer unangemessenen oder nicht marktgerechten Vereinbarung gemindert wurde.

Der Inhalt dieser Bestimmung ist bei Gegenüberstellung mit dem amerikanischen Steuerrecht nicht neu. Jedoch enthielt das deutsche Steuerrecht bis dahin keine allgemeine Bestimmung dieser Art. In der Praxis der Verwaltung und in der Rechtsprechung wurden schon vor Einführung des § 1 AStG Gewinnkorrekturen bei international verbundenen Unternehmen durch die Rechtsinstitute der verdeckten Gewinnausschüttung und der verdeckten Einlage berücksichtigt. Beide Vorschriften haben durch die Einführung des § 1 AStG an Bedeutung nicht verloren. Ein Problem besonderer Art ist das Verhältnis zwischen § 1 AStG und den übrigen Gewinnkorrekturvorschriften des geltenden Rechts. Eine Erörterung dieses Problemkreises würde jedoch über den Rahmen dieses Beitrages hinausgehen. [2]

§ 1 AStG bezieht sich ausschliesslich auf internationale Transaktionen. Zweck dieser Bestimmung ist, der deutschen Verwaltung die Ausübung der deutschen Steuerhoheit bei der Erhebung von Einkommensteuer soweit als möglich durch die Berichtigung von Gewinnen aus internationalen Transaktionen zu gestatten.

Eine derartige Berichtigung führt zu einer Steuerfestsetzung die sonst der deutschen Besteuerung entgangen wäre.

§ 1 AStG verlangt nicht den Nachweis der Steuerflucht oder die Absicht der Steuerhinterziehung. Allein die Feststellung der Verwaltung, dass das Einkommen eines Steuerpflichtigen durch Nichtbeachtung des „arm's length" -Grundsatzes bei Geschäftsbeziehungen mit verbundenen Personen zum Ausland gemindert wurde, genügt für die Anwendung des § 1 AStG. [3] Schliesslich sieht § 1 AStG keine entsprechende Berichtigung des Einkommens bei der anderen nahestehenden Gesellschaft vor. Da dieser andere nahestehende Steuerpflichtige Steuersubjekt unter anderer Gerichtsbarkeit ist, kann ein Konflikt zwischen den beiden Staaten nur in einem Verständigungsverfahren gelöst werden, wie es in allen deutschen Doppelbesteuerungsabkommen vorgesehen ist (zum Verständigungsverfahren vgl. unten VI). Der in Vorbereitung befindliche Einführungserlass zum Aussensteuergesetz bringt die Bereitschaft der deutschen Finanzverwaltung zum Ausdruck, zur Vermeidung einer etwaigen Doppelbesteuerung anlässlich einer Gewinnberichtigung nach § 1 AStG im Verhandlungswege mit den ausländischen Finanzbehörden eine Lösung anzustreben.

In diesem Erlass ist ferner vorgesehen, dass die deutsche Finanzverwaltung günstige Vereinbarungen für den Steuerpflichtigen im Verständigungsverfahren selbst dann anerkennen wird, wenn eine Erstattung an sich durch Verjährung ausgeschlossen wäre.

In diesem Zusammenhang sei noch er-

2. Die bisher einzige detaillierte Veröffentlichung in englischer Sprache über dieses schwierige Gesetz findet sich in der Dezember-Ausgabe 1973 von „Tax Management International" Washington D.C. unter dem Titel: „A new German Statute regulating International Tax Aspects — its Implications for Multinational Companies" von Dr. Jürgen Killius, München.
Zur Vertiefung vgl. H. Becker „Zur Gewinnermittlung internationaler Unternehmen", Otto Schmidt, Köln, 1974.

3. Eine eingehende Darstellung gibt: Becker, Helmut, in Flick/Wassermeyer/Becker, Kommentar zum Aussensteuergesetz, Köln 1973, Anm. 1 zu § 1.

wähnt, dass der Steuerausschuss der OECD im Zusammenhang mit der Überarbeitung des OECD Musterabkommens einen neuen Art 9 Abs. 2 vorgeschlagen hat, der eine korrespondierende Berichtigung im anderen Staat vorsieht. [4] Bis heute hat noch kein Land Vorbereitungen zur Einführung einer solchen Klausel in seinen Doppelbesteuerungsabkommen getroffen; auch die Schweiz hat eine solche Klausel nicht akzeptiert.

2. *Verdeckte Gewinnausschüttung*

a) *Allgemeines*

Der Begriff „verdeckte Gewinnausschüttung" (abgekürzt in der deutschen Fachsprache mit vGA) wurde von der Verwaltungspraxis und der Rechtsprechung entwickelt. Nach unseren Erfahrungen wird dieser Begriff und seine Bedeutung von ausländischen Steuerexperten häufig nicht richtig verstanden und bedarf deshalb einer kurzen Erläuterung.

Ausgangspunkt ist der Begriff „Einkünfte aus Gewerbebetrieb". Das deutsche Steuerrecht definiert diesen Begriff als Unterschiedsbetrag zwischen dem Betriebsvermögen am Schluss des Wirtschaftsjahres und dem Betriebsvermögen am Schluss des vorangegangenen Wirtschaftsjahres, unter Berücksichtigung von Entnahmen und Einlagen, die den Unterschiedsbetrag vermehren oder mindern. Ausschüttungen jeglicher Art dürfen das steuerpflichtige Einkommen *nicht* mindern (§ 7 KStG), ebenso nicht verdeckte Gewinnausschüttungen (§ 6 Abs. 1 Satz 2 KStG).

Das deutsche Steuerrecht unterscheidet im Fall der Berichtigung von Transaktionen bei verbundenen Unternehmen unter Beachtung des arm's length-Prinzip zwischen

aa) Transaktionen, bei denen die Gesellschaft (Tochtergesellschaft) dem Gesellschafter (Muttergesellschaft) einen Vorteil gewährt (up stream) und

bb) Transaktionen, bei denen der Gesellschafter (Muttergesellschaft) der Gesellschaft (Tochtergesellschaft) einen Vorteil gewährt (down stream).

Im ersten Fall nimmt das deutsche Steuerrecht eine sogenannte verdeckte Gewinnausschüttung, im zweiten Fall eine verdeckte Kapitaleinlage an. Es ist festzuhalten, wie weiter unten erläutert wird, dass die Steuerlast in beiden Fällen unterschiedlich ist.

Eine verdeckte Gewinnausschüttung ist ebenfalls möglich zwischen Schwestergesellschaften. Die deutsche Finanzverwaltung sieht in einem solchen Fall eine Vorteilsgewährung als verdecke Gewinnausschüttung der leistenden Tochtergesellschaft gegenüber der Muttergesellschaft als gegeben an, bei gleichzeitiger Annahme einer verdeckten Einlage seitens der Muttergesellschaft an die empfangende Tochtergesellschaft.

b) *Rechtsprechung auf diesem Gebiet*

Eine Definition des Begriffes „verdeckte Gewinnausschüttung" ist im Gesetz nicht enthalten, § 19 KStDV — Körperschaftsteuer-Durchführungsverordnung — nennt lediglich einige Beispiele zur Erläuterung. Die Rechtsprechung nimmt eine verdeckte Gewinnausschüttung dann an, wenn eine Gesellschaft ihrem Gesellschafter ausserhalb der gesellschaftsrechtlichen Gewinnverteilung einen Vermögensvorteil zuwendet, den sie bei Anwendung der Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters einem Nichtgesellschafter (Dritten) unter sonst gleichen Umständen nicht gewährt haben würde. [5] Die

4. Vgl. OECD Dokument 84, 697 April 1972.
5. Stellvertretend für viele: BFH-Urteil vom 21.12.1972, I R 70/70, Bundessteuerblatt (BStBl.) 1973 II S. 449.

Rechtsprechung stützt sich auf das objektive Kriterium der „Interessewahrung eines ordentlichen Kaufmanns gegenüber der Gesellschaft" zur Feststellung einer verdeckten Gewinnausschüttung.

c) *Steuerliche Belastung einer verdeckten Gewinnausschüttung*

Im Fall der Annahme einer verdeckten Gewinnausschüttung kann der deutsche Steuerpflichtige den Vorteil, den er dem Gesellschafter gewährt hat, nicht als Betriebsausgabe bei Ermittlung seines steuerpflichtigen Einkommens geltend machen; vielmehr wird der Vorteil als Dividende (Ausschüttung) behandelt. Die verdeckte Gewinnausschüttung geniesst nicht den ermässigten Steuersatz in Höhe von 15% für ausgeschüttete Gewinne, sondern unterliegt dem allgemeinen Steuersatz für einbehaltene Gewinne in Höhe von 51%, da die Voraussetzungen für sogenannte „berücksichtigungsfähige Ausschüttungen" im Sinne des § 19 Abs. 3 KStG[6] nicht vorliegen. Darüberhinaus wird Gewerbesteuer entsprechend der Berichtigung erhoben.

Verdeckte Gewinnausschüttungen gehören zu den beschränkt steuerpflichtigen Einkünften aus Kapitalvermögen[7] des den Vorteil empfangenden ausländischen Gesellschafters (Muttergesellschaft). Die hierauf entfallende Kapitalertragsteuer in Höhe von 25% zuzüglich Ergänzungsabgabe in Höhe von 3% wird im Wege des Abzugs vom Kapitalertrag erhoben. Der Steuersatz der Kapitalertragsteuer ermässigt sich, soweit DBA-Bestimmungen eine Begrenzung des Steuersatzes vorsehen, wie z.B. in dem deutsch-amerikanischen Doppelbesteuerungsabkommen ein Steuersatz von 15%, wenn keine Reinvestition der amerikanischen Muttergesellschaft an die deutsche Tochtergesellschaft vorliegt. Unter Berücksichtigung der erwähnten Steuern beträgt die deutsche Steuerlast auf die verdeckte Gewinnausschüttung, je nach dem anwendbaren Kapitalertragsteuersatz ca. 80 - 90%. Verständlicherweise sind die ausländischen Steuerbehörden, die den gewährten Vorteil ihrerseits als Einkommen des empfangenden Gesellschafters der Steuer unterworfen haben, regelmässig nicht bereit, die Veranlagung im Hinblick auf die steuerliche Beurteilung der Transaktion durch die deutsche Steuerbehörde zu ändern. Die daraus resultierende wirtschaftliche Doppelbesteuerung des strittigen Gewinnanteils kann nur im Wege des Verständigungsverfahrens beseitigt werden. Die Aussichten für eine dem Steuerpflichtigen günstige Einigung der Steuerbehörden in diesem Verfahren können nur schwierig beurteilt werden, da nur wenige Fälle bekannt sind.

In der Anlage wird ein Vergleich der Steuerlast einer selbständigen Tochtergesellschaft und einer rechtlich unselbständigen Zweigniederlassung oder Betriebstätte, sowie die Auswirkung des gespaltenen Körperschaftsteuersatzes dargestellt. Die tatsächliche Steuerbelastung auf ausgeschüttete Gewinne beträgt ca. 23% da ein Teil des Gewinnes zur Bezahlung der Körperschaftsteuer einbehalten werden muss.

In diesem Zusammenhang sei erwähnt, dass von der Möglichkeit der Gründung eines rechtlich unselbständigen Zweigbetriebes durch ausländische Unterneh-

6. Gem. § 19 Abs. 3 KStG sind „berücksichtigungsfähige Ausschüttungen" die aufgrund eines den gesellschaftsrechtlichen Vorschriften entsprechenden Gewinnverteilungsbeschlusses vorgenommenen Gewinnausschüttungen.

7. Nach den Grundsätzen der sog. isolierenden Betrachtungsweise auch dann, wenn sie im Rahmen eines Gewerbebetriebes anfällt. Vgl. BFH-Urteil vom 4.3.1970, I R 140/66 BStBl. 1970 II S. 428.

mungen in der Bundesrepublik Deutschland mit Ausnahme von Banken und Versicherungsgesellschaften selten Gebrauch gemacht wird.

d) *Rückgängigmachung einer verdeckten Gewinnausschüttung.*

Im deutschen Schrifttum [8] wird die Frage eingehend diskutiert, ob die schwerwiegenden steuerlichen Konsequenzen einer verdeckten Gewinnausschüttung dadurch zu vermeiden sind, dass der Gesellschafter den ihm gewährten Vorteil an die Gesellschaft aufgrund eines im Einzelvertrag vereinbarten oder in der Satzung der Gesellschaft enthaltenen Vorbehalts (sogenannte Steuerklauseln oder Satzungsklauseln) zurückerstattet.

Die steuerrechtliche Anerkennung wird nach der überwiegenden Meinung im Schrifttum unter gewissen Umständen für zulässig gehalten. Die Rechtsprechung ist diesbezüglich nicht einheitlich und lässt eine Rückgängigmachung nur in Ausnahmefällen zu. Die Finanzverwaltung ist grundsätzlich nicht bereit, solche Klauseln anzuerkennen und in der Praxis kann man sich gegenwärtig noch nicht auf die Vereinbarung von Steuerklauseln verlassen. Die Rückgängigmachung wurde nur der Vollständigkeit halber erwähnt und kann im Rahmen dieses Beitrages nicht näher behandelt werden.

3. *Verdeckte Einlage*

Der Tatbestand einer verdeckten Einlage liegt nach der Rechtsprechung des Bundesfinanzhofes dann vor, wenn ein Gesellschafter (Muttergesellschaft) seiner Gesellschaft (Tochtergesellschaft) Vorteile gewährt, die ein unabhängiger Dritter bei Anwendung der Sorgfalt eines ordentlichen Kaufmannes (§ 347 HGB) nicht gewährt hätte [9].

Nach der Rechtsprechung des Bundesfinanzhofes kann die unentgeltliche oder zu niedrig vergütete Überlassung von Wirtschaftsgütern zum Gebrauch oder zur Nutzung (entsprechendes gilt für Dienstleistungen) nicht Gegenstand einer verdeckten Einlage sein. Umstritten ist, ob diese Grundsätze auch im Verhältnis zum Ausland gelten. [10] Bekanntlich sind nach Auffassung der deutschen Finanzverwaltung bei unentgeltlichen Nutzungsüberlassungen und Dienstleistungen einer inländischen Muttergesellschaft an die ausländische Tochtergesellschaft die Grundsätze der verdeckten Einlage anzuwenden. [11] Der BFH nahm in einem jüngst ergangenen Urteil [12] zu diesem Problemkreis für den innerstaatlichen Bereich

8. Vgl. Grass, Adolf: die Rückgängigmachung von Rechtsgeschäften durch Steuer- und Satzungsklauseln, Steuer und Wirtschaft 1967, Spalte 449.
Dopfer, Claus: Rückgängigmachung von verdeckten Gewinnausschüttungen nach Handels- und Steuerrecht, Jahrbuch der Fachanwälte für Steuerrecht 1973/74, S. 142 ff.
Henninger: Zur Behandlung von Satzungsklauseln in Gesellschaftsverträgen, GmbH-Rundschau 1965, S. 178.

9. Vgl. Döllerer, Georg: Verdeckte Einlagen bei der Aktiengesellschaft, Der Betriebsberater 1971, S. 1245 ff.

10. Vgl. Mersmann, Wolfgang: Die Ertragsbesteuerung inländischer Betriebstätten und Tochtergesellschaften ausländischer Kapitalgesellschaften, Heidelberg 1966, S. 166 ff.
Neubauer, Heinz: Aktuelle Fragen aus der Praxis der Betriebsprüfung. Zur Abgrenzung der verdeckten Einlage in ausländische Kapitalgesellschaften von Betriebsausgaben im Gesellschafterinteresse, Steuerliche Betriebsprüfung 1971, S. 250 ff.

11. Vgl. Erlass des Finanzministeriums Nordrhein-Westfalen vom 13.3.1970 - S 2741 - 7 V4 -, veröffentlicht in: Die Wirtschaftsprüfung 1970, S. 256.

12. BFH-Urteil vom 12. Juli 1973, IV R 205/69 BStBl. 1973 II S. 842.

Stellung. Für den Fall, dass der Gesellschafter, der eine natürliche Person ist und dessen Anteile an der Kapitalgesellschaft im Privatvermögen gehalten werden, seiner Gesellschaft ein Grundstück seines Einzelunternehmens unentgeltlich zur Nutzung überlässt, nimmt der BFH eine steuerrechtliche Entnahme in Höhe des erlassenen Mietzinses an, die dem steuerpflichtigen Einkommen des Gesellschafters hinzuzurechnen ist.

Der BFH weist jedoch ausdrücklich darauf hin, dass eine andere steuerliche Beurteilung geboten sei, soweit die Anteile an der Kapitalgesellschaft zum Betriebsvermögen des Gesellschafters gehören.

Die Annahme einer verdeckten Einlage führt bei der empfangenden Gesellschaft (Tochtergesellschaft) nicht zu einer Erhöhung des steuerpflichtigen Einkommens. Allerdings unterliegt der als verdeckte Einlage qualifizierte Vorteil der Gesellschaftsteuer in Höhe von 1%, soweit die Leistung an eine inländische Kapitalgesellschaft bewirkt wird.

Beim Gesellschafter (Muttergesellschaft) führt die Gewährung des Vorteils zu einer Minderung des Betriebsvermögens. Diese Leistung darf nicht als Betriebsausgabe abgezogen werden. Sie wird als eine den Wert der Anteile an der Beteiligungsgesellschaft erhöhende Aufwendung im Sinne zusätzlicher Anschaffungskosten behandelt mit der Folge, dass der Berichtigungsbetrag auf dem Beteiligungskonto gewinnerhöhend zu aktivieren ist.

Für die steuerrechtliche Behandlung der verdeckten Einlage ist es dabei ohne Bedeutung, ob sich die leistende Obergesellschaft im Inland oder im Ausland befindert [13]. Gewährt eine ausländische Muttergesellschaft ihrer deutschen Tochtergesellschaft Vorteile, die nach deutschem Steuerrecht als verdeckte Einlage zu qualifizieren sind, so bleiben diese Vorteile nach obigen Grundsätzen in Deutschland steuerfrei. Räumt eine deutsche Muttergesellschaft ihrer ausländischen Tochtergesellschaft Vorteile ein, so sind diese gewinnerhöhend auf dem Beteiligungskonto zu aktivieren, unabhängig davon, wie die ausländische Steuerbehörde den Zufluss der verdeckten Einlage bei der ausländischen Tochtergesellschaft behandelt. Damit besteht auch hier die Gefahr der wirtschaftlichen Doppelbesteuerung des gleichen Gewinnanteils.

II. ANWENDUNG DES GRUNDSATZES „DEALING AT ARM'S LENGTH" IN DER DEUTSCHEN PRAXIS

1. *Allgemeines*

Wie erwähnt, sehen die meisten Doppelbesteuerungsabkommen eine Bestimmung vor, der die Berichtigung des Einkommens verbundener Unternehmen in den Fällen erlaubt, in denen die Transaktionen zwischen diesen Unternehmen nicht dem „arm's length"-Prinzip entsprechen. Die praktische Anwendung dieses Prinzips bereitet jedoch erhebliche Schwierigkeiten. Zur Lösung dieses Problems sind die Steuerbehörden bestrebt, Regeln zur Bestimmung eines angemessenen Preises (arm's length-Preis) festzulegen. Wie in vielen anderen Fällen hat darin das US-Finanzministerium die Führung übernommen und eine Sammlung detaillierter

13. Vgl. Döllerer, Georg: Aktuelle Fragen aus dem Bereich der verdeckten Gewinnausschüttung und der verdeckten Einlage, Der Betriebsberater 1973, S. 9 ff.

Richtlinien erlassen.[14] Ebenso hat auch das französische Finanzministerium Richtlinien zu Artikel 57 CGI (Code général des impôts) veröffentlicht.[15]
Trotz dieser Richtlinien und übereinstimmender Methoden neigen die Finanzverwaltungen nach unseren Erfahrungen dazu, einen unterschiedlichen Standpunkt einzunehmen, je nachdem ob es sich um die Prüfung der Muttergesellschaft oder der Tochtergesellschaft handelt. Im ersten Fall ist die Verwaltung daran interessiert, den Verrechnungspreis zu erhöhen, im zweiten Fall, diesen zu mindern. Auf diese Weise betrachten die Steuerbehörden den gleichen Sachverhalt von verschiedenen Standpunkten und mit entgegengesetzten Interessen.

a) *US-Richtlinien zu Section 482 IRC*
Nach langen und eingehenden Erörterungen verkündete das US Treasury Department 1968 die Richtlinien zu Section 482 IRC und umschrieb den Zweck dieser Regelungen folgendermassen:
„..... die Anwendung des „arm's length-standard" allgemein und im einzelnen für fünf spezielle Arten von Transaktionen zu beschreiben. Für jeden dieser Einzelfälle wird zuerst die allgemeine Regel angegeben, nach der die richtige arm's length-Vergütung unter Berücksichtigung aller in Frage kommenden Tatsachen und Umstände zu bestimmen ist. Als nächstes sehen sogenannte „safe haven" oder Regeln der widerlegbaren Vermutung für Einzelfälle bestimmte Bandbreiten vor, innerhalb derer die Vergütung als angemessen gilt, es sei denn, der Steuerpflichtige (und nicht die Regierung) wünscht eine andere, angemessenere Vergütung anzusetzen."
Obwohl diese Bestimmungen weder von anderen Regierungen noch von dem Steuerausschuss der OECD als Grundlage für vergleichbare Regelungen übernommen worden sind, haben sie doch einen grossen Einfluss auf die Betrachtungsweise und Beurteilung der Leistungsentgelte bei verbundenen Unternehmen durch andere Steuerbehörden, insbesondere der deutschen Steuerbehörde, ausgeübt. Es ist sogar eine deutsche Übersetzung der amerikanischen Richtlinien verfügbar. Darüberhinaus zeigt ein Blick auf die Handhabung der deutschen Verwaltungspraxis eine weitgehende Übernahme der in den Vereinigten Staaten entwickelten Methoden.

b) *Entwurf des „Handbuchs zur Prüfung von Auslandsbeziehungen"*
Der inoffizielle Entwurf des „Handbuchs zur Prüfung von Auslandsbeziehungen" im folgenden „Handbuch" genannt, der nicht veröffentlicht aber in der deutschen Steuerverwaltung und bei den Beratern weit verbreitet ist, enthält Regeln zur Bestimmung des „arm's length" -Standard. Der Entwurf enthält die Berichte verschiedener Ausschüsse — erstellt unter Leitung des Bundesamtes für Finanzen — und stellt eine Zusammenfassung der bei Betriebsprüfungen gewonnenen Erfahrungen dar. Augenblicklich erfolgt eine Überarbeitung des Entwurfs durch verschiedene Arbeitsausschüsse; die Federführung wurde der

14. Vgl. die eingehende Darstellung in „Tax Management" Allocation (Sec. 482) — Specific Transactions, Hrsg. Leonard Silverstein, Tax Management Inc. a Division of the Bureau of National Affair, Inc. Washington D.C. 1970-73.
15. Note vom 4. Mai 1973 veröffentlicht in: Bulletin officiel de la Direction Générale des Impôts, B.O.D.G.I. Nr. 82 vom 9. Mai 1973 unter Nr. 4 A-2-73 zu 5.
Vgl. auch hierzu die Veröffentlichung „France: Shifting of profits from and to foreign subsidiaries", European Taxation 1973, Vol. 13 S. 265 ff.

Abteilung für Doppelbesteuerungsabkommen beim Bundesfinanzministerium übertragen.

2. *Ermittlung des angemessenen Verrechnungspreises bei Lieferungen und Leistungen*

Zur Überprüfung der Angemessenheit von Lieferungs- und Leistungsentgelten im Konzern sieht das Handbuch ebenso wie die US-Bestimmungen insbesondere die folgenden Methoden vor:

a) die Vergleichspreismethode („comparable uncontrolled price method")
b) die Absatzpreismethode („resale price method")
c) die Kostenaufschlagmethode („cost plus method")

a) *Die Vergleichspreismethode*

Dem Grundgedanken des "dealing at arm's length" entsprechend wird der Marktpreis als Wertnorm bestimmt. Soweit vergleichbare Verkäufe mit unabhängigen Dritten vorliegen, kann aus den dabei erzielten Preisen der angemessene Preis abgeleitet werden (sogenannter innerer Preisvergleich) [16].

Hinsichtlich der Vergleichbarkeit des Geschäfts mit dem „unabhängigen" Dritten sind hohe Anforderungen zu stellen und bei der Beurteilung der Preisgestaltung zu berücksichtigen. So können z.B. die Funktion und die Marktposition des Abnehmers, Zeitpunkt des Verkaufsabschlusses und die geographische Lage des Abnehmermarktes entscheidende preisbeeinflussende Faktoren sein.

Liegen vergleichbare Käufe zwischen dem verbundenen Unternehmen und unabhängigen Dritten nicht vor, wird der sogenannte äussere Preisvergleich empfohlen, der auf den Vergleich der Preisgestaltung im Lieferungs und Leistungsverkehr zwischen unabhängigen Unternehmen der gleichen Branche abstellt. Voraussetzung hierfür ist, dass für gleiche Güter und Leistungen auch ein Markt besteht und die darüber erforderliche Preisinformation beschafft werden kann.

Die Erfahrung zeigt jedoch, dass es in vielen Fällen schwierig, wenn nicht unmöglich ist, annähernd vergleichbare Marktpreise zu ermitteln, die als Masstab für die Angemessenheit des zu beurteilenden Geschäfts dienen können.

b) *Die Vertriebs- oder Absatzpreismethode*

In den Fällen, in denen ein angemessener Verrechnungspreis mit Hilfe der Vergleichspreismethode nicht bestimmt werden kann, wird die Absatzpreismethode empfohlen. [17] Der angemessene Verrechnungspreis wird dabei, ausgehend vom Wiederverkaufspreis des selben Gutes, durch Kürzung eines angemessenen Bruttogewinnabschlages ermittelt. Der Verkaufspreis ist aus getätigten Wiederverkäufen des verbundenen Unternehmens an unabhängige Dritte abzuleiten. Die geeignete Bruttogewinnmarge wird durch Vergleich mit der Bruttogewinnspanne unabhängiger Unternehmen der selben Branche, die unter vergleichbaren Bedingungen dieselbe bzw. annähernd gleiche Tätigkeit ausüben, ermittelt. Angesichts der Schwierigkeiten, Vergleichsbetriebe zu finden, die den Anforderungen

16. Vgl. Becker, H., in Flick/Wassermeyer/Becker, a.a.O. § 1 Anm. 193.
Schröder/Hoppstädter: Verrechnungspreise, Zinsen und Vergütungen für sonstige Finanzierungsleistungen in internationalen Konzernen, Steuerliche Betriebsprüfung 1972, S. 25 ff.
17. Vgl. Becker, H., in Flick/Wassermeyer/Becker, a.a.O. § 1 Anm. 201 ff.

der Vergleichbarkeit genügen, und eine angemessene Rohgewinnspanne abzuleiten, die auch für das verbundene Unternehmen als einigermassen repräsentativ angesehen werden kann, neigen die deutschen Steuerbehörden dazu, bei Prüfung der Angemessenheit des Konzern-Verrechnungspreises auf die unter a) dargestellte Vergleichspreismethode zurückzugreifen. In amtlichen deutschen Kreisen wird teilweise die Ansicht vertreten, dass diese Methode eine weit bessere Grundlage für die Bestimmung des angemessenen Preises darstelle als die Absatzpreismethode.

c) *Die Kostenaufschlagsmethode*

Kann ein angemessener Verrechnungspreis weder mit der unter a) noch mit der unter b) beschriebenen Methode festgesetzt werden, findet die Kostenaufschlagsmethode Anwendung.[18] Der angemessene Preis wird dabei durch Addition einer Kosten- und Erfolgskomponente festgelegt. Nach Auffassung der deutschen Finanzverwaltung sind die Selbstkosten auf der Basis einer Vollkostenrechnung zu ermitteln, wobei offengelassen wird, ob die Vollkosten auf der Grundlage der Ist-Kosten-, Normalkosten- oder Plankostenrechnung zu berechnen sind.

Neben der Berücksichtigung der Selbstkosten erfolgt die Verrechnung eines „angemessenen" Gewinnaufschlags, der neben einem Unternehmergewinn auch das sogenannte allgemeine Unternehmerrisiko abdecken soll. Die Bestimmung des „angemessenen" Gewinnaufschlages ist nur durch Schätzung möglich, wobei in der Praxis der steuerlichen Betriebsprüfung die Orientierung an branchenüblichen Zuschlagssätzen empfohlen wird. Nach dem Handbuch soll diese Methode vorwiegend in den Fällen Anwendung finden, in denen das deutsche Unternehmen einen Fertigungsbetrieb unterhält und die produzierten Güter im Ausland vertreibt. Werden die Güter in einem verbundenen Unternehmen im Ausland hergestellt und in Deutschland nur vertrieben, ist diese Methode nicht praktikabel, da es der deutschen Finanzverwaltung nicht möglich ist, die Herstellungskosten des ausländischen verbundenen Unternehmens festzustellen.

d) *Schätzungen*

Falls keine der oben beschriebenen Methoden zu annähernd vertretbaren Ergebnissen führt und auch nicht auf andere Weise die Besteuerungsgrundlagen ermittelt werden können, so sind diese nach § 217 AO (Abgabenordnung) durch Schätzung festzulegen. Für diese Fälle bestimmt nun § 1 Abs. 3 AStG, der nach dem zu erwartenden Einführungserlass zu § 1 AStG auch für Berichtigungen bei internationalen Geschäftsbeziehungen gilt, die auf anderen Vorschriften beruhen, als Schätzungsmasstab die Verzinsung des im Unternehmen eingesetzten Kapitals oder die Umsatzrendite, die üblicherweise zu erwarten ist, sofern keine anderen geeigneteren Anhaltspunkte gegeben sind. Nach unserer Erfahrung wird diese Methode in der Praxis kaum angewendet. Selbst Experten der deutschen Steuerverwaltung halten diese Methode im internationalen Bereich für ungeeignet.[19]

3. *Lizenzgebühren*

a) *Begriff*

In der Praxis wird der Begriff „Lizenzge-

18. Ebenda § 1 Anm. 212 ff.

19. Ausführlich zur Schätzung mit weiteren Literaturhinweisen vgl. Becker, H., in Flick/Wassermeyer/Becker, a.a.O. § 1 Anm. 332 ff.

bühren" ziemlich umfassend gebraucht.[20] Lizenzvereinbarungen können das weite Spektrum der immateriellen Rechte, des know-how und der technischen Beratung einschliessen. Im Rahmen dieser Abhandlung kann nicht unterschieden werden zwischen Lizenzen im engeren Sinn (für Patentnutzung, Gebrauchsmusternutzung und Warenzeichen) und dem weiteren Begriff für know-how, der nun ganz allgemein für die Zurverfügungstellung von Erfahrungen in Bezug auf Verfahren, Muster, Formeln oder einfach Erfahrung der Angestellten, gebräuchlich ist.

b) *Steuerliche Behandlung von Lizenzen*

Die meisten Doppelbesteuerungsabkommen sehen eine Steuerbefreiung für Lizenzgebühren einschliesslich know-how im Land des Lizenznehmers vor. Falls ein DBA keine solche Befreiung gewährt, beträgt der deutsche Steuersatz 25% zuzüglich 3% Ergänzungsabgabe (von der Steuer).

In Deutschland lassen die Steuerbehörden einen Abzug von Lizenzgebühren auch innerhalb verbundener Unternehmen zu, wenn ein Lizenzrecht und eine genaue schriftliche Vereinbarung über die Lizenzvergabe besteht. Abzugsfähig sind nur ‚angemessene" Lizenzgebühren, die dem Kriterium des „arm's length" entsprechen. Es bestehen aber keine allgemeinen Bestimmungen zur Festsetzung der angemessenen Sätze und die Beurteilung richtet sich nach den Umständen des Einzelfalles. Nach unserer Erfahrung hat sich jedoch folgende Faustregel in der Praxis entwickelt:

Lizenzgebühren zwischen 0 und 5 % werden in der Regel von den Steuerbehörden ohne Schwierigkeiten anerkannt, wenn eine echte und gültige Lizenzvereinbarung besteht.

Bei Lizenzgebühren zwischen 5 und 10% verlangt die Finanzverwaltung zur Anerkennung eine genaue Erklärung und Begründung für den Lizenzsatz, was bedeutet, dass die Beweislast für die Lizenzhöhe beim Steuerpflichtigen liegt, d.h. er hat gegenüber den Steuerbehörden den Nachweis zu führen, dass der vereinbarte Satz nach den gegebenen Verhältnissen angemessen ist.

Lizenzgebühren zwischen 10 und 15% werden nur in aussergewöhnlichen Fällen anerkannt, mit Ausnahme für Urheber- und Verlagsrechte, wo derartige höhere Sätze üblich sind.

Die deutschen Steuerbehörden haben eine sogenannte Lizenzkartei für verschiedene Industriebereiche erstellt, die nun unseres Wissens vom Bundesamt für Finanzen geführt wird. Die Finanzbeamten bezweifeln jedoch den praktischen Wert einer solchen Kartei, da jede Lizenzvereinbarung im Hinblick auf die besonderen Umstände des konkreten Falles, wie oben erwähnt, beurteilt werden muss. Ein sinnvoller Vergleich der tatsächlich vereinbarten Gebühren mit denen laut Lizenzkartei ist nur möglich, wenn der Umfang der Rechte, ihr Wert, die damit verbundene laufende technische Assistenz und ähnliche Faktoren annähernd identisch sind, was eine genaue Kenntnis der Einzelheiten der zugrunde liegenden Vereinbarungen erfordern würde. Die Brauchbarkeit der Angaben in der Lizenzkartei zur Prüfung der Angemessenheit des Lizenzsatzes ist deshalb nach überwiegender Auffassung sehr beschränkt.

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20. Vgl. Hoppstädter, Kurt: Besteuerung von Lizenz, know-how- und Beratungsvergütungen im Verhältnis zum Ausland, Steuerliche Betriebsprüfung 1971, S. 241 ff.
Knoppe. Lizenzverträge und verdeckte Gewinnausschüttung, Betriebsberater 1967, S. 1117.

4. *Konzernumlagen*

a) *Begriff*

Der Begriff „Konzernumlage" oder Regiekosten (management fees) umfasst gewisse Leistungen des Zentralunternehmens, die zugunsten der Gesamtheit des Unternehmensverbandes oder eines Teils hiervon, ausserhalb des eigentlichen Geschäftsgegenstandes — aber doch in wirtschaftlichem Zusammenhang mit diesem — erbracht werden.[21] Sprachlich werden hierbei mehrere Begriffe verwendet, z.B. Konzernumlagen, Regiekosten (management fee, home office charges, head office charges). Darüberhinaus ist die Abgrenzung zwischen technischer Beratung im Rahmen von Lizenzverträgen und Konzernumlagen in der Praxis schwierig. In vielen Fällen unterscheiden die Unternehmungen nicht deutlich zwischen den verschiedenen Arten der Leistungen seitens der Zentrale und erheben eine Pauschalumlage bei den verbundenen Unternehmen.

Nach deutscher Auffassung ist ferner zwischen den sogenannten Ausgaben für die Konzernleitung und -kontrolle (cost of control) einerseits und den abgrenzbaren Dienstleistungen der Muttergesellschaft andererseits zu unterscheiden.

b) *Auffassung der deutschen Steuerbehörden in dem Handbuch*

Nach den Ausführungen im Handbuch werden Umlagen der Muttergesellschaft von den deutschen Steuerbehörden nur anerkannt, falls der Umlage im einzelnen messbare und abgrenzbare Leistungen für die deutsche Tochtergesellschaft zugrunde liegen. Weiterhin müssen die Leistungen der Muttergesellschaft im *Interesse* und zum Nutzen der Tochtergesellschaft erfolgen. Ferner müssen sie von ihr angefordert werden.

Kosten für Koordinierung und Kontrolle der Tochtergesellschaft durch die Muttergesellschaft können der Tochtergesellschaft nicht belastet werden und sind nicht abzugsfähig.[22] Zum Abzug zugelassen sind hingegen Ausgaben für solche Leistungen der Muttergesellschaft, die auch von einem fremden Dritten ausgeführt werden könnten, z.B. auf den Gebieten Werbung, Marketing, insbesondere Rechts-, Steuer- und technische Beratung.

Nach Auffassung der deutschen Finanzverwaltung ist für jede erbrachte Leistung eine getrennte Rechnungslegung erforderlich. In der Praxis kann aus technischen Gründen diesen Anforderungen oft nicht nachgekommen werden und es sind uns Fälle bekannt, in denen pauschale Umlagen insbesondere dann von der Finanzverwaltung anerkannt wurden, wenn die Umlage im Verhältnis zu den erbrachten Leistungen angemessen war und ein Nachweis der Kosten für die Leistungen nebst Aufteilungsschlüssel erbracht wurde.

Das Handbuch verlangt weiter Klarheit und Genauigkeit bezüglich der Vereinbarungen zwischen Muttergesellschaft und Tochtergesellschaft. Insbesondere müssen Leistung und Gegenleistung im voraus vereinbart, hinsichtlich Art und Umfang, und die Gebühren in zeitlichem Zusammenhang mit dem Anfall der Kosten be-

21. Vgl. Becker, H., in Flick/Wassermeyer/Becker, a.a.O. § 1 Anm. 249.
Becker, H.: Konzernumlagen und Konzernpreise im deutschen Aussensteuerrecht, Internationale Wirtschaftsbriefe Fach 3 Gruppe 4 S. 97.
Becker, H.: Konzernumlagen und Konzernpreise bei Betriebstätten, Europäische Steuerzeitung 1971, S. 95 ff.

22. BFH-Urteil vom 19.3.1969, I R 31/67 BStBl. 1969 II S. 497.

lastet werden. [23] In allen Fällen muss die Gegenleistung angemessen sein und mit den Preisen übereinstimmen, die auch unabhängige Berater für gleiche Leistungen berechnen würden. Grundsätzlich ist bei der Bemessung des Leistungsentgeltes der ausländischen Muttergesellschaft die Berücksichtigung eines angemessenen Gewinnaufschlages möglich. Ohne Gewinnaufschlag, also auf Selbstkostenbasis, sind nur solche Kosten weiterzubelasten, die die ausländische Muttergesellschaft einem Dritten für Leistungen an die deutsche Tochtergesellschaft erstattet.

Es ist festzuhalten, dass das Gebiet der Konzernumlagen, insbesondere die Aufteilung der Kosten für Forschung und Entwicklung, schwierig und neu ist. Es ist ungewiss, ob die dargelegte Auffassung der Finanzverwaltung im Entwurf des Handbuchs in vollem Umfang auch in den revidierten Entwurf übernommen wird. Zweifelhaft erscheint uns ferner ob die sehr hohen Anforderungen in allen Punkten auch durch Entscheidungen der Finanzgerichte aufrechterhalten werden. Rechtsprechung gibt es auf diesem Gebiet nur in sehr begrenztem Umfang.

Nach unseren Beobachtungen ist die Einstellung der deutschen Finanzverwaltung zu diesem Problemkreis nicht konsequent. Je nachdem, ob es sich um die steuerliche Beurteilung der deutschen Tochtergesellschaft einer ausländischen Muttergesellschaft oder einer deutschen Muttergesellschaft handelt, führt die unterschiedliche Interessenlage zu einer anderen Betrachtungsweise, die rechts-theoretisch sicherlich nicht gerechtfertigt ist.

5. *Zinsen für Darlehen von verbundenen Unternehmen*

Viele deutsche Tochtergesellschaften ausländischer Muttergesellschaften sind unterkapitalisiert. Die geringe Kapitalausstattung gibt der Tochtergesellschaft die Möglichkeit, Zinsen für ein von der ausländischen Muttergesellschaft gewährtes Darlehen als Betriebsausgabe abzuziehen, um so mit steuerlicher Wirkung den Gewinn zu mindern. In der Regel sind diese Zinszahlungen in Deutschland steuerbefreit. Im Bereich der Einkommensteuer bzw. Körperschaftsteuer (im Gegensatz zur Gewerbesteuer und Vermögensteuer) ist es nach der Rechtsprechung des BFH nur in Ausnahmefällen gerechtfertigt, ein Gesellschafterdarlehen als verdecktes Stammkapital zu behandeln und den Abzug der dafür entrichteten Zinszahlungen zu versagen. [24]

Einschränkungen dieser Gestaltungsmöglichkeit löste die Einführungen der Bardepot-Verordnung aus. Danach muss für ein von einem Ausländer gewährtes Darlehen ein Betrag in Höhe von früher 50% und nun 20% des Darlehens bei der Deutschen Bundesbank unverzinslich hinterlegt werden. In diesem Zusammenhang sei erwähnt, dass zur Überwindung dieser Schwierigkeiten verschiedentlich die Rechtskonstruktion einer stillen Gesellschaft gewählt wird. Diese Konstruktion bietet gleichzeitig einige Steuervorteile und gewinnt daher immer mehr an praktischer Bedeutung.

Für ein Darlehen, das eine deutsche Tochtergesellschaft gewährt oder erhält, muss ein angemessener Zinssatz bezahlt werden.

Das Handbuch sieht im Gegensatz zur amerikanischen Handhabung keine soge-

23. Finanzgericht München vom 21. Oktober 1969, EFG 1970, S. 111;
Hessisches Finanzgericht vom 8. März 1973 EFG 1973 S. 511.

24. BFH-Urteil vom 18.3.1966, IV 218/65 BStBl. 1966 III S. 197.

nannten „safe havens" vor, d.h. Bandbreiten innerhalb derer die Zinsvereinbarung als angemessen betrachtet wird. Darüberhinaus geht aus dem Handbuch nicht klar hervor, ob die Zinskonditionen im Land des Darlehensnehmers oder des Darlehensgebers entscheidend sein sollen. Offenbar haben die deutschen Steuerbehörden dazu noch keine feste Stellung bezogen. Wir neigen zu der Auffassung, dass im Falle der Darlehensgewährung durch eine Muttergesellschaft an die Tochtergesellschaft die Kapitalmarktverhältnisse im Land der Tochtergesellschaft massgeblich sein sollen.

6. *Verhältnis von Betriebstätte zu Tochtergesellschaft*

Wie schon erwähnt, ist die Organisationsform der unselbständigen Zweigniederlassung für die Geschäftstätigkeit ausländischer Gesellschaften in Deutschland, von einigen Ausnahmen im Bereich des Bank- und Versicherungswesens abgesehen, kaum gebräuchlich. Grundsätzlich gilt für den Leistungsaustausch zwischen Betriebstätte und Stammhaus ebenso das „arm's length"-Prinzip wie für die Beziehungen von Mutter- und Tochtergesellschaft. Es sind jedoch einige Ausnahmen zu beachten, die auf der Tatsache beruhen, dass eine Zweigniederlassung keine eigene Rechtspersönlichkeit darstellt. Daher sind Zahlungen für Zinsen und Lizenzgebühren der Betriebstätte an das Stammhaus steuerlich nicht abzugsfähig. Es ist aber zweifelhaft, ob diese Betrachtungsweise in steuerlicher Hinsicht im internationalen Bereich gerechtfertigt ist. [25]

7. *Ausgleich von Vorteilen und Nachteilen*

Der Bundesfinanzhof hat in zwei Entscheidungen zur verdeckten Gewinnausschüttung zum Problem des Vorteilsausgleichs Stellung genommen. [26] Danach ist ein Ausgleich von Vorteilen, die die Gesellschaft ihrem Gesellschafter gewährt hat, durch Leistungen des Gesellschafters an die Gesellschaft nur dann möglich, wenn die Vertragsparteien im voraus ausdrücklich vereinbart hatten, dass die Vorteile als Gegenleistung für entstandene Nachteile anzusehen seien und ein zeitlicher Zusammenhang besteht, der Leistung und Gegenleistung miteinander verbindet.

Es ist strittig, ob unter dem neuen Aussensteuergesetz die von der Rechtsprechung festgelegten engen Grenzen zur Saldierung von Vorteilen und Nachteilen zugunsten erweiterter Ausgleichmöglichkeiten modifiziert werden. Dies scheint allerdings die Absicht des Gesetzgebers bei der Abfassung von § 1 dieses Gesetzes gewesen zu sein und in dieser Richtung geht, wenn auch mit gewissen Vorbehalten, der bereits erwähnte Erlassentwurf.

III. BETRIEBSPRÜFUNG

Da bei einer Reihe von Ländern das geltende Steuerrecht unterschiedlich gehandhabt wird, insbesondere Art und Umfang der steuerlichen Überwachung durch die Verwaltung ziemlich verschieden sind, scheint es ratsam, den ausländischen Leser mit der deutschen Betriebsprüfung vertraut zu machen.

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25. Bezüglich weiterer Einzelheiten vgl. Cahiers de Droit Fiscal International Volume LVIIIa, **premier sujet**. Die Besteuerung von Unternehmen mit Betriebstätten im Ausland.

26. BFH-Urteil vom 22.4.1964, I 62/61 U. BStBl. 1964 III S. 370.
BFH-Urteil vom 4.5.1965, I 130/62 U. BStBl. 1965 III S. 598.

1. *Allgemeines*

Die Betriebsprüfung ist in Deutschland ein wichtiger Teil des Veranlagungsverfahrens. Die Amtsgewalt der Finanzbehörden, insbesondere der Betriebsprüfung, gründet sich auf die Abgabenordnung und das Steueranpassungsgesetz. Allgemein kann man das Ausbildungsniveau und die Fachkenntnis der deutschen Finanzbeamten als sehr hoch bezeichnen. In der Praxis liegt das Hauptgewicht der Überprüfung der Steuererklärung und der endgültigen Festsetzung der Steuerschuld mehr bei der Betriebsprüfung als bei der Veranlagungsstelle des jeweiligen Finanzamtes. Wenn auch nach dem Buchstaben des Gesetzes die letztere Stelle die Entscheidungsbefugnis besitzt, wird in der Praxis die Veranlagungsstelle kaum einen von der Betriebsprüfung abweichenden Standpunkt beziehen.

Für die Betriebsprüfung bestehen genaue Regelungen, die in der allgemeinen Verwaltungsvorschrift für die Betriebsprüfung — Betriebsprüfungsordnung — enthalten sind. Wichtige Begriffe im Bereich der Betriebsprüfung z.B. Fertigungslöhne, werden erläutert und definiert, um eine gleichmässige Anwendung dieser Begriffe innerhalb der Betriebsprüfung zu gewährleisten.

2. *Aufgaben der Betriebsprüfung*

Der Betriebsprüfer hat alle tatsächlichen und rechtlichen Umstände, die für die Besteuerung und die Berechnung der Steuerschuld von Bedeutung sind, genau zu ermitteln und zu überprüfen. Diese Prüfung hat sowohl zugunsten wie auch zu Lasten des Steuerpflichtigen zu erfolgen.

Die Unternehmen werden eingeteilt in grössere Unternehmen, mittelgrosse Unternehmen und kleine Unternehmen. Grössere Unternehmen sollen alle 3 Jahre geprüft werden. Dabei werden regelmässig alle einschlägigen Steuern der Unternehmung von dem Betriebsprüfer geprüft. Es gibt jedoch auch Spezialprüfer für bestimmte Steuern, wie z.B. für den Bereich der Kapitalverkehr- und der Lohnsteuer.

3. *Durchführung der Betriebsprüfung*

Der Steuerpflichtige wird von der bevorstehenden Betriebsprüfung unterrichtet und nur in Ausnahmefällen z.B. beim Verdacht der Steuerhinterziehung wird eine besondere Steuerfahndungsabteilung eingeschaltet, die mit gerichtlicher Genehmigung das Unternehmen durchsuchen und Unterlagen beschlagnahmen kann.

Grundsätzlich soll der Betriebsprüfer alle notwendigen Auskünfte vom Steuerpflichtigen oder von der von ihm benannten Person erlangen. Nur unter besonderen Umständen kann er sich an andere Angestellte des Steuerpflichtigen wenden und an Dritte darf nur in den Fällen herangetreten werden, in denen die Verhandlungen mit dem Steuerpflichtigen zur Erholung der Auskünfte nicht erfolgversprechend sind. Der Betriebsprüfer macht bei der Prüfung eines Steuerpflichtigen sogenannte „Kontrollmitteilungen", die für die Besteuerung anderer Steuerpflichtiger bedeutsam sind, z.B. über ausgestellte Rechnungen eines Lieferanten die zu den Steuerakten des Lieferungsempfängers und damit bei dessen Betriebsprüfung berücksichtigt werden.

4. *„Schlussbesprechung"*

Erfahrungsgemäss bemühen sich bei der sogenannten Schlussbesprechung am Ende der Betriebsprüfung die Beteiligten im Kompromisswege eine Einigung über die verschiedenen Streitpunkte zu erzielen, z.B. über die Abschreibungssätze und die

Angemessenheit von Lizenzgebühren. In der Regel sind beide Seiten bemüht, einen langwierigen Rechtsstreit zu vermeiden. Diese Einstellung findet man insbesondere dann, wenn es sich um schwierige und komplizierte Sachverhalte handelt und gilt auch ganz besonders für den internationalen Bereich.

Über das Ergebnis der Betriebsprüfung wird ein sogenannter Betriebsprüfungsbericht erstellt und dem Finanzamt vorgelegt, das in der Regel — wie bereits erwähnt — der Stellungnahme des Betriebsprüfers folgt. Die Veranlagungsstelle fertigt dann die Steuerbescheide entsprechend aus. Die üblichen Rechtsbehelfe, wie z.B. Einspruch, bestehen auch gegen diese neuen Steuerbescheide der Veranlagung.

5. *Aufbau und Organisation der Betriebsprüfung*

Die Organisation der Betriebsprüfung ist in dem „Erlass zur Betriebsprüfungsordnung" behandelt. Alle grösseren Finanzämter, insbesondere die Finanzämter für Körperschaften, haben ihre eigene Abteilung für Betriebsprüfung. In der Regel werden die besser qualifizierten Beamten der Finanzverwaltung der Betriebsprüfung zugewiesen.

Eingehende Regelungen bestehen auch für das Verfahren zur Erlangung von Auskunft seitens ausländischer Steuerbehörden mit Bezugnahme auf die einschlägigen Bestimmungen in den Doppelbesteuerungsabkommen.

6. *Bundesamt für Finanzen*

Das „Bundesamt für Finanzen" wurde eingerichtet, um Betriebsprüfungen im internationalen Bereich wirkungsvoller zu gestalten und Informationen und Daten von Bedeutung für die Auslandsbeziehungen der Steuerpflichtigen zu sammeln. Es hat in gewissem Umfang vergleichbare Funktionen wie das „Office of International Operation" in der amerikanischen Verwaltung.

Wie oben erwähnt, hat das Bundesamt für Finanzen auch den ersten Entwurf des Handbuchs erstellt. Das Bundesamt sammelt ferner Informationen auf dem Lizenzgebiet, insbesondere Lizenzsätze, die in der Lizenzkartei erfasst werden, sowie Informationen aus ausländischen Handelsregistern, z.B. der Schweiz und Liechtenstein, die in der Bundeskartei für Auslandsbeziehungen aufgenommen werden.

In diesem Zusammenhang sei erwähnt, das auch bei der Tätigkeit dieses Amtes der Grundsatz des „Steuergeheimnisses" zu beachten ist. Eine einschlägige Information darf nicht an einen Dritten weitergegeben werden. Es kann jedoch kaum verhindert werden, dass Kenntnisse, die ein Betriebsprüfer bei der Betriebsprüfung eines Wettbewerbers gewonnen hat, bei einer anderen Betriebsprüfung in der gleichen Branche verwertet werden. Die praktische Bedeutung dieser Kenntnisse und Erfahrungen darf nicht unterschätzt werden.

IV. PFLICHTEN DES STEUERPFLICHTIGEN

Bereits die Rechtsprechung des RFH und BFH [27] hat bei Auslandsbeziehungen eine besonders starke Mitwirkungspflicht des Steuerpflichtigen bejaht, da die Möglichkeiten der Beschaffung entsprechender Informationen zur Aufklärung der ins

27. z.B. BFH-Urteil vom 13.7.1962 VI 100/61 U, BStBl. 1962 III S. 428.
z.B. RFH-Urteil vom 17.7.1934, V A 456/33 RStBl. 1935 III S. 306.

Ausland reichenden Sachverhalte für die deutsche Steuerverwaltung naturgemäss begrenzt sind. Davon ausgehend wurde in dem erwähnten Aussensteuergesetz eine erhöhte Aufklärungspflicht des Steuerpflichtigen kodifiziert, insbesondere wenn der Steuerpflichtige den Abzug von Schulden oder Betriebsausgaben für die seitens der ausländischen Gesellschaft in Rechnung gestellten Ausgaben beantragt. Die Aufklärungspflicht umfasst die Offenlegung aller Beziehungen, die zwischen dem Steuerpflichtigen und der verbundenen ausländischen Gesellschaft oder Person bestehen. Darüberhinaus sind auf Verlangen der Finanzverwaltung alle sachdienlichen Unterlagen einschliesslich der Bilanzen und Erfolgsrechnungen vorzulegen. Die Finanzverwaltung kann ferner anordnen, dass diese Unterlagen mit dem Prüfungsvermerk einer anerkannten Wirtschaftsprüfungsgesellschaft oder einer vergleichbaren Stelle versehen sind.

Schliesslich wurde die Abgabenordnung durch Vorschrift (§ 171 Abs. 3 AO) ergänzt. Danach sind bei Auslandsbeziehungen die Beteiligten verpflichtet, unter Ausschöpfung aller tatsächlichen und rechtlichen Möglichkeiten den Sachverhalt aufzuklären und alle erforderlichen Beweismittel zu beschaffen. Der Steuerpflichtige kann nicht geltendmachen, dass er zur Abgabe der notwendigen Informationen nicht in der Lage sei oder die notwendigen Beweismittel nicht liefern könne, wenn er nach den gegebenen Umständen sich die Möglichkeit dazu hätte verschaffen können.

V. ERFAHRUNGEN BEI BETRIEBSPRÜFUNGEN

Im folgenden versuchen wir einige unserer Erfahrungen, die wir bei Betriebsprüfungen ausländischer Tochtergesellschaften in Deutschland erworben haben, darzulegen. Naturgemäss erheben sie keinen Anspruch auf Allgemeingültigkeit und wollen nur einen Einblick in das Verhalten der deutschen Betriebsprüfer vermitteln, das nach unserer Kenntnis im Verhältnis zur Praxis in Grossbritannien und in anderen europäischen Ländern doch ziemlich verschieden ist. Eine grössere Ähnlichkeit scheint hingegen mit der Praxis in den Vereinigten Staaten zu bestehen.

1. *Einstellung der Betriebsprüfer im internationalen Bereich*

Entgegen der Praxis in manchen anderen europäischen Ländern sind die deutschen Steuerbehörden und Betriebsprüfer bei der Anwendung der Gesetze und Verordnungen sehr streng und genau. Des weiteren konnten wir in den vergangenen Jahren eine intensivere Nachprüfung im internationalen Bereich, insbesondere bei Transaktionen zwischen deutschen Tochtergesellschaften und ihren ausländischen Muttergesellschaften feststellen. Die Ausbildung der Finanzbeamten zur Prüfung von Auslandbeziehungen wurde verbessert und das mehrfach erwähnte Handbuch gibt dem Beamten ein gutes Rüstzeug zur Hand und konkrete Anweisungen für Vorgehen und Methoden zur Überprüfung. Bei der Betriebsprüfung grösserer Unternehmen werden meist auch Experten des Bundesamtes hinzugezogen, wobei deren Erfahrungen und Kenntnisse bei der Betriebsprüfung anderer Unternehmen in der gleichen Branche für die Beurteilung des zugrundeliegenden Falles unter Umständen von erheblicher Bedeutung sein können, insbesondere für den „arm's length"-Test, der weitgehend auf dem Fremvergleich beruht.

Ganz allgemein bemerken wir bei den

Betriebsprüfern ein gewisses Misstrauen bei Auslandsgeschäften mit verbundenen Unternehmen, und zwar selbst in den Fällen, in denen die Muttergesellschaft sich nicht in einem „Steuerparadies" sondern in einem Land befindet, das eine gleichartige Steuerbelastung wie Deutschland besitzt.

Darüberhinaus ist zu beobachten, dass eine gewinnträchtige Tochtergesellschaft nicht in dem Masse und mit der Intensität überprüft wird wie eine Tochtergesellschaft, die Verluste aufweist, wenn auch theoretisch die Prüfung der Angemessenheit der Transaktionen unabhängig von der Gewinnerzielung, die von anderen, marktabhängigen, Faktoren bestimmt wird, vorgenommen werden soll. So kann beispielsweise die Anerkennung der Lizenzgebühren in Höhe eines bestimmten Prozentsatzes im Falle einer profitablen Tochtergesellschaft anerkannt, jedoch im Falle einer verlustausweisenden Tochtergesellschaft versagt werden.

2. *Keine verbindliche Auskunft durch deutsche Steuerbehörden*

Bezüglich der Anerkennung von Verrechnungspreisen im Konzern und anderen Vereinbarungen zwischen verflochtenen Gesellschaften werden von der deutschen Finanzverwaltung keine verbindlichen Auskünfte erteilt. Nur in Einzelfällen sind die Finanzämter bereit, zur Frage des Verrechnungspreises Stellung zu nehmen, jedoch vorbehaltlich der endgültigen Entscheidung anlässlich einer späteren Betriebsprüfung. Da die Betriebsprüfung wegen Personalmangels selbst bei grösseren Unternehmen oft nur alle 4 - 5 Jahre stattfindet, resultiert hieraus eine Unsicherheit und schwer zu bestimmende latente Steuerlast beim Steuerpflichtigen für einen längeren Zeitraum.

3. *Vorbereitungen auf die Betriebsprüfung und taktische Erwägungen*

Nach unserer Erfahrung ist es sehr wichtig, bei allen Vereinbarungen zwischen verbundenen Unternehmen präzise und detaillierte Regelungen zugrunde zu legen, für die auch gute kaufmännische Gründe angeführt werden können. Sie müssen auch Art und Umfang der Leistungen beschreiben. Oftmals sind die Verträge zwischen Mutter- und Tochtergesellschaft nur unbestimmt und kurz gehalten, da die Muttergesellschaft eine detaillierte Vereinbarung im Hinblick auf die Kontrolle der Tochtergesellschaft nicht für notwendig oder wünschenswert erachtet. Das deutsche Steuerrecht erkennt jedoch nur solche Vereinbarungen an, die die Rechte und Pflichten der Parteien in eindeutiger und klarer Weise begründen. Rückwirkende Abmachungen zwischen den verbundenen Unternehmen sind steuerlich nicht zulässig.

Alle für die steuerliche Beurteilung notwendigen Belege, Urkunden, Briefwechsel, schriftliche Beweisstücke und Dokumente sind in geeigneter Weise zu sammeln und dem Betriebsprüfer auf Verlangen vorzulegen. Diese Materialsammlung ist insbesondere bei globaler Abrechnung und bei Beratungsverträgen (Technical Assistance) von grosser Bedeutung.

4. *Global- und Einzelrechnungen*

Streitpunkt bei vielen Betriebsprüfungen ist die Frage, ob die Muttergesellschaft für gewisse Dienstleistungen gegenüber ihrer Tochtergesellschaft eine pauschale Belastung vornehmen kann. Wie erwähnt, ist nach Auffassung der deutschen Finanzverwaltung nur die gesonderte Abrechnung einzelner abgrenzbarer Leistungen steuerlich anzuerkennen. Dieser Verpflichtung nachzukommen ist für den Steuer-

pflichtigen oftmals aus technischen Gründen schwierig wenn nicht unmöglich. In einigen uns bekannten Fällen war die deutsche Finanzverwaltung bereit Pauschalgebühren deshalb anzuerkennen, jedoch nur unter der Voraussetzung der ausreichenden Nachweisführung über die bei der Muttergesellschaft angefallenen Kosten und bei einem angemessenen Schlüssel der Kostenzuweisung gegenüber allen ausländischen Tochtergesellschaften, z.B. durch Bestätigung von anerkannten Wirtschaftsprüfungsgesellschaften.
Andere europäische Finanzbehörden nehmen nach unserer Kenntnis auch auf diesem Sektor eine grosszügigere und mehr flexible Haltung ein.

5. *Bedeutung der Beweislast*

Obwohl es eine Beweislast im eigentlichen Sinne im deutschen Steuerrecht nicht gibt, versucht die deutsche Finanzverwaltung in der Praxis die Nachweisführung über die Angemessenheit der Verrechnungspreise dem Steuerpflichtigen aufzubürden. Unseres Erachtens steht diese Verfahrensweise nicht in Übereinstimmung mit dem Grundsatz der Gesetzmässigkeit der Verwaltung und der daraus resultierenden Verpflichtung der deutschen Finanzbehörden, alle tatsächlichen und rechtlichen Verhältnisse zu ermitteln, die für die Steuerpflicht und Bemessung der Steuer von Bedeutung sind. Dabei ist jedoch einzuräumen, dass in der Praxis die Grenze zwischen Umfang der Mitwirkungspflicht des Steuerpflichtigen und Amtsermittlungspflicht der Steuerbehörden insbesondere bei der Aufklärung internationaler Sachverhalte fliessend ist, an dem Grundsatz aber, dass es der Steuerverwaltung obliegt, den Steueranspruch und die ihn begründenden Umstände darzulegen, muss festgehalten werden.

6. *„Schlussbesprechung" und ihre Bedeutung*

Wie oben erwähnt, wird in den meisten Fällen bei Streitfragen (insbesondere im internationalen Bereich) eine Kompromissregelung mit der Steuerbehörde angestrebt. In der Regel ist keine der beiden Parteien darauf bedacht, eine gerichtliche Entscheidung über die Streitpunkte herbeizuführen. Vielmehr werden in Verhandlungen die gegensätzlichen Standpunkte angeglichen, z.B. über die Angemessenheit von Verrechnungspreisen [28]. Daher sind auch nur wenige gerichtliche Entscheidungen zu diesem Problemkreis ergangen.
Folgendes Beispiel soll einen solchen Kompromiss verdeutlichen: Die deutsche Tochtergesellschaft einer ausländischen Muttergesellschaft hat einen Markt in einem anderen europäischen Land erschlossen und dabei Verluste erlitten, die bei der steuerlichen Gewinnermittlung in Deutschland als Betriebsausgabe abgezogen wurden. Später übertrug die ausländische Muttergesellschaft diesen Markt auf eine andere europäische Tochtergesellschaft, ohne der deutschen Tochtergesellschaft für die erlittenen Verluste einen Ausgleich zu gewähren. In diesem Fall bestand der Kompromiss darin, dass ein bestimmter Prozentsatz der Verluste als Forderung in der Bilanz der deutschen Tochtergesellschaft aktiviert und keine verdeckte Gewinnausschüttung angenommen wurde.

7. *Verhältnis der Zollverwaltung zur Steuerverwaltung*

Wie im Steuerrecht stellt sich auch im Zollrecht das Problem der Ermittlung

28. Vgl. Pöppl, Franz: Die Problematik der Beurteilung von Leistungsentgelten im internationalen Konzern nach deutschem Steuerrecht, Deutsche Steuerzeitung 1974, S. 158.

angemessener Verrechnungspreise. Das Zollrecht definiert als Zollwert den sogenannten „Normalspreis" (§ 29 Abs. 1 ZG), wobei als Masstab für die Angemessenheit des vereinbarten Preises der sogenannte übliche Wettbewerbspreis dient, also der Preis, zu dem der Verkäufer die eingeführte Ware üblicherweise an jeden Käufer verkauft oder verkaufen würde, (§ 1 Abs. 1 Satz 2 Wertzollordnung — WertZO —). Obwohl Zollrecht und Steuerrecht bei der Preisermittlung entsprechend dem „arm's-length"-Grundsatz von der Fiktion des unabhängigen Unternehmens ausgehen, ist die Steuerverwaltung nach der Rechtsprechung des BFH bei der ertragssteuerlichen Behandlung durch die zollrechtliche Beurteilung nicht gebunden. Die unterschiedlichen Ergebnisse resultieren aus den unterschiedlichen Interessen und Ermittlungsrichtung von Zoll- und Steuerverwaltung: erstere ist an einem hohen, letztere an einem niedrigen Importpreis der Güter gelegen. Der Steuerpflichtige kann unter diesen Umständen der unterschiedlichen Betrachtungsweise beider Behörden ausgesetzt sein.

VI. DAS VERSTÄNDIGUNGSVERFAHREN GEMÄSS DOPPELBESTEUERUNGSABKOMMEN

1. *Verständigungsverfahren*

Die meisten Doppelbesteuerungsabkommen enthalten entsprechend den Empfehlungen des OECD-Musterabkommens eine Bestimmung über das sogenannte Verständigungsverfahren [29] wie z.B. in Art. XVIII A des britisch-deutschen Doppelbesteuerungsabkommens.

Art. XVIII A DBA GB/BRD eröffnet dem Steuerpflichtigen die Möglichkeit, seinen Fall der Finanzverwaltung vorzulegen, wenn zur Frage der Angemessenheit von den beteiligten Steuerbehörden ein unterschiedlicher Standpunkt eingenommen wird und somit eine Doppelbesteuerung droht. Die britische und die deutsche Finanzverwaltung werden ersucht eine Lösung anzustreben, wodurch die doppelte Besteuerung des strittigen Betrages vermieden werden soll.

2. *Der OECD Vorschlag*

Wie erwähnt, erlaubt Art. 9 des OECD-Musterabkommens eine Zuweisung von Gewinnen, wenn den Anforderungen der „Angemessenheit" bei der Vereinbarung der Leistungsentgelte zwischen verbundenen Unternehmen nicht Rechnung getragen ist.

Der OECD Steuerausschuss hat nun in einem Entwurf zur Revision des Musterabkommens vorgeschlagen, dass im Falle der Berichtigung von Einkünften eines verbundenen Unternehmens eine korrespondierende Berichtigung im anderen Staat durchgeführt werden soll. Dabei geht die neue OECD Regelung jedoch nicht so weit, eine automatische Gewinnminderung bei dem anderen verbundenen Unternehmen (Staat B) festzulegen, wenn der Gewinn des einen verbundenen Unternehmens (Staat A) berichtigend erhöht wurde. Eine solche Lösung würde eine weitgehende Kompetenzübertragung auf die Finanzverwaltung eines anderen Staates bewirken, die zumindest in naher Zukunft von keinem Land hingenommen werden dürfte.

Ebenso wird in dem revidierten Art. 9 offengelassen, durch welche Methode eine korrespondierende Gewinnberichtigung herbeigeführt werden soll. Eine

29. Vgl. Studer, Walter: Über das Verständigungsverfahren in Doppelbesteuerungsabkommen, Bulletin for International Fiscal Documentation 1971, Vol. XXV, S. 81 ff.

Klarstellung wird durch die neue Regelung nur insoweit bewirkt, als das Verständigungsverfahren auch im Fall rechtlich selbständiger verbundener Unternehmen zur Beseitigung der Doppelbesteuerung offenstehen soll, was lange Zeit strittig war.

3. *Erfahrung bei Verständigungsverfahren*
Veröffentlichungen über die im Verständigungsverfahren ergangenen Entscheidungen liegen unseres Wissens nicht vor. In einigen uns bekannten Verständigungsverfahren zwischen Deutschland und der Schweiz konnte eine Einigung zwischen den beiden Regierungen herbeigeführt werden. Des weiteren sind zwischen Deutschland und den Vereinigten Staaten einige Verständigungsverfahren anhängig. Die Anzahl dieser Verfahren dürfte in den kommenden Jahren im Hinblick auf die Ausweitung der internationalen Wirtschaftsbeziehungen zunehmen.
In Deutschland ist es ferner möglich, den Fall auf zwei Ebenen zu verfolgen, d.h. den Streitfall an das Finanzgericht zu tragen und gleichzeitig die Überprüfung durch die Finanzverwaltung im Verständigungsverfahren zu betreiben.

4. *EG Behörden*
Die Steuerabteilung der Hohen Kommission hat noch keine Entschliessungsentwürfe zu dem Problem der Verrechnungspreise veröffentlicht, sondern lediglich in ihrem Bericht über steuerliche Vereinbarungen bei Holding-Gesellschaften (18. Juni 1973 com. (73) 1008 final) allgemeine Erklärungen bezüglich Holding-Gesellschaften abgegeben.
Ein ad-hoc-Ausschuss der Vereinten Nationen beschäftigt sich gegenwärtig mit dem Problem der Konzernverrechnungspreise [30]. Der amerikanische Professor Surrey, der geistige Vater der Richtlinien zu Section 482 IRC, ist zum Berater dieses Ausschusses bestellt worden.

VII. INFORMATIONSAUSTAUSCH ZWISCHEN DEN FINANZVERWALTUNGEN

1. *Informationsklauseln in den Doppelbesteuerungsabkommen*
Die meisten DBA enthalten Vorschriften für den Informationsaustausch zwischen den Steuerverwaltungen und bezwecken die Erteilung von Auskünften, die notwendig sind zur Durchführung der Vorschriften in den DBA bzw. zur Verhinderung der Steuerhinterziehung oder Steuerverkürzung. Jede danach ausgetauschte Information ist als geheim zu behandeln und darf dritten Personen, die mit der Steuerfestsetzung nicht betraut sind, nicht zugänglich gemacht werden.

2. *Praxis*
Offenbar wird die Informationsklausel nach unserer Kenntnis im Hinblick auf die bürokratische Verfahrensregelung und die damit verbundene Langwierigkeit der Auskunfterteilung nicht umfassend genutzt, wenn auch im innerdeutschen Recht detaillierte Richtlinien für das Verfahren in derartigen Fällen bestehen.
Des weiteren findet in gewissen Fällen ein automatischer Informationsaustausch statt. So werden z.B. die US - Steuererklärungen für gebietsfremde Ausländer, die Investmentzertifikate oder andere Wertpapiere besitzen, dem US Treasury Department übermittelt (Office of International Operations) das seinerseits diese

30. Vgl. dazu UN-Report on Multinational Companies — tax aspects, in Intertax 1973/6, S. 165 ff.

Erklärungen, soweit sie z.B. Deutschland betreffen, dem Finanzamt in Hamburg weiterleitet. Von Hamburg aus soll die Verteilung an die örtlichen Finanzämter erfolgen, die die Veranlagung der Wertpapierbesitzer durchführen.

3. *„Interfisc"*

Auf einer anderen Ebene und zu einem anderen Zweck ist die Studiengruppe „Interfisc" von den Finanzministerien der Vereinigten Staaten, Grossbritannien, Deutschland und Frankreich eingerichtet worden.

Der Gruppe gehören die Leiter der Abteilungen für Doppelbesteuerungsabkommen der vorgenannten Ministerien und Sachverständige der Betriebsprüfungsabteilungen an.

Aufgabe der „Interfisc" ist die Untersuchung der Methoden der Gewinnaufteilung im internationalen Bereich, insbesondere der Probleme der Konzern-Verrechnungspreise, sowie die Intensivierung des Erfahrungs- und Informationsaustausches bei der Betriebsprüfung multinationaler Gesellschaften.

Schlussbemerkungen

1. Die deutsche Finanzverwaltung wendet die Steuervorschriften genau und streng an. Die Transaktionen zwischen verbundenen Unternehmen sind Gegenstand gründlicher Überprüfung durch einen gut ausgebildeten und erfahrenen Stab von Finanzbeamten.
2. In der Vergangenheit haben wir festgestellt, dass die Finanzverwaltung besonderes Gewicht auf die Prüfung der Geschäftsbeziehungen zwischen deutschen Tochtergesellschaften und deren ausländischen Muttergesellschaften legt. Neuerdings wird in verstärktem Masse auch die Auslandstätigkeit deutscher Muttergesellschaften einer genaueren Prüfung unterzogen.
3. Die Frage der Belastung ausländischer Tochtergesellschaften durch Aufwendungen für Forschung und Entwicklung und andere Ausgaben der Muttergesellschaft wird künftig ein Hauptproblem im internationalen Steuerbereich darstellen, das auch auf dem IFA-Kongress in London 1975 Gegenstand der Erörterung sein wird. In diesem Zusammenhang ist die Entwicklung in den Vereinigten Staaten im Hinblick auf den Vorschlag der Richtlinien zu Sect. 861 IRC von besonderer Bedeutung.

ANHANG

Vergleich der Steuerlast einer deutschen GmbH (unabhängige Tochtergesellschaft) und einer deutschen (unselbständigen) Betriebstätte.
Es wird davon ausgegangen, dass die GmbH, die eine in vollem Anteilsbesitz stehende Tochtergesellschaft einer ausländischen Muttergesellschaft ist, eine höchstmögliche Ausschüttung vornimmt. Die folgenden Zahlen sind teilweise aufgerundet, insbesondere was die Gewerbesteuer betrifft, die in den einzelnen Gemeinden unterschiedlich hoch ist; die Zahlen berücksichtigen nicht die Vermögensteuer und die Gewerbekapitalsteuer.

		GmbH	Betriebstätte
Gewinn (nach Abzug von Betriebsausgaben und AfA)		1.000	1.000
Deutsche Gewerbesteuer (nach dem Gewerbeertrag) geschätzt		200	200
Der Körperschaftsteuer unterliegendes Einkommen		800	800
Deutsche Körperschaftsteuer			
Betriebstätten-Steuersatz: 49% × 800 =			392
GmbH Steuersatz			
15% × 610 (max. Gewinnausschüttung)	92		
51% × 190 (einbehaltener Gewinn)	98		
Körperschaftsteuer		190	
3% Ergänzungsabgabe		6	12
5% Stabilitätszuschlag auf die in 1973 und 1974 erhobene Steuer		9,5	20
Körperschaftsteuer gesamt		205,5	424
Deutsche Kapitalertragsteuer			
25% × 610		152,5	—
Nettogewinn nach Steuern		442	376

Die gesamte Steuerbelastung hängt von der Behandlung des Einkommens aus deutschen Quellen im Land der Muttergesellschaft ab. Dieses Land kann z.B. eine direkte Steueranrechnung für die deutsche Quellensteuer auf Dividenden oder der deutschen Körperschaftsteuer auf das Betriebstättenergebnis und/oder eine indirekte Steueranrechnung für die deutsche Körperschaftsteuer und Gewerbesteuer gewähren, die auf das steuerpflichtige Einkommen der deutschen GmbH erhoben wird.

Der normale Steuersatz von 25% für Quellensteuer auf Dividenden ist durch die meisten deutschen DBA auf 15% vermindert, jedoch nur für Wertpapieranlagen und nicht für Schachtelbeteiligungen an Tochtergesellschaften. Lediglich im deutsch-amerikanischen DBA ist der Quellensteuersatz auch für diese Fälle auf 15% begrenzt, es sei denn, die Muttergesellschaft nimmt eine Reinvestition des Gewinnes bei der Tochtergesellschaft vor.

I. CLAEYS BOUUAERT *:

LA PROCEDURE FISCALE EN BELGIQUE

REMARQUE INTRODUCTIVE

Comme ses voisins, la Belgique connaît une procédure distincte pour le contentieux concernant l'assiette, le montant et la forme des impositions aux impôts sur les revenus. Cette procédure, qui concerne la très grande majorité des litiges fiscaux, est la seule qui sera envisagée dans la présente note.

Les litiges, beaucoup moins nombreux, concernant les droits d'enregistrement et de succession, la T.V.A. et le recouvrement des impôts, sont soumis aux tribunaux civils selon les procédures ordinaires. Cette dualité de procédure est le résultat d'une très ancienne tradition. On peut discuter du point de savoir si elle est souhaitable; notamment l'instauration de la T.V.A. peut avoir pour conséquence, à plus ou moins longue échéance, de rendre opportun un rapprochement entre ces procédures. Jusqu'ici elles semblent cependant, chacune sur son terrain, assurer d'une façon efficace la défense des intérêts en présence.

LIGNES GENERALES

Comme aux Pays-Bas cette procédure présente:

a) une phase administrative: la réclamation adressée au directeur (provincial ou régional) des impôts.
b) deux phases judiciaires: appel et cassation.

ACCESSIBILITE POUR LE JUSTICIABLE. QUELQUES DONNEES SOCIOLOGIQUES

Il semble qu'il y ait par an en moyenne, en Belgique, environ 125.000 réclamations introduites devant les directeurs.

Il s'agit souvent de rectifications assez simples, ce qui explique sans doute que la proportion des recours en appel soit fort réduite: environ 500 par an en moyenne, soit 0,4%. Quant aux pourvois en cassation, ils ont atteint ces dernières années un nombre approximatif de 40 à 60 par an. A première vue, ces chiffres semblent indiquer que dans l'ensemble les contribuables obtiennent satisfaction ou acquiescent de bon gré aux décisions directoriales. La réalité est peut-être plus complexe. Il y a des cas où les contribuables évitent une procédure pour des raisons psychologiques (recherche d'un arrangement) ou en raison de problèmes de preuve.

La durée de ces procédures est extrêmement variable, mais il est assez fréquent que la phase administrative (de la réclamation à la décision du directeur) dure environ un an; la phase judiciaire au fond (de la décision à l'arrêt de la cour d'appel) un à 2 ans; la phase de cassation (de l'arrêt d'appel à l'arrêt de la cour de cassation) également un à deux ans. En cas de cassation la procédure est renvoyée devant une autre cour d'appel, ce qui entraîne à nouveau un délai analogue.

Le contribuable peut théoriquement parcourir toute cette procédure sans l'assistance d'un avocat ou d'un conseil quelconque. En fait, l'intervention d'un avocat auprès du directeur est relativement peu fréquente, tandis qu'un grand nombre de réclamations sont défendues par une fiduciaire ou un conseiller fiscal (profession non officiellement organisée jusqu'ici).

Par contre, devant les cours d'appel et de

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cassation, les dossiers non traités par un avocat ne sont qu'une très faible minorité.
Ces procédures sont fort peu coûteuses: quelques centaines de francs pour la notification du recours en appel (qui doit être signifié au directeur par exploit d'huissier) et une somme analogue pour la signification et le dépôt du pourvoi en cassation. Il est bien entendue que les honoraires de la défense restent de toute façon à charge du contribuable.
L'intervention d'avocats au cours des procédures judiciaires s'explique par le fait que les règles de procédure, bien qu'elles soient simples et peu nombreuses, sont très strictes. En outre, il n'es pas permis à un conseiller fiscal de plaider à l'audience.
Les avocats qui interviennent dans ces procédures sont souvent des spécialistes du droit fiscal, ou ont acquis une certaine expérience dans ce domaine. Il n'est cependant pas rare de voir intervenir un avocat «omni-praticien».

RECLAMATION

Les réclamations doivent être introduites par écrit auprès du directeur compétent. Il est normal que le contribuable y indique ses griefs, mais il peut en ajouter d'autres au cours de l'instruction de la réclamation.
Le délai est long: jusqu'au 30 avril «de l'année qui suit celle au cours de laquelle l'impôt est établi» avec un minimum de six mois à compter de la date d'envoi du billet d'imposition. Ce délai est prolongé pour les demandes résultant de doubles emplois ou d'erreurs matérielles.
Le directeur qui reçoit la réclamation est le supérieur hiérarchique du fonctionnaire (normalement un controleur) qui a en fait déterminé les montants imposables.
La question de savoir si la décision du directeur est un acte juridictionnel ou administratif est controversée. La jurisprudence dominante tend à reconnaître à la décision un caractère juridictionnel. Divers auteurs sont d'un avis contraire; dans ce sens on souligne:
— que le directeur est juge et partie;
— qu'il peut trancher extra et ultra petita;
— qu'il n'y a pas de débat contradictoire, mais un complément d'instruction «inquisitoriale».
On soulignera d'ailleurs que l'origine de cette décision est strictement administrative.

INSTRUCTION DE LA RECLAMATION ET DECISION

La réclamation est examinée par un inspecteur (fonctionnaire de grade intermédiaire entre le controleur et le directeur), qui fait rapport. Ce fonctionnaire dispose de pouvoirs de vérification plus étendus que le controleur.
Après réception de ce rapport, le directeur tranche par une décision motivée. Celle-ci est signifiée au contribuable par pli recommandé.
Le directeur peut (et doit en principe) réexaminer dans tous ses éléments l'imposition contestée, et y apporter tous les correctifs nécessaires, tant en plus qu'en moins.
La jurisprudence en a déduit qu'il peut, sans aucune limitation de délai, décréter un supplément à l'imposition contestée.
Ceci est valable quelle que soit la cause du supplément, sous la seule restriction que ce supplément doit se rapporter à l'imposition contestée. Par ailleurs, le droit belge ne connaît pas la distinction, qui existe aux Pays-Bas, entre une imposition «définitive" et une autre. Notamment, le supplément peut aussi avoir pour but de rectifier une erreur commise précédemment par l'administration, par exemple par une

interprétation inexacte de la déclaration.
Ce pouvoir peut donner lieu à des abus. Une proposition de loi récente tend à le restreindre, mais il n'est pas possible de prévoir quand cette proposition sera adoptée.

RECOURS EN APPEL

Sur le plan judiciaire, les cours d'appel connaissent en première et dernière instance du litige en matière de contributions directes.

1. Les règles de recevabilité sont relativement simples, mais leur application est rigoureuse et elles sont imposées à peine de déchéance. Elles peuvent se résumer comme suit:

a) Rédaction d'une requête à la Cour (il n'y a pas de forme sacramentelle. Une requête sous forme de lettre est admise, bien que cette forme ne soit pas habituelle).
b) Notification au directeur d'une copie de cette requête; ceci doit se faire par exploit d'huissier.
c) Dépot de la requête et de l'original de la notification au greffe de la Cour d'appel.

Le tout doit être fait dans le délai de quarante jours à partir de la notification de la décision.
La requête peut, mais ne doit pas être motivée. Dans la majorité des cas, sa motivation est très sommaire, et se limite à un renvoi en termes généraux aux arguments soulevés au cours de la phase administrative.

2. La Cour d'appel ne peut connaître que des contestations qui ont été soumises au directeur, ou qui ont été tranchées d'office par lui. Les demandes nouvelles sont donc exclues.
Par contre, la Cour d'appel a le droit et l'obligation de trancher les points contestés, sans être tenue par les arguments qui lui sont soumis.
La Cour d'appel ne peut pas aggraver la situation du contribuable.

3. La procédure devant la cour comporte en principe:
— l'échange d'écrits («conclusions») dans lesquels les parties exposent leurs arguments. Chaque partie peut répondre à l'autre aussi souvent qu'elle le juge utile;
— l'exposé oral à l'audience.
Le contribuable n'est jamais obligé d'utiliser ces possibilités. Même s'il ne le fait pas, la Cour doit en principe examiner le fond de l'affaire.

4. La charge de la preuve est réglée par la loi.
En principe la preuve du revenu contesté incombe à l'administration, celle des charges, déductions et exceptions incombe au contribuable. Dans certains cas (imposition d'office ou consultation d'une commission fiscale) le contribuable doit fournir la preuve du chiffre exact de ses revenus.
En fait, l'administration est aidée, pour les preuves qu'elle doit fournir, par des présomptions sans doute raisonnables en principe mais très étendues en fait (les comparaisons avec des redevables similaires sont parfois dangereuses). Pour les preuves contraires que le contribuable est apportées à fournir, la jurisprudence se montre assez restrictive. L'exigence d'une preuve du «chiffre exact" due dans les deux cas mentionnés plus haut est très rigoureuse: la jurisprudence rejette toute argumentation qui chercherait simplement à refuter les présomptions retenues par l'administration.
En principe, la preuve est libre. En fait,

les moyens de preuve utilisés sont le plus souvent des éléments comptables ou des présomptions. La loi limite le droit pour le contribuable d'invoquer des pièces nouvelles, mais la jurisprudence se montre peu restrictive à cet égard.

5. L'arrê de la Cour est prononcé en audience publique, et notifié au contribuable, sous pli recommandé, par le greffier.

POURVOI EN CASSATION

La Cour de cassation ne se prononce pas sur le fond du litige, mais apprécie uniquement la légalité de l'arrêt de la cour d'appel. Ceci peut signifier qu'elle vérifie l'interprétation donnée par la cour d'appel à la loi, ou l'existence d'une motivation suffisante, ou le respect des droits de la défense etc.

Le pourvoi doit exposer d'une façon rigoureuse les moyens invoqués et les dispositions légales sur lesquelles se fonde la violation en question.

Il est notifié au directeur par exploit d'huissier et déposé, avec l'original de la signification et les pièces justificatives, au greffe de la Cour d'appel, qui transmet à la Cour de cassation. Le tout dans les trois mois de la notification de l'arrêt de la Cour d'appel.

Le défendeur en cassation a 40 jours pour déposer un mémoire en réponse. Il n'y a pas d'autres débats, sauf que le demandeur peut répliquer si le mémoire en réponse soulève l'irrecevabilité du pourvoi.

Si la cassation est prononcée, la cour renvoie le litige à une autre cour d'appel.

Les arrêts de la Cour de cassation n'ont pas de force obligatoire. Mais l'autorité de la cour est telle qu'il est quasi impensable de défendre devant une juridiction inférieure une thèse contraire à celle que la Cour de cassation a adoptée.

INSTITUTIONS PARTICULIERES: IMPOSITIONS NOUVELLES OU SUBSIDIAIRES

Si, au cours des débats devant la Cour d'appel, l'administration estime que l'imposition contestée pourrait être déclarée nulle par suite d'une illégalité quelconque, elle peut soumettre à la Cour d'appel une «cotisation subsidiaire" que remédie à cette illégalité.

Cette cotisation subsidiaire ne devient exécutoire que par l'arrêt de la Cour, pour autant que celle-ci adopte le même point de vue.

D'autre part, si la décision du directeur ou l'arrêt de la Cour d'appel annule une imposition par suite d'une illégalité quelconque, l'administration peut réimposer le contribuable en raison du même revenu, celui-ci fût-il déterminé par d'autres moyens.

Ces possibilités n'existent pas en cas d'imposition tardive. Elles sont limitées à la même matière imposable et, en principe, au même contribuable (extension pour certains proches et les sociétés de personnes).

Ces possibilités, et surtout la seconde, font l'objet d'applications nombreuses. Elles ont d'ailleurs donné lieu à une série de nouveaux litiges.

REMARQUES POUR CONCLURE

La première fonction des tribunaux est de trancher les litiges. Les règles de procédure doivent tendre à ce qu'ils s'en acquittent d'une façon efficace, en respectant les droits de toutes les parties et sans lenteurs ni charges financières excessives.

Sur ce double point de l'efficacité humaine et de l'efficacité technique, les règles de procédure applicables en Belgique sont, dans l'ensemble, satisfaisantes. Il reste

sans doute des imperfections, mais ne tiennent-elles pas, plus qu'aux institutions, aux hommes qui doivent les appliquer et qui ne seront jamais à l'abri de leurs propres déficiences'

Les points les plus contestés de notre droit fiscal formel se situent plutôt au stade des techniques d'imposition: caractère discutable, dans certains cas, du calcul du bénéfice par comparaison avec des redevables similaires; exigences trop rigides en matière de preuve; sécurité juridique compromise par le droit, pour l'administration, de revenir sur des points antérieurement admis, etc.: ces critiques ne concernent pas la procédure en tant que telle. Celle-ci est simple, aisée, et raisonnablement rapide. On pourrait cependant souhaiter un peu moins de «distance» psychologique entre certaines chambres de nos Cours et les justiciables.

Les tribunaux ont en outre une seconde fonction, non pas accessoire mais dérivée de la première: celle de participer à l'élaboration du droit. Sur ce plan qui est celui de l'interprétation de la loi, la jurisprudence belge a manifesté une certaine tendance au rigorisme. L'interprétation littérale des textes prend le pas sur l'interprétation téléologique ou systématique, et la raison d'état n'est pas toujours absente des préoccupations de la Cour de cassation. La situation en Belgique ne diffère pas sensiblement, en cela, de ce qui se voit dans la plupart des pays voisins.

Une étude comparée de ces problèmes reste cependant utile pour élargir les horizons et «relativiser» les vues que chacun peut avoir de son droit national.'

Efforçons-nous de nous communiquer les uns aux autres ce que nos institutions ont de meilleur.

Becker

Profit determination of international enterprises

This is a separate publication of the commentary on section 1 of the international transactions tax reform act (Aussensteuergesetz) from the commentary of Flick-Wassermeyer-Becker, together with the reproduction and translation of the related U.S. regulations as well as the French decree on the determination of prices between the closer related international enterprises.

By Helmut Becker, attorney at law in Düsseldorf.
266 pages, quarto, DM 58.

The author is also known as a specialist in international tax law. He explains comprehensively the present law which is to regulate the determination of prices between internationally related companies and the intercorporate allocations. His commentary on the German tax law is effectively supplemented and plays in a broader perspective by the reproduction and translation of the related review and French regulations. The work of Becker represents a standard commentary and an indispensible guide for parent companies and their subsidiaries in foreign countries, wherever they are located.

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Herausgegeben vom
DEUTSCHEN ÜBERSEE-INSTITUT
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G. Wojtkowiak
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ISBN 3 8039 0083 2

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WELTFORUM VERLAG, 8 München 19, Hubertusstraße 22.

27th INTERNATIONAL TAX CONFERENCE OF IFA

LAUSANNE, OCTOBER 7-12, 1973

Address at the Mitchell B. Carroll luncheon

Pronounced by Dr. Paul Gmür, President of IFA, on October 8, 1973

My dear President,
dear Colleagues,

This luncheon, informally introduced years ago, has become a tradition of our congresses. Its original purpose has been nothing else but a friendly get-together both of those who have contributed to the organization and to the scientific results of the congress and of the prominences of IFA such as the members of the Executive Committee and of the General Council. To our great regret, our Honorary President who has given his name to this gathering can not be with us this time. His address which he wanted to make to us will be read by the Secretary General. We have permission by Mitchell B. Carroll to continue the use of his name for the identification of this social event and we will gladly avail ourselves of this authority thus securing continued recognition to the innumerable services he has rendered to this organization and preservation to the footprints he has left with it. You all know that under the Presidency of Mitchell Carroll the life of IFA was extended for another period of 29 years at the memorable General Assembly in Lisbon on September 9, 1966. It will continue in being until 1996 when most of us will no longer be alive. Co-incidentally with the extension of IFA's life span, its articles have been thoroughly discussed and were subsequently revised. The plan of action of the association was thereby extended and now includes scientific research in the first place. We also know that the structure of the organization has been so amended that the national groups have become recognized institutions without however making of IFA a loose federation of such groups as certain members had intended. We are now a kind of quasi-confederacy with a central government and a constitution under which the national groups are given specific powers exercizable through their delegates to the General Council. Contrary to what a confederation like Switzerland represents, IFA was not organized federally from below but from above, the individual member still having the last word to say when gathering in General Assembly. I think this, although the result of a compromise, is a viable solution.

Another problem with which the draftsmen of the articles were confronted was the notion of rotation in the executive bodies of the association. Here, too, a compromise was found which assures both stability and dynamism to our organization. Rotation has its natural limitation because there is only a relatively limited number of persons who have the ability and experience required for serving in the go-

vernment of a kind of league of nations and who, at the same time, are willing to carry the torch without compensation.

The question has also arisen whether IFA still has a function to perform in the present world of fiscal committees such as those of OECD, EC, EFTA, ICC, Institut des finances publiques and whether it is worth our while to carry on.

In so far as I am concerned the question is to be answered in the affirmative without hesitation and reservation, for

1. there must be a neutral place where persons interested in international taxation can meet and exchange views;
2. there must be a forum where relevant problems of international fiscal law can be discussed, without government interference, independent from the interests of particular social and economic groups and free of all doctrines and ideologies;
3. there must be a central place where new ideas and tendencies in the field of taxation are registered, coordinated and objectively examined, and finally
4. there must be an organization which, on the international scene, acts as a watch dog and sees to it that tax remains part of the rule of law and does not degenerate to a football kicked around by theories of a socio-economic or political nature.

I think it will have to be one of the concerns of the immediate future to work out guidelines for the long-term and mid-term development of IFA and I invite you to assist the Executive Committee in defining the goals to be achieved, thus giving the activities of IFA direction and consistency.

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CONGO (BRAZZAVILLE)

LES CONDITIONS D'INSTALLATION D'ENTREPRISES INDUSTRIELLES DANS LES ETATS AFRICAINS ET MALGACHE ASSOCIES,

vol. 13: République Populaire du Congo. Published by the Commission des Communautés européennes, Direction générale de l'aide au développement, Brussels, 1972. 8 + 79 pp.
Brochure containing basic information on the conditions relating to the setting up and the functioning of industrial enterprises.

Library International Bureau of
Fiscal Documentation no. B 10.504

DAHOMEY

LES CONDITIONS D'INSTALLATION D'ENTREPRISES INDUSTRIELLES DANS LES ETATS AFRICAINS ET MALGACHE ASSOCIES,

vol. 8: République du Dahomey. Published by the Commission des Communautés européennes, Direction générale de l'aide au développement, Brussels, 1972. 8 + 86 pp.
Brochure containing basic information on the conditions relating to the setting up and the functioning of industrial enterprises.

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Fiscal Documentation no. B 10.506

DEVELOPING COUNTRIES

GUIDE FOR INVESTMENT IN DEVELOPING COUNTRIES,

by A. M. Allen. Published by Charles Knight, London, 1973. 8 + 123 pp. £ 3.50.
This guide aims to classify the basic information for overseas investors in selected developing countries. It should provide the background for preliminary assessment; no attempt has been made to be comprehensive.

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LAMY FISCAL

Tome I: Taxes sur le chiffre d'affaires, enregistrement et timbre, taxes sur les véhicules.
Tome II: Impôts directs, contrôle, contentieux, pénalités, fiscalité immobilière. Published by Services Lamy, Paris, 1974.
2 vols.
Annual publication of "Services Lamy" containing an explanation of the French tax legislation. Supplements are issued regularly in order to keep these two volumes up to date.

Library International Bureau of
Fiscal Documentation no. B 7979/80

GABON

LES CONDITIONS D'INSTALLATION D'ENTREPRISES INDUSTRIELLES DANS LES ETATS AFRICAINS ET MALGACHE ASSOCIES,

vol. 12: République gabonaise. Published by the Commission des Communautés européennes, Direction générale de l'aide au développement, Brussels, 1972. 8 + 81 pp.
Brochure containing basic information on the conditions relating to the setting up and the functioning of industrial enterprises.

Library International Bureau of
Fiscal Documentation no. B 10.507

GERMANY

DER BUNDESHAUSHALT 1974,

by F. W. Wissmann. Published by the Institut "Finanzen und Steuern", Bonn, 1974. 78 pp., No. 104.
Analysis of the federal budget for 1974.

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Fiscal Documentation no. B 8016

HANDBUCH DER RECHTSPRECHUNG ZUM STEUER- (ZOLL-) -STRAF- UND ORDNUNGSWIDRIGKEITENRECHT MIT VERFAHRENSFRAGEN,

by P. Pfaff. Published by Verlag Neue Wirtschafts-Briefe, Herne, 1974. 776 pp.
Monograph designed as a handbook explaining tax avoidance, tax evasion and related subject matters as governed by German legislation and case law.

Library International Bureau of
Fiscal Documentation no. B 8031

BESTEUERUNG DER ERBEN UND ERBENGEMEINSCHAFTEN,

3rd rev. edition by H. Segebrecht. Published by

Verlag Neue Wirtschafts-Briefe, Herne, 1973. 238 pp.
Explanatory guide to inheritance tax law in connection with civil and commercial law, with reference to case law.

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LA TAXATION EN GRECE ET L'EVOLUTION DU SYSTEME FISCAL HELLENIQUE,

by A. D. Tsaconas. Published in Athens, 1973. 172 pp.
Taxation and its development in Greece as an introductory text to the Greek tax system.

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INDONESIA

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Published by Berita Pajak, Jakarta, 1973. 83 pp. English translation of the text of Indonesian corporate income tax legislation, as amended. Some relevant, implementary decrees and circular letters are appended.

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INCOME TAX ORDINANCE 1944

Published by Berita Pajak, Jakarta, 1973. 49 pp. English translation of the text of Indonesian individual income tax legislation, as amended. Some relevant implementary decrees and circular letters are appended.

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INTERNATIONAL

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8th edition, by H. J. Doedens. Published by Kluwer, Deventer, 1974. 22 pp., *f* 5.—.
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Consolidated text of the land and income tax act 1954 as of January 1, 1973.

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UNITED KINGDOM

THE NEW BRITISH SYSTEM OF TAXATION

Published by Her Majesty's Stationery Office, London, 1973. 57 pp. Central office of information reference pamphlet, 112.
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GREEN'S DEATH DUTIES,

2nd (cumulative) supplement to 7th edition, by A. G. Nield and P. D. Freshney. Published by Butterworths, London, 1974. 12 + 83 pp. £1.00.
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U. S. A.

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by R. A. Musgrave and P. B. Musgrave. Published by McGraw-Hill, Düsseldorf, 1973. 16 + 762 pp., DM 37.50.

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SUPPLEMENT TO No. 2 (A 1974)

Convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste tchécoslovaque tendant à éviter les doubles impositions en matière d'impôts sur les revenus

SUPPLEMENT TO No. 4 (B 1974)

Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne

SUPPLEMENT TO No. 6 (C 1974)

Convention between the Republic of Singapore and the State of Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Prof. Dr. P. J. A. Adriani †

3.6.1879 - 14.9.1974

It is with great regret that we received the sad news that the founder and first Director of the International Bureau of Fiscal Documentation passed away peacefully at the age of 95.

It is not an easy task to briefly describe the significance of Adriani as a scholar, and his influence on the development of national, international and comparative tax law.

Until 1937, Adriani held several outstanding positions in the Dutch tax administration. During this period, he and the two top Dutch civil law scholars, Professors Paul Scholten of Amsterdam and E. M. Meijers of Leyden, became members of the Board of Editors of one of the leading weekly law reviews.

On the occasion of the 300th anniversary of the University of Amsterdam, he was awarded the doctorate honoris causa in 1932. Five years later, he became the first full-time professor of tax law at that University.

Meanwhile, Adriani had built up personal contacts with other scholars, such as Blumenstein in Switzerland, Griziotti in Italy, Trotabas in France, Becker and Bühler in Germany, and Van Houtte in Belgium. It was this personal relationship that led to the foundation of the International Fiscal Association (I.F.A.) in 1937/1938. Several of the previously mentioned colleagues contributed to a liber amicorum which, under the title **Tractatus Tributarii,** was offered to Adriani when he became professor emeritus in 1949. This volume contains a list of the numerous books, articles, annotations, reports and other

writings of this man, who has had a predominant influence on the development of taxation as a separate discipline of law in the Netherlands.

Adriani completed a substantial number of writings and delivered many lectures on the subject of comparative tax law. In the late forties, he published a three-volume work, in the Dutch language, entitled **The Law of Taxation - Its Principles and Development.** A few years later it was followed by a second edition. Every chapter of this work constitutes a remarkable piece of comparative legal study.

As one of the co-founders of I.F.A., Adriani felt the need for a center where reference material on world-wide taxation could be collected and used by the members of the Association. As a result of his initiative, in 1938 the International Bureau of Fiscal Documentation was founded, with the I.F.A. as its sponsor. Since then, the University of Amsterdam, as well as the City of Amsterdam itself, has given moral and material support to the Bureau.

The University of Ghent, Belgium, honored Adriani with a doctorate honoris causa.

I.F.A. appointed him an honorary member. After his retirement from the University, Adriani remained active in the field of international and comparative tax law. Among other interests, he was Director of the Bureau until 1954, and subsequently its special adviser.

Meanwhile, he continued his work and studies in the artistic field. His frequent travels to France and Italy resultet in many drawings and paintings which reflect Adriani's personal approach and lively interest in nature and architecture.

Adriani was a great scholar. Above all, however, he was a man of modesty, warmth, and kindness, the characteristic of a truly great person. Those who have known him will remember him for all they have learned from him professionally. Above all, he will be remembered as the human colleague, with his mild critical mind and his subtle sense of humour.

The Director, and several staff members personally, and the Bureau as a whole, are greatly indebted to Adriani for all he has done during a long life of contructive activity.

J. van Hoorn Jr.

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* * * ARTICLES * * *

BERTUS MELLINK* AND JAN R. SCHAAFSMA**:

THE SCOPE OF THE NETHERLANDS TAX EXEMPTION FOR HOLDING COMPANIES

A comment on a recent Netherlands Supreme Court case on the corporate income tax exemption for dividends from non-Netherlands sources.

The Netherlands offers a favorable climate for holding companies (as opposed to investment companies) [1] first, because of the network of double taxation treaties concluded between the Netherlands and a number of countries providing *inter alia* for reduction of withholding tax on dividends paid to and received from companies in the treaty countries and second, because of "the participation exemption" which is available to companies incorporated under Netherlands law.[2] The participation exemption permits a company to exclude from its taxable income (a) any dividends received from companies in which it has holdings of 5% or more of the aggregate par value of its outstanding stock and (b) all gains made on the sale or other disposition of such holdings.[3] The exemption is contained in Section 13 of the Netherlands Corporate Income Tax Act of 1969 ("CITA"), which provides as follows:

"1. In the event that the taxpayer ... has a participation in a company ..., the income arising out of the participation ... will not be taken into account in computing (the taxpayer's) profit.

2. The preceding subsection does not apply to a taxpayer which qualifies as an investment institution ... or to a participation in an investment institution ...

3. With respect to a participation in a company ... which is not located in The Netherlands, the first subsection will apply only in the event that that company ... is subject to tax on income by another Country ...

6. There will be deemed to be a participation in the event that a taxpayer is a holder of shares representing at least 5 per cent of the aggregate par value of the outstanding stock of a company which is located in The Netherlands. ...

7. In the case of a company not located in The Netherlands, there will be deemed to be a participation in the event that the taxpayer is the holder of shares representing at least 5 per cent of the aggregate par value of the outstanding stock of that company, *unless it appears that the shares are held as a passive investment.* ...

8. The Minister of Finance may qualify shares which do not otherwise represent a participation

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1. The terms "holding company" and "investment company" are not terms of art in Netherlands tax law. At this juncture, the common understanding of these terms should suffice. This comment will demonstrate what the critical distinction is between a holding company and an investment company. A Netherlands company may elect the status of "investment institution". See below, footnote 23.

2. Also other "tax subjects", including companies organized under the laws of a country other than The Netherlands, may benefit of the participation exemption, provided the tax subject is established in The Netherlands (CITA Section 18 (2)). There is no special tax system for holding companies like the *droit d'abonnement* available to holding companies in Luxemburg.

3. Correspondingly, generally losses incurred in connection with such holdings are not deductible; costs incurred in connection with non-Netherlands participations do not constitute deductible expenses (CITA 13 (5) and (4)).

(under the above definition) ... as a participation in the event that such shares are held for purposes relating to the normal conduct of the taxpayer's business ..." (emphasis added).

The beneficiaries of this tax climate include both Netherlands companies with multinational ramifications and United States corporations which make use of an intermediate Netherlands holding company in their overseas operations.

A decision,[4] dated November 7, 1973, of the Supreme Court of The Netherlands, denying the benefit of the participation exemption to a self-proclaimed "pure holding company" [5] has given rise to considerable concern about the scope of the exemption.[6] This comment will report on this case, and advance the argument that the importance of the *November 7th case* has been exaggerated.

NOVEMBER 7TH CASE

This is the first Supreme Court case which deals with CITA Section 13(7). The facts of the case are as follows:

S (a retired businessman) had made gifts to his daughter and to his grandchildren of shares in three companies, viz. *A*, a Netherlands company engaged in the manufacture and sale of textiles; *B*, a German company manufacturing building components; and *C*, another German company owning and dealing in real estate. *S* was also the owner of 12 shares in company *T*, the six remaining shares in *T* being owned by *S*'s daughter and grandchildren. In December 1965, *S*'s daughter and grandchildren sold their shares in *A*, *B* and *C* to *T*. *T* is paying for these shares in installments, as dividends received by it from *A*, *B*, and *C* permit.

Under its Articles of Association, *T*'s objects are: (i) textile manufacture and trade (ii) participation in and management of companies engaged in textile manufacture or trade, or engaged in other business (iii) investment and management of moneys and the acquisition of debentures, securities, or other interests in domestic or foreign companies or businesses. The par value of *T's* issued capital amounts to D.fls. 18,000. In addition to some cash, *T's* assets consist exclusively of the shares in *A*, *B* and *C* mentioned above, which in 1969 represented a value of approximately D.fls. 4,000,000. *T* owes debts to *S*'s daughter and grandchildren. *T* is not an operating company. The management of *T* has been entrusted to a bank which has charged one of its officers with the task of exercising some control over the management of *A*, *B* and *C*, to the extent that *S* is ceasing to do so.

B and *C* distribute all profits to *T* in the form of dividends.

For the taxable year 1970, *T* claimed that dividends received from its subsidiaries should be excluded from taxable income on the basis of CITA Section 13. There was no discussion as to the dividends received from the Netherlands subsidiary

4. Usually, reports of Netherlands tax cases anonymize the taxpayer(s).

5. In this connection, a pure holding company is a parent holding company or an intermediate holding company not actively engaged in manufacture or trade. In the case of an intermediate holding company, typically it is managed from outside The Netherlands and constitutes an element in a "tax route" designed to minimize the aggregate tax burden of a group of companies.

6. Hoge Raad der Nederlanden, November 7, 1973, *Beslissingen in Belastingzaken Nederlandse Belastingrechtspraak* ("BNB") 1974, no. 2. Comments: —, in *Vakstudienieuws,* December 8, 1973; N. Nobel, in *Het Financieele Dagblad,* December 21, 1973; H. J. Hofstra, in BNB 1974/2; G. Telkamp, in *Weekblad voor fiscaal Recht,* 1974/5163, and 1974/5175; — Molenaar, in *Losbladig Fiscaal Weekblad FED,* February 7, 1974. See also Kees van Raad, Netherland Holding Companies - A recent case, in *Tax Management International Journal,* April '74, Maarten J. Ellis and H. A. Sherman, Dutch Holding Companies - A Question Mark, in —, Vol. XXII, No. 2, and Nico N. Nobel and Lee S. Ullman, will the favorable tax climate for Netherlands holding companies persist, in *The Journal of Taxation,* July, 1974.

(*A*). However, the tax inspector took the view that in this situation the participation exemption was not applicable to dividends received from the German subsidiaries (*B* and *C*). The Court of Appeals upheld that position.

In confirming the lower court decision, the Supreme Court relied on certain parts of the Explanatory Memorandum to the CITA. The Court pointed out that a distinction should be made between "participation" on the one hand and "passive investment" on the other. It indicated that shares held by one company in another qualify as a participation if such shares constitute a link between the business activities of the two companies, whereas securities held merely by way of investment qualify as passive investment. The business link justifies subjecting income which forms part of the results of two companies to taxation "in the same sphere only once". However, there is no such rationale for passive investments. CITA Section 13(6) provides an arbitrary quantitative standard for participations in the case of holdings in companies organized under the laws of The Netherlands. However, in the case of holdings in non-Netherlands companies, CITA Section 13(7) provides that even holdings exceeding that standard should not be considered as a participation in the event that such shares are held as a passive investment. The Court concluded that shares owned by a company not actively engaged in any business should be viewed as a passive investment, because there could be no connection between the business of that company and the company or companies in which it holds shares. Since *T* was not actively engaged in any business, the Court held that *T*'s holdings in *B* and *C* constituted passive investments within the meaning of CITA Section 13(7).

FURTHER DEVELOPMENTS

Even before the text of the *November 7th case* was generally available, *Het Financieele Dagblad* (the leading financial paper in The Netherlands) published comments on the decision.[7] The paper declared that it had been generally believed that a pure holding company could avail itself of the participation exemption provided it directly or indirectly held shares in foreign operating companies, but that as a result of this case there is serious doubt whether pure holding companies are eligible for the benefits of the participation exemption for non-Netherlands source dividends. A number of non-Netherlands corporations were reported to be considering the withdrawal of their holding companies from The Netherlands. *The Financial Times* echoed these statements in a small column in its January 9, 1974 issue. That message caused serious concern outside The Netherlands. On December 28, 1973, a member of the Netherlands House of Representatives, *W. Scholten,* questioned *M. J. van Rooyen,* The Netherlands Under-Minister of Finance, to the following effect:

(i) Is the Under-Minister aware of the fact that the pertinent Supreme Court decision has caused great concern?

(ii) Is the Under-Minister aware that this concern may jeopardize the position of The Netherlands in the international financial arena?

(iii) Is the Under-Minister of the opinion that the judgment is in conformity with a certain part of the Memorandum in Reply to the CITA, which reads as follows:
"There is no doubt that there is no question of a passive investment within the meaning of (CITA Section 13 (7)) in the event that a Netherlands company acts as a holding company of non-Netherlands subsidiaries conducting a business of their own. The (Minister is) furthermore of the

7. Issue of December 21, 1973.

opinion that there is likewise no doubt that the exemption will be available to the Netherlands subsidiary of a foreign parent company, in the event that the (Netherlands) subsidiary acts as a holding company for foreign subsubsidiaries whose activities are in the line of business of the foreign parent company. (In order to make this clear) there is no need for ... the proposed statutory language ... to be amended."

(iv) Is the Under-Minister prepared to honour the expectation created by the above part of the Memorandum in Reply and either to instruct the tax inspectors not to follow the pertinent Supreme Court case or to propose a legislative amendment? [8]

The Under-Minister's response may be summarized in this fashion:

(i) and (ii) The Under-Minister answers these questions in the affirmative but fails to see a justification for concern.

(iii) In this exceptional case, private individuals sold passive investments in German companies to a Netherlands trading and investment company, but in fact the nature of the passive investments remained unchanged. The Netherlands company was not involved in the management of the German companies. Therefore, in fact, the Netherlands company was not a holding company but an investment company. The Supreme Court's decision does not conflict with the pertinent part of the Memorandum in Reply. There is no reason to instruct the tax inspectors to disregard this case.

(iv) The presently prevailing system with respect to the participation exemption for non-Netherlands source dividends may be summarized as follows: the participation exemption will be available to holding companies located in The Netherlands which perform an essential function in the carrying on of the business of the group of which they form a part, whether at the top of the group or at a lower echelon. [9]

Despite its conciliatory tone, this statement may provide only cold comfort, since it seems to introduce an additional test for the availability of the participation exemption, *viz.* whether the intermediate holding company performs an "essential function" [9a], a phrase which is as yet undefined.

THEORETICAL FRAMEWORK

In order to put the *November 7th case* into perspective, it is necessary to discuss some aspects of the principles, the basic system, and the mechanics of Netherlands tax law. Among scholars, there is debate as to which principles underlie taxation of business income. It should suffice here to note that these include the *buitenkansbeginsel* (a business is in a privileged position to generate income), and the *profijtbeginsel* (a business benefits from various State "services").[10] In international situations, the principle of *situs* requires that business income be taxable in the country of its source rather than in the country of the taxpayer's domicile. This principle takes the form of an exemption from Netherlands tax for business income from non-Netherlands sources (as opposed to a credit against tax).[11]

Generally, the Netherlands system focuses on each company and each individual as a separate "tax subject".[12] The "object of taxation" may consist of various parts.

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8. Published in *Weekblad voor fiscaal Recht,* 1974/5166.

9. See footnote 8.

9a. See footnote 22a.

10. See D. Juch, *De deelnemingsvrijstelling in de vennootschapsbelasting* (1974) (Fed - Deventer), at p. 5, *et seq.*

11. Juch, *op. cit.,* at p. 8, *et seq.* Accordingly, income generated by "a permanent establishment," outside The Netherlands is also generally fully tax exempt in The Netherlands (subject to a certain adjustment of the rate of tax).

12. However, under CITA Section 15, in the case of a Netherlands parent company holding all the shares of one or more other Netherlands companies, the parent company (together with a subsidiary) may elect to be taxed according to the principle of "fiscal unity", that is, "as would be the case if the subsidiary had been merged into the parent company", subject to certain provisions.

Under the Netherlands Personal Income Tax Act of 1964 ("PITA"), a private individual is taxed on *winst* (business income) pursuant to Sections 6-20 inclusive, and on *inkomsten* (non-business proceeds)[13] pursuant to Sections 24-38 inclusive. The rules on what should be included in income, what constitutes a deductible expense, and when any of these items should be recognized, are different for business income and non-business proceeds. However, business income and non-business proceeds (and losses) are integrated to the effect that an individual's tax liability is determined on the basis of the aggregate of these elements, which is called *belastbaar inkomen* (taxable income). Theoretically, a company's taxable income consists of business income and non-business proceeds as well.[14] A company's business income is determined in accordance with PITA Sections 6-20 inclusive, which are applicable to companies *per analogiam*. CITA provides that a company's tax liability is based on *het belastbare bedrag* (taxable amount, a concept comparable to taxable income).

Mechanically, the distinction between business income and non-business proceeds is made by reference to its respective sources, *viz. een onderneming* (a business) or — in substance — *beleggingen* (passive investments).[15] In this context, a business is a permanent organization of capital and labour designed to generate income.[16] Passive investments include non-business investments in shares of stock, bonds, debentures and real estate. In established tax jargon, the distinction between the sources of business and non-business income is referred to in terms of "the business sphere" and "the passive investment sphere".

For a variety of reasons, a business may take the form of a group of related companies. Dividends received from operating subsidiaries constitute business income for the parent company. Where a subsidiary is actively engaged in business, income earned by the subsidiary and passed on to the parent may be considered to have been generated once, by the group. Similarly, it may be assumed that state services have been utilized only once in the production of income, although it has passed through two (or more) entities. Thus, on the basis of the postulated theories of business taxation, income earned by the subsidiary (domestic or foreign), which has been subject to taxation (in The Netherlands or elsewhere), and is passed on to the parent, should not be taxed as part of the parent's income.[17] Hence, the participation exemption has been provided for.[18]

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13. *Inkomsten* also includes income from employment (PITA Section 22 *et seq.)*. See also text at footnote 15.

14. A. J. van Soest en J. van Soest, *Belastingen* (1959) (Gouda Quint) at p. 263; J. H. Christiaanse (J. F. M. Giele-A. K. P. Jongsma), *De Belastingwetgeving* (Wet op de Vennootschapsbelasting 1959) (Noorduijn), at Section 2 (no. 19 - p. 35) and, for example, at Section 17 (no. 3 - p. 234*b et seq.*).

15. See footnote 13.

16. A. J. van Soest en J. van Soest, *Belastingen* (19—) (Gouda Quint) at p. —. The definition has been simplified somewhat for purposes of this comment.

17. Juch refers to this reasoning as the extension theory, *op. cit.* at p. 13. This theory also underlies the concept of fiscal unity discussed in footnote 12.

18. Logically, the private individual whose business assets include shares in operating companies also should be entitled to relief from double taxation. However, this has not been provided for by PITA. All dividends received are includible in a private person's taxable income. This results in double taxation (once in the

In a departure from the logic of the structure described above, CITA Section 2(5) provides that a Netherlands company "will be deemed to conduct its business with its entire equity". As a result of this fiction, not only shares in operating subsidiaries, but also passive investments will be treated as business equity, and all dividends received are includable in business income, except for the exemption for participation dividends. Since there is no such rationalization for exclusion of non-business income,[19] a distinction must be made between participations and passive investments.

For a holding in a Netherlands company, CITA Section 13(6) simply provides for a formal criterion, i.e. an interest of 5% or more of the aggregate par value of the outstanding stock of the issuer is legally presumed to be a participation.

For a holding in a non-Netherlands company, Section 13(7) additionally provides that it may not be a passive investment.

The Legislature intended to prevent incorporation of passive investments in a non-Netherlands subsidiary.

It follows from the principles that application of the passive investment standard hinges on whether in a particular case a holding is a part of the organization of capital and labour of the Netherlands company (or the group it forms part of) or rather represents capital made available by that company to another company's organization of capital and labour.

Stated another way, as long as income remains within the sphere of one particular organization of labour and capital structured in the form of a group of companies, the "extension theory" (and, in the case of a non-Netherlands subsidiary, the *situs* principle) prohibit that income from being subjected to corporate income taxation more than once. However, as soon as income leaves this sphere and (for the recipient) constitutes proceeds deriving from the business of another company, the relevant principles do not protect it from double taxation.

Confusion arises from considering this problem in terms of the distinction between a pure holding company and an operating company. The test is whether the holding company and its subsidiaries are in the same business sphere.

THE NOVEMBER 7TH CASE FITS INTO THE FRAMEWORK

The *November 7th case* is fully understandable against this background. The Supreme Court points out that business income generated by one company which also constitutes business income for another company shall be taxed only once in this "tax sphere".[20] The Court holds that the exemption was not available because the recipient of the dividends was not actively engaged in business. This holding completes the description of the system given in the Memorandum in Reply, which only focuses on the requirement that, for a divi-

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corporate sphere and once in the private sphere) without alleviation. The relationship between corporate tax and personal tax is currently a subject of discussion within the Common Market. See, *inter alia*, A. J. van den Tempel, *Weekblad voor fiscaal Recht*, 1974/5164.

19. For a discussion of the lack of rationale for corporate taxation of investment income (from Netherlands or from non-Netherlands sources), see Juch, *op. cit.*, at p. 184 *et seq.*

20. See summary of the *November 7th case* above, at p. —.

dend to be exempted, it should be paid by an operating company.[21]

The Under-Minister also concluded that the taxpayer was not actively engaged in business. The importance of the term "essential function in the carrying on of the business of the group" probably lies in its distinction from the term "essentially an instrument for pooling portfolio investments".[22/22a] The Netherlands Legislature held ... for purposes relating to the normal course of the taxpayer's business" may be construed accordingly. CITA Section 13(8) requires that the parent company's holding of shares in a subsidiary be normal in the course of the parent's business, and does not require that the subsidiary be in the same kind of business as the parent. The language on the link between the business activities of two companies referred to by the Supreme Court should be viewed as exemplifying the rationale of the participation exemption (*e.g.*, car manufacturer — tire company) but not as introducing a new test which has not been embodied in the statutory language. For example, conglomerates should create no specific problem in this respect (provided they act clearly differently from investment companies, notably in terms of the management of subsidiaries).

Parenthetically, it would also be very hard to devise a test for determining whether a subsidiary is in the same kind of business as the parent. That test would probably become so broad as to be not more specific than whether or not the holding is in a company actively engaged in any business.

22a. After the date of completion of this text, members of the Netherlands Senate have pointed out to the Under-Minister of Finance that the term "essential function" has necessitated numerous discussions between tax authorities and taxpayers. In response, the Under-Minister has stated that he never intended to introduce a new element by using this term. The Under-Minister has further confirmed that a Netherlands intermediate holding company which is used as a "link" between the business activities of a non-Netherlands parent company and non-Netherlands subsidiaries will qualify for the participation exemption. A "link" includes a company which is used for purposes of channeling dividends and collecting capital gains for a group. An intermediate holding company of this type does not hold shares in subsidiaries by way of passive investment. In the case of a Netherlands top holding company, not only the nature of the subsidiaries but also the function of the holding company is determinative for the availability of the participation exemption. A top holding company which is used, for example, for purposes of policy making, management, or finance will benefit of the participation exemption for all subsidiaries except subsidiaries which are used as an investment company.

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21. It is probably not relevant to discuss the *November 7th case* in terms of whether the taxpayer should be shielded from disappointment with respect to expectations created by the language used in the Memorandum in Reply to CITA (see Mr. Scholten's question (iv) in the text preceding footnote 8. It is an accepted element of the legal system that a finding by a court of what the law is will have "retro-active effect". The requirement that "respectable expectations be protected" seems to apply especially to the way in which an administrative agency applies the law. In any event, it would seem that the taxpayer, or rather the shareholders of the company in the *November 7th case,* can hardly complain about disappointment of respectable expectations. Those shareholders did not even take the trouble of having one or more of themselves appointed as managers of that company. In addition, those shareholders went to some length to avoid the normal effects of personal income taxation. Their "vice", basically, consisted of transforming taxable dividends into non-taxable repayments of debt.

22. In accordance with the analysis developed above, the term "essential function in the carrying on of the business of the group" should not be deemed to introduce a requirement that the holding company itself be actively engaged in business or otherwise involved in "outside activities". Therefore, the question whether a subsidiary should be engaged in the same kind of business as the parent company is not relevant for determining whether the participation exemption will be available. Provided that a holding company is in the business sphere, it will benefit of the participation exemption even if it is availed of only for purposes of providing a low cost or no cost tax-route. The language of CITA Section 13(8) referring to "a ... participation

has envisioned that, for such purposes, private individuals should either use a regulated investment company,[23] or suffer double taxation.

BORDERLINE CASES AND RECOMMENDATION

The foregoing analysis suggests that the recent concern expressed by *Het Financieele Dagblad* and others is not warranted. There is no need for phasing out all Netherlands (intermediate) holding companies. However, quite understandably, the broadly phrased dicta of the *November 7th case* caused some consternation in the nurseries of elaborate transnational tax schemes. CITA Section 13(7) must be construed in accordance with its underlying principles. It will have to be determined from case to case whether a holding company is in the business sphere. For example, in a case where one or a few private investors with little expertise own a holding company representing only "incorporated wealth", that company's investments are likely to be found passive. On the other hand, in the event that private investors with experience in manufacturing or trade have contributed part of their personal wealth to some companies for purposes of exploiting that expertise, and have grouped those operating companies by means of a holding company, then there should be no doubt that that holding company is "in business" and its holdings are likely to be business assets. Generally, in the case of a holding company whose shares are traded on a stock exchange, the "distance" between the shareholders and the holding company will be larger than the distance between the holding company and its subsidiaries, and there should be no doubt about the availability of the participation exemption to the ultimate holding company. In the absence of a possibility under Netherlands law of merging two or more operating companies into a single company, a holding company is frequently availed of as a means of creating a unity between various companies, and again, assuming that there are no circumstances dictating otherwise, such a holding

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See *Het holdingarrest in het Parlement, Weekblad voor Fiscaal Recht* 1974/5186 and *Handelingen Eerste Kamer*, June 19, 1974, at p. 944 (Prof. Christiaanse). BM and JRS consider these views to be fully in line with the analysis developed in this comment.

23. At this stage of the comment, the distinction between a holding company and an investment company can be made, notably in terms of business sphere as opposed to passive investment sphere. See text at footnotes 15 and 16 and footnote 1. To the extent that the holding company takes the form of an investment institution, or investments take the form of shares issued by an investment institution (see text of CITA Section 13(2) above), that takes care of the question whether or not the participation exemption will be available. CITA Section 28(2) defines investment institutions as "Netherlands companies ... which have as their object and which are in fact engaged in investment of wealth exclusively or almost exclusively in securities, real estate or mortgage secured loans and which (observe certain standards, including a certain capital-debt ratio)". Broadly speaking, investment institutions must distribute their earnings to their shareholders within eight months of the end of the tax year. Under Section 9 of the *Besluit Beleggingsinstellingen* (Decree Investment Institutions), the applicable tax rate is reduced to 0%. Clearly, the investment institution is designed as a conduit for pooled passive investments of a relatively great number of private individuals, resulting in current personal income taxation of passive investment income (while avoiding another incidence of corporate taxation at the level of the investment vehicle). In the case of investments in non-Netherlands investment companies, the result of current taxation is achieved by other means (cf. PITA Section 29a).

company should be viewed as a business tool entitled to the benefits of the participation exemption. The participation exemption should also be available to a holding company which functions as an intermediate between operating companies belonging to the same group. In borderline situations, it is recommended that an application be made to the tax inspector or the Ministry of Finance for an advance ruling to the effect that the participation exemption will be available.

CHRISTIAN BOUCKAERT AND PHILIPPE DEROUIN*:

LOCAL TAXATION IN FRANCE

The replacement of the business licence tax (contribution des patentes) by a new business tax (taxe professionnelle)

The French tax system includes a tax, the importance of which is often ignored or misappreciated by foreign enterprises doing business in France.

This tax is the business licence tax (contribution des patentes) which was enacted in 1791 [1]. Together with the tax on real property, the tax on household occupation and the tax on doors and windows, it was one of the "old four" taxes which were the major source of income of the state until World War I.

In 1917 general income tax was introduced in France and the proceeds of the business licence tax were surrendered to the local authorities ("départements" and "communes").

This tax still accounts for a substantial portion of the tax revenues of the local authorities: 22.1% in 1963 and 29% in 1973. It yielded approximately F.F. 2.7 billion in 1963 and F.F. 10 billion in 1973, i.e. 46% of the revenue from corporation tax for the latter year. Although the business licence tax is deductible for corporation tax purposes it thus amounts to a tax burden which should not be underestimated.

1. The mechanism of the tax is somewhat intricate:

a) *The rate* (known as the "centime le franc") was originally based on the national rate: each local authority just decided how many supplementary centimes ("centimes additionnels") is wanted to levy for each franc of tax levied by the state. As the state no longer levies this tax, the tax rate is determined on the basis of the assumed proceeds of the "old four" taxes (known as the "principal fictif" or "fictitious principal" of each of these taxes).

Of course the rate varies according to the commune involved and the total amount of tax levied by the commune itself or the department in which it is located.

b) *The basis of assessment for the tax* is neither the net income nor the sales volume of the enterprise but rather results from a combination of indicia designed to provide a standard evaluation of the normal productivity of the enterprise and the benefits it should derive from the area in which it is located.

These indicia are:

— the rental value of the premises and equipment employed,
— the number of employees (or for a few industries, the quantities manufactured, handled or sold),
— a fixed amount corresponding to the nature of the activity carried on and the population of the commune.

The first two indicia are multiplied by coefficients given by the business tax schedule ("tarif des patentes"), a document covering 1650 types of business, and the sum is added to the last component (which is taken directly from the business tax schedule) to obtain the basis of assessment.

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1. Law of March 2, 1791.

To take for instance the case of an enterprise engaged handling and packaging, the coefficients are the following:

- 1/30 for the rental value of the equipment,
- 1/60 for the rental value of the premises and other fixed assets,
- F.F. .10 per employee (reduced to F.F. .05 for the first five employees),
- the fixed amount being F.F. .20 [2].

Assuming the enterprise employs forty employees and the rental value of its equipment is 200 and the rental value of its premises 1,000, the basis of assessment is computed as follows:

— fixed component		.20
— variable component	.05 x 5	.25
	.10 x 35	3.50
— proportional element	1,000 x 1/30	33.33
	200 x 1/60	3.33
		F.F. 40.61

The basis of assessment thus amounts to F.F. 40.61 x 100 = F.F. 4,061.
Further assuming the "centime le franc" is 12, the average rate in the Paris area (Paris excluded), the total tax would thus amount to

F.F. 4,061 x 12 = F.F. 48.732.

2. Apart from the intricacy of the tax mechanism the "patente" his given rise to three main types of criticism.

a) *The first type of criticism is directed at the outdatedness of the elements retained in the basis of assessment.*

The rental values used in the computation of the "patente" are not current rental values but the amounts for which the premises or plant of the business were or might have been let in 1947 or 1948.
Moreover, the coefficients mentioned in the "tarif des patentes", whose object is to balance the three elements in the basis of assessment, in order that the burden of the tax should be relatively consistant in its application to different sectors of the economy, basically depends on studies which were carried out between 1938 and 1944.
The updating of the "tarif des patentes" has proved impossible to achieve in a satisfactory manner.

b) *The second type of criticism relates to the indicia themselves*

One criticism is not actually very serious. It merely points out that the basis of assessment does not depend on the actual profitability of each business and does not account for the particular circumstances in which each enterprise may operate.
A further criticism relates to the choice of the number of employees as one of the elements of the basis of assessment. Such a choice is seen as discriminating against firms which employ a high proportion of unskilled labour.
The notional character of the "patente" has also resulted in the mediocre increase in the properties assessable and hence the necessity for the local authorities to raise the rate at which the tax is levied nearly every year.

c) *The third type of criticism relates to disparities in the levy of the tax*

The considerable disparities in the rates of the "patente" depending on the local authorities imposing it, undoubtedly have a great deal to do with the disenchantment towards the "patente". The variety in the subject matter assessable and the differing needs of the local authorities create large inequalities in tax burdens. Thus the rates of tax vary:

2. Business tax Schedule-Table C-3rd part.

— between 1 and 3.7 among "départements"
— between 1 and 30 among "communes".
Certain "communes", benefiting from the presence of an exceptionally important establishment within their areas can maintain their tax rates at a moderate level, whereas neighbouring "communes", in which the employees of the establishment in question often live, are obliged to extract the maximum yield in an area with a low capacity for taxation.

3. The French tax authorities envisaged several answers to these criticism including the revival of a local turnover tax, an increase in the tax on value added and the creation of a new local income tax [3].
They decided finally just to modernise the "patente" by substituting data taken from the enterprise's accounts for some of the indicia and coefficients presently used for the computation of the basis of assessment and by simplifying the computation rules themselves (Section II).
Furthermore, the tax rate instead of being defined by reference to fictitious principals and supplementary centimes will be directly fixed by the local authorities as a percentage of the basis of assessment (Section III).
However the scope of the tax will remain substantially unaltered (Section I).

SECTION I: SCOPE OF THE BUSINESS TAX

A — Taxable and exempt persons and activities

a) *Persons liable*

4. Generally speaking, the "taxe professionnelle" would be payable, as is the present "patente", by all persons engaged in industry, commerce or the professions [4]. It would, however, also be extended to all public concerns carrying on activities liable to taxation and not limited, as the "patente" is at present, to public concerns legally considered as industrial or commercial entities. In the same way, the "taxe professionnelle" would be extended to cover agricultural concerns which are of an industrial or commercial nature and which are accordingly subject to tax on value added.

b) *Exemptions*

5. The majority of the exemptions under the "patente" will be retained within the framework of the "taxe professionnelle" [5]. Within this category of exemptions are notably the press, public institutions providing low cost housing, mining businesses subject to payment of a special tax, self-employed craftsmen, artists, authors and composers. Except as mentioned above, farming will continue to escape assessment.
A fundamental feature of the "taxe professionnelle" in this area would be an exemption for very small amounts assessed, i.e. where the basis of assessment does not exceed certain limits which will be fixed by government orders [6].

B — Territorial scope of the tax

a) *General domestic rules*

6. As with the "patente", the "taxe professionnelle" would only be payable in respect of business activities carried on in France and installations located in this country [7].

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3. Bill no. 931 discontinuing the business licence tax ("patente") and creating the business tax ("taxe professionnelle") hereinafter referred to as "the Bill". See also this Bulletin June issue no. 6 1974 p. 244.
4. Article 2 of the Bill.
5. Article 3 of the Bill.
6. Article 3-13° of the Bill.
7. Preamble to Article 10 of the Bill.

The relevant criteria in this respect are somewhat similar to the French domestic rules applicable to corporation tax. A foreign firm is accordingly liable to business tax in France if it has an establishment there or engages in acts characteristic of a business activity [8]. It is also liable to the tax if it carries on business operations in France and sends a representative to France even temporarily if the representative has authority to engage in, supervise or perform those operations [9].

Likewise, the maintenance of a purchasing office in France by a foreign firm renders the foreign firm liable to business tax in France even if the office limits its activities to purchasing materials for use outside France [10]. However if the foreign firm merely buys materials in France without maintaining an office there it is not liable to business tax in this country [11].

Foreign firms maintaining a sales dépôt in France are also liable to business tax in France on account of this dépôt [12]. This rule also applies to companies rendering services if they have a permanent office in France in charge of collecting orders even if the contracts are concluded after approval by managers established abroad [13].

b) *Special domestic rules relating to transport*

7. The application of this territorial principle to international transport companies gives rise to certain practical difficulties. It is proposed to leave the task of formulating the conditions for the assessment of these businesses to government order to take into account only those activities which actually take place in France [14].

c) *Tax treaties*

8. Although this is not generally so, some income tax treaties signed by France cover the business tax either expressly or impliedly.

For instance the French-German tax treaty provides that a German company is liable to business tax in France only if it has a permanent establishment in France within the meaning of the definition of the permanent establishment in the treaty [15]. The same rule applies under the French-Austrian tax treaty [16].

In the French-Swedish tax treaty however this provision is limited to shipping lines and airlines [17].

SECTION II: BASIS OF ASSESSMENT OF THE BUSINESS TAX

A — Definition

9. As mentioned above (no. 3) the formula giving the basis of assessment of the "taxe professionnelle" will retain some of the elements of the basis of assessment of the "patente" but it will be considerably simplified.

According to the Bill [18], the basis of assessment of the "taxe professionnelle" will be the total of:

8. e.g. purchase and sale in France (CE October 14, 1964 "Currau").
9. Instr. May 20, 1955 § 4 - CE October 27, 1916 (Insurance company) and November 22, 1912 (shipping lines).
10. Instr. May 20, 1955 § 4.
11. CE May 4, 1859 "Agathon-Bougiclès"; November 6, 1880 "Denat"; May 24, 1963 "Gebrüder Stamm".
12. CE April 29, 1932 "Sté John Forster".
13. CE July 13, 1968 "Sté Radio Monte-Carlo".
14. Art. 10 of the Bill.
15. Art. 6 - § 4 of the French-German tax treaty of July 21, 1959 as amended.
16. Art. 1 - § 2 (1) and Art. 6 of the French-Austrian tax treaty of October 8, 1959 as amended.
17. Art. V Protocol of December 24, 1936.
18. Art. 11 of the Bill.

— the net profit (as defined in B hereunder)
— one half of wages and salaries (as defined in C hereunder)
— the rental value of fixed assets (as defined in D hereunder).

10. Small labour intensive industries which are presently liable to a reduced rate of "patente" will be liable to the "taxe professionnelle" on one half of the above basis of assessment [19].

B — Determination of net profit [20]

11. Net profit for the purposes of the "taxe professionnelle" will have the same basis of assessment as for corporation tax, subject to the following adjustments:

— Profit would be assessed before deduction of losses carried forward, depletion allowances and the remuneration of managing directors.
— The majority of profits from real estate would be included in their full amounts, although they may only attract direct taxation on part of them only or at reduced rates.

Conversely, capital gains from the appreciation in the value of any asset arising on the winding up or termination of business activities would not be included in the basis of assessment.

Finally, net profit for the purposes of the "taxe professionnelle" must not amount to less than 10% of the total of wages and salaries and rental values as defined hereunder [21].

C — Determination of wages and salaries [22]

12. The "taxe professionnelle" would be assessable on all remuneration, benefits and payments in kind received by persons employed by a business. The salaries of the managing directors, already taken into account in the computation of net profit, would be deducted.

D — Determination of the rental value of assessable fixed assets

a) *Determination of assessable fixed assets* [23]

13. Unlike the "patente", assessment for which is determined on notional bases and regulated according to the characteristics of every different type of business, the "taxe professionnelle" would be based on the actual economic position of each individual business.

All property used by an enterprise in connection with its business would fall within the scope of this tax, such as buildings, land, industrial plant and equipment, fixtures and fittings in some way related to the exercise of the activity giving rise to the tax (including data processing equipment, transport, etc.) [24]

14. However, small and medium sized businesses operated by individuals or partnerships and which are liable to income tax on business profits according to simplified rules ("régime du forfait" and "régime simplifié") will only be liable to the business tax on the rental value of their premises excluding equipment and furniture used by them [25].

15. The tax will normally be levied on the person who occupies or uses the assessable premises and other fixed assets, i.e. the tenant [26].

19. Art. 11 "in fine" of the Bill.
20. Art. 6 of the Bill.
21. Art 6 II of the Bill.
22. Art. 7 of the Bill.
23. Art. 8 of the Bill.
24. Preamble to Art. 8 of the Bill.
25. Art. 8 III of the Bill.
26. Art. 8 II of the Bill.

However, this principle would be departed from in three cases:

— When property is hired for a short period only,
— When the property hired is not completely at the disposal of the hirer (e.g. the hiring of data processsing equipment on shared time),
— When the hirer is not subject to the "taxe professionnelle" (e.g. a business carrying on its activities outside France).

In the above circumstances, tax on the rented property would be payable by the owner [27].

b) *Determination of rental value of fixed assets*

16. A distinction should be drawn between assets liable to property tax ("taxe foncière") (i.e. land, buildings, storage installations, bridges and means of communication) and other fixed assets (stock, fittings, plant and machinery).

17. (i) *The rental value of the assets liable to "taxe foncière"* will continue to be valued according to the rules laid down for that tax [28].

It should be noted in this connection that the rental value of these assets has recently been reappraised as a result of the laws of December 22, 1967, February 2, 1968 and December 31, 1970. This reappraisal was started in 1970 and was completed in 1973.

Generally the rental value of these assets is equal to 8% of the cost as regards land and 12% of the cost as regards buildings and fixtures forming part of an industrial establishment. The rental value of commercial and other premises is equal to the rent actually paid or to the rent paid for similar premises.

18. (ii) *The rental value of other fixed assets* will be determined according to special rules [29].

(*) Generally this rental value will be fixed at a given percentage of the net cost of the asset involved.

The applicable percentages have been fixed by government order and are equal to:

— 20% in the case of mechanical or electronic data processing equipment
— 16% in the case of other equipment [30].

The net cost of these assets shall be their total cost possibly revaluated after deduction of an overall amount of F.F. 150,000 for the whole enterprise.

(**) Rented assets (except for assets rented under a lease-back agreement) will be assessed according to the amount of rent actually paid [31].

19. The rental values defined under (i) and (ii) above being the rental values of the assets for a full calendar year, will be reduced pro rata if the enterprise starts or ceases its activities during the year [32].

E — Territorial allocation of the elements of the basis of assessment

20. Since the "taxe professionnelle" has to be, like the "patente", established at local level, each taxpayer would be liable to the tax in the "commune" where he carries on business [33].

Businesses which carry on their activities in several "communes" would be taxed in each of them according to the wages and salaries paid to their employees who usually work

27. Preamble to Art. 8 of the Bill.
28. Art. 9 I 1 of the Bill.
29. Art. 9 I 2 of the Bill.
30. Decree no. 73.353 of March 26, 1973.
31. Art. 9 I 2(c) of the Bill.
32. Art. 9 II of the Bill.
33. Art. 12 I of the Bill.

there and according to the letting values of property assessable to the "taxe foncière" which is situated there [34].

A more difficult problem arises with regard to the taxation of profits and rental value of materials and equipment. In the majority of cases, the location of these elements cannot be exactly determined unless they are established in the financial accounts of the business. The same will apply to wages and salaries paid to travelling employees or to those who work at home.

Therefore, it is proposed to add up all these elements and to allocate them between the "communes" in proportion to the bases of assessment for the preceding year [35].

However the businesses which are in a position to specify the location of the rental value of their assets not liable to property tax would have the option of being taxed according to the actual location of these assets.

21. Since the apportionment of the bases of assessment of sea, inland water-way and air, transportation businesses as well as large businesses having establishment in a large number of "communes" poses certain individual problems, it is proposed to delegate the task of stating the applicable provisions to government order [36].

F — Conclusion

22. As mentioned in the preamble of the law [37] the effect of the shifting from the "patente" to the "taxe professionnelle" will be twofold.

a) Generally the bases of assessment of small concerns will be reduced in comparison with the bases of assessment of major concerns.

b) More specifically the variations in the bases of assessment of the tax will be the following:

Industry	+ 14%
Handicrafts and Small Industrial concerns [38]	— 20%
Retail businesses	— 34%
Non-commercial professions	+ 10%
Aggregate variation	0%

SECTION III: RATE OF THE BUSINESS TAX

A — General

23. Basically, the tax rate will be fixed directly by the local authorities as a percentage of the basis of assessment without using the complicated scheme of fictitious principals and supplementary centimes presently in force.

The local authorities will be able to fix the rate freely, irrespective of the rate of the other local taxes provided however that:

a) the rate does not vary by more than one fifth from one year to the following year [39] and

b) the rate does not exceed twice the average rate for the whole of France and is not lower than one half of that average [40].

B — Transitional provisions

a) *Determination of the tax rate for 1975*

24. The new scheme cannot be brought into force before the 1975 budgets of the local authorities are prepared.

Accordingly the local tax authorities will decide the amount of tax they wish to levy

34. Art. 12 II a) of the Bill.
35. Art 12 II b of the Bill.
36. Art. 12 III of the Bill.
37. This Bulletin June issue no. 6 p. 246-247.
38. Manufacturing concerns employing less than 10 employees.
39. Art. 17 II of the Bill.
40. Art. 17 I of the Bill.

according to the same rules as in the past i.e. by reference to fictitious principals and supplementary centimes. The amount of business tax required will then be allocated in proportion to the new bases of assessment [41].

b) *Harmonization of local tax rates*

25. Since it may happen the 1975 rate resulting from the above rules for a local authority will either exceed twice the average rate or be inferior to half of that rate, the local authority involved will have to reduce (or increase) it by at least one tenth in order to bring it within the legal limits by January 1st, 1979 at the latest [42].

C — Tax incentives [43]

26. The local authorities are presently allowed to grant total or partial exemptions from the "patente", for a period which may not exceed five years, to concerns which decide to transfer, extend or install industrial or commercial equipment or which decide to change the nature of their activities. These exemptions must be approved by the Finance Ministry [44].

It is proposed to enable the local authorities to grant the same incentives under the "taxe professionnelle".

However, a new system would be put into effect in order to comply with the resolution of October 20, 1971, of the EEC Council concerning incentives for regional purposes [45]. This new system would, however, only come into effect by government order when the EEC members have themselves decided to comply with the resolution. This new system would not differ very much from the existing system except that it would be extended to purchases of used plant and it would be computed in such a way that the total amount of the exemptions would be known at the time that they were granted.

Until the new system is enforced the previous one will apply to the "taxe professionnelle" as it applied to the "patente" [46].

SECTION IV: MISCELLANEOUS

A — Tax returns

27. Unlike the "patente", the "taxe professionnelle" requires that the taxpayers give the tax authorities the information necessary to establish the bases of assessment.

This information will be given as a supplement to the corporation tax return if the fiscal year of the firm coincides with the calendar year. Otherwise a special return will have to be filed within the first two months of each calendar year [47].

The return would be checked by the tax authorities in the same way as returns for other direct taxes [48].

B — Payment of taxes — Payment on account

28. The "taxe professionnelle" would be recovered by means of an assessment list, i.e. payment would not be required on a fixed date for all taxpayers but would depend for each taxpayer on the date on which he receives a notice from the tax authorities.

However, a payment on account would have to be made before June 15 of each year. It would amount to 60% of the tax due in

41. Art. 21 of the Bill.
42. Art. 17 II of the Bill.
43. Art. 20 of the Bill.
44. Art. 1473 bis of the General Tax Code (CGI).
45. JOCE no. C 111 of November 4, 1971.
46. Art. 20 II of the Bill.
47. Art. 13 of the Bill.
48. Art. 14 of the Bill.

the previous year. No payment on account would be due where the overall payment for the preceding year was less than F.F. 1,500 [49]. As an exception to this rule for the year 1975, no payment on account would be due by businesses whose payment in respect of the "patente" for the year 1974 amounts to less than F.F. 3,000 [50].

CONCLUSION

29. The introduction of the "taxe professionnelle" may be considered as a valuable modernization of the French local tax system. As from 1976, businesses and in particular foreign companies wishing to set up a subsidiary or branche in France would be able to determine their potential business tax liability much more easily than in the case of the "patente". They would merely have to apply the prevailing rate of the "taxe professionnelle" in the area concerned to the estimated taxable basis of the business in question. This would prove most valuable when choosing the location of a business in France.

49. Art. 15 of the Bill.
50. Art. 22 of the Bill.

R. VANDAMME*:

L'UNIFICATION DES DROITS D'ACCISE AU SEIN DU BENELUX**

Avant d'aborder le sujet pour lequel vous m'avez invité à votre tribune, je voudrais, tout d'abord vous dire où en est l'harmonisation des accises sur le plan de la Communauté. Ceci me permettra, après avoir esquissé l'état de l'unification des droits d'accise au sein du Benelux, de vous indiquer dans quelle mesure cette unification s'intègre dans le plan d'harmonisation des accises au sein du Marché commun.

CHAPITRE I. — HARMONISATION DES ACCISES DANS LA C.E.E.

Après avoir décrit brièvement la situation des Etats membres en matière d'accises, je me propose de vous indiquer les buts poursuivis par cette harmonisation, le programme d'harmonisation envisagé et la procédure prévue pour la réalisation de celui-ci.

I — *Situation des Etats membres en matière d'accises*

La situation des Etats membres en matière d'accises peut se schématiser comme suit, cette situation démontrant déjà rien que par elle-même la nécessité d'une harmonisation dans ce secteur:

quatre accises sont perçues dans tous les Etats membres, à savoir les accises sur les huiles minérales, les tabacs, les alcools et la bière.

En dehors de ces quatre accises, il en existe une multitude d'autres, d'importance très variable, perçues dans quelques Etats membres, parfois même dans un seul.

Ainsi sont frappés d'accise:

— le vin dans 7 Etats membres, l'Allemagne et l'Italie faisant exception (encore que l'Allemagne connaisse une accise sur les vins mousseux);
— les eaux de table et les limonades au Danemark, en Irlande, en France, en Belgique et aux Pays-Bas, le Luxembourg devant l'introduire prochainement dans le cadre de l'unification des droits d'accesse au sein du Benelux;
— le sucre au Benelux, en Allemagne et en Italie;
— les allumettes en Allemagne, au Danemark, en France, en Irlande et au Royaume-Uni;
— le café en Allemagne et en Italie;
— le thé en Allemagne, en France et en Italie.

On peut encore citer les accises sur les briquets, les cartes à jouer, les disques, le sel, les articles de chocolaterie, les lampes d'éclairage, les parfums, les pneumatiques, etc... qui sont souvent perçues dans un seul ou 2 Etats membres.

Si le nombre des accises appliquées diffère considérablement d'un Etat membre à l'autre, il en est de même des taux. Ainsi l'accise sur l'alcool varie du simple au décuple selon que l'on envisage la situation italienne ou britannique; celle sur le vin varie ± de 80 FB par hl en France à près de 4.000 FB par hl au Danemark. Les écarts sont également importants pour les cigaret-

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* Chef de division auprès de la Commission des Communautés Européennes.

** Contribution aux travaux de droit fiscal comparé et de droit fiscal communautaire du colloque hollando-belgo-luxembourgeois des 3 et 4 mai 1974 a Luxembourg.

tes, un peu moindres pour les huiles minérales.

L'importance des recettes budgétaires provenant des accises est également très différente d'un Etat membre à l'autre; si elles représentent globalement 13% des recettes fiscales totales au Luxembourg et aux Pays-Bas, elles représentent par contre 26% au Danemark et au Royaume-Uni et atteignent même 44% en Irlande.

II — *Buts poursuivis par l'harmonisation des accises*

L'harmonisation de l'ensemble des impôts de consommation, et en particulier des accises, a pour but:

— de réaliser une véritable neutralité concurrentielle entre les Etats membres;
— et de permettre la suppression des frontières fiscales entre ces Etats.

a) *Neutralité concurrentielle*

L'harmonisation des impôts de consommation est indispensable en vue d'assurer la neutralité concurrentielle, tout spécialement sur le plan des échanges, entre les Etats membres. Il est clair, en effet, que l'existence de structures d'impôts différentes entre ces Etats peut provoquer des perturbations de la concurrence. Par exemple, il est reconnu que l'existence entre Etats membres de structures différentes d'accises en matière d'imposition des cigarettes (indépendamment de taux différents) constitue un obstacle à l'interpénétration des marchés, car elle est à l'origine de conditions de concurrence différentes selon les Etats membres. Ainsi un système d'accise spécifique appliqué dans un Etat membre a pour effet d'encourager la fabrication de cigarettes de haute qualité au détriment des cigarettes dites populaires. Par contre, un système de taxation proportionnelle au prix de vente a exactement l'effet inverse. Les entreprises se sont, bien entendu, adaptées à ces conditions fiscales avec cette conséquence que leurs produits peuvent difficilement pénétrer sur le marché où existent d'autres conditions fiscales, c'est-à-dire d'autres conditions de concurrence. Seule une harmonisation des structures de ces accises permettra d'harmoniser ces conditions de concurrence.

Par ailleurs, des écarts importants entre les taux appliqués à des produits en concurrence *à l'intérieur d'un Etat membre* (entre les boissons par exemple) peuvent influencer diversement la consommation de ces produits et provoquer de ce fait des perturbations de la concurrence à l'intérieur de cet Etat membre et entre les Etats membres. De même, l'existence, *sur le plan communautaire,* de différences importantes entre les niveaux de la charge fiscale grevant un même produit peut mettre les entreprises de certains Etats membres dans une position concurrentielle beaucoup plus favorable que celles d'autres Etats membres.

Afin de créer des conditions de concurrence neutres sur le plan du Marché commun, il convient donc de faire porter l'harmonisation des impôts de consommation à la fois sur les structures et sur les taux.

b) *Suppression des frontières fiscales*

Chaque Etat membre applique à l'heure actuelle le principe de la taxation dans le pays de consommation, il détaxe les produits exportés et taxe les produits importés au même niveau que les produits indigènes similaires; c'est ce qu'on appelle les mesures de compensation aux frontières.

Or, les mesures compensatoires aux frontières et les formalités y afférentes sont susceptibles de freiner le développement du commerce intracommunautaire, car, d'une part, ces formalités constituent en elles

mêmes un coût que ne supportent pas les produits nationaux et, d'autre part, le formalisme qui s'y attache est de nature à amener certaines entreprises, notamment les petites, à se limiter au marché national.
Seule l'application dans les Etats membres d'un système commun d'impôts de consommation comportant les mêmes structures et des taux très rapprochés, voire unifiés, permettra de supprimer ces mesures compensatoires et ces formalités, c'est-à-dire les frontières fiscales entre les Etats membres, de telle sorte que les marchandises puissent circuler à l'intérieur de ces Etats comme si elles circulaient à l'intérieur d'un seul marché.

III — *Programme pour l'harmonisation des accises*

A. Si l'harmonisation des accises est de toute évidence nécessaire pour aboutir à une circulation libre et sans distorsion de concurrence des biens entre les Etats membres, une première question se pose: quelles sont les accises qu'il faut maintenir et harmoniser sur le plan communautaire, le maintien et l'harmonisation d'une accise impliquant son introduction dans l'Etat membre où elle n'existerait pas encore? Nous avons vu, en effet, que la liste des accises est très variable selon les Etats membres, plus importante dans certains Etats membres que dans d'autres. Or, il est clair qu'il est impossible de justaposer les différentes accises existantes, c'est-à-dire de faire la somme de ces impôts, de les généraliser sur le plan des neuf et de les harmoniser. Il faut donc faire un choix parmi les différentes accises, en vue de leur harmonisation. Encore, convient-il, pour faire ce choix, de savoir au préalable s'il faut s'efforcer de supprimer le plus grand nombre d'accises possible ou s'il faut, au contraire, en maintenir et harmoniser un assez large échantillon.

B. D'une manière générale, les accises n'ont pas très bonne réputation auprès des théoriciens de l'impôt. Elles sont considérées comme barbares, car elles frappent les produits assujettis sans distinction de valeur. Elles ont un caractère rétrograde car elles ne font pas appel aux méthodes modernes de gestion. Et il serait tellement plus satisfaisant pour l'esprit d'appliquer un impôt général sur les affaires.
Et pourtant, il semble qu'un certain nombre de raisons militent en faveur du maintien, à côté de la TVA, non seulement de quelques grandes accises, comme celles sur les huiles minérales et les tabacs, mais également d'un certain nombre d'autres accises, même si le niveau de leurs recettes est généralement moindre.
Il faut remarquer, tout d'abord, que les accises permettent de frapper certains produits non seulement d'une charge fiscale différenciée par rapport aux autres mais encore d'une charge ajustée en fonction directe de celle qu'ils peuvent supporter, ce qui n'est pas possible avec la TVA dont les taux doivent être peu nombreux.
Par ailleurs, il ne faut pas perdre de vue que les pertes de recettes résultant de la suppression de ces autres accises devraient vraisemblablement être compensées dans certains pays par une majoration des taux de la TVA. Or, il semble qu'il soit préférable de faire supporter cette charge fiscale par quelques produits qui peuvent la supporter sans inconvénients majeurs plutôt que par l'ensemble de l'économie.
D'autre part, ces autres accises combinées avec les plus grandes permettent de donner à l'ensemble du régime fiscal une plus grande souplesse. Elles peuvent, en effet, être manoeuvrées plus facilement que la

TVA, en cas de besoin de recettes fiscales nouvelles par exemple. Cette souplesse sera très utile dans le cadre de la suppression des taxations à l'importation et des détaxations à l'exportation et des contrôles aux frontières, car elle permettra, par un aménagement des différentes accises, de combler ou de réduire les pertes de recettes pouvant provenir pour certains Etats de l'harmonisation, soit de la TVA, soit de certaines accises, soit même d'autres impôts.
Enfin, les accises, peuvent même constituer le moyen d'une politique, dans le domaine économique, agricole et social, ainsi que dans le cadre de la politique de l'environnement.

C. S'il faut maintenir, à côté de la TVA, un assez large échantillon d'accises, encore faut-il, pour procéder au choix des accises à percevoir, ne pas perdre de vue les principes généraux auxquels il est souhaitable que répondent ces impôts.
A cet égard, on peut considérer qu'en règle générale, la perception d'une accise ne semble devoir être envisagée que si celle-si répond aux critères suivants:
— le but premier d'une accise est de procurer des recettes. Une accise n'a donc de sens que si son rendement est suffisamment important, ce qui suppose qu'elle frappe des produits de large consommation, ceci n'empêchant toutefois pas qu'elle puisse également servir à freiner la consommation de produits préjudiciables à la santé;
— l'accise ne doit pas frapper des produits de première nécessité, c'est-à-dire des produits quasi indispensables à la vie;
— l'accise doit éviter autant que possible de frapper des produits utilisés comme matières premières par l'industrie, comme moyens de production ou comme agents de fabrication.
A côté de ces critères généraux, il y a, bien entendu, d'autres critères particuliers qu'il peut être utile de prendre en considération lorsqu'il s'agit de déterminer si un produit doit être soumis ou non à une accise commune: par exemple, la nécessité de maintenir des conditions de concurrence égales entre produits concurrents. En ce qui concerne le Marché commun, la situation de fait existant au sein des Etats membres est de même un élément à ne pas négliger lors de cette appréciation.
Sur base des critères qui précèdent, la Commission des Communautés européennes estime que devraient être maintenues et harmonisées sur le plan communautaire les accises sur:
— les huiles minérales
— les tabacs manufacturés
— les alcools
— la bière
— le vin.
Mais le faut de ne retenir à l'heure actuelle que cinq accises à maintenir et à harmoniser ne préjuge pas de l'avenir. Une telle décision ne peut faire obstacle à l'établissement ultérieur, sur le plan communautaire, d'autres accises, que ce soit pour des raisons fiscales, économiques ou autres, si la nécessité s'en fait sentir.
Quant aux autres accises, étant donné que l'harmonisation des impôts de consommation a pour but final de réaliser la circulation libre et sans distorsion de concurrence des biens entre les Etats membres, elles devraient être supprimées, car sinon il faudrait, pour assurer leur perception à l'importation dans les pays où elles existeraient, maintenir des frontières fiscales. Toutefois, si certaines de ces accises ne donnaient pas lieu à des compensations et des contrôles aux frontières dans les échanges entre les Etats membres, elles pourraient être maintenues telles quelles, puisqu'elles ne gêneraient pas alors la suppression des

frontières fiscales. En d'autres termes, pourraient être maintenues parmi ces autres accises, celles pour lesquelles aucune détaxation n'est accordée en cas d'exportation vers un autre pays membre dont l'exigibilité ne naît pas du fait même de l'importation d'un pays membre dans un autre pays membre et dont la perception n'implique pas un contrôle à la frontière. Encore faudrait-il dans ce cas qu'elles ne troublent pas la concurrence. Pourraient, par exemple, rentrer dans cette catégorie les taxes sur la consommation de boissons dans les débits de boissons.

IV — *Procédure suivie pour la mise en oeuvre de ce programme d'harmonisation*

En matière d'accises, comme en matière de TVA, la première phase de l'harmonisation au sein du Marché commun ne portera que sur les structures de l'impôt.

Dans cette perspective, la Commission a transmis au Conseil, le 7 mars 1972, une proposition de directive-cadre en matière d'harmonisation des accises et quatre propositions de directives particulières.

La proposition de directive-cadre établit les principes généraux de l'harmonisation des accises: elle fixe le principe des cinq accises qui devraient exister dans la Communauté et être harmonisées, et celui de la disparition à terme de toutes les taxes, autres que la TVA et ces cinq accises, frappant la consommation de produits et donnant lieu à des compensations aux frontières. Elle indique également que la Commission sa réserve de soumettre au Conseil des propositions visant à établir d'autres accises, si cela s'avère nécessaire.

Les propositions de directives particulières concernent l'harmonisation des structures des accises sur l'alcool, de vin et la bière.

Dans le domaine des accises sur les huiles minérales, une proposition de directive harmonisant les structures de l'accise sur les huiles minérales a été adressée par la Commission au Conseil, en août 1973.

Quant à l'accise sur les tabacs manufacturés et plus particulièrement sur les cigarettes, une directive qui se limite à fixer les principes auxquels cette accise doit répondre a déjà été adoptée par le Conseil, en décembre 1972.

Au cours d'une deuxième phase, devraient être prises les mesures nécessaires pour aboutir à la suppression des frontières fiscales, c'est-à-dire à la suppression des taxations à l'importation et des détaxations à l'exportation et des contrôles aux frontières.

Or, comme nous avons déjà eu l'occasion de le voir, cette suppression impliquera que l'on procède au préalable à un très net rapprochement des taux des accises. C'est donc au cours de cette seconde phase que devraient être harmonisés les taux des accises à maintenir sur le plan communautaire.

C'est au cours de cette seconde phase également que devraient être progressivement éliminées toutes les autres impositions indirectes non harmonisées qui frappent la consommation de produits, dans la mesure tout au moins où elles donnent lieu à des compensations aux frontières.

L'harmonisation des taux des accises à maintenir ne devra pas nécessairement se traduire par une uniformisation de ces taux.

En matière de taxe sur la valeur ajoutée, il est actuellement prévu que même au stade final de l'harmonisation, les taux nationaux pourront être fixés à l'intérieur d'une fourchette, assez étroite il est vrai. Rien n'interdit de penser que pour certaines accises, les Etats membres pourront également fixer librement leurs taux à l'intérieur d'une certaine fourchette.

Pour le moment il n'est pas possible de fixer le niveau, même de manière indicative, auquel devront se situer ces taux ou ces fourchettes de taux. Leur niveau dépendra, en effet, en partie de celui auquel sera fixé le niveau de la taxe sur la valeur ajoutée, car il conviendra d'éviter lors de cette 2e phase que l'harmonisation des taux des droits d'accise conjugée avec celle des taux de la TVA n'ait des répercussions budgétaires trop importantes pour certains Etats membres. En d'autres termes, l'harmonisation des taux des accises doit être intimement liée à l'harmonisation des taux de la TVA. Pour la même raison d'ailleurs, la détermination du taux d'un droit d'accise harmonisé ne pourra se faire de façon isolée, mais devra se faire en même temps que les autres accises à harmoniser, ce qui permettra de rechercher des compensations entre accises différentes du point de vue des recettes budgétaires.

CHAPITRE II. — UNIFICATION DES ACCISES AU SEIN DU BENELUX

Avant d'examiner la Convention Benelux du 29 mai 1972 portant unification des droits d'accise, je voudrais vous rappeler que les tentatives d'unification de ces droits sont antérieures à cette date. Les études dans ce domaine dans les organes appropriés du Benelux remontent à 1946. Elles ont abouti à la signature d'une 1ère Convention d'Unification, le 16 décembre 1948. Mais cette convention ne fut jamais approuvée par les instances intéressées et fut abolie par une nouvelle convention de 1950 qui tendait au même but. Cette nouvelle convention ne fut elle-même jamais mise en vigueur, à l'exception de certaines dispositions concernant les boissons fermentées de fruits et les boissons fermentées mousseuses dont l'unification des droits avant déjà été réalisée fin 1947.

A quoi attribuer cet échec?

Si l'on se réfère à l'exposé des motifs de la dernière Convention portant unification des droits d'accise de mai 1972, on peut considérer que, outre les difficultés que peut entraîner toute unification de taux sur le plan économique, deux raisons principales expliquent cet échec:

— l'unification des taux des droits d'accise a pour conséquence que les Etats concernés perdent dans ce domaine toute autonomie. Or, dans les années 50 et presque sans interruption depuis lors, les Etats du Benelux ont dû fréquemment faire appel de manière indépendante aux accises pour trouver de nouvelles recettes. D'où leur réticence à se lier les mains dans ce domaine.

— l'unification des accises a des répercussions sur les budgets et sur le niveau des prix, ce qui, dans le passé, a été jugé inacceptable par les instances compétentes.

Le désir de réaliser en fin de compte la suppression des frontières fiscales a finalement amené les 3 gouvernements du Benelux à décider de passer outre à ces difficultés. Ils ont dans ce but signé la Convention du 29 mai 1972. Cette convention, avec celle du 10 juin 1970 prévoyant l'unification du territoire Benelux en matière d'accise, vise, à travers à l'unification des droits d'accise, à permettre aux marchandises beneluxiennes de circuler à l'intérieur du Benelux comme si elles circulaient à l'intérieur d'un seul marché. En fait, ces conventions unifient les 3 territoires du Benelux en un seul, du point de vue de la perception des droits d'accise, d'autres mesures tendant sensiblement au même objectif

devant être prises en matière de taxe sur la valeur ajoutée.

Que prévoit la Convention de 1972 conjuguée à celle du 10 juin 1970?

Les produits passibles d'accise, que ces droits aient déjà été acquittés ou ne l'aient pas encore été, peuvent traverser les frontières intérieures du Benelux sans compensations aux frontières ni formalités. Il en est de même pour les produits venant de pays hors du Benelux, les formalités en matière d'accises étant pour ceux-ci accomplies aux frontières extérieures du Benelux. Pour que cette circulation à l'intérieur du Benelux sans perception de droits aux frontières internes s'accomplisse sans formalités ni contrôles aux frontières, il a paru indispensable d'harmoniser au préalable les droits d'accise entre les 3 pays. La Convention de 1972 prévoit, à cet effet, la mise en place de droits entièrement unifiés qui ont été fixés sur base d'un compromis, lequel a été réalisé en tenant compte du désir des pays d'éviter autant que possible des pertes budgétaires et de limiter l'influence sur les prix. Les seules exceptions au principe de l'unification des droits concernent, d'une part, les cigarettes où à la place d'une unification des droits est prévu un accord sur les prix et, d'autre part, l'alcool dont le taux au Grand Duché de Luxembourg pourra rester inférieur à celui des 2 autres pays. La Convention n'harmonise pas les modalités de perception des droits d'accise qui peuvent rester particulières à chaque pays; celles-ci ne seront harmonisées ultérieurement que si la nécessité s'en fait sentir sur le plan économique.

La Convention de 1972 prévoit que les parties peuvent déroger de manière entièrement autonome vers le haut aux tarifs communs ou percevoir des droits d'accise autonomes, à condition que ceci ne conduise pas à l'instauration ou au maintien de contrôles ou de formalités aux frontières intérieures.

Il convient de noter que, si pour la perception des droits d'accise, le territoire du Benelux est considéré comme un seul territoire, il n'empêche que les recettes des droits d'accise communs continueront à être attribués à chacun des Etats concernés selon le principe de l'attribution des recettes au pays de consommation. En d'autres termes, si des produits ont été assujettis à une accise commune par un des partenaires, mais sont ensuite expédiés vers le territoire d'un autre partenaire pour y être consommés, c'est à ce dernier que seront dévolues les recettes de ces droits. Dans ce but, un décompte des droits encaissés par l'un pour le compte des autres devra intervenir périodiquement entre les Etats partenaires.

Où en est la réalisation de la Convention de 1972?

Cette Convention devait entrer en vigueur le 1er janvier 1973, sous réserve de quelques dispositions transitoires. Bien qu'approuvée par les parlements belge et néerlandais, elle n'est cependant pas encore en application, par suite de l'absence d'approbation par le parlement luxembourgeois.

Il convient de remarquer toutefois que, si cette Convention n'est pas encore officiellement en vigueur, les dispositions qu'elle prévoit concernant l'unification des droits entre les trois Etats du Benelux, sont déjà en grande partie d'application dans ces Etats. Mais l'objectif poursuivi par la Convention, à savoir la suppression des frontières fiscales, n'a pas encore, quant à lui, reçu de réalisation; les marchandises exportées continuent donc à être détaxées à l'exportation et taxées à l'importation entre l'UEBL et les Pays-Bas.

CHAPITRE III. — COMPARAISON DES BUTS ET PROGRAMME POURSUIVIS PAR L'HARMONISATION DES DROITS D'ACCISE AU SEIN DU BENELUX ET DU MARCHE COMMUN

1) Si l'on se réfère aux buts poursuivis par l'harmonisation des accises tant au niveau du Benelux qu'au niveau du Marché commun, on peut considérer qu'ils sont identiques: il s'agit de supprimer les frontières fiscales, c.à.d. les compensations et contrôles aux frontières. Toutefois, la Commission de Bruxelles assigne à l'harmonisation, au sein de la C.E.E., un autre objectif: celui de supprimer, dans les échanges principalement, les distorsions de concurrence qu'engendre, à l'heure actuelle, la disparité des systèmes d'accise entre les 9 Etats membres du Marché commun. Si cet objectif n'est pas repris tel quel dans l'exposé des motifs de la Convention Benelux de 1972, il y a tout lieu de penser que cela est dû au fait qu'au sein du Benelux les structures présentes des accises, même si non unifiées, sont déjà suffisamment proches pour qu'elles n'entraînent pas de graves perturbations de concurrence dans les échanges entre les partenaires du Benelux.

2) A deux exceptions près, les produits soumis à des accises communes sont les mêmes dans le cadre des 2 harmonisations projetées: il s'agit des tabacs, des alcools, des vins, des bières et des huiles minérales. Les exceptions concernent, d'une part, les boissons sans alcool et, d'autre part, les sucres, produits pour lesquels les propositions de la CEE ne prévoyent pas d'accise. Mais quant au sucre, on peut penser, sur base des discussions déjà intervenues, qu'il ne devrait pas y avoir trop de difficultés pour supprimer ultérieurement cette accise au sein du Benelux. Quant aux boissons sans alcool, si l'on tient compte aussi des points de vue exprimés antérieurement au sein des 9, la question de son ajout aux 5 accises communautaires se posera avec acuité lorsque cette question viendra en discussion devant le Conseil des Ministres des 9.

3) La Convention Benelux, tout comme la proposition de la CEE, prévoyent que le Conseil des Ministres pourra, non seulement modifier la liste des accises communes dans l'avenir, mais encore que les Etats concernés pourront percevoir soit un supplément d'impôt sur les produits soumis à des accises communes, soit percevoir des droits d'accises autonomes, à la condition dans ces 2 éventualités que ces perceptions n'entraînent pas l'instauration ou le maintien de frontières fiscales.

4) Dans l'un comme dans l'autre cas, l'opération de suppression des frontières fiscales est envisagée à la fois sur le plan des accises et sur celui de la TVA. Il ne suffirait à rien, en effet, de supprimer les frontières fiscales dans l'un de ces secteurs si l'on devait les laisser subsister dans l'autre.

Il convient de noter cependant que dans le cadre du Benelux et contrairement à ce que prévoit la Commission de la CEE, il n'est envisagé de supprimer en matière de TVA que les contrôles aux frontières et non pas les frontières fiscales elles-mêmes c.à.d. les compensations aux frontières. Les exportations vers un pays partenaire continueront, en effet, à être détaxées et seront imposées au niveau de l'importateur, le contrôle de ces opérations se faisant sur base d'une déclaration à établir par l'exportateur. Dans ce système il est sans doute également prévu de rapprocher les taux de la TVA entre les 3 pays partenaires, mais ce rapprochement

n'a en réalité d'autre raison d'être que d'éviter que des non-assujettis à la TVA ne soient enclins à se procurer des biens sur le territoire d'un autre partenaire, en raison des taux de TVA inférieurs qui y seraient pratiqués.

5) Par contre, la CEE propose de réaliser l'objectif de la suppression des frontières fiscales dans le domaine des accises, comme d'ailleurs dans celui de la TVA, par une harmonisation en premier lieu des structures de ces impôts et ensuite de leurs taux. Le Benelux envisage l'opération en sens inverse; il propose tout d'abord d'unifier les taux des accises communes et ensuite, si nécessaire, d'harmoniser leurs modalités d'imposition. Mais comme je l'ai déjà dit, cette différence dans le processus d'harmonisation des accises s'explique si l'on considère que déjà à l'heure actuelle les structures des accises dans le Benelux sont très proches l'une de l'autre et ne sont pas de nature en elles-mêmes de provoquer de graves distorsions de concurrence.

6) L'une et l'autre des propositions d'harmonisation envisagent d'attribuer les recettes des accises au pays de consommation. Le Benelux prévoit, à cet effet, que le décompte des droits revenant à chaque partenaire pourra se faire notamment à partir de déclarations à remplir par l'exportateur et l'importateur. La Commission de la CEE n'a, quant à elle, pas encore examiné de manière précise cette question. On peut noter toutefois que dans la mesure où les accises communes pourraient être perçues à l'aide de marques fiscales, comme c'est le cas dans le secteur des tabacs, ce problème de l'attribution des recettes au pays de consommation pourrait se résoudre de façon plus aisée.

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En conclusion, il y a lieu de souligner que l'unification des droits d'accise au sein du Benelux s'intègre parfaitement dans le programme prévu pour l'harmonisation des accises dans le Marché commun. A ce titre, on peut considérer que le Benelux est un précurseur et espérer que la voie qu'il est en train de suivre pour arriver à la suppression des frontières fiscales servira d'exemple à ses autres partenaires du Marché commun. Souhaitons donc que cette suppression des frontières avec ce qu'elle implique sur le plan de l'harmonisation des accises et de la TVA soit rapidement mise en vigueur par le Benelux.

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In Belgium **The Netherlands**
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THE ANDEAN SUBREGION AND INTERNATIONAL DOUBLE TAXATION

OUTLINE

I. Introduction: The process of economic integration in Latin America.

II. Formation of the Andean group.

III. Conventions for the prevention of international double taxation adopted by the Andean group.
- A) Doctrinal and technical basis of the conventions.
- B) The Decision 40 conventions and tax harmonization.
- C) Effective date of Decision 40.
- D) Treatment accorded each type of income, and patrimony in the Decision 40 conventions.
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  - j) Pensions and annuities.
  - k) Public entertainment activities.
  - II) Taxes on net wealth.

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ADOLFO ATCHABAHIAN *:

THE ANDEAN SUBREGION AND ITS APPROACH TO AVOIDANCE OR ALLEVIATION OF INTERNATIONAL DOUBLE TAXATION

I. INTRODUCTION: THE PROCESS OF ECONOMIC INTEGRATION IN LATIN AMERICA

At the outset, it is necessary to explain, briefly, the history of efforts which are leading towards a Latin American common market. In this context the Andean Group was formed, emerging from the Agreement of Cartagena in 1969. In turn, this explanation will establish the purpose and characteristics of the topic of this paper.

In the early 1950's, it became clear that there was a decline in the heretofore satisfactory economic growth rate in Latin America, a trend which had originated in the years just after the close of World War II.

One cause for the decline was the fact that the import substitution process was loosing its dynamic impact, although there were marked variations from country to country in this regard. It was in this situation that the genesis of the elaboration of the idea of a Latin American common market occurred.

It was observed that one of the most effective means of maintaining levels of economic growth, which would be similar to those achieved in the prior period, would be through a mechanism of broadening the economic space for the countries of Latin America.

In 1959, the Secretariat of the Economic Commission for Latin America (ECLA) stated that "there are grounds for asserting that a common market could be established, within which development would be more rapid than if the market were not organized, not only in Latin America as a whole, but in each of the individual countries of the region." [1]

At the same time, ECLA noted the improbability "that the common market would suffice in itself to ensure equally intensive development for all its members," [2] considering that the countries would encounter the idea in different stages of economic evolution.

On the other hand, in various means of realization, in the most varied circles within the region — political, economic, academic — the conviction arose that a great portion of the problems interfering with accelerated, ordered and balanced development in Latin America, and which could eventually strangle it, could be solved by means of economic integration of the countries of the region. [3]

* Acting Director, Office of Public Finance, Organization of American States.

1. "The Latin American Common Market", United Nations, Department of Economic and Social Affairs, New York, 1959 (E/CN.12/531), page 53.

2. Op. cit., Note 1, Page 53.

3. In any event, the reasons for supporting the need for a common market are still clearly justified. It should be noted that in spite of the rapid economic growth of Latin America in the 1960s, in comparison to the 1950s, and regardless of the favorable total situation for almost the whole region, stimulated by a notably improved performance in the external sector for the last two or three years, this was not reflected even at the outset in the parallel processes of in depth transformations of the internal economic and social structure of the countries. Within this framework, only partially completed, a new and serious element of vulnerability was introduced — the rise in petroleum prices — most severe for countries with little or no petroleum producing capability of their own.

The validity of these formulations left firmly implanted from the outset the need that a concomitant objective for the implementation of the proposed common market would be that of reaching a balanced economic development among the member countries so that, over time, the process would permit an equitable distribution of its benefits. For this purpose, in order to attenuate the relatively lesser economic development of some countries, the common market would provide a better framework than if it failed to exist, and thus the lesser developed countries would approach the level of the better developed countries of the region; to this end the latter would offer special treatment in their reciprocal relations with medium and lesser developed countries.

The concern for advancing the ideas favorable to the common market was growing at the beginning of the decade of the sixties. At that time, the first agreement leading to the construction of the Central American Common Market had taken place — the General Treaty for Economic Integration signed in December 1960. In February 1960, the Treaty of Montevideo had been signed, relating the signatory countries in a Free Trade Area, giving rise to the entity called "The Latin American Free Trade Association" (LAFTA). [4]

Clearly, the purposes of a scheme such as a free trade area are more modest and much less far-reaching than those of a common market. Despite the fact that Article 1 of the Treaty of Montevideo specifically states that its purpose is to establish "a Free Trade Area," and that the following text contains basic norms for the implementation of that Area, both in the directing spirit of the Treaty and in its language as well dwells on economic goals of much greater importance. Thus, it is stated that the signatory countries are "... determined to persevere in their efforts to establish, gradually and progressively, a Latin American common market."; similarly, they affirm the search, "... animated by the proposition of uniting efforts in favor of a progressive complementarity and integration of their economies, based on an effective reciprocity of benefits."

Even within the limit of the contemplated objectives, the Treaty of Montevideo contains provisions concerning both external and internal taxation implicitly projected toward the achievement of a future tax harmonization, with a view to facilitating the most fluid interchange of goods and services within the Area and tending basically to preventing less favorable tax treatment by one country on an imported good as compared with the tax treatment accorded the same domestically produced item (Article 21). Also, Article 52 of the Treaty implicitly induces the application of the well known principle of the country of destination in the internal taxation of goods. [5]

In a more broadly stated order of ideas, exceeding those appropriate only to the conformation of a free trade area, the Treaty of Montevideo contains provisions which imply prerequisites directly inherent

4. Subsequently, this paper will concentrate on LAFTA because it includes the Andean Group countries.

5. Article 52 prohibits the countries from "favoring their exports through subsidies or other measures which would disturb the normal conditions of competition within the Area." However, "exemptions in favor of exported products for taxes and fees imposed on the product or its components for internal consumption or refund of such taxes and fees" are not treated as subsidies.

in a common market. This is the interpretation that might be acceptable for the provision according to which "... capital from the Area will enjoy within the territory of each Contracting Party a treatment no less favorable than that provided for capital arising from any other country" (Article 20).

Further, Article 15 of the Treaty provides that "... in order to assure equitable conditions of competition among the Contracting Parties to facilitate increasing integration and complementarity in their economies, especially in the field of industrial production, the Contracting Parties agree, in all ways possible, to harmonize ... the treatment applicable to capital, goods and services from outside of the Area."

It is evident both in Article 20 and in Article 15 that they comprehend matters of taxation, most importantly involving international double taxation and how to avoid or attenuate it.

However, we should not think that these tax aspects are decisively important in the magnitude of economic exchange activities among countries involved in an integration process.

For this it is important to emphasize that to the limited extent in which such exchange can depend on circumstances of a tax character, the removal of obstacles which, in this regard, can exist among such countries most essentially serves purposes of greater import, such as those related with tax harmonization within the projected common market, and not just the avoidance of international double taxation among the respective countries.

There are eleven countries incorporated into LAFTA: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. In 1960 special rules were adopted "... for the relatively lesser developed countries ..." including Bolivia, Ecuador, Paraguay and Uruguay.

In that way, the Treaty of Montevideo only partially accepted the guidelines proposed by ECLA as contained in the recommendations of the special body it created, the Working Group for the Latin American Regional Market. In its second meeting in Mexico City in February 1959, the Working Group had proposed that "In order to encourage the development of countries in the early stages of industrialization and to make the benefits of the common market available to them on bases of effective reciprocity with the industrially more advanced countries, they will be given differential treatment." [6]

The consequent classification of countries falls into three groups: for this we can state that the Treaty of Montevideo contemplated, on one hand, the existence of the relatively lesser developed countries but that it did not recognize the presence of an intermediate level of medium countries, with insufficient markets, distinct from the lesser developed countries and from the three more developed countries of the Area: Argentina, Brazil and Mexico.

At this point in this very succinctly stated background, the great importance of the meeting of the Chiefs of State of the Americas, in Punta del Este, Uruguay, from April 12 through 14, 1967, should be emphasized. The Declaration emanating from this Conference was concerned fundamentally with the proposal for advancing the Latin American Common Market over a period, beginning in 1970, which would see the effective functioning of this

6. See op.cit in note 1, page 41.

market by 1985. In striving to reach this goal, the Chief Executives recommended that subregional agreements compatible with the global objective of Latin American regional integration could be undertaken. On the other hand, after ten years of LAFTA activity, it was seen that the progress from the free trade area phase to the common market and beyond to full economic integration was slow indeed.

II. FORMATION OF THE ANDEAN GROUP

At this point it is clear that the circumstances mentioned above — failure to foresee the situation of the medium level developed countries, the possibility of subregional agreements and the slow progress in LAFTA — resulted in an increasing interest in some countries in a subregional grouping within LAFTA, of four medium level developed countries — Chile, Colombia, Peru and Venezuela — with two of the relatively lesser developed countries — Bolivia and Ecuador.

In strict truth, the first steps of this process to the formation of the Andean Group occurred actually when, "... during the first years of the functioning of LAFTA, the medium level developed countries initiated efforts to assure special measures in view of their narrow markets and the relative insufficiency of development in certain industrial sectors or branches." [7]

Consequently, at the LAFTA Conference in 1964 in Bogota, the proposition was raised to permit agreements for "closed" industrial complementarity among lesser and medium developed countries. [8]

Subsequently, in August 1966, the Declaration of Bogota was proclaimed, through which Chile, Colombia, Ecuador, Peru and Venezuela proposed to contribute to accelerating the process of Latin American economic integration. In order to create a plan for the execution of the measures adopted, a Mixed Commission was created, composed of government representatives. The meetings of this Commission resulted, in 1967, in the development of the bases of a subregional agreement. When these were approved by the LAFTA Conference, the Mixed Commission, during the second part of its Sixth Meeting in Cartagena in May 1969, approved the text of the Subregional Agreement, which was signed in Bogota on the 26 of that month by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela became a signatory to the Agreement in 1973.

In this way, then, the Andean Group was born, by virtue of the provisions contained in the Agreement of Cartagena as a subregional grouping within LAFTA.

One of the three members of the Junta of the Agreement — its technical organ — analyzed the means by which the prior experiences of economic integration in Latin America were capitalized on by the Andean Group, stating: "It united a group of countries which because of their economic dimension and capacity did not believe that they were in condition to fully participate in the benefits which would arise from LAFTA and which thought that by combining their efforts through closer

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7. "Antecedentes y Principales Características y Mecanismos del Acuerdo Subregional Andino": document prepared by the National Department of Planning of Colombia and reproduced in "Derecho de la Integración", the biannual review edited by the Institute for Latin American Integration (INTAL), Buenos Aires, No. 5, October 1969, page 117.

8. See note 7.

and deeper integration formulas, they would not only find occasion to overcome the most severe market limitations but also improve their capacity for action within the LAFTA scene and contribute, in general, to the ultimate integration of Latin America. This is the goal which must be kept in mind by our peoples, most importantly then to be witnesses to the enormous concentration of world power contained within recent international combinations and integration movements such as the European Economic Community." [9]

The basic guidelines expounded at the outset of the creative stage of the subregional group, which served as the basis for the Agreement of Cartagena, were stated by doctor Salgado as follows:

"a) integration is a requirement for economic development, and its form should be conditioned to the needs of a development politicy;"

"b) the process of integration should be rapid and its objective sufficiently profound so as to induce rapid action in the new economic space;"

"c) the interdependence of interests which integration develops should be utilized consciously in the external relations of the Group as the basis of a new negotiating aptitude." [10]

Consequently, it is almost unnecessary to note that the provisions of the Agreement of Cartagena are much more emphatic than those of the Treaty of Montevideo, both in the establishment of objectives and in the determination of instruments for achieving these objectives. It belabors the obvious to note that the member countries of the Agreement have shown a much more clearly defined will to pursue in successive stages, in rather short time periods, the steps toward economic union among themselves. The pace with which a variety of measures have been adopted make it clear that, in this case, intentions are being closely followed by results.

The Agreement of Cartagena (Article 1) states the following fundamental objectives for the ultimate purpose of obtaining a persistant improvement in the living conditions of the subregion's inhabitants:

a. Promote the balanced and harmonic development of the member countries.
b. Accelerate the growth of member countries through economic integration.
c. Facilitate the participation of the member countries in the integration process contemplated in the Treaty of Montevideo.
d. Establish conditions favorable to the conversion of LAFTA to a common market.

Among the mechanisms the Agreement considers appropriate for achieving these objectives, Article 3, section a, makes special mention of the "harmonization of economic and social policies." Also Article 26 repeats it, together with a provision that the member countries immediately initiate a process of coordination of development plans in specific sectors "... with a view to achieving joint planning for the integrated development of the area."

Then, the Agreement details especially the various paths which it considers apt for reaching these goals, providing in their totality a true development strategy upon

9. Germánico Salgado Peñaherrera: "El Grupo Andino y el Poder de la Acción Solidaria," in "La Integración Latinoamericana en una Etapa de Decisiones," edited by IDB/INTAL, Buenos Aires, 1973, pp. 135-6.

10. Germánico Salgado Peñaherrera, op.cit. note 7, page 136.

which the competent authorities of the member countries can construct their own national development policies. Among other measures contemplated for these purposes, tax harmonization is prescribed as well as harmonization of exchange, monetary and financial policies, including the treatment of subregional capital and capital from outside sources (Article 26, section d).

Earlier, we noted the existence of short deadlines for adopting the measures, deadlines established in particular for the Commission of the Agreement of Cartagena, the ultimate organ of the subregional group, which acts currently on the basis of proposals submitted by the Junta of the Agreement.

In this regard, Article 27 of the Agreement indicated December 31, 1970 as the close of the term for approval of a common system for the treatment of foreign capital, as well as on trademarks, patents, licenses and royalties. Within this term, the Commission issued Decision 24. This measure of such an extraordinary importance was taken only one year and a half after the signing of the Agreement of Cartagena. It is a conclusive demonstration of rapid pace of action within the Andean Group.

In Decision 24, Article 47 prescribes that "... the Commission, upon the proposal of the Junta, will approve, no later than November 30, 1971, a convention to avoid double taxation among the member countries. Within the same period, the Commission, upon the proposal of the Junta, will approve a model convention for the negotiation of double taxation arrangements between a member country and a country outside the region."

Article 89 of the Agreement treats the same topic, reiterating the member countries' obligation to coordinate their national financial and payments policies — in ways necessary to facilitate achievement of objectives of the Agreement — adding that for those ends, the Junta should present to the Commission, among others, proposals for "... rules to solve problems which can cause double taxation" (section e). This article does not impose a time limit within which the Junta should act; such time limit was instead imposed by Article 47 in the Decision 24.

III. CONVENTIONS FOR THE PREVENTION OF INTERNATIONAL DOUBLE TAXATION ADOPTED BY THE ANDEAN GROUP

Consequently, the Junta ordered that related studies be undertaken; it also promoted meetings between June and October 1971 of subregional experts on international double taxation. Then, the Junta made its recommendation to the Commission, which approved the proposal as Decision 40 of November 16, 1971. Decision 40 contains the text of a convention for the avoidance of double taxation among the member countries, "with respect to income and net wealth taxes," and a second text of a model convention for preventing double taxation between a member country and a country outside the region, "... concerning income, capital and net wealth taxes."

In order to provide an adequate basis for the analysis of these conventions, we shall divide this exposition into four parts: A) Doctrinal and technical bases for supporting the conventions; B) scope of the conventions within the general framework of tax harmonization; C) approval of Decision 40 by the member countries and

dispositions adopted for that purpose; D) treatment extended in the conventions to each type of income and patrimony.

A) *Doctrinal and technical basis of the conventions*

The most faithful, precise characterization which can be formulated about these conventions — in their most important aspect — is to say that they are essentially founded on the principle of source of income. That is, the taxing power rests with the country in whose territory such income originates or is generated. Thus expressly in Article 4 of both conventions, this is enumerated as follows:

1) The power to tax income is attributable exclusively to the country in whose territory such income originated, for which purpose concepts of domicile, residence or nationality of the recipient of income are omitted; Article 2, section e), of the convention states that "the expression 'source' means the activity, right or property that generates the income";

2) The power to tax net wealth situated within the territory of a country is attributable only to that country (Article 17 of the conventions).

At this point, two consequences of major importance, derived from these principles, should be emphasized.

The first of these concerns the extention of the taxing power, of an exclusive nature for a country with respect to income generated in its territory. This means for one country — through the recognition of the same right for other countries — that it cannot tax income obtained outside of its territory.

The second very significant consequence is that this exclusivity signifies, in the strictest technical sense, that the income taxed by the State in one country cannot be taken into account by another State, even for the sole purpose of applying a higher rate of tax within the progressive scale affecting global income which would result from the aggregation of the income obtained from different countries by individuals.

Both consequences — which have our intellectual adherance — are products of a logical rigor to which one is led by the true and complete application of the principle of source. The effort to include income from foreign sources, in order to apply a higher rate in the country, raises the germ of an idea that, in some way, the motion of domicile or nationality of the taxpayer is polluting the purity of the concept of source of the income.

"If we admit the right of each country to levy taxes on income generated in its territory and concede to the need of eliminating overlapping taxes, the logical conclusion of this reasoning is that each country must only levy taxes on income generated within its jurisdiction and abstain from levying taxes originated outside such jurisdiction. [11]

Upon adoption of this doctrinal basis and so as to provide the consequent technical-conceptual substance for Decision 40, the Andean Group has expressly taken a position traditionally sustained by Latin

11. Sir Franklyn Bowes: "Tax Problems and the Development of International Trade and Commerce", as cited by Jose Wurgaft Barr in "Treatment of Dividends, Interest and Royalties in Agreements for the Avoidance of Double Taxation between Developed and Developing Countries." Inter-American Center of Tax Administrators (CIAT), Seventh General Assembly, Guatemala, 1973.

American countries in various national and international contexts for almost half a century.

It is unnecessary to repeat those rather remote antecedents, but they clearly support the validity of the principle of source. It is sufficient to indicate those more recent pronouncements from the beginning of the time when acute interest was evidenced in finding adequate formulas for the tax relations between countries with different levels of economic development. It is well known, and very important, that the United Nations Economic and Social Council had recommended in its Resolution 486-B (XVI) of July 9, 1953, that the principle of source constituted the primary basis of tax agreements between developed and developing countries. It is interesting to note that this precedent appears to be ratified by the same agency in its Resolution 1430 (XLVI) of June 6, 1967.

The efforts of the Special Group of Experts meeting under UN auspices are similarly well known. This Group has met for the purpose of recommending an adequate treatment for the problem of tax agreements between developed and developing countries. After five meetings of this Group, it can be stated that in the developing countries the reaction to the focus given to the deliberations is not one of satisfaction. On the contrary, it has merited criticism unnecessary to detail at this point, but which principally concerns the fact that this Group has not given due attention to any of the essential aspects leading to its creation — the search for mechanisms which, within the ambit of tax relations between countries, can facilitate a broader flow of capital from the developed countries to the developing countries. It has also been observed with some degree of disenchantment that the Group adopted, as a point of reference for its debates — and not just as a simple methodological tool — the OECD model treaty, the basic concept of which is frankly opposed to the principle of source.

For these reasons, the efforts of this UN Group have an adverse echo in the developing countries.

The Latin American countries have been among the most vehement stating their views on this matter. This is immediately and clearly explained in the circumstances just noted about the doctrinal development within the region, to which should be added the similar expression through the existing organs of economic integration, with respect to their throughts on international double taxation.

Thus, the Latin American Conferences on Tax Law have been the pioneers of this position: conferences in 1956 in Montevideo, in 1964 in Buenos Aires, and in 1970 in Punta del Este have invariably reaffirmed the principle of source on rigorously technical, and not merely political, bases.

LAFTA, as a matter of preparation for tax harmonization among the countries of the Area, have since 1969 included the topic of international double taxation and its influence on the flow of foreign investment in their agendas for the annual meetings of directors of internal taxation of member countries. Given the specific importance which those directors have assigned to the topic, they provided for meetings of experts from the member countries on the subject of international double taxation — the first in April 1973 and the second in May 1974. As did the Andean Group, they analyzed the topic both from the viewpoint of relations among member countries of the Area and from

the viewpoint of relations with third countries — principally the developed ones. The respective final reports express their understanding of the problem and their agreement with the technical conclusions referred to earlier.

The Final Report of the first meeting of experts on international double taxation states that they agreed to the effect that the basic criteria for attributing taxing power for the income tax is that of source, as opposed to domicile, residense or nationality. It added that a clear determination of the concept of source "... should be reelaborated in terms of obtaining a Latin American formulation since it or the various concepts of source as a principle of attribution of taxing power would basically respond to ideas undertaken within the framework of developed countries and, in consequence, be inadequate for the interests of developing countries."

Following this, the Final Report affirmed the proposition for developing the general concept of source of income and also, "... to examine specific cases which would merit special treatment by virtue of the nature of the activity involved and for those in which the simple and complete application of any concept of source would be difficult."

It is necessary to emphasize that, parallel to the principle of source for income taxation, this same meeting sustained, for the attribution of taxing power for taxes on net wealth, the principle of the economic location of property, in other words limiting the exercise of this power to the State in whose territory the property composing the taxable net wealth is located.

Evidently, the LAFTA member countries experts were very much aware of the provisions contained in Decision 40.

In concluding the commentary here, it must be admitted that Decision 40, even when clearly adhering to the principle of source and determining in each case of which State has the taxing power, is not very specific in defining, even for the most generally important cases — and with capability of serving as guidelines for situations not explicitly dealth with — what is the location of the source as the taxable object for the income tax, susceptible of being referred to the territory of one or another State.

It would be useful to establish, in each case of income, expressly and not tacitly as it is contained in the Decision 40, that this attribution of taxing power is based on circumstance in which the presence or existence of the source of income is indicated.

If the affirmation in favor of the principle of source has special significance as an inspiration of tax law, it would be even much more effective to establish concrete rules for determining the place which is understood to be the seat or locus of the source of each type of income. This would avoid the raising of international double taxation problems which could happen if source rules among the countries were divergent.

B) *The Decision 40 conventions and tax harmonization*

Previously, we mentioned the objective of the Agreement of Cartagena for harmonizing economic and social policies and for coordinating development plans of the member countries. In this regard, the Commission approved Decision 22, recommending the adoption of measures necessary for compliance with this objective and creating several Councils, among them

one on Fiscal Policy to deal with tax harmonization and other fiscal policy aspects.

The functions of these Councils are to formulate their respective recommendations, and cooperate with the Junta, as and when requested, in the elaboration of policy harmonization proposals and to cooperate in the application of the Decisions about such proposals, as approved by the Commission. Article 4 of Decision 22 provides: "The Councils will be composed of high level representatives of the national institutions of each member country charged with the formulation and execution of development plans and related policies."

To the present time, the Fiscal Policy Council has not had one meeting and none has been scheduled. Nevertheless, the Andean Group has initiated a series of preparatory studies to establish more adequate technical bases for the diverse and complex aspects of that area of responsibility, including true tax harmonization, with a view to its implementation by stages.

At this point it will be interesting to consider how the Andean Group's Decision 40 is reconciled, concerning the approval of instruments for the purpose of avoiding international double taxation, with the objective of attaining subregional tax harmonization.

First of all, it is worthwhile to recall that the most appropriate technical solution for the problems of international double taxation does not require a separate treatment, but, rather, a coincident handling together with other aspects which come into play, all of which are related to the purpose of harmonizing taxes within the scene of a common market.

In this process, if the minimum technical-formal bases which taxes should have were given, they would almost completely solve, in a simultaneous fashion, a good part of the difficulties caused by international double taxation.

It is clear that, while a consensus does not exist among the member countries on objectives and adequate instruments for achieving tax harmonization, there is sufficient agreement for the focus given to the subject by the Andean Group, as evidenced by the approval of Decision 40 through which the phenomenon of international double taxation would be reduced as far as possible.

At first glance it would seem as if these conventions — regardless of which of the two we review — introduce some elements of rigidity in the path to tax harmonization, because they presuppose the adoption of certain principles at least with respect to the taxing power of the countries that may compromise the efforts necessary for harmonization.

In reality, this inflexibility is not as bad as if a broad international network, of international tax treaties already existed previously and separately agreed to by the countries of the subregion. Then, just this new fact would create additional difficulties in the highly heterogeneous nature of the existing tax systems on income and net wealth. In truth, this is not the situation in the Andean subregion. There is just one existing tax treaty, that between Peru and Sweden, signed in 1966.

The proposal for avoiding the multiplication of those eventual conflicts is contained in Article 47 of Decision 24, ordering the member countries to abstain from "... approving conventions of this sort (double taxation) with any country outside the subregion."

It is also logical that, simultaneously, the Andean Group wanted, in this way, with

respect to capital from outside the subregion, to neutralize the possibility of differences among the member countries in the applications of their tax systems on that capital and its income.

Concerning tax relations among member countries, we mentioned earlier that the Andean Group had opted to follow the means of a multilateral convention, developed in considerable detail, in the fashion which is frequently found in bilateral conventions; the other path would have been to provide in such multilateral convention only those essential guidelines as the basis for subsequent bilateral agreements between member countries.

In synthesis, before approaching the varied and complicated problems inherent in tax harmonization in general, the Andean Group prefered to give preliminary consideration to questions of an international tax type mixed with a common system for treating foreign capital. This was done to stimulate investments from third countries within the region and, at the same time, facilitate the circulation of capital and persons among the member countries. For these purposes it was necessary to basically delimit the taxing power which could be exercised by the country in which the investment is made and by the country of the investor of capital, with respect to the most important aspects of income and net wealth taxation.

On the other hand, it is clear, through the texts of the Decision 40 conventions, that the member countries of the Andean Group established certain steps for the broader and deeper task of tax harmonization which the subregion necessarily should undertake.

As far as tax harmonization is concerned, there is still much to be done since, as Gerson da Silva indicated, in the countries of the Andean Group, income taxes "... present conceptual and methodological differences which make it difficult to identify the direction of tax policy implicit in the tax system of each country. Thus, it is almost impossible, in many cases, to compare those policies on a regional level." [12]

Gerson da Silva also specified, as follows, the obstacles which had to be overcome in the execution of a program of tax harmonization with respect to income taxes. This begins by adopting a common conceptual framework among the existing systems of the countries: "The diversity of legislation on the income tax results in different tax burdens on business and investors in general, with respect to three fundamental aspects:

a) conceptual differences affecting the basis for calculation, and the breadth of the taxable object;
b) differences in the basic criteria and levels of taxation;
c) additional differences resulting from alterations introduced, at those basic levels, of varied, highly heterogeneous legislation for so-called "tax incentives." [13]

However, the cumulation of problems on the road to tax harmonization is not yet exhausted because — as da Silva continues — "in addition to the conceptual differences and the differences in the levels of taxation on returns to capital generally, the integration process will be especially affected, in the case of the Andean Group, by the existing differences,

12. Gerson A. da Silva, "Tax Harmonization in the Ambit of the Andean Pact," Unpublished paper, OAS.
13. Op.cit. note 12.

from country to country, in the tax treatment of foreign capital, particularly:

a) taxation of profits of corporations having foreign capital, including branches, subsidiaries and other agencies of foreign businesses domiciled in the countries of the subregion;
b) tax treatment adopted concerning the reinvestment of profits in the country, including the capitalization of profits by the businesses;
c) taxation of profits and other returns credited or remitted to natural or legal persons resident or domiciled elsewhere." [14]

Evidently, the normative content of Decision 40 does not contemplate, to any extent, solutions for overcoming these discrepancies: it is limited to establishing for subregional purposes the provisions according to which the taxation of income or net wealth can be applied in the most important cases when a conflict between the taxing authority of two or more sovereignties is presented.

In other words, for this reason, in addition, to Decision 40 provisions for minimizing problems of international double taxation and, simultaneously, stimulating subregional capital movements — at least where one could depend on factors of a tax nature — they appear as minimum technical — formal bases of great importance, creating among the subregional countries a uniform concept of income and uniform rules of a similar character of elements to be considered in arriving at a determination of taxable income. This is de rigour with respect to taxation of profits of business, or rather economic units in which is concentrated the greatest potential of taxable income in the subregion and which constitute simultaneously subjects and objects in intrasubregional capital movements.

Thus, among countries related in a common market program, the tax aspects most directly affecting investments and their income should be, by definition, devoid of differential characteristics from country to country, so that in a limited sense in which taxation can excercise some influence on investment decisions, these characteristics disappear.

In that way, the assignment of resources to impel this or that economic activity, in this or that country, should depend on all other types of circumstances, which enter into play for the location of investment — in any case, taking especially into account the industrial development policy planned for countries of the subregion, in benefiting its common objectives — but making abstractions of the tax aspects to the greatest possible extent.

In other words, those aspects should necessarily behave in a neutral manner — within the described scheme —; it is easy to understand if it were otherwise, that is, if there were notorious differences among the concepts of taxable object, the results in its determination and in the levels of the tax burden applied by the countries would be thus undermining the bases of support which were raised for achieving the most important objective — economic integration.

Actually, it is not conceivable to differentiate the rates imposed on taxable income, so determined according to uniform rules. The diversity of rates applicable to business income — equal in all other circumstances — behaves in a well defined manner so as to orient investment solely in the

14. Op.cit. Note 12.

direction of the countries with lesser effective tax burdens.

In this framework of conceptual clarification it is impossible to duck the important impulse which results from the highly varied gamut of so-called "tax incentives" applied by the countries of the subregion to the income tax and other taxes as well. The influence of those incentives on the movement of intrasubregional capital cannot be ignored.

The inclusion of those uniform technical-formal bases in income taxation would serve to greatly facilitate the adoption of a new and more ordered point of departure for conceding tax incentives. They could be conditioned, as far as possible, to a policy consistent with the economic development strategy intended to be shaped for the countries of the subregion, considering that this strategy should essentially relate the stimulation of activity requiring the most intensive use of labor, but attempting to avoid a reduced absorbtion of technological advances in favor of the economies of the subregional countries. It is almost unnecessary to explain that the congruence which is obtained for those technical-formal bases will be totally invalid if there prevails in the countries of the subregion, rules on incentives which give contrary results, thus neutralizing the effects of that uniformity in the substantive tax law. That way would lead to a sort of distortion; taxation would then be converted into a factor susceptible of provoking detours in the location of investments and, thus, create undesired tendencies in the movement of intrasubregional capital.

With special reference to the situation of taxpayers in the member countries of the Agreement, Article 19 of the multilateral convention states: "With respect to taxes which are subject to this Convention, no Member Country shall apply to persons who are residents of other Member Countries a treatment less favorable than that applied to its own residents." [15]

In one view, this rule implies the establishment of elements leading to tax harmonization in the subregion.

C) *Effective date of Decision 40*

In developing this particular comment, we shall separate the remarks on the multilateral convention among member coun-

15. Decision 46 on "a uniform system for multinational enterprises and regulation of treatment applicable to subregional capital," contains a similar disposition in its Article 32, stating that, "... multinational enterprises will enjoy in regard to national internal taxes, treatment established or to be established for the most favored into economic activity in which they are involved, so long as they comply with the requirements of respective legislation." Almost the same can be said about Article 26, Decision 49 — on "directives for the harmonization of industrial development legislation" —, providing that "... with regard to taxes, fees and other internal charges, products orginating in one member country will enjoy in the territories of the others a treatment no less favorable than that accorded to similar domestic products." Additionally, it is useful to note that those multinational enterprises subject to said Decision 46 are formed by subregional capital essentially; with respect to this, there should be a requirement that existing restrictions for the departure of capital, in any of the member countries, should not apply when the destination of the capital is investment in that type of enterprise. It should also be mentioned that this identification of "multinational enterprises" is completely independent of that which recently has come to be in respect to firms with operational assets in two or more countries; the current preference is to distinguish them as "transnational enterprises."

tries from those on the convention between a member country and a third country.

1) With regard to the former, Article 3 of Decision 40 itself provides: "Before June 30, 1972, the Member Countries shall adopt the necessary measures to implement the Convention for the Avoidance of Double Taxation between Member Countries, in order that the same may enter into force in accordance with the provisions of Article 21 of said Convention."

Consequently, the entry into effect of this convention depends on compliance with the requirements of Article 21. It was for this purpose that a limit — June 30, 1972 — was fixed for the adoption of "... the necessary measures ..." by the member countries. Such measures do not simply consist of adopting ratification proceedings pursuant to each country's body of law, but to consider incorporating into each body of law the rules emanating from international organizations, such as the Commission of the Agreement of Cartagena. Together with this, the member countries should consider adapting their own tax laws to the norms contained in the convention tot the extent that discrepancies exist. . .

Discrepancies exist, without distinguishing between the treatment for taxpayers from other subregional countries and that for third country taxpayers, in cases such as those of the income tax in Chile [16] in Colombia [17] and in Peru [18] which utilize the world-wide rule with respect to individuals domiciled therein; and the same treatment in Chile [16] and Peru [18] with regard to juridical persons. [19]

It is obvious that the world-wide income rule [20] supposes departure from the principle of source of income.

The possibility that a country within the subregion, in applying the world-wide income rule to resident taxpayers, would unilaterally allow a credit for the foreign tax paid against its own tax is, at this time, a technical circumstance of a marginal nature in this analysis. Even though it is of major importance in attenuating

16. Law 15.564 of February 11, 1964; Articles 2, 3, 11 and 12.

17. Law 81 of December 22, 1960, Articles 15 and 17.

18. Supreme Decree 287-68-HC, of August 9, 1968, Articles 6 and 7.

19. Before its broad tax reform in 1973, Bolivia also applied the worldwide rule, but Decree Laws 11.153 and 11.154, of October 1973 on individual and business profits taxes, respectively, adopted the principle of source as the exclusive territorial base.

20. In income taxation, the underlying purpose including both income obtained in the country and that from without, is to apply the principle called worldwide income rule by which is meant that nothing should be excluded from the taxable base of the taxpayer, and that the taxpayer's current, total economic capacity to pay is encompassed.

Simultaneously, this worldwide income tax principle attemps to deflect and even punish the departure of capital, because the condition of the developing country requires that the rate of investment be maintained and grow with the national economy to the greatest extent possible, and that savings would not be exported.

The question receives a different theoretical focus in developed countries in which — in addition to the above mentioned reasons — reasons of international tax neutrality are raised in the sense that for the investor to be indifferent from the tax viewpoint, as to whether he would invest within the country or externally, the tax has to fall with equal force on income from both sources.

The experience of developing countries which apply the worldwide income rule indicates that it is practically worthless — at least with regard to individual taxpayers — with respect to revenue collected from income received in the country from foreign sources.

international double taxation that otherwise would be produced, what is now of interest to us is to point out the contradiction between those provisions contained within the national legislations vis-à-vis the principle inspiring Decision 40, to which those provisions should be adapted when Decision 40 becomes effective in the subregion.

Four member countries have proceeeded to adoption of Decision 40, but limited their actions to a mere ratification of it, without consideration of the effect which its existence at the subregional level will have on national legislation.

As such, the question is whether according to the priority of the legal norms in each country, an automatic precedence for international types of dispositions is recognized — once ratified — over the national types when conflicts arise.

Article 21, cited earlier, requires above all that the member countries deposit the instruments of ratification with the Secretariat of the Junta of the Agreement, that is the text of related legislation placing the convention in effect.

So far, three countries have complied with this requirement — all in 1973 — on the bases of legal provisions which will be discussed momentarily: Ecuador on September 19; Bolivia on October 5, and Venezuela on December 31. Peru ratified Decision 40 but has not yet made the required deposit.

It should be noted that the June 30, 1972 deadline has not been respected.

Also, as we noted previously, Article 21 provides that once the appropriate deposits have been made, the convention will enter into effect as follows:

a) for individuals, concerning income received or accrued from January 1 following the date of deposit of the required instruments *by all member countries;*
b) for enterprises, concerning income received or accrued during the first accounting period commencing after said deposit;
c) for net wealth taxes, from January 1 following the date of said deposit.

With respect to b) and c), it is understood that the condition of deposit also refers to the deposit by all member countries as stated explicitly in paragraph a). Given this condition, as has been seen, the convention among member countries is not yet in effect.

Concerning the legislation for ratification of Decision 40 at the national level, the background is as follows:

— Bolivia, through Supreme Decree 10343 of July 7, 1972, expressed the interest of the country in the process of integration and stated that this measure permits it to "establish the bases of tax harmonization."
— Ecuador issued Decree 932 of August 29, 1972 which merely approved the conventions.
— Peru issued Decree Law 19535 of September 19, 1972: the first of its two articles approves Decision 40 — reproducing it — and the second article forsees, with a general normative purpose, that "... legal provisions inconsistent with this Decree-Law will not be applied or remain in suspense, as the case may be." As is known, this type of general repeal is the source of serious difficulties in the interpretation of the law.
— Venezuela issued the Law of September 26, 1973, which included approval of Decision 40.

Again with reference only to the convention among member countries, this

situation was forseen by Article 4 of Decision 40 which states "when difficulties or doubts exist originating in the application" of its rules and these cannot be resolved through Article 20 consultations, the problem will be submitted for the consideration of the Fiscal Policy Council.

Article 20 is clear, requiring no explanation, and it is useful to transcribe it here so as to show how explicit its provisions are concerning the current tax treaties in regard to exchange of information among contracting parties. Article 20 states: "The competent authorities of the Member Countries shall hold consultations among themselves, and exchange the information necessary for deciding by mutual agreement any difficulty or doubt which may arise out of the application of this Convention, and for establishing the administrative controls required for the avoidance of fraud and tax evasion.

"The information exchanged pursuant to the provisions of the preceding paragraph shall be considered as confidential, and shall not be transmitted to any person other than the authorities responsible for the administration of taxes which are subject to this Convention.

"For the purposes of this Article, the competent authorities of the Member Countries may communicate directly among themselves."

In conformity with Article 2, paragraph 1 of the Convention, the Ministers of Finance or equivalents in each country are the competent authorities. So, to comply with the final paragraph quoted above, and for the purposes of the exchange of information and consultations, the procedure to be followed is that of immediate and direct relations among the Ministers of Finance, without following the traditional route through the Foreign Ministers.

Turning to Article 4 of Decision 40, it adds that, if the consideration of the Fiscal Policy Council is needed for the purposes of its application, the Council can be convened at the request of any member country. If the Council's involvement does not resolve the problem before it, the member countries can request guidance in the case pursuant to procedures specified in Article 23 of the Agreement of Cartagena concerning the solution of controversies as to the interpretation or execution of the Agreement itself or of decisions adopted by the Commission.

2) Concerning tax relations with countries outside the subregion, Article 5 of Decision 40 provides that related conventions for avoiding double taxation to be approved by member countries "... shall be guided by the Model Convention..." approved by this Decision. Similarly, it states that "... Before subscribing such conventions, each Member Country shall hold consultations with the other Member Countries within the Fiscal Policy Council."

Finally, Article 6 of Decison 40 provides: "The Member Countries that have subscribed conventions for the avoidance of double taxation prior to the date of this Decision, shall endeavor to harmonize the provisions of such conventions with those of the Model Convention."

Of the four countries mentioned above as those ratifying Decision 40, only Bolivia made special reference to this matter for the purpose of issuing the related act. Supreme Decree 10343, cited earlier, Article 2 provides, "The model convention for the avoidance of international double taxation between a member country of the subregion and countries outside the sub-

region is adopted as the model for Bolivia in its negotiations with third countries." Previously, we have indicated that the only existing treaty of a general character, concerning the taxation of income and capital signed by a subregional country is that between Peru and Sweden. However, information is lacking about its actual application even though it took effect on January 1, 1969.[20a]

On the other hand, agreements exist — especially by Colombia with various countries within and without the subregion — for the avoidance of double taxation on income and capital or net wealth of maritime and air navigation enterprises. Usually for these, the solution already provided in Decision 40, Article 8 would be adopted, providing for taxing such enterprises solely by the contracting State in which the firm is domiciled. This logically translates into a reciprocal exemption from taxes, although exclusively in relation to that income and that capital which the business domiciled in a contracting state, realizes from transportation activities in both countries.

Consequently, in that limited way this latter type of convention would be harmonized with the provisions of the model convention. However, it appears that the treaty between Peru and Sweden is based on terms inspired by the 1963 OECD model which cannot be reconciled with the model convention.

Given this situation, it is clear that Peru, when it wishes to adequately apply Article 6 of Decision 40, should adopt some measure related to its convention with Sweden as, logically, its content is not consistent with that of Decree Law 19535 of September 19, 1972, cited earlier, which approved Decision 40. Article 2 of the Decree Law states that existing legal provisions inconsistent with the decree law will not be applied or will be suspended.

D) *Treatment accorded each type of income, and patrimony in the Decision 40 conventions*

At this point, the analysis will proceed on the basis of the principle of source for each type of income — both the general situations and some special cases — with respect to income. Concerning net wealth, the basic analytical principle is locus of the property, both principles being adopted by Decision 40.

I) *Income taxation*

a) *Income from property*

Such income, whatever its nature, is taxable only by the country in which the goods are situated (article 5).

On this topic there are no differences in criteria between developing and developed countries; it could not be otherwise taking the nature of real property into account. There is no alternative but to attribute the taxing power to the state of situs.

Consequently, there should be a controversy over the adoption of this solution by the Andean Group.

b) *Income from the right to exploit natural resources*

The country in which the national resources exist will have the exclusive

20a. Similarly, we understand that a similar treaty was signed between Colombia and Sweden but that it has not yet been ratified.

right to tax the income from the lease or sublease, by cession or concession of the right to exploit or to utilize any type of such resource (article 6).

The type of such natural resources, necessarily related to the territorial element of the State, explains completely that the solution with respect to the taxation of income from contracts for the right to exploit them should be identical to that contemplated in the case of income from real property itself.

It should be mentioned that, independent of the rules which the law provides on the ownership of natural wealth — be it on or under the soil — it is proposed that the income derived from the negotiation of the right to exploit or utilize it, in one way or another, should be by the provisions of the income tax existing in the country in which the resources are located. It is understood that the profits derived from business activities specifically dedicated to the exploitation of natural resources should not be included here, but that the rules for taxing business profits generally would apply to such profits.

c) *Business profits*

Business profits shall be taxable only in the country in which the business activities were undertaken (article 7) or pursuant to the definition in article 2, paragraph f of the conventions. In turn, those charged with establishing that, "the word 'enterprise' means an organization constituted by one or more persons that undertakes a profit making activity" (article 2, paragraph g).

If a business exercises its actvities in more than one country, each one of them can tax the income generated in its territory (article 7).

Simultaneously, and simply as an example, the conventions consider (article 7) that a business undertakes its activities within the territory of a State when it has:

a) An office or place of business management;
b) A factory, plant, industrial workshop or assembly shop;
c) A construction project in progress;
d) A place or facility wherein natural resources are extracted or exploited, such as a mine, well, quarry, plantation, or fishing boat;
e) An agency or premises for the sale of goods;
f) An agency or premises for the purchase of goods;
g) A depository, storage facility, warehouse, or any similar establishment used for receiving, storing or delivering goods;
h) Any other premises, office or facilities the purpose of which is preparatory or auxiliary to the business activties of the enterprise;
i) An agent or representative.

If the business activities are developed through a representative or using installations such as those enumerated above, the profits obtained will be attributed to such representative or installation as if they were independent of the firm (article 7, final paragraph).

From this combination of rules, it can be concluded that the subject matter is very important and what this indicates, in a special way, is that to the tax treatment of business profits omits the notion of "permanent establishment", which, as is well known, seems almost invariably included in existing bilateral treaties and which relates to the principle of domicile. In those treaties, the existence of a "permanent establishment" is an inescapable premise for attributing to a State the right to

tax business profits.

In the Decision 40 solution, what counts in the assignment of the taxing power is the fact of obtaining the income and the physical place where obtention occurred, independent of the existence of a more or less stable organization or institution owner of the income produced and of the domicile, residence or nationality of such person.

Stated otherwise, aside from the indicated territorial limitation, there is no restriction of any sort on the exercise of the taxing power by country of source: the generation of profit is sufficient for the imposition of the taxing power.

It is necessary to regress a moment to explain the objectives of such an important clause. We are inclined to consider it a definite, categorical step in the tendency which, perhaps in a relatively short time, will transform into an anachronistic and technically inconceivable pretense, the effort to tax income obtained in Country A belonging to a person — natural or legal — which Country B considered subject to its taxing power, which can only be exercised by Country A subject to conditions distinct from and foreign to the decisive factor that the income was produced in the territory of Country A.

For this, we consider as unreasonable the dispositions contained in the treaty formulating criteria according to which a "permanent establishment" must exist, in order to give birth to the exercise of taxing power by the State, to tax income obtained within its jurisdiction and eventually consider the amount of related tax as a credit against the tax of the country of domicile of the owner of what has qualified as a "permanent establishment."

Before continuing, it should be made clear that we are not confusing the ambit of the principle of domicile with that emerging from the notion of "permanent establishment" even though both have common doctrinal inspiration.

While the former contains the proposal that the subject or taxpayer of a country is taxed on the sum of all his income — regardless of the countries of origin —, to the notion of "permanent establishment" there has been an attempt to establish a prerequisite which must be complied with to created, in favor of the country where such "permanent establishment" is understood to be, the right to classify it as the taxable subject. Stated in another manner, if the conditions for shaping that notion are not assembled, the right to tax can not be exercised because there would be no legal subject susceptible of being taxed.

The final consequence of this reasoning would be that even when it was very clear that the source of income was located in Country A, Country A should sacrifice its taxing power — because the person which obtains the income would be "non-existent" from a tax standpoint for the country — for the benefit of the right of Country B where the same person exists as a legal entity, is a taxpayer and is domiciled.

If Country A, at any rate, imposes tax in the above case, Country B would not recognize that payment for any purpose connected with its own tax rules.

In other words, and to clarify this point, the "admission" of the existence of the exercise of that right to tax by Country A does not prevent, in parallel and simultaneous fashion, that Country B — generally a developed country — where the owner of the establishment lives, would not consider as taxable the income obtained in Country A by the "permanent establishment."

On the contrary, the most which happens is that the payment of the tax, made in Country A where the "permanent establishment" is located, is recognized by Country B, and the effect is usually that this payment is treated as if it were a payment on account or a credit against Country B tax, usually on the highest average rate in the country of the investment, Country A, if this is a developing country.

In consideration of a conceptual discrepancy of this nature, the logical position for developing countries is to come up with convincing technical solutions so that the terms of characterizing of the taxable subject in existing legislation would not be impaired, with the understanding that this ignores nationality, domicile or residence for the application of tax and which, on the other hand, considers the territorial locus of its origins or the productive source of the taxable object. The consequence is that the taxing authority is attributed to the State exercising sovereignty over that territory.

If, on the contrary, the authority to tax certain income is attributed to developing countries only when income is imputable to a "permanent establishment, the clear result would be that in many cases when the developing country attempts to exercise that authority, it could not do so if the requirements for "permanent establishment" do not exist.

This notion is, in essence, totally foreign to the internal laws of the developing countries. It is unnecessary because the technical bases on which such a country rests its power to tax are those which consider when and how much income is generated within its territory, the territory to which the protection of its laws and its institutional order is extended, the territory to which the State is responsible for the provision of services, all of which are supportive of the production of this income. The objective fact implicit in these bases provides the necessary and sufficient premise to justify the imposition of tax. To weaken that position, whatever the means, would produce a reduction in tax revenue for the developing country in favor of the developed country.

The particular emphasis placed on the question of "permanent establishment" is a result of the simple fact that it affects the area of greatest importance within the system of income taxation, that is, the tax on business profits, most of all from the point of view of tax collections and principially, also, as the most important sector in any tax policy scheme designed as an instrument for achieving planned objectives pursuant to a global strategy for economic development.

In that respect, the logical derivation of the principle of source translates into the fact of generating profits, at the root of the exercise of any economic activity, be it domestic or foreign. As such it functions within the territorial jurisdiction of a particular country, giving rise to the right of that country to apply a tax related to business profits.

The prevailing current tendency is to define "profit" or the breadth of the tax using a net income concept, considering neither the legal nature of the entity obtaining such profits, nor the origin of the entity's capital, nor whether the receipt of such profits is contingent or final.

This net income concept does not prevent, for the purposes of determining taxable object and payment of tax, that the pertinent legal rules consider the adequate treatment of taxable and exempt income and the means of treating the expenses

necessary for obtaining such income, regardless of whether obtained in the country or outside of it. (In the latter case, some safeguards should be adopted to prevent abuses).

It is almost unnecessary to note that the referenced formulation of Decision 40 is dramatically opposed to that resulting from the OECD model convention, which is structured on the basis of the concept of "permanent establishment," and which, as a consequence, causes dependence on it in other aspects of taxation of various types of income. These give preference in the right to tax to the country of domicile to the impairment of the right of the country of source.

Decision 40 considers one special situation, within general business. This concerns profits of transportation firms. In that sphere, it is recognized that basic reasons derived from the purpose of facilitating communications to the greatest extent possible — today more closely connected with sea than air transport — encourages the adoption of reciprocal exemption of income received by such businesses; that policy is implemented through a vast network of treaties signed for this sole purpose.

Thus, to tax such profits, the Decision 40 multilateral convention departs from the principle of source, providing that profits "... earned by a transportation enterprise from its air, and sea, lake or river operations, shall be liable to taxation only by the Member Country of which such enterprise is a resident."

In the model convention for third countries, the solution is the same as the principal rule but, as an alternative this convention proposes that the profits from such enterprises, resulting from "operations in any of the Contracting States shall be taxable only by such Contracting State;" that is, to say, the latter proposal returns to the strict application of the principle of source so that the country of source has exclusive right to tax the income, to the elimination of the country in which the firm has its residence.

It is clear that to effect the alternative solution, the calculation of taxable income would be a serious stumbling block.

When the network of operations of enterprises with typically international activities — and transportation firms are perhaps the most typical — is very dispersed through the world it is certainly difficult to establish more or less precise results attributable to any one jurisdiction.

Regardless of this, it is necessary to distinguish the case of air transport firms from sea transport firms. In the former situation there are various reasons — encouraging traffic, principally passenger traffic — the chronically deficit operation of those firms — which could justify a tendency for the countries to allow the exemption reciprocally for the profits realized by the respective firms between two contracting countries.

On the other hand, maritime transportation, fundamentally concerned with cargo traffic, presents a different situation which does not not admit a similar conclusion as with air transportation. This is understandable when one takes into account the inequality of transport capacity existing between the merchant marines of developed and developing countries, the latter of which rely in great measure on the former for the transportation of cargo which is their international trade.

Thus, the obstacle to the satisfactory determination of taxable profit derived from the transportation business to or from developing countries has led such countries

to impose tax on the basis of alternate solutions, generally involving application of certain percentages of total or of part of gross income of the respective firms. In the former case, the rate should be low, but, in the latter, higher when a lesser portion of gross income is involved. Other solutions treat a certain portion of gross income as net profit, and apply a general rate usually fixed by the tax law on business profits. It is logical that the determination of the rates would reflect indices which are valid or sufficiently representative of the income producing capacity for this sort of business.

What in these matters does not seem acceptable is to make the tax dependent on the determination of net profit which arises from the computation of the entire operation of the maritime transportation firm, since this concept of net income entails the loss, logically, of any possibility of controlling the accuracy of the results.

d) *Royalties from the use of patents, trade marks and technology*

Such income shall be taxable only by the State in which the utilization takes place (Article 9).

From the point of view of the principle of source, Decision 40 also seems consistent in providing that the country in which is employed the licence, the patented invention or the trade mark which gives rise to the payment of royalties should, exclusively, tax the recipient of such income regardless of the domicile, residence or nationality of the recipient. The practical application of a criteria of this sort can lead to distinct types of calculation of the tax base, be it gross royalty income or whether a deduction is allowed for related expenses incurred in making it. Perhaps the correct determination of deductible expense to obtain a net taxable amount of royalty is the most difficult aspect of this particular problem.

From the point of view of incorporating advanced technologies into the developing countries, the utility of applying moderate rates of income tax to royalties is frequently proposed. It is clear that this question is more closely related to technological policy, which should predominate here, rather than tax policy.

On the matter of royalties, it should be understood, in the context of the Andean Group, that the general precept contained in Article 21 of Decision 24, regarding the common system of treating foreign capital is of major importance. On one hand that article establishes that even if "the intangible technogical contributions give rise to a right to payment of royalties," it will be "previously authorized by competent national agency" and those contributions will not be computed as returns to capital. On the other hand, Article 21 provides that when technological contributions are furnished to a foreign firm of the subregion by its headquarters or other subsidiary of the same headquarters, "payment of royalties will not be authorized nor will any deduction be allowed for tax purposes."

The clarity and scope of the rules noted here make it unecessary to comment further on their tax significance.

e) *Interest*

Interest shall be taxable only to the State in the territory of which the loan has been used (Article 10).

This is the means adopted by Decision 40 on a technical conclusion consistent with the principle of source, attributing the right to tax interest to the State in which the loan was used, regardless of the loca-

tion or nationality of the recipient of interest.

This solution is justified by the circumstances in which the country using the loan generated the economic capacity to satisfy the obligation to pay interest and, for this reason, that State has the right to tax it.

However, the second paragraph of Article 10 contains a difficult rule which presumes that the loan is used in the country from which interest is paid. Evidently, transferring the taxing power to the country from which interest on the loan was paid can result in substituting, for the taxing orbit of the subregional country using the loan, the developed country which provided the loan.

Such a provision could become the cause of manipulation and abuses — with eventual danger to the principle of source — generalizing the practice of considering as the country of payment of interest any country outside the subregion on the pretext that it was there that the loan was used. This would result in reducing tax revenues of the subregion. It would also distort the true sense of this special rule which is only applicable in cases of real difficulty in the determination of where the loan was used.

The presumption in the paragraph noted exists "subject to rebuttal," which logically should be undertaken by the country which believes that it has lost the exercise of the taxing power and that it has the right to such power. That is to say, this latter country is in the position of having to demonstrate that the utilization of the loan took place in its territory and not in that of the country from which interest was paid.

The case of interest obtained through leading operations which developing countries undertake with foreign governments and other official agencies or international financing organizations would have been excluded from this analysis. In this situation, the current thinking would lead developing countries to consider exempting this interest from tax.

Possibly, the concept of interest could include those charges for financing merchandise transactions, for purchases of goods and equipment, through deferred payments.

In opposition to this, it could be argued that some developing countries apply very high tax rates and that this promotes a tendency to a very high rate of interest on loans, to the prejudice of the borrower. Without admitting the relative validity of this observation and without ignoring that this argument is based on the assumption of maintaining intact taxation by the country of residence, regarding any credit for the tax paid in the country of source, in a contrary sense it can be argued that tax rates in developing countries do not reach levels of that magnitude, so that the tax burden applied on interest by countries of source are not higher than those existing in any countries of creditors' residence. The rate of interest on the loan should not be changed because of such circumstance.

An aspect of principal significance in this area is that of the tax base: whether it has to consider just the gross amount of interest or if a deduction is allowed for expenses of collection, implying the determination of a sort of net income. The existing technical analysis is not adequate to provide conclusions on this matter.

However, on this particular matter, the need in the law to determine as clearly as possible what is the technical criterion for following a "gross interest" or "net interest" concept cannot be disregarded.

Concerning the level of the applicable tax rate, it is obvious that this would depend on the tax base adopted; that is, whether we are dealing with an effectively total amount paid by the borrower, or a different amount resulting from a deduction of costs allowed. The tendency here is that interest is taxed on a gross basis when the recipient is a foreign resident, or perhaps a standard deduction is allowed, so that the result is net interest, at least from a legal point of view.

f) *Dividends and shares of profit*

These are taxable only by the country in which the distributing enterprise resides (Article 11).

With respect to this type of income, the logical consequences considering the comments on the tax treatment for business profits make clear that the State in which the business obtained profits and that, as a result of obtaining them distributed them to its shareholders or partners is the jurisdiction to apply tax to each of the recipients of that distribution, even when they are residing abroad.

The legislation of some member countries of the Agreement of Cartagena contains different treatment for dividends and for distributions of profits — as a function of form — money or goods — or the class of shares giving the right to the dividend — registered or bearer[21] — or by the nature of the taxpayer — whether it is domiciled in the country or abroad, with establisment of lesser rates for the former than the latter class.[22]

However, all of this is really accessory to the main point and loses effect in the face of the primary basis of the cited rule in Article 11 of Decision 40.

Completing the comment on the tax treatment which the conventions contemplate for royalties, interest and dividends, with respect to these three types of income, it is important to maintain the integrity of each type of income, that is to say, respecting the true nature of each one of them at the time they are paid. It is no novelty to indicate the tendency to characterize one as another type of income to obtain a lower tax rate than properly contained in the law.

This question, in addition to that concerning transfers between economically related businesses — with activities within and without the subregion — is one which merits the closest attention in a rational and comprehensive scheme of harmonization of the tax on income.

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21. Decision 24, cited earlier, provides in Article 45 that "company capital through shares should be represented by registered shares." It continues that, "the bearer shares already existing should be transformed into registered shares within a year from the effective date of this Decision."

22. A consideration of technical character should be noted here. In this last assumption, the discrimination would appear to be justified if, for the resident taxpayer, there exists the requirement of combining dividends with other kinds of income, since in the case in which the dividend tax operates separately the different rate for residents and non-residents could give rise to manipulations of different sorts, for the purposes of obtaining the lower rate.

If an obligation exists to integrate dividends with other income for resident taxpayers, there would apply, to dividends received by taxpayers resident abroad, a rate varying around the maximum marginal rate in the existing progressive tax rate schedule for the annual net taxable income of individuals.

However, to limit the tendency to avoid tax, it would not be useful to introduce excessive differences in rates between recipients of dividends domiciled within the country and abroad.

g) *Capital gains*

Capital gains are taxable only by the State in which territory the goods were situated at the time of the sale (Article 12).

The general rule adheres to the principle of source if it is noted that the exercise of the taxing power depends on the location of the goods, the transfer of which has produced the gain, and not the place where the productive operation of the gain occurred, nor the domicile, residence or nationality of the contracting parties.

Capital gains from the transfers of the following goods are exceptions to this general rule: a) ships, airplanes, buses and other transportation vehicles, capital gains from which are taxable only by the country in which they are registered at the time of transfer; b) bonds, stock, and similar securities which are taxable only by the country in which they were issued.

Each exception to the general rule has its own rationale. With respect to transportation vehicles, the solution is parallel to the special treatment accorded to the profits of transportation enterprises; thus, as taxing power was accorded to the country of residence, it was understood that the results of the operations involve the disposition of transportation vehicles by the same firms and this should be taxed by the country in which the vehicles are registered.

In the case of securities, it must be noted that the principle of source is reaffirmed since nothing has occurred in the country where the transaction happened to produce the capital gain. The same is true for the countries of domicile, residence or nationality of the parties to the transfer. On the other hand, underlying this is the idea that securities transferred have been issued where the good which they represent are found. In this way the source of the capital gain would be identified by the economic location of the goods which would be indirectly transferred with the transfer of the securities.

It could happen, however, that the issuance of shares would be made in a different place from the location of the underlying assets; such circumstances through the rule of the Decision 40 conventions would produce a weakening of the strict application of the principle of source.

h) *Income from the rendering of personal services*

This is taxable only by the country in the territory of which the services were rendered (Article 13).

As in the prior situations, the strict application of the principle of source to this situation means that the origin of the income will be found where the services were rendered or, stated otherwise, where use was made of the ability of the individual responsible for rendering it. The locus of action of the ability gives birth to the right to receive income; without that activity at a determined time and place there would be no generation of income, and, thus, that is the source or origin of it. The country of occurrence should be the one to apply income tax to it.

In support of this principle — without being decisive as to sustaining its validity — it should be noted that usually together with the fact of the provision of personal services in a particular place is added the receipt of related income in the same place. Since it is the economy of that country supported the obligation to pay that income — and since the protection of the governmental institutions of this country in which the exercise of the activity giving rise to the income were

accorded to it — it seems that in all technical logic the same country should be the one applying tax to that income.

If the personal service is provided in one country and the income is paid in another country, the former should have the exclusive right to tax it.

Article 13, referred to above, considers two special situations which do not detract from the basic principle; they are as follows:

a) For the purpose of providing services in a country, in the exercise of official functions, the resulting income would be taxable only by that country, even when the services are provided within the territory of another country. Foreign service officials are typical, their salaries traditionally being subject to the tax laws of their own country.

b) Crews of ships, planes, buses, and and other transportation vehicles undertaking international traffic are taxable only by the laws of the country in the territory of which the employer is resident. In turn, this clause is explained by the need to be in accord with the treatment given to income of transportation firms, that tax by the country where those businesses — currently employing the crews mentioned in Article 13 — are resident.

i) *Professional service and technical assistance business enterprises*

This type of income is taxable only by the territory in which the services were rendered (Article 14).

This solution coincides with that discussed for Article 13, by requiring equivalent tax treatment for personal services income and for income from professional and technical assistance services, even those provided by firms. The plase of occurrence can be different from the residence of the firm, and thus the special rule for this type of income contained in Article 14, which provides a different treatment from that applied through the Article 7 rule.

j) *Pensions and annuities*

This is taxable only by the country in whose territory the source is located (Article 15). It is considered that such source is situated in the territory of the country in which the contract was signed originating the income and, when no contract exists, in the country from which payment is being made.

This article simply ratifies the principle of source, interpreting it in the sense of relating that source with the place from which the funds for the payment of the income originated. This could result in partial distortion of the general principle. It should be understood that this solution rests on the circumstance of income obtained by virtue of a special contractual relation negotiated for this purpose. It would not cover cases, for example, of pensions or retirement resulting from social security systems.

k) *Public entertainment activities*

Income from this activity is taxable only by the country in the territory of which the activities take place, regardless of the length of time the performers spend in the country (Article 16).

This a special case of personal services and a specific rule has been derived even though its contents are the same as contained in Article 13 on income arising from the rendering of personal services in general.

The strict application of the principle of source to income from public entertainment activities is appropriately covered in Article 16, which ignores the domicile,

residence, or nationality of the performers, and also ignores the period of time during which they perform in the country.

II) *Taxes on net wealth*

In this regard, as noted earlier, the Decision 40 conventions adhere to the principle of economic locus of the goods so as to state that "Net wealth situated within the territory of a Member Country shall be taxable only by said Member Country." (Article 17).

As was assumed in the case of the income tax, the criteria of domicile, residence or nationality of the owners of net wealth has been left out, affirming the concept of territoriality so that each taxpayer is taxed on net wealth with respect to what he has within the jurisdiction of a particular country, without consideration of the patrimony located elsewhere in the tax rate schedule for this tax.

Article 18 of these conventions deals with two situations similar to the treatment already discussed in the special capital gains case. That is, on one hand, that planes, ships, buses and other transportation vehicles and the movable assets used in the operation of a transportation business are located in the country in which the property is registered. The second matter is that loans, shares of stock and other securities are considered situated in the country of which the debtor or the issuing enterprise is a resident, as the case may be.

IV. CONCLUSIONS

Through the analysis above, a résumé has been presented on the background of the approval of a singularly important measure for the member countries of the Agreement of Cartagena.

This importance lies as much in the multilateral character of the decision as in the conceptual bases pursuant to which the decision was taken.

Our comments have attempted to explain the objectives for all of this, from a substantially technical point of view, without overlooking the policy aspects.

Finally, we understand that the factors in play seem more reconcilable as time goes on, most importantly if objective analysis is given to the problem through the clear consideration of the economic and financial reality, at the margin of historical preeminence which some countries attempt to exercise over others which is now anachronistic.

Clearly the Andean Group, upon approving the texts of the conventions examined here, is showing a vigorous political will and has exhibited technical rationality in providing solutions which developing countries are supporting emphatically in the field of international double taxation.

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2. Membership of the Australian Branch continues to expand at a satisfactory rate, with a pleasing response from senior members of the professions in Sydney and Melbourne.

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SUPPLEMENT TO No. 2 (A 1974)

Convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste tchécoslovaque tendant à éviter les doubles impositions en matière d'impôts sur les revenus

SUPPLEMENT TO No. 4 (B 1974)

Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne

SUPPLEMENT TO No. 6 (C 1974)

Convention between the Republic of Singapore and the State of Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income

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* * * ARTICLES * * *

DR. ERWIN SPIRO:

THE 1974 INCOME TAX CHANGES IN SOUTH AFRICA

Because of the elections earlier this year the Budget for 1974, was presented later than usually, that is on the 14th August. The underlying policy is fourfold: (i) maintenance of a satisfactory rate of economic growth, (ii) the preservation of economic stability as well as the reduction of the rate of inflation, (iii) the long-term strengthening of the current account of the balance of payments and (iv) the alleviation of the effects of inflation.

Single-premium endowment policies. To close a loophole. Dr. Diederichs, the Minister of Finance, proposed to bring gains on all single-premium endowment policies issued after the 14th August, 1974, into the taxation net. Policies issued on the strength of proposals already made and accepted in writing would not be affected.

Mining industry. The Minister of Finance proposed two concessions affecting the mining industry.

Firstly, the capital allowance on unredeemed capital expenditure to which new gold mines are entitled in recognition of the enormous capital expenditure and the risks involved is to be increased from 8 per cent which are rather low by today's standards to ten per cent for gold mines to which a mining lease is granted after the 14th August, 1974.

The second concession refers to unredeemed balances of capital expenditure which must be written off over a period of not more than four years in the case of gold mines and over a period of not more than 30 years in the case of other mines. To finance expansion, these other mines are to be allowed to write off such unredeemed balances over a period of not more than five years.

Non-residents' tax on interest. To overcome the difficulty that often the lender simply insists that the borrower bear the tax, provision is to be made for the Minister to grant exemptions from the tax under certain conditions. Applications for exemptions which must be submitted before the loan is obtained will be sympathetically considered if the loan is for a deserving project in connection with long-term industrial or mining development and is made between a lender and a borrower "at arm's length".

Exemption of amounts relating to employee training. The exemption of 50 per cent of the grant for the training of skilled workers, introduced last year, is to be increased to 100 per cent in order to give further encouragement to the training of skilled labour. The Government accepted a recommendation that expenditure by an employer on an approved training scheme for Bantu labour in White areas should qualify for a double deduction from income and decided further that where such training took place in an economic development area, the additional deduction should be not 100 per cent, but 125 per cent.

Investment allowances. The investment allowances which lapse on the 30th June, 1977, are to be extended to the 30th June, 1978, and the various rates are also to be increased.

Married women. To make it easier for married women in the middle-income group to go out for work, the present

allowance of R500 deductible from the earnings of a married woman is to be increased by 20 per cent to R600.

Abatements. The primary abatement is to be increased from R1 000 to R1 200 for married and from R600 tot R700 for unmarried taxpayers. The "Children's abatement" is to be increased from R450 to R500 for each of the first two children and from R550 to R600 for each subsequent child with an additional abatement of R200 in the year of birth. The "dependant's abatement" is to be increased from R80 to R100 if the taxpayer contributes at least R100 and from R200 to R250 if the taxpayer contributes at least R250 towards the maintenance of the dependant. The abatements in respect of medical and dental expenditure, insurance premiums and contributions to benefit, provident, unemployment and medical aid funds are to be consolidated into a single abatement based on actual expenditure on these items up to a maximum of R700 for a married person and R600 for an unmarried person. The supplementary abatement for persons over the age of sixty years is to be increased from R350 to R400, and is, as in the case with other abatements, to begin to taper off only after the income exceeds R5000 per annum instead of after R1500 as at present. The purpose of the increase of the latter abatement is to encourage elderly persons to continue in employment after the normal retiring age.

Rates. The main changes in the rates are a reduction of the surcharge in the case of persons other than companies from 10 per cent to 5 per cent and a reduction of the loan levy in the case of companies from 10 or 5 per cent to 5 or 2½ per cent respectively. The rates will now be as follows:

1. *NORMAL TAX (INCOME TAX)*

(a) *Persons other than companies.* Persons other than companies are, in respect of the year of assessment ending the 28th February or 30th June, 1975, subject to the tax at the rates contained in the two tables annexed hereto. Provided the basic tax is R150 or more, there is added thereto a surcharge of 5 per cent (last year it was 10 per cent). In the case of a natural person who is over 60 years of age on the last day of the year of assessment and whose taxable income for that year is R5 000 or less the surcharge is not payable at all. The basic tax is calculated on the taxable amount, that is the amount remaining after deducting from taxable income the abatements provided for. There is no loan levy. Due regard being had to the surcharge of 5 per cent, the maximum marginal rate is now sixty-three per cent.

(b) *Companies.* The rates for companies in respect of taxable income derived in the Republic and taxable income derived in South-West Africa, in respect of the year of assessment, that is the financial year ending during the twelve-month period from 1st April, 1974, to 31st March, 1974, are as follows:

(i) Taxable income derived otherwise than from mining — if derived in South-West Africa 35 cents per R1 and if derived elsewhere than in South-West Africa, that is the Republic, 40 cents per R1. To the tax so determined is added a surcharge of 2½ per cent of such tax and a loan portion of 2½ per cent of such tax. The effective rate is thus 36.75 and 42 cents in the rand respectively.

(ii) Taxable income derived from gold mining — on any mine other than a post-1966 gold mine an amount determined in accordance with one of the formulae provided for plus a surcharge (which is not

payable in the case of certain assisted gold mines) equal to 5 per cent of the said amount and a loan portion equal to 2½ per cent of the said amount; on a post-1966 gold mine an amount determined in accordance with one of the formulae provided for plus a surcharge of 5 per cent of the said amount and a loan portion of 2½ per cent.

(iii) Taxable income in the form of recoupments of capital expenditure accruing to companies which are or have been gold mining companies — the average rate of tax as determined in accordance with the Act or 35 cents per R1 whichever is higher.

(iv) Taxable income from diamond mining — a basic tax of 45 cents per R1 plus a surcharge equal to 10 per cent of the basic tax plus a loan portion equal to 5 per cent of the basic tax.

(v) Taxable income from mining operations (other than mining for gold, diamonds or natural oil) — where derived in South-West Africa 35 cents per R1 and where derived elsewhere than in South-West Africa, that is in the Republic, 40 cents per R1. To the tax so determined is added a surcharge of 2½ per cent of such tax and a loan portion of 2½ per cent of such tax.

2. *NON-RESIDENT SHAREHOLDERS' TAX*

The non-resident shareholders' tax is 15 per cent of the amount of the dividend or interim dividend in question.

3. *UNDISTRIBUTED PROFITS TAX*

The undistributed profits tax is 25 cents on every rand of the amount by which the distributable income as defined exceeds the amount of dividends distributed during the specified period as defined.

4. *NON-RESIDENTS TAX ON INTEREST*

The non-residents tax on interest is 10 per cent on the amount of the interest in question.

Annexures

TABLE I

Taxable Amount	Rates of tax in respect of married persons
Where the taxable amount—	
does not exceed R1 000	9 per cent of each R1 of taxable amount;
exceeds R1 000 but does not exceed R2 000	R90 plus 10 per cent of the amount by which the taxable amount exceeds R1 000;
„ R2 000 „ „ R3 000	R190 plus 10 per cent of the amount by which the taxable amount exceeds R2 000;
„ R3 000 „ „ R4 000	R290 plus 11 per cent of the amount by which the taxable amount exceeds R3 000;
„ R4 000 „ „ R5 000	R400 plus 12 per cent of the amount by which the taxable amount exceeds R4 000;
„ R5 000 „ „ R6 000	R520 plus 14 per cent of the amount by which the taxable amount exceeds R5 000;
„ R6 000 „ „ R7 000	R660 plus 16 per cent of the amount by which the taxable amount exceeds R6 000;
„ R7 000 „ „ R8 000	R820 plus 18 per cent of the amount by which the taxable amount exceeds R7 000;
„ R8 000 „ „ R9 000	R1 000 plus 20 per cent of the amount by which the taxable amount exceeds R8 000;
„ R9 000 „ „ R10 000	R1 200 plus 22 per cent of the amount by which the taxable amount exceeds R9 000;
„ R10 000 „ „ R11 000	R1 420 plus 24 per cent of the amount by which the taxable amount exceeds R10 000;
„ R11 000 „ „ R12 000	R1 660 plus 26 per cent of the amount by which the taxable amount exceeds R11 000;
„ R12 000 „ „ R13 000	R1 920 plus 28 per cent of the amount by which the taxable amount exceeds R12 000;
„ R13 000 „ „ R14 000	R2 200 plus 30 per cent of the amount by which the taxable amount exceeds R13 000;
„ R14 000 „ „ R15 000	R2 500 plus 32 per cent of the amount by which the taxable amount exceeds R14 000;

Taxable Amount	Rates of tax in respect of married persons
Where the taxable amount— exceeds R15 000 but does not exceed R16 000	R2 820 plus 34 per cent of the amount by which the taxable amount exceeds R15 000;
„ R16 000 „ „ R17 000	R3 160 plus 36 per cent of the amount by which the taxable amount exceeds R16 000;
„ R17 000 „ „ R18 000	R3 520 plus 38 per cent of the amount by which the taxable amount exceeds R17 000;
„ R18 000 „ „ R19 000	R3 900 plus 40 per cent of the amount by which the taxable amount exceeds R18 000;
„ R19 000 „ „ R20 000	R4 300 plus 42 per cent of the amount by which the taxable amount exceeds R19 000;
„ R20 000 „ „ R21 000	R4 720 plus 44 per cent of the amount by which the taxable amount exceeds R20 000;
„ R21 000 „ „ R22 000	R5 160 plus 46 per cent of the amount by which the taxable amount exceeds R21 000;
„ R22 000 „ „ R23 000	R5 620 plus 48 per cent of the amount by which the taxable amount exceeds R22 000;
„ R23 000 „ „ R24 000	R6 100 plus 50 per cent of the amount by which the taxable amount exceeds R23 000;
„ R24 000 „ „ R25 000	R6 600 plus 52 per cent of the amount by which the taxable amount exceeds R24 000;
„ R25 000 „ „ R26 000	R7 120 plus 54 per cent of the amount by which the taxable amount exceeds R25 000;
„ R26 000 „ „ R27 000	R7 660 plus 56 per cent of the amount by which the taxable amount exceeds R26 000;
„ R27 000 „ „ R28 000	R8 220 plus 58 per cent of the amount by which the taxable amount exceeds R27 000;
„ R28 000	R8 800 plus 60 per cent of the amount by which the taxable amount exceeds R28 000.

TABLE II

Taxable Amount	Rates of tax in respect of persons who are not married persons
Where the taxable amount—	
does not exceed R1 000	12 per cent of each R1 of taxable amount;
exceeds R1 000 but does not exceed R2 000	R120 plus 12 per cent of the amount by which the taxable amount exceeds R1 000;
„ R2 000 „ „ R3 000	R240 plus 13 per cent of the amount by which the taxable amount exceeds R2 000;
„ R3 000 „ „ R4 000	R370 plus 14 per cent of the amount by which the taxable amount exceeds R3 000;
„ R4 000 „ „ R5 000	R510 plus 17 per cent of the amount by which the taxable amount exceeds R4 000;
„ R5 000 „ „ R6 000	R680 plus 20 per cent of the amount by which the taxable amount exceeds R5 000;
„ R6 000 „ „ R7 000	R880 plus 23 per cent of the amount by which the taxable amount exceeds R6 000;
„ R7 000 „ „ R8 000	R1 110 plus 26 per cent of the amount by which the taxable amount exceeds R7 000;
„ R8 000 „ „ R9 000	R1 370 plus 28 per cent of the amount by which the taxable amount exceeds R8 000;
„ R9 000 „ „ R10 000	R1 650 plus 30 per cent of the amount by which the taxable amount exceeds R9 000;
„ R10 000 „ „ R11 000	R1 950 plus 32 per cent of the amount by which the taxable amount exceeds R10 000;
„ R11 000 „ „ R12 000	R2 270 plus 34 per cent of the amount by which the taxable amount exceeds R11 000;
„ R12 000 „ „ R13 000	R2 610 plus 36 per cent of the amount by which the taxable amount exceeds R12 000;
„ R13 000 „ „ R14 000	R2 970 plus 38 per cent of the amount by which the taxable amount exceeds R13 000;
„ R14 000 „ „ R15 000	R3 350 plus 40 per cent of the amount by which the taxable amount exceeds R14 000;
„ R15 000 „ „ R16 000	R3 750 plus 42 per cent of the amount by which the taxable amount exceeds R15 000;

Taxable Amount	Rates of tax in respect of persons who are not married persons
Where the taxable amount— exceeds R16 000 but does not exceed R17 000	R4 170 plus 44 per cent of the amount by which the taxable amount exceeds R16 000;
„ R17 000 „ „ R18 000	R4 610 plus 46 per cent of the amount by which the taxable amount exceeds R17 000;
„ R18 000 „ „ R19 000	R5 070 plus 48 per cent of the amount by which the taxable amount exceeds R18 000;
„ R19 000 „ „ R20 000	R5 550 plus 50 per cent of the amount by which the taxable amount exceeds R19 000;
„ R20 000 „ „ R21 000	R6 050 plus 52 per cent of the amount by which the taxable amount exceeds R20 000;
„ R21 000 „ „ R22 000	R6 570 plus 54 per cent of the amount by which the taxable amount exceeds R21 000;
„ R22 000 „ „ R23 000	R7 110 plus 56 per cent of the amount by which the taxable amount exceeds R22 000;
„ R23 000 „ „ R24 000	R7 670 plus 58 per cent of the amount by which the taxable amount exceeds R23 000;
„ R24 000	R8 250 plus 60 per cent of the amount by which the taxable amount exceeds R24 000.

DR. JEAN OLINGER *:

LUXEMBOURG: LE CONTENTIEUX EN MATIERE D'IMPOTS DIRECTS**

I. INTRODUCTION

Au Grand-Duché les instances compétentes diffèrent suivant l'objet du litige. S'agit-il d'un litige né à l'occasion de l'établissement de l'impôt, des instances administratives (le directeur de l'administration des contributions directes et le Conseil d'Etat, comité du contentieux) sont compétentes. Il s'agit du contentieux de *l'établissement* de l'impôt. Si le litige est, par contre, dirigé contre un acte de recouvrement de l'impôt, le litige est de la compétence des juridictions de droit commun (tribunal d'arrondissement, cour d'appel et cour de cassation). Dans ce cas on parle du contentieux du *recouvrement* de l'impôt.

Ce dernier ne fera pas l'objet de longs développements dans le présent exposé qui se concentrera, en raison de son importance, sur le contentieux de l'établissement de l'impôt.

Cette division des compétences est solidement établie par la jurisprudence luxembourgeoise. Elle est fondée sur le principe de la séparation des pouvoirs. Elle n'est d'ailleurs pas propre à la matière des impôts directs, mais s'applique d'une façon plus générale dans les matières où des instances administratives émettent des décisions ayant force exécutoire et dont l'exécution forcée a lieu d'après les règles du droit commun.

Le contentieux du recouvrement est aujourd'hui fort rare. La procédure à suivre est celle du droit commun en matière de litiges civils. Aussi suffira-t-il d'examiner un point, celui de *l'objet* du contentieux du recouvrement dans le but de tracer la ligne de démarcation entre les deux contentieux, celui de l'établissement et celui du recouvrement des impôts directs.

On peut poser le principe suivant: Sont en matière d'impôts directs de la compétence de la juridiction civile les actions qui ont pour objet de critiquer *la régularité, la validité en la forme* des actes d'exécution lancés contre le contribuable en vue du recouvrement forcé de l'impôt.

Deux jugements du tribunal civil de Luxembourg ont eu à se prononcer sur cette question. Il s'agit des jugements du 26 novembre 1947, No. 1759 du rôle, et du 25 avril 1951, No. 4286 du rôle.

II. LE CONTENTIEUX DE L'ETABLISSEMENT DES IMPOTS DIRECTS

A. *Les deux degrés de recours.*

Il y a deux degrés de recours, le directeur de l'administration des contributions directes et des accises et le Conseil d'Etat, comité du contentieux. Comme le directeur des contributions, le comité du contentieux statue *en fait et en droit.* La loi ne prévoit pas de juridiction statuant seulement en droit sur des recours en annulation.

B. *Le directeur des contributions.*

Pour pouvoir saisir le directeur de l'administration d'une réclamation, le contribuable doit être en possession d'une décision administrative préalable. Sauf de très rares

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* Docteur en droit.

** Colloque Benelux de l'International Fiscal Association (I.F.A.), 3 et 4 mai 1974.

exceptions ces décisions émanent des bureaux d'imposition composés d'un certain nombre de fonctionnaires exécutifs travaillant sous la direction du préposé du bureau.
En règle générale les décisions administratives à objet fiscal susceptibles d'être entreprises devant les instances de recours revêtent la forme écrite. La rubrique de loin la plus importante de ces décisions est constituée par les bulletins d'impôt, qui sont des actes administratifs individuels fixant une cote d'impôt (ou une base d'imposition) à l'égard d'une ou de plusieurs personnes et qui reprennent en vue de leur communication au contribuable, les données chiffrées figurant sur la minute de la décision administrative, appelée feuille d'établissement, qui est classée au dossier fiscal du contribuable détenu par le bureau d'imposition.

C. *Le Conseil d'Etat, comité du contentieux.*
La décision du directeur des contributions confirmant ou réformant le bulletin d'impôt attaqué est susceptible d'une recours en appel devant le Conseil d'Etat, comité du contentieux siégeant au nombre de trois membres, tous docteurs en droit. Celui-ci statue en fait et en droit en dernier ressort.
D'après la jurisprudence à laquelle nous reviendrons dans le cadre de l'étude de la nature administrative ou juridictionnelle des décisions contentieuses du directeur des contributions, le Conseil d'Etat refuse de statuer omisso medio. Pour être recevable dans son recours, le contribuable doit l'exercer contre une décision expresse du directeur. Tant que ce dernier n'a pas statué, le litige est pendant et une des conditions essentielles de la recevabilité du recours devant le Conseil d'Etat fait défaut.

D. *Caractéristiques communes aux deux degrés de recours.*
Il y a deux séries de caractéristiques communes dont la première série présente un intérêt pécuniaire pour le contribuable et dont la deuxième est de nature procédurale.

1. Première série:
Ni devant le directeur des contributions, ni devant le Conseil d'Etat, comité du contentieux, le ministère d'avoué ou d'avocat n'est requis. Cette dispense est surtout importante dans le procès qui se déroule devant le Conseil d'Etat, puisqu' en droit commun les recours formés devant cette juridiction administrative doivent l'être par requête signée d'un avocat inscrit. Si cependant le contribuable a recours à un mandataire, avocat ou expert fiscal, les honoraires de ces mandataires sont à sa charge, même s'il gagne son procès.
D'autre part, devant les deux instances les actes introductifs d'instance sont rédigés sur papier non timbré et dispensés du droit d'enregistrement. Les actes de procédure consécutifs et les décisions et arrêts rendus bénéficient de ces mêmes privilèges fiscaux.
Devant le Conseil d'Etat, comité du contentieux, il n'y a en matière fiscale pas non plus de frais de greffe à payer.
Les dépens d'avocat, également peu importants, restent à charge du contribuable, même s'il gagne son procès, pour le motif que le ministère d'avocat n'est pas obligatoire.

2. Deuxième série:
Le Conseil d'Etat, comité du contentieux, statue, comme le directeur des contributions, comme juridiction directe, c.à.d. en fait et en droit.
Devant les deux instances la procédure est

dépourvue du rigorisme existant en matière civile. Les deux instances peuvent être introduites par simple lettre du contribuable qui peuvent être acheminées par voie postale simple.

D'autre part grâce à une pratique et à une jurisprudence libérales une motivation sommaire suffit pour saisir valablement du litige le directeur des contributions et le Conseil d'Etat. Il faut, mais il suffit, que le contribuable désigne l'acte administratif (bulletin d'impôt ou décision du directeur des contributions) qu'il entend entreprendre en spécifiant le genre d'impôt et l'année d'imposition que cet acte concerne.

Les caractéristiques décrites font du contentieux des impôts directs une procédure peu coûteuse et lui impriment une certaine simplicité dépourvue de formalisme excessif.

E. *Caractéristiques de procédure ayant une incidence au fond.*

1. Etendue de la saisine de l'instance de recours (objet du litige).

L'examen de l'étendue de la saisine se confond avec l'examen de ce qui fait *l'objet* du litige. A ce sujet nous empruntons une approche pratique, concrète qui permet d'arriver plus rapidement à la réponse qu'une approche par les textes.

L'illustration a lieu à l'aide d'une exemple choisi en matière d'impôt sur le revenu des personnes physiques.

Supposons un contribuable marié dont le revenu est composé de son traitement, de revenus de location et de revenus de capitaux.

Il a un enfant et a recueilli un oncle sous son toit. Le contribuable reçoit son bulletin d'impôt sur le revenu qu'il critique sur un point: Le bureau d'imposition n'a pas pris en considération les frais professionnels que le contribuable fait valoir en rapport avec son traitement. Il entreprend le bulletin sur ce point devant le directeur des contributions. Ce dernier admet le principe des frais professionnels, mais il ne les admet pas dans l'envergure déclarée par le contribuable. Ce dernier introduit un recours devant le Conseil d'Etat basé sur le même grief et, en outre, sur le fait que le bureau d'imposition n'a pas davantage tenu compte des charges extra-ordinaires qu'il a à supporter du fait de l'entretien de son oncle impotent et sans ressources. Le Conseil d'Etat statue comme suit: Il réforme la décision directoriale en statuant qu'elle a admis à tort que les frais invoqués sont en rapport causal avec le traitement. Il accueille, par contre, la demande du contribuable concernant les charges extraordinaires du fait de l'entretien de l'oncle.

Est-il procéduralement correct que le Conseil d'Etat ait statué sur ces charges extraordinaires, bien que le grief n'ait pas été présenté dans la réclamation adressée au directeur des contributions?

En droit procédural luxembourgeois il convient de répondre par l'affirmative. En droit luxembourgeois la *cote d'impôt* constitue *l'objet* du litige en matière de bulletin d'impôt.

Le bulletin d'impôt est une décision administrative dont le *dispositif* est constitué par la seule *cote d'impôt, tous les autres éléments dont se compose le bulletin d'impôt* (en matière d'impôt sur le revenu p.ex. les diverses catégories de revenus, les frais en rapport économique avec ces catégories de revenus, les diverses dépenses et abattements déductibles du total des revenus nets, la classe d'impôt applicable suivant la situation de famille du contribuable) *ne constituant que les motifs* de l'acte administratif.

Dans l'exemple choisi il eut été incorrect

d'opposer au contribuable dans l'instance devant le Conseil d'Etat que la demande relative à l'oncle, produite pour la première fois devant le Conseil d'Etat et non déjà devant le directeur des contributions, est irrecevable comme *demande nouvelle* changeant *l'objet* du litige. Dans la conception procédurale luxembourgeoise il s'agit en l'occurrence d'un *moyen nouveau* qui ne modifie pas *l'objet* de la demande, qui est et reste *le montant* de la *cote d'impôt.*
Cette conception laisse au contribuable un maximum de possibilités à toute hauteur de la procédure pour obtenir une modification en sa faveur de l'acte administratif que constitue le bulletin d'impôt.

2. Procédure accusatoire ou inquisitoire (instruction d'office ou non du litige)

La procédure devant le directeur des contributions est indubitablement de caractère inquisitoire. Ce caractère lui est imprimé par les textes légaux applicables en la matière. Il est reconnu unanimement par la jurisprudence et la doctrine. Pour s'en convaincre il suffit de reproduire en traduction officieuse deux des pierres angulaires de la procédure contentieuse, les paragraphes 243 et 244 de la loi générale des impôts:
§ 243.— (1) Pour autant que les instances de recours sont chargées du réexamen des faits, elles sont tenues d'instruire d'office la situation de fait.
(2) Elles ne sont pas liées par les conclusions de l'auteur de la voie de recours.
(3) Elles peuvent modifier la décision également au détriment de l'auteur de la voie de recours.
§ 244.— Les instances de recours ont les pouvoirs dont jouissent les bureaux d'imposition dans la procédure d'imposition.

Si la détermination des caractéristiques de la procédure devant le directeur des contributions est aisée, la même entreprise au sujet de la procédure devant le Conseil d'Etat, comité du contentieux, est plus hasardeuse. La raison en est que le Conseil d'Etat applique cumulativement deux corps de textes législatifs, d'une part le Règlement de procédure du Conseil d'Etat en matière contentieuse du 21 août 1866 et, d'autre part, les dispositions de la procédure contentieuse de la loi générale des impôts (AO). Tandis que pour la découverte de l'esprit de la procédure contentieuse contenue dans la loi générale des impôts on est guidé par les déclarations de principe des paragraphes 243 et 244 précités, tel n'est pas le cas pour l'interprétation de la conception à la base du Règlement de procédure du Conseil d'Etat.
Le Règlement de procédure nous semble s'inspirer à la fois des principes du système accusatoire et de ceux du système inquisitoire. On pourrait même être d'avis que les dispositions du Règlement auraient permis à la jurisprudence de les interpréter de façon à imprimer à la procédure devant le Comité du Contentieux un caractère plus nettement inquisitoire. Le contraire s'est pourtant produit, peut-être en partie en raison de l'influence des conceptions civilistes du Comité dès sa création. Ainsi la souplesse inhérente à certaines dispositions du Règlement — laquelle était en partie la condition afin que le même règlement puisse s'appliquer tant dans les procès statuant au fond que dans les procès d'annulation — a-t-elle été abandonnée en faveur d'un rigorisme établi par une jurisprudence constante et invariable.
Mais, dans une évolution prudente, le comité du contentieux du Conseil d'Etat a réussi à tempérer en matière fiscale la rigueur qu'a imprimée pendant plus d'un siècle un esprit civiliste à l'application du règlement de procédure en matière conten-

tieuse devant le Conseil d'Etat par l'adoption du système plus souple de la loi générale des impôts, renouant ainsi avec la conception légale et jurisprudentielle qui avait été celle d'avant-guerre sur la base de dispositions spécifiques à la procédure fiscale contentieuse.
Depuis 1956 une série d'arrêts du Comité du Contentieux affirment l'applicabilité des paragraphes 243 et 244 dans l'instance contentieuse devant le Conseil d'Etat. Citons notamment les arrêts suivants dont aucun n'a été publié à la Pasicrisie:
arrêt 20.6.1956, No. 5014/5015 du rôle
arrêt 13.7.1957, No. 5588 du rôle
arrêt 24.1.1962, No. 5753 du rôle.

Le Règlement de procédure du Conseil d'Etat contient une disposition (art. 6 al. 2) suivant laquelle chaque partie litigante doit se limiter à deux mémoires, y compris pour le demandeur sa requête introductive d'instance. Dans une première phase le Comité du Contentieux applique cette disposition également dans les procès fiscaux portés devant lui. Ainsi un arrêt du 14 juillet 1954, No. 4985 du rôle, rejeta-t-il des débats un mémoire en tant que troisième requête. Ici encore une évolution s'est produite fort heureusement dans l'intérêt de la manifestation de la vérité. Citons un premier arrêt, du 9 janvier 1963, No. 5677 du rôle, dont les énonciations révèlent que quatre mémoires avaient été échangés entre parties sans qu'en application de l'article 6 al. 2 du Règlement de procédure les mémoires au-delà du deuxième aient été écartés des débats. Depuis lors on peut constater que le Comité du Contentieux ne s'empara plus du moyen tiré de l'article 6 al. 2 du Règlement.
A l'article 1er du Règlement de procédure l'alinéa 2 dispose que la requête introductive d'instance doit contenir, outre les noms et demeures des parties, l'exposé sommaire des faits et des moyens, les conclusions et l'énonciation des pièces dont on entend se servir et qui doivent être jointes à la requête.
Dans un premier temps cette disposition fut appliquée par le Conseil d'Etat également dans les procès fiscaux. C'est ainsi qu'un arrêt du 23 juin 1954, No. 5060 du rôle (Pasicrisie, tome XVI, p. 288) écarta deux moyens des requérants au motif qu'ils étaient irrecevables parce que, contrairement aux exigences de l'article 1er al. 2, ils n'avaient pas été énoncés dans le mémoire introductif d'instance. Une dizaine d'années plus tard un revirement se produisit. Dans une affaire vidée par arrêt du 23 décembre 1964, No. 5684, non seulement le Comité du Contentieux n'écarta pas des débats les mémoires au-delà du deuxième, mais il entra même dans le mérite de moyens de droit qui ne furent présentés par le contribuable que dans son sixième mémoire.
Il y a lieu de se féliciter de cette évolution de la jurisprudence du Conseil d'Etat. La nouvelle jurisprudence, appliquant les dispositions de procédure de la loi générale des impôts qui sont conçus, à l'instar des dispositions indigènes d'avant-guerre, en fonction de la matière qui fait l'objet des litiges, est, nous semble-t-il, plus favorable à la manifestation de la vérité que les dispositions rigoureuses du Règlement de procédure conçues, pourrait-on croire, pour des procès en annulation bien plutôt que pour une instance chargée de statuer également en fait.

3. Possibilité de réformer le bulletin d'impôt attaqué au détriment du contribuable (objet du procès)

A l'instar de la législation fiscale luxembourgeoise d'avant-guerre, la législation procédurale en vigueur actuellement dispose expressément, nous l'avons vu, que

les instances de recours en matière d'impôts directs non seulement ne sont pas liées par les conclusions de l'auteur de la voie de recours, mais peuvent même réformer en sa défaveur le bulletin d'impôt dont il poursuit pourtant le redressement en sa faveur.

Le principe de la reformatio in pejus met particulièrement en lumière ce qui, en matière d'impôts directs, constitue l'objet du procès. En procédure administrative contentieuse de droit commun l'objet du procès consiste à mettre fin à un litige né d'un acte administratif individuel, soit en accueillant totalement ou partiellement la demande de celui que la décision administrative concerne, soit en la rejetant.

L'office du juge ne va pas plus loin. En matière fiscale, du moins pour les impôts directs, il en va différemment dans notre conception légale. Le procès fiscal n'a pas pour objet de statuer seulement dans le cadre de la requête du contribuable.

Par sa requête le contribuable déclenche bien la procédure contentieuse, mais à l'instar de ce qui se passe normalement en procédure pénale à la suite d'une plainte, la direction du procès échappe au contribuable. Le juge s'attache à fixer la cote d'impôt légalement due, qu'elle soit supérieure ou inférieure à celle fixée dans l'acte administratif dont recours, peu importe. Le juge refait en somme le travail de l'administration fiscale. Le contribuable jouit, toutefois, d'un moyen pour mettre un terme à un procès fiscal dont il craint une issue défavorable pour lui: Il peut se désister. Il s'agit d'un désistement d'action. Il porte donc sur le fond même du droit. Sur ce point le procès fiscal se distingue du procès pénal puisqu'en cette matière le retrait de la plainte ne met en règle générale et sauf les exceptions prévues par la loi, pas fin à l'action publique.

4. Le régime des preuves.

Le régime des preuves en droit fiscal est fortement influencé par deux principes applicables en procédure d'imposition comme en procédure fiscale contentieuse: celui de *l'examen d'office* des cas d'imposition et celui de *la coopération obligatoire du contribuable.* On pourrait dès lors être amené à appliquer en droit fiscal le régime des preuves que la tradition a développé en droit administratif, surtout que les deux branches ressortissent au droit public, que la procédure fiscale a de nombreux traits en commun avec la procédure administrative et qu'en droit administratif la coopération entre le citoyen et l'administration est également de principe. Cette assimilation, en partie justifiée, ne peut pourtant pas être poussée à l'extrême. En effet, s'il est vrai qu'en procédure administrative le citoyen coopère également avec l'administration, il ne faut pas perdre de vue qu'en règle générale cette collaboration est spontanée et active pour la raison que la majorité des procédures administratives sont entamées par les citoyens en vue d'obtenir un droit, un avantage ou une autorisation (p.ex. droit d'électorat actif et passif; octroi d'une distinction honorifique; autorisation de faire le commerce et de tenir cabaret; autorisation de conduire un véhicule automoteur). Dans ces hypothèses le citoyen est tout prêt à coopérer avec l'administration parce qu'il y a le plus grand intérêt personnel. Au contraire en droit fiscal la coopération du citoyen a en règle générale pour but et pour effect de le grever d'une charge fiscale. La coopération dans le domaine fiscal est de ce fait moins spontanée et souvent moins sincère. Elle doit généralement être sollicitée par des aménagements de procédure appropriés, fût-ce au moyen de certaines mesures de contrainte, comme p.ex. l'astreinte, les

suppléments d'impôt, les amendes fiscales. Le droit fiscal requiert du citoyen des prestations pécuniaires sans contre-prestation directe et apparente à son avantage de la part de l'autorité publique. Cet état de choses découle du principe de l'universalité du budget d'après lequel l'ensemble des ressources garantit l'ensemble des dépenses. Une recette ne peut pas, en règle générale, être affectée à la satisfaction d'un besoin particulier.

Le citoyen ne voit pas de lien entre sa prestation fiscale pécuniaire et les services que lui assure en contre-partie l'autorité publique au moyen p.ex. de l'enseignement gratuit, de l'équipement sanitaire, du réseau routier, de la force publique, des diverses sources d'énergie mises à sa disposition.

Le citoyen éprouve sa charge fiscale souvent comme un sacrifice unilatéral. Par contre, à l'égard d'autres sacrifices pécuniaires qu'il doit consentir, le citoyen est plus ou moins conscient qu'ils lui assurent sinon dans l'immédiat, alors ultérieurement, une contre-prestation. Tel est le cas notamment en matière de législation sociale où, pour le surplus, les sacrifices pécuniaires imposés au citoyen sont généralement moins importants que les charges fiscales qui le grèvent. Or ces circonstances ont des incidences non négligeables sur la procédure, les voies et moyens de preuve et leur caractère probant.

La problème de la preuve en droit fiscal doit être examiné sous trois aspects: les moyens de preuve admis, la charge de la preuve et l'appréciation des preuves fournies.

a. Les moyens de preuve admis:

Le droit fiscal est caractérisé par la liberté dans l'administration de la preuve. Il n'y a pas de preuve légale qui serait admise à l'exclusion de toute autre. D'autre part la nature de la preuve ne dépend en règle générale pas du fait matériel ou juridique à prouver. Pour la preuve des actes juridiques, la loi civile est défavorable à la preuve testimoniale; au-delà d'une certaine somme, qui est actuellement de 4.000 fr., elle n'admet en principe que la preuve littérale. En matière fiscale la liberté de la preuve va plus loin. Ainsi la déduction de dépenses d'exploitation supérieures à 4.000 fr. ne peut pas être refusée au contribuable pour le motif que la réalité de ces dépenses ne résulte pas d'un écrit. Si l'instance d'imposition ou de recours a l'intime conviction que les dépenses ont été effectuées, elle est obligée de les admettre en déduction. Il est, toutefois, admis que tout ce qui concerne l'état des personnes (célibat, mariage, état de divorcé ou de veuf; parenté, alliance; descendance légitime, naturelle ou adoptive) ne peut être prouvé que par les documents établis pour constater l'état (p.ex. acte de mariage; acte de l'état civil constatant la prononciation du divorce par l'officier de l'état civil). De tels documents authentiques, qui sont en général constitutifs de droit, font preuve à l'égard de l'administration fiscale et la limitent dans son droit d'investigation.

b. La charge de la preuve:

La répartition de la charge de la preuve telle qu'elle est conçue en droit civil suivant certaines règles classiques (ei incumbit probatio qui dicit, non qui negat; actori incumbit probatio; reus in excipiendo fit actor) ne peut jouer avec la même rigueur en droit fiscal, puisque la procédure fiscale diffère partiellement de la procédure contentieuse en matière civile. La différence des régimes de preuves entre les deux branches du droit découle de l'aménagement des dispositions légales mêmes qui établissent clairement l'obligation de collaboration du contribuable ou du présumé contribuable.

Si l'on considère l'envoi d'une déclaration d'impôt comme l'affirmation de l'imposabilité, il appartient au contribuable d'opposer et de prouver les faits et circonstances qu'il estime le libérer de l'imposition ou en diminuer la charge. Dans cette mesure le contribuable a, par conséquent, la charge de la preuve.

Mais la charge de la preuve ne va pas en droit fiscal aussi loin qu'en droit civil. Les limites de la charge de la preuve résultent de deux principes du droit fiscal positif. Une première limitation fort importante apportée à l'obligation de prouver incombant au contribuable découle du § 171 (1) AO: L'instance d'imposition ou de recours ne peut exiger la preuve des affirmations faites par le contribuable que dans la mesure où la preuve *peut raisonnablement être exigée* («soweit den Steuerpflichtigen dies nach den Umständen zugemutet werden kann»). Une deuxième limitation — qui n'est que le complément et la conséquence de la précédente — résulte du § 217 instituant l'estimation des bases d'imposition. L'estimation consiste à déterminer et à utiliser une valeur probable et (ou) approximative, lorsque la détermination de la valeur réelle et exacte n'est pas possible. L'estimation procède en règle générale par voie de généralisation à partir de données constantes, ses calculs reposant sur des présomptions de probabilité.

Par l'institution du procédé de l'estimation la loi fiscale reconnaît elle-même qu'il existe des limitations à l'obligation de prouver du contribuable. Au § 217 AO elle indique la manière d'agir lorsque le contribuable a épuisé ses possibilités de preuve: Dans ces hypothèses l'administration ou l'instance de recours doit estimer c.-à-d. évaleur les bases d'imposition sur lesquelles porte le doute, en tenant compte dans l'évaluation de toutes les circonstances qui peuvent avoir une influence sur l'estimation (§ 217 (1) phrase 2 AO: «Dabei sind alle Umstände zu berücksichtigen, die für die Schätzung von Bedeutung sind»).

c. L'appréciation des preuves fournies:

La loi fiscale adopte la régime de la libre appréciation des preuves. Il n'existe pas de hiérarchie légale en matière de modes de preuve en ce sens qu'un mode de preuve aurait plus de poids qu'un autre.

Ainsi il est possible que des présomptions puissent emporter la conviction à l'encontre des preuves écrites opposées aux présomptions. Comme l'administration fiscale l'instance de recours puise ses convictions dans tous les éléments dont elle dispose. Elle apprécie librement toutes les preuves, toutes les présomptions, tous les indices dont elle a connaissance.

L'imposition est fondée sur l'intime conviction de l'autorité appelée à toiser le litige.

De l'applicabilité de l'adage «in dubio contra fiscum». Qu'on donne à cet adage un fondement historique ou qu'on le considère comme une transposition dans le droit fiscal du principe de droit pénal «in dubio pro reo», il est douteux qu'il puisse constituer une saine règle d'interprétation des dispositions fiscales et d'appréciation des faits. Aussi ne connaissons-nous guère que deux arrêts du Conseil d'Etat qui se soient emparés de l'adage pour trancher une question de fait. Il s'agit des arrêts du 28 juillet 1951, No. 4619 du rôle, et du 20 juin 1956, No. 5343 du rôle. Le dernier arrêt, après avoir souligné la difficulté de ventilation des frais mixtes en litige constate

«que les calculs et les estimations de l'Administration d'une part, et de l'expert d'autre part, accusent des divergences qui s'expliquent par les difficultés d'apprécia-

tion inhérentes à la matière»
et motive la solution qu'il adopte comme suit:
«que le doute sur le caractère des différents postes de frais en litige doit s'interpréter en faveur du contribuable».

L'application de critères économiques dans l'appréciation des faits et l'interprétation des notions et dispositions fiscales.—

En matière fiscale les instances administratives et juridictionnelles doivent percer la réalité des choses sans se laisser abuser par les apparences formelles extérieures. Le droit fiscal est un droit d'intervention publique qui impose au profit de la collectivité publique des charges au contribuable. Cette relation statutaire, exclusive de tout lien contractuel, peut déterminer le contribuable de se placer dans une position qui lui permet d'échapper à l'impôt, soit totalement, soit en partie. Cette tentative est d'ailleurs généralement fort légitime, car il n'existe aucun principe obligeant quelqu'un à gérer ses affaires de la manière la plus onéreuse au point de vue fiscal.
Pour arriver à son but l'intéressé pourra, dans l'hypothèse où il s'agit d'une situation de fait du passé, donc figée, en donner une présentation qui ne déclenche aucun impôt ou ne fait naître qu'une faible charge d'impôt, et dans l'hypothèse où il s'agit d'une situation à créer, sur laquelle l'intéressé a donc une emprise, la modeler de façon à ne pas faire naître d'impôt ou à faire naître seulement une faible charge d'impôt. Il est évident que ces possibilités d'aménagement des particuliers et des collectivité's peuvent les mettre en conflit avec l'administration fiscale, qui estime soit que la présentation des faits n'est pas correcte, soit que la manière dont l'intéressé a aménagé, agencé les choses est inhabituelle et inappropriée, qu'elle est en quelque sorte forcée. Dans les deux hypothèses il se peut en plus que l'interprétation d'une disposition fiscale soit en cause. Pour l'appréciation de ces faits et l'interprétation des dispositions légales en cause il est alors fait application de critères économiques en ce sens que la signification et portée économique des faits et des dispositions légales est recherchée.

Dans un grand nombre de pays il est admis depuis longtemps qu'en droit fiscal des considérations économiques peuvent avoir le pas sur les considérations juridiques. Ainsi en est-il en France ou d'après le professeur Morange le Conseil d'Etat français
«avait dû faire souvent prévaloir des considérations économiques sur des considérations purement juridiques, qualifier, par exemple, de «revenu», ce qui, juridiquement parlant, apparaissait plutôt comme appartenant à la catégorie «capital».
Des considérations économiques de même ordre se sont imposées ... pour la définition du producteur ou des choses consomptibles par premier usage ... (Extrait d'un article paru en 1951 dans la «Revue de science et de législation financière», L.G. D.J., Paris).

L'importance du facteur économique a été reconnue également en Suisse, en Autriche et aux Pays-Bas. Mais c'est surtout en droit fiscal allemand que s'est développée la théorie de l'appréciation des faits et de l'interprétation des dispositions légales en function de critères économiques sous la terminologie de «wirtschaftliche Betrachtungsweise».

d. La jurisprudence du Conseil d'Etat.
En matière d'impôts directs et notamment d'impôt sur le revenu le droit fiscal luxembourgeois n'a pas échappé à cette évolution somme toute heureuse et même nécessaire.

Il y a divers arrêts du Conseil d'Etat qu'on peut citer sous ce rapport.
Citons d'abord l'arrêt du Conseil d'Etat du 15 juillet 1953 (Pasicrisie, tome XV, p. 445) où la juridiction décide que la Société nationale des chemins de fer, bien qu'elle ne fut pas propriétaire, ni usufruitier au sens du code civil des immeubles dépendant du réseau ferroviaire, était néanmoins redevable de l'impôt foncier pour ces biens, parce que les statuts de la société, approuvée par la loi, avaient placé la société dans une *position économiquement équivalente* à celle d'un propriétaire.
Dans un arrêt du 15 janvier 1958 (Pasicrisie, tome XVII, p. 352) le Conseil d'Etat statua qu'en raison du fait qu'une société anonyme belge possédait presque l'intégralité des actions d'une société anonyme luxembourgeoise et la dominait financièrement, économiquement et administrativement à tel point que la société luxembourgeoise n'avait plus de pouvoir d'initiative personnel, la société luxembourgeoise dominée était l'organe de la société belge dominante, il était permis de considérer la société luxembourgeoise en matière fiscale comme une filiale de la société belge, *n'ayant plus le caractère d'un être juridique distinct.*

Enfin un troisième arrêt du Conseil d'Etat, daté du 21 janvier 1970, No. 6059 du rôle, toise le litige porté devant lui en fonction de critères économiques. Il s'agissait en l'occurrence de déterminer la nature des réserves mathématiques que créent les compagnies d'assurance pour faire face à leurs obligations d'indemnisation. La compagnie avait fait plaider que la réserve mathématique ne serait qu'un moyen technique de fixer les charges et le passif probable l'assureur, mais que cette réserve n'indiquerait pas le passif réel de la Compagnie.

Le Conseil d'Etat n'admit cependant pas cette thèse parce que, argumentait-il, pour établir la nature des réserves mathématiques on ne doit pas *se placer sur le plan des rapports juridiques entre la compagnie et un assuré déterminé,* mais sur celui des rapports existant entre la société et la masse des assurés et que dans ces rapports, qui *reflètent l'aspect économique* des opérations d'assurance, la réserve mathématique ne constitue pas de simples opérations techniques de calcul, mais des opérations financières concrètes.

III. LE DIRECTEUR DES CONTRIBUTIONS COMME INSTANCE DE RECOURS.

A. *La nature juridique des décisions rendues sur réclamation par le directeur des contributions.*

Les sources doctrinales sont fort rares. Dans son manuel «Introduction à la Science du Droit» le professeur Pierre Pescatore semble dénier la fonction juridictionnelle au directeur des contributions (voir § 272, p. 389). Dans son étude intitulée «Le silence de l'administration en droit luxembourgeois» et parue au Livre jubilaire du Conseil d'Etat (1955, p. 573, No. 34) Maître Ernest Arendt, avocat à la Cour, se prononce en faveur du caractère juridictionnel des décisions du directeur des contributions.
Dans son avis complémentaire du 30 décembre 1959 à la proposition de loi sur l'organisation du Conseil d'Etat (Document parlementaire No. 600[6], Session ordinaire 1959/60), le Conseil d'Etat se prononce implicitement contre le caractère juridictionnelle de la fonction du directeur des contributions, lorsqu'il expose:
« . . . la surcharge de besogne qui pèse sur

le Comité du Contentieux est due principalement à la pléthore des recours fiscaux sur lesquels le Comité statue en dernier ressort, sans que ces recours soient déférés au préalable à la connaissance d'une juridiction de première instance.»

La jurisprudence du comité du contentieux du Conseil d'Etat est cependant en sens contraire. Dès le 12 février 1930 (Pasicrisie, tome XII, p. 2) un arrêt statue d'une façon générale que les décisions administratives peuvent passer en force de chose jugée. Un arrêt du 12 novembre 1947 (Pasicrisie, tome XIV, p. 337), rendu en matière d'accise sur l'alcool, constate qu'en rendant sa décision, le directeur des contributions est dessaisi de la cause.

En matière d'impôts directs un arrêt du 26 juillet 1963, No. 5833 du rôle, a décidé en termes dépourvus d'ambiguïté que les décisions du directeur des contributions sont des *décisions juridictionnelles.*

Il a été suivi de deux autres arrêts dans le même sens en date du 12 octobre 1966, Nos 6004 et 6021 du rôle.

B. *Physionomie de la procédure*

La procédure devant le directeur des contributions est caractérisée par deux traits qui en déterminent la physionomie.

D'abord il n'y a pas de débat contradictoire oral précédant la décision. La raison en est évidente. Dans ce procès ne sont engagées que deux personnes, le contribuable comme réclamant et l'administration fiscale représentée par son directeur des contributions qui, malgré sa fonction d'instance contentieuse, n'en reste pas moins un fonctionnaire de l'Exécutif. Même si l'on attribue selon la jurisprudence, à l'activité d'instance de recours du directeur un caractère juridictionnel, ce fonctionnaire combine néanmoins avec cette charge la qualité de membre de l'Exécutif. Elle nous semble rendre superflue dans cette instance la présence d'un autre représentant de l'Exécutif qui permettrait de porter devant le directeur des contributions un débat contradictoire avec le contribuable.

C'est sans doute la position quelque peu hybride de cette instance de recours qui a amené le professeur Edgar Schreuder (Les impôts sur le revenu, No. 485, p. 457), partageant l'opinion de la Cour de cassation belge sur la fonction juridictionnelle du directeur des contributions, a en tirer la conséquence que le directeur n'a pas à rendre compte de sa décision à l'autorité supérieure et que le ministre des finances qui lui donnerait des instructions concernant la décision à prendre, commettrait un excès de pouvoir.

Un autre trait à signaler découle du précédent:

Il n'y a pas de publicité des débats. Le contribuable présente par écrit ses griefs et ses moyens de fait et de droit. S'il s'avère nécessaire le contribuable peut encore s'expliquer oralement ou fournir, sur demande ou spontanément, par écrit des renseignements supplémentaires et verser des pièces pour corroborer sa thèse.

Lorsque le contribuable a eu l'occasion d'exposer suffisamment son point de vue, le litige est prêt pour être vidé.

IV. LE CONSEIL D'ETAT, COMITE DU CONTENTIEUX, COMME INSTANCE DE RECOURS.

A. *Prescriptions particulières relatives au Comité du Contentieux.*

Le Comité du Contentieux siège, délibère et rend ses décisions au nombre de cinq membres, sauf dérogation par des lois spéciales. L'une de ces dérogations concerne précisément les impôts directs. Les conseil-

lers se remplace mutuellement en cas d'empêchement.
Les résolutions du Comité du Contentieux sont arrêtées à la majorité des voix. Actuellement le Comité du Contentieux compte deux chambres fiscales.
Les membres du Conseil ne peuvent délibérer, siéger ou décider dans aucune affaire dans laquelle soit eux-mêmes, soit leurs parents ou alliés jusqu'au quatrième degré inclusivement ont un intérêt personnel.
Les membres du Comité du Contentieux ne peuvent prendre part aux délibérations sur les affaires dont ils ont déjà connu dans une qualité autre que celle de membre du Conseil d'Etat. Les membres du Comité peuvent en outre être récusés pour les causes indiquées par le code de procédure civile.
La procédure à suivre en matière contentieuse a fait l'objet d'un règlement grand-ducal du 21 août 1866, couramment cité dans le présent rapport.
Le secrétaire du Conseil délivre les expéditions des décisions rendues par le Comité du Contentieux. Ces expéditions sont exécutoires.

B. *Nombre des requêtes (mémoires).*

L'article 6 du Règlement de procédure dispose en son alinéa 2:
«Il ne pourra y avoir plus de deux requêtes de la part de chaque partie, y compris la requête introductive».
Cette prescription nous paraît, nous l'avons déjà exprimé, excessivement rigoureuse. Si elle peut se défendre pour les instances où le Comité du Contentieux siège comme juge d'annulation, nous pensons que son application soit inopportune et préjudiciable à la manifestation de la vérité dans les instances où le Comité siège comme juge du fond. De toute façon elle ne peut satisfaire en matière de procédure fiscale où deux requêtes de part et d'autre sont dans la majorité des cas notoirement insuffisantes pour instruire convenablement le litige et pour clarifier les positions du contribuable et du fisc.
L'application de cette prescription complique, d'autre part, inutilement la tâche du Comité du Contentieux consistant essentiellement dans une bonne administration de la justice. La limitation des requêtes au nombre de deux serait, enfin, incompréhensible en matière fiscale où aujourd'hui comme avant-guerre les instances de recours statuant au fond sont chargées d'examiner d'office et dans leur ensemble les cas d'imposition litigieux qui leur sont soumis.
Aussi avons-nous déjà signalé le revirement de jurisprudence qui s'est produit dans les chambres fiscales en ce qui concerne la nature impérative de la prescription limitant à deux, de part et d'autre, le nombre des requêtes.
Le Comité du Contentieux semble donc adopter actuellement en matière fiscale la règle applicable en procédure civile: Les parties sont admises à échanger autant de corps de conclusions qu'elles estiment nécessaires à appuyer leurs prétentions respectives. Signalons sous ce rapport l'arrêt C.E. fort intéressant du 4.3.1964, No. 5681 du rôle, qui fait, semble-t-il, tacitement application d'un principe inscrit en matière d'intervention dans le Règlement de procédure: Le troisième mémoire du requérant est écarté non en tant que troisième mémoire, mais parce qu'il a été déposé après le rapport du conseiller-rapporteur seulement.

C. *Procédure contradictoire et secret fiscal.*

La communication à la partie adverse des pièces dont une partie entend se servir

pour entraîner la conviction du juge constitue l'une des principales manifestations de la procédure contradictoire. Il peut arriver en droit fiscal que l'obligation de communication entre en conflit avec une autre règle fondamentale du droit fiscal, le secret fiscal.

Le secret fiscal fait l'objet du § 22 AO qui dispose que le secret fiscal est inviolable. Le législatur attribue au respect du secret fiscal une importance telle qu'il a fait de sa violation dans le § 412 AO un délit sui generis sanctionné d'amende et d'emprisonnement jusqu'à six mois.

Comme le contribuable est obligé de communiquer à l'administration fiscale sans réserve ni réticence aucune dans la procédure d'imposition tout ce qui sur le plan familial, social, économique, financier, professionnel, peut affecter sa situation fiscale — y compris les faits et actes à incidence fiscale, contraires à la loi et aux bonnes moeurs — il faut que le secret de ces renseignements soit garanti. Tombent sous la protection du secret fiscal non seulement les débiteurs d'impôt, mais tous les contribuables au sens procédural du mot, qu'ils soient ou deviennent ou non débiteurs de cotes d'impôt, qu'ils soient mis à contribution par l'administration à tort ou à raison.

Un des cas les plus courants où l'obligation de communiquer les pièces peut entrer en conflit avec l'obligation au secret fiscal se rencontre, lorsque la juridiction fiscale est obligée de fonder sa conviction, à défaut d'autres éléments probants ou complémentairement à des éléments à eux seuls insuffisants, sur des objets de comparaison ou sur des exploitations de comparaison (entreprises similaires).

Le § 22 AO défend la communication au contribuable en litige des noms, objets ou entreprises des contribuables servant à titre de comparaison. D'autre part, pourtant, ne rien communiquer au contribuable des éléments de comparaison qui serviront le cas échéant à la juridiction de former sa conviction au détriment du justiciable, heurte le droit de défense de ce dernier et revient à utiliser contre lui des pièces secrètes. Peut-être la communication permettrait-elle au plaideur d'établir que les objets ou exploitations présentés comme comparables ne le sont pas et sont dès lors impropres à intervenir dans la formation de la conviction des juges.

On pourrait envisager d'éluder la difficulté en demandant aux personnes protégées par le secret fiscal de consentir à la divulgation des données fiscales qui les concernent.

Si cette solution permet de sortir, dans certains cas, de l'impasse, elle ne satisfait cependant pas sur le plan des principes.

Dans nombre de cas les personnes protégées refuseront à bon escient leur consentement. Ainsi les commerçants et industriels ont-ils généralement intérêt à ce que leurs concurrents ne soient pas informés sur les caractéristiques techniques et organisatrices de leur entreprise.

Cet intérêt subsiste même souvent entre entreprises imbriquées au point de vue administratif, économique ou financier.

Le consentement de la personne protégée ne peut pas constituer la solution pleinement satisfaisante si l'on se représente que le secret fiscal n'a pas seulement été institué dans l'intérêt privé, mais, comme nous l'avons exposé, également dans l'intérêt public. A ce sujet il faut d'abord soulever la question si la personne protégée, dont le consentement est sollicité, est toujours à même de prévoir et de mesurer la portée exacte et les conséquences de son assentiment. En outre la question se pose si, dans bien des cas, la personne protégée n'est pas moralement excédée par la de-

mande tendant à obtenir son consentement et n'estime pas, à tort ou à raison, ne pas pouvoir le refuser pour des raisons d'opportunité.

Le problème se pose finalement si, en faisant dépendre le secret fiscal de la seule décision de la personne protégée, on n'aboutit pas en pratique à la paralysie et à l'inefficacité de cette institution équivalent à son absence. La conséquence en serait que les contribuables manifesteraient dans leurs déclarations fiscales la réticence que l'institution du secret fiscal a précisément pour but d'éliminer.

Aussi certains auteurs émettent-ils l'opinion que l'accord de la personne protégée de fournir à des tierces personnes des renseignements sur sa situation fiscale ne suffit pas en lui-même pour justifier la divulgation, mais qu'il appartient encore à l'autorité ou à la juridiction appelée à communiquer ou à faire communiquer ces renseignements d'apprécier l'opportunité de la divulgation.

Le problème que nous venons d'exposer au sujet du conflit entre le principe du caractère contradictoire de la procédure et celui du secret fiscal s'est posé également en France où le législateur a cherché à lui donner une solution, qui, nous semble-t-il, n'embrasse toutefois pas le problème dans toute sa complexité. La loi y prévoit la communication aux contribuables des éléments contenus dans le dossier présenté par l'administration fiscale au tribunal y compris ceux relatifs aux bénéfices ou chiffres d'affaires de tiers.

Mais, en vue de sauvegarder le secret fiscal, ces éléments concernant les tiers ne peuvent être communiqués que sous forme de moyenne. Le tribunal, par contre, peut demander pour son intime conviction communication en chambre du Conseil de l'intégralité des documents concernant les tierces personnes (art. 90 de la loi du 28 décembre 1959 formant le § 6 de l'article 1938 du code général des impôts).

Le Conseil d'Etat, comité du contentieux, a eu l'occasion à deux reprises d'examiner certains aspects du problème préexposé.

Dans la première affaire, vidée par arrêt C.E. du 20.6.1956, No. 5014/5015 du rôle, une des questions litigieuses était de savoir si aux dates respectives des 31.12. 1946 et 31.12.1947 certaines marchandises du contribuable commerçant avaient subi une diminution de valeur en-dessous du prix d'acquisition ou de revient («Anschaffungs- oder Herstellungskosten») permettant au contribuable d'évaluer ces marchandises à cette valeur économique inférieure («Teilwert»). L'administration des contributions contestait cette dépréciation de valeur. Le Comité du Contentieux, s'estimant insuffisamment éclairé, institua une expertise aux fins d'examiner si les marchandises avaient subi aux dates-clef préindiquées une diminution de valeur au-dessous du prix d'acquisition ou de revient. Les experts furent habilités à s'entourer de tous renseignements et à entendre même de tierces personnes.

Dans leur rapport les experts arrivèrent à la conclusion qu'aucune dépréciation effective n'avait existé ni sur le marché de gros, ni sur celui du détail. A l'appui de leurs conclusions ils invoquaient les constatations faites auprès de trois commerçants de la même branche que le requérant, dont ils n'indiquaient cependant pas les noms dans leur rapport.

Le requérant fit valoir à l'encontre du rapport d'expertise comme moyen de nullité que les droits de la défense avaient été violés, les parties n'ayant pas été appelées à assister auprès des tierces personnes aux opérations relatées dans le rapport d'expertise et les experts n'ayent pas indiqué les

noms des commerçants auprès desquels ils s'étaient renseignés. Ces noms avaient, toutefois, été communiqués sous pli séparé au conseiller-président de chambre.
L'arrêt rejeta ces conclusions sur la base des motifs suivants:
«Considérant que s'il est admis que sous peine de nullité du rapport d'expertise, les parties doivent être appelées aux opérations essentielles des experts, il n'en est plus de même lorsque, comme en l'espèce, il ne s'agit plus que de prendre certains renseignements auprès de tierces personnes;
que s'agissant de simples constatations matérielles et de la documentation de déclarations précises de tierces personnes que les experts étaient spécialement chargés de recueillir, il n'y avait pas d'obligation pour ces derniers de provoquer l'assistance des parties aux dites opérations, le droit de la défense de celles-ci étant suffisamment sauvegardé par la possibilité de libre discussion des renseignements supplémentaires devant le Comité du Contentieux;
Considérant que la circonstance que les experts n'ont pas indiqué le nom des commerçants auprès desquels ils se sont renseignés n'est pas de nature à voir refuser toute valeur à leur rapport, alors qu'il faut admettre que les motifs de leur façon d'agir consistent spécialement dans les hésitations de ces commerçants de prendre position dans un litige concernant un collègue;
que d'un autre côté, l'objectivité des experts n'a pas été révoquée en doute;
Considérant qu'il ressort de l'ensemble des investigations des hommes de l'art relatées dans les détails dans leur rapport supplémentaire que pour les marchandises en stock . . . aucune dépréciation effective n'a existé . . .;»

Dans une deuxième affaire, vidée par arrêt C.E. du 3.7.1963, Nos 5721 et 5722 du rôle, le requérant avait demandé la communication de deux rapports de service interne de l'administration des contributions faisant partie du dossier fiscal de la société à responsabilité limitée X, dont le requérant était associé et qui, de l'avis de l'administration des contributions, avait fait à ce dernier une distribution de bénéfice occulte que le requérant contestait.
L'arrêt a eu l'occasion de se prononcer sur deux principes importants.
Le premier concerne l'étendue du droit d'inspection des dossiers fiscaux par le Comité du Contentieux.
A ce sujet il résulte de l'arrêt que le Comité du Contentieux a, en sa qualité de juge du fond, dans la procédure d'imposition les mêmes droits que l'administration. Le Comité a, par conséquent, le droit de prendre inspection du dossier fiscal intégral du contribuable sur l'imposition duquel il est appelé à statuer.
Mais il a, en plus, le droit d'obtenir communication du dossier intégral de contribuables tiers, si l'administration invoque à l'appui de l'imposition litigieuse des données et renseignements puisés dans les dossiers fiscaux de ces tierces personnes.
En deuxième lieu l'arrêt affirme le principe que
«l'obligation au dépôt et à la communication concerne de façon générale toutes les pièces dont une partie entend se servir dans l'instance en vue d'établir ses prétentions.»

Par la suite il tempère cependant la portée de ce principe en statuant comme suit à l'égard de l'actio ad exhibendum à laquelle le requérant avait eu recours:
«Considérant que bien que notre droit ne consacre pas formellement l'existence d'une telle action, il est admis qu'une partie peut demander au juge la communication d'une

pièce par l'adversaire, pour autant que cette production paraît nécessaire à la manifestation de la vérité; que d'après l'opinion généralement admise, il appartient aux juridictions d'apprécier l'utilité des productions de pièces demandées par les parties».

Il est impossible de formuler une règle générale sur l'étendue des obligations de communiquer aux contribuables engagés dans les procès fiscaux des données et renseignements concernant d'autres contribuables, étrangers aux litiges.

Il est pareillement impossible d'énoncer sous forme générale sous quelles conditions l'obligation de communication doit s'effacer au profit du secret fiscal. Ces questions ne peuvent être que décidées de cas en cas.

V. RENSEIGNEMENTS STATISTIQUES SUR LE CONTENTIEUX RELATIF A L'ETABLISSEMENT DES IMPOTS DIRECTS.

A. *Aperçu général*[1] *sur l'activité contentieuse en matière d'impôts directs.*

a. Réclamations portées devant le directeur des contributions.

	1946-1973	1970[2])	1971[2])	1972[2])	1973[2])
Réclamations introduites	5.059	184	188	122	151
Réclamations vidées au total (1 + 2)	4.612	174	209	159	183
(a) par décision formelle 1		35	85	40	32
(b) par voie de procédure simplifiée		62	68	48	64
2 Désistements		77	56	71	87

b. Recours portés devant le Conseil d'Etat, comité du contentieux

	1946-1973	1970[2])	1971[2])	1972[2])	1973[2])
Recours introduits	814	8	23	14	8
Recours vidés au total (1 + 2)	748	12	20	10	5
1 Arrêts rendus	288	7	3	5	3
2 Désistements	460	5	17	5	2

1. Les chiffres indiquent le nombre des réclamations et recours, sans égard au nombre d'années d'imposition que ces réclamations et recours englobent. Dans plus de 50% des cas une réclamation ou un recours est dirigé contre différents genres d'impôts ou/et différentes années d'imposition.

2. Il n'y a aucun lien entre les réclamations et recours introduits au cours d'une année et les réclamations et recours vidés au cours delamême année.

B. *Situation du contentieux relatif à l'impôt sur le revenu 1967 au 31.12.1972.*

1. Impositions établies 48.611
   (Impôt sur le revenu des personnes physiques et des collectivités, fixé par bulletin d'impôt, à l'exclusion des impositions des personnes physiques intervenues par voie de retenue à la source)
   1.1. collectivités 1.625 unités
   1.2. personnes physiques 46.611 unités

2. Impositions entreprises par réclamation devant le directeur des contributions au 31.12.1972 226
   (= 0,44% de 1.)

3. Réclamations vidées au 31.12.1972 169
   3.1. par décision directoriale formelle 42 (= 74,8% de 2.) (= 24,8% de 3.)
   3.2. par voie de procédure simplifiée (§ 94 de la loi générale des impôts) 60
   3.3. par désistement 67

4. Réclamations en suspens au 31.12.1972 57

5. Décisions directoriales entreprises au 31.12.1972 par recours devant le Conseil d'Etat 15
   (= 38% de 3.1.)

6. Recours vidés au 31.12.1972 2

7. Recours à vider au 31.12.1972 13

DEVELOPMENTS IN INTERNATIONAL TAX LAW

IRELAND

White Paper on Capital Taxation

Foreword by the Minister for Finance

The Parties to the National Coalition agreement undertook in their pre-election document entitled "The Cost of the National Coalition Programme" to replace estate duty by a new form of taxation of capital.

In by Budget Statement of 16 May, 1973, I re-affirmed the commitment of the Government in relation to estate duty. Because of the need for detailed consideration of the matter, however, and because I felt it desirable to allow all interested parties an opportunity to give their views, I indicated that a White Paper would be published before any radical re-shaping of our system of capital taxation was made. In the interim I announced a number of measures effective from 16 May, 1973, to alleviate considerably the burden of estate duty in those cases in which hardship was most likely to arise under the present system. The effect of these measures was to relieve 25% of estates of the burden of estate duty. The measures included substantial increases in the abatement of duty on property passing to widows and children, an increase in the general exemption limit, a valuable concession in favour of insurance policy benefits and superannuation death benefits and an increase in the limit for artificial valuation of agricultural land. Over 50% of farmers previously liable were thereby relieved of all estate duty liability.

This Paper examines the present system of capital taxation in this country, assesses its strength and weaknesses, compares it with systems operating in other countries, e.g., the United Kingdom and other members of the European Economic Community, and finally indicates the Government's decisions on a broad outline of a new system of capital taxation. [1]

Various organisations have already indicated their desire for consultations on the proposed system of capital taxation. There are doubtless many others who will also wish to make representations or suggestions in the light of the proposals in this Paper. All those interested are invited to make their representations to the Department of Finance, Government Buildings, Dublin 2, not later than the end of June, 1974.

28 February, 1974.

Chapter 7

Proposed system of capital taxation.

83. This chapter contains an outline of a system of capital taxation which the Government consider necessary in Irish circumstances, having regard to the main objectives of capital taxation and to the considerations which should govern the choice of various capital taxes as set out

1. We acknowledge that the following material is reproduced from "Capital Taxation", a White Paper laid by the Minister for Finance before each House of the Oireachtas, 28 February, 1974. We are reprinting chapter 7 because of its significance.

in earlier chapters. Schemes of the individual capital taxes are sketched in the broadest manner, the object being to give a general indication of the form the taxes might take. The taxes covered are a capital gains tax, an annual wealth tax and a capital acquisitions tax which would tax property passing by way of gift during life and by way of inheritance on death.

Capital gains tax.

84. Proposals for a capital gains tax which might be considered suitable for this country are outlined below. For assets owned on the commencement date, only the gain attributable to the period from that date up to the date of disposal would be chargeable.

Nature of charge

85. Subject to certain exceptions and exemptions, all forms of property, wherever situated, would be assets for the purpose of the tax. The term property would include debts, options, foreign currency, business or professional goodwill or copyright. Interests in, or rights over property, as for instance, the right to exploit copyright or a lease of plant, would be regarded as assets.

Occasions of charge

86. Liability to the charge would arise whenever a gain was made on the disposal of an asset. For this purpose disposal would include all changes of ownership and the divesting by the owner of his rights in or over the asset by sale, exchange or transfer except such transfers as would constitute a gift under the proposed capital acquisitions tax. Death would not be regarded as a disposal. A winding up of a company or compulsory acquisition would constitute an occasion for a charge. Disposals between spouses would not give rise to a chargeable gain or an allowable loss.

Taxpayer

87. All persons, including individuals, companies and unincorporated bodies liable to income taxation who are resident in the State would be liable to tax on the disposal of chargeable assets, wherever those assets are situated. A non-resident would be liable only in respect of capital gains on the disposal of real estate and business assets in the State. Persons who now enjoy a limited exemption from income tax would be liable in respect of capital gains. Thus, for example, companies qualifying for export sales relief and cooperative societies would be chargeable. On the other hand, such bodies as approved superannuation funds, qualified friendly societies and charities which are now wholly exempt from income tax, would not be liable.

Valuation

88. The general principle of the computation of capital gains would be that from the consideration received for the disposal of an asset deductions would be made for the following: —

(a) the cost of acquiring the asset including incidental costs;

(b) expenditure wholly and exclusively incurred to improve the value of the asset or to maintain the owner's right over it; and

(c) expenditure incidental to the disposal of the asset.

Any part of the consideration on a disposal which would be chargeable under the rules of income taxation would not be included as a receipt for the calculation of chargeable gains. Only gains relating

to the period after the commencement date would be chargeable in the case of assets owned at that date. For this purpose, where the assets are quoted shares and securities or land which has acquired development value as for example agricultural land which has become zoned for housing, the market value at the commencement date would have to be ascertained but the amount chargeable would be limited to the gain over the whole period of ownership if it were less. For other assets the gain or loss would be computed by apportionment on a time basis over the whole period of ownership. Where an asset had been held for more than ten years before the commencement date, and where actual cost figures are not available, it would be deemed to have been acquired on the corresponding date ten years previously, and the capital gain would be apportioned as between the ten year period up to the commencement date, and the period subsequent to it. Only the amount attributable to the latter period would be taken into account. The taxpayer, however, would be given the option of electing to have the gain computed by reference to the market value at the commencement date.

Rate of Tax

89. (a) There would be a separate charge at the rate of 35% on capital gains from the disposal of all forms of property (with certain exceptions) which arise to individuals or companies and which are not at present liable to income tax.

(b) Where it would be to the taxpayer's advantage, e.g. if he had a reasonably low income tax liability, an alternative basis of charge could be permitted in the case of individuals whereby they would be taxed as if half of the capital gains up to £ 5,000 and the whole of any gains in excess of £ 5,000 were charged to income taxation as investment income.

Examples of the tax assessment in respect of capital gains are given in the Appendix (not reproduced).

Exemptions and reliefs

90. The following might be considered for exemption in appropriate circumstances —

(a) Gains up to, say, £ 15,000 from disposal of a principal private residence; normal life assurance policies; government securities; important works of art and similar objects subject to the same conditions as will apply in the case of annual wealth tax, and winnings from betting, lotteries and sweepstakes up to, say, £ 15,000 in a year.

(b) Capital gains by an individual not exceeding, say, £ 500 in a year; and disposals by an individual in any year of tangible movable property worth less than, say, £ 2,000.

(c) Allowance would be given for losses which would be computed in the same manner as chargeable gains, but the losses would be allowed only against chargeable gains and not against other income.

(d) *Sales within the family of farms and family businesses on retirement.*

In order not to place any obstacle in the way of transfers of farms or businesses within the family, provision could be made that the disposal of farms or family businesses for a consideration of up to, say, £ 150,000 would not attract liability to the tax. To prevent abuse there would have to be a safeguard and this exemption would apply only once during the life of an individual, and the individual would be required to have owned the farm or business for at least ten years.

(e) *Trade assets*

Provision could be made whereby payment of tax on gains from the sale of certain trade assets could be deferred if the proceeds of the sale were used to acquire new assets of a similar type for exclusive use in the trade. Thus, instead of paying tax on the gain, the trader could have the amount of the gain deducted from the cost price of the new assets and this process could be continued according as assets are renewed. On their final disposal, the tax would be charged. The type of assets to which this relief would apply would include land and buildings, fixed plant and machinery and goodwill.

Administration

91. (a) The procedural arrangements of the code relating to income taxation would apply in assessing and collecting the tax on capital gains. A return of capital gains would be given on the annual tax form and assessments would be made by the inspectors of taxes. Matters in dispute would be dealt with under the usual appeal procedures.

(b) Interest would be charged on tax in arrear.

(c) Penalties would be provided to ensure compliance with the legislation.

Annual wealth tax.

Nature of charge

92. (a) Subject to the exemptions mentioned later, the tax would be imposed on the market value of all property, real and personal, of every kind whatsoever of which a person is competent to dispose or in which he has any beneficial interest. As the tax would apply to net wealth only, provision would be made for the deduction of *bona fide* debts and encumbrances.

(b) The tax would apply to all property, wheresoever situated, of persons domiciled or ordinarily resident in the State and to property in the State of persons not so domiciled or resident.

Occasion of charge

93. The wealth of the taxpayer would be valued on, say, the last day of the tax year, at present the 5th April. As a fixed annual date invites evasion, safeguards would be introduced to protect the tax base from artificial depreciation of the market value of assets.

Taxpayer

94. (a) Basically, individual persons would be the taxpayers. Legal persons as such, for example, companies, partnerships, etc., would not normally be regarded as taxable entities. The interest of the individual in these concerns would be taxed in the hands of the individual. In special circumstances it might be found essential to treat certain entities as taxable units, e.g. private non-trading companies and discretionary trusts, with perhaps the elimination of any initial exclusion applicable to individuals. The wealth of the family, that is, of husband, wife and minor children would be added together to form one taxable unit.

(b) The beneficial owner of the property would be liable for tax. For the purposes of the family unit the husband would be primarily liable but separate assessments would be made if required. Trustees and any other person in whom an interest in property is vested would also be liable for payment of the tax. All or any of these persons would be required to disclose and return details of the property. The Revenue Commissioners would have the usual powers to call for accounts, information, etc., and the taxpayers would have the usual rights of appeal. The tax would

be a charge on the property and remain a charge in the hands of a purchaser. Clearance certificates would be required in the event of sales.

Valuation

95. (a) Property would be liable at its open market value, with special provisions for some items such as shares in private companies and agricultural land. Provision would also be made for the valuation of permissible deductions such as annuities. Taxpayers would submit their own valuations. Provisional assessments would be made on those values which would then be subject to review by the Revenue Commissioners. The Commissioners would have power to call for accounts, certificates, etc. and to appoint valuers. Taxpayers would have the usual rights of appeal.

(b) In recognition of the fact that the rate of return from farming is low when calculated by reference to current market values for agricultural land it is proposed that agricultural land up to £ 200,000 would be valued at 50% of market value. Any excess over £ 200,000 would be assessed at full market value. The tax assessment on sample farm estates is shown in the Appendix. This favourable treatment of agricultural land would be confined to genuine farmers i.e. those who work the farm on a full time basis and whose wealth consists mainly of the farm.

Rate of tax

96. (a) Assessments would be made on single taxpayers whose total wealth exceeds £ 40,000. All wealth of such persons over £ 30,000 would be subject to the tax. The corresponding figures for a married man would be £ 60,000 and £ 50,000. The reason for the £ 10,000 gap is to minimise administrative costs both in the private and the public sectors. Progressive rates, on the successive slice system, might be as follows:

1½% on the value of an estate worth between £ 30,000 and £ 100,000 (single person)

1½% on the value of an estate worth between £ 50,000 and £ 100,000 (married person)

2% on the value of an estate worth between £ 100,000 and £ 150,000

2½% on the value of an estate worth over £ 150,000.

The tax assessment in sample estates is shown in the Appendix.

(b) There will be no overall limit on the proportion of total income which may be taken by income taxation and annual wealth tax. To mitigate possible hardship, appropriate adjustments will be made in the higher rates of income taxation.

Exemptions and reliefs

97. As owners of property below £ 40,000 (single) and £ 60,000 (married) would be totally exempt from tax, specific exemptions would appear to be unnecessary. Important works of art and other objects of national, scientific, historic or artistic interest would be exempt if they remain in the country and the public have reasonable access to them. For social, administrative and other reasons, however, it might emerge after some experience of the operation of the tax that some other specific exemptions should be introduced.

Administration

98. (a) The tax would be under the care and management of the Revenue Commissioners. An annual return of wealth would be given by the taxpayer.

(b) Interest would be payable on tax in arrear.

(c) Fairly heavy penalties would be ne-

cessary to prevent nondisclosure of assets or of essential information or other evasion of the tax. Serious undervaluation would also call for penalties but these penalties would be imposed only for fraudulent behaviour.

Capital acquisitions tax.

99. The present legacy and succession duties will be abolished at the same time as estate duty. Their place will then be taken by a new capital acquisitions tax which will have the following major characteristics:

— property passing by way of gift at any time during the lifetime of a donor as well as property passing on his death as an inheritance would be taxed. In the case of members of the immediate family, the threshold for liability will be set at a high level of £ 150,000;
— it would be levied at progressive rates on a successive slice system with different scales of rates for different classes of beneficiaries depending on their relationship to the person from whom the gift or inheritance was derived;
— the tax would be levied in respect of property in excess of a certain amount acquired by any one donee/legatee from any one donor/testator.

Nature of charge

100. The tax would be a charge on the property comprised in the gift or inheritance. It would be levied

(i) in the case of donors domiciled in the State or deceased persons dying domiciled here—on all their property wheresoever situated and

(ii) in the case of donors who are not domiciled in the State or deceased persons who do not die domiciled here—on their property which is situated in the State.

Occasion of charge

101. Liability would arise in the case of a gift at the date of the gift and in the case of an inheritance at the date of the relevant death.

Taxpayer

102. The ultimate liability to pay the tax would fall on the beneficiary. Concurrent liability would attach to donors, executors and trustees.

Valuation

103. (a) Property acquired would be valued at its open market value as at the date of the charge. Special provision would be made for valuing certain types of assets such as shares in private companies, annuities, life interests, or reversions. Usual appeal provisions would be available.

(b) As in the case of annual wealth tax, agricultural land will be valued at 50% of market value up to £ 200,000. Any excess over £ 200,000 would be assessed at full market value. This favourable treatment would be confined to genuine farmers, i.e., those who work the farm on a full-time basis and whose wealth consists mainly of the farm.

(c) *Bona fide* debts or encumbrances (other than the capital acquisitions tax itself) payable out of or charged on acquisitions would be allowed as deductions for tax purposes.

Rates of tax

104. This paragraph gives an indication of the structure of the tax, the scale of rates and the exclusions which might be considered. The effective rates of tax are considered and the position is compared with the liability to duty which would arise under the existing death duty system.

(a) Beneficiaries would be divided into five separate classes —

Class I: Spouse and children.

Class II: Lineal issue (other than those in Class I) and lineal ancestors.
Class III: Brothers and Sisters.
Class IV: Nephews and Nieces.
Class V: All others.

The suggested scales of rates of acquisitions tax for each class are set out in Tables I to V at the end of this chapter. These scales apply in effect only to inheritances; in the case of gifts the rates would be reduced by 25%.

(b) The scale of rates of tax for each class would apply only to taxable acquisitions, that is, to the property acquired by a particular beneficiary in excess of his appropriate exclusion. In Class I, for example, a spouse or child would be taxed only on the property he received in excess of £ 150,000. For the other classes, the exclusions would be as follows: Class II: £ 10,000; Classes III and IV: £ 5,000 and Class V: £ 2,000. (Small receipts in any year would be disregarded — see paragraph 105 (a)).

(c) It is considered that there should be two scales of rates applicable to each class — one referable to all acquisitions received by a beneficiary during the lifetime of the donor, the other to the inheritances acquired on the donor's death. With a view to encouraging dispositions by a donor in his lifetime, it is proposed to set the rate applicable to gifts at a level 25% below that for inheritances. This approach would require safeguards to prevent avoidance of tax by donors making death-bed gifts to avail of the lower rate. This problem might be met by introducing a gift-period of two years which would have the effect of treating all inter vivos gifts made during that time as inheritances and thus liable to tax at the appropriate points in the inheritance scales.

(d) To illustrate the effect of the slice system of rates, Col. (5) has been inserted in each Table to give a realistic picture of what a donee pays on his total acquisitions, which would, of course, include the amount of his tax-free exclusion. This column might be compared with the final column which shows the effective rate of tax payable on similar amounts under the existing death duty system. The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.

In any case where there is more than one beneficiary no valid comparison is possible since the total amount of inheritance tax payable in connection with a death depends not alone on the number of beneficiaries but on the proportions in which the assets are divided between them. It can be said, however, that, even in cases where an estate passes to one beneficiary only, less duty is payable under these scales (with a few exceptions) than under the existing death duty system; where there is more than one beneficiary, the amount would be considerably less.

Examples of the tax assessment in respect of sample acquisitions are given in the Appendix.

Exemptions and reliefs

105. (a) Acquisitions not exceeding £ 250 by any person from any one donor in any one year;

(b) compensation or damages for personal injury — including damages recovered in respect of the death of a deceased person;

(c) retirement gratuities or redundancy payments from employers, with safeguards to prevent abuse through, e.g., private companies;

(d) objects of national, scientific, historic or artistic interest, subject to the same conditions as would apply in the case of the annual wealth tax;
(e) acquisitions by charitable and public bodies.

Administration

106. (a) Beneficiaries would be required to disclose acquisitions. Donors, trustees and executors would also be required to make disclosures within a period of, say, one month of the date of the gift or the relevant death.
(b) Interest would be charged on tax in arrear.
(c) Penalties would be provided for failure to deliver accounts or to pay tax within the prescribed period and for failure to disclose necessary information.

RATES OF CAPITAL ACQUISITIONS TAX ON INHERITANCES

Table I

Class I

SPOUSE AND CHILDREN

Slices over £ 150,000 (1)	Cumulative taxable acquisitions i.e. acquisitions over £ 150,000 (2)	Rate % (3)	Tax on Column (2) (4)	Effective rate % on total acquisitions (5)	Effective rate % under present death duty system (6)
£	£		£		
first 50,000	50,000	25	12,500	6.25	50
next 50,000	100,000	30	27,500	11.00	55
next 50,000	150,000	35	45,000	15.00	55
next 50,000	200,000	40	65,000	18.57	55
next 50,000	250,000	45	87,500	21.87	55
next 50,000	300,000	50	112,500	25.00	55
Excess		55			

Notes (1) In the case of gifts *inter vivos* these rates will be reduced by 25%.
(2) The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.

RATES OF CAPITAL ACQUISITIONS TAX ON INHERITANCES

Table II

Class II

LINEAL ISSUE (OTHER THAN THOSE IN CLASS I) AND LINEAL ANCESTORS

Slices over £ 10,000 (1)	Cumulative taxable acquisitions i.e. acquisitions over £ 10,000 (2)	Rate % (3)	Tax on Column (2) (4)	Effective rate % on total acquisitions (5)	Effective rate % under present death duty system (6)
£	£		£		
first 3,000	3,000	5	150	1.15	8
next 5,000	8,000	7	500	2.78	12
next 10,000	18,000	10	1,500	5.36	16
next 10,000	28,000	13	2,800	7.37	21
next 10,000	38,000	16	4,400	9.17	27
next 10,000	48,000	19	6,300	10.86	33
next 10,000	58,000	22	8,500	12.50	37
next 15,000	73,000	25	12,250	14.76	41
next 15,000	88,000	28	16,450	16.79	41
next 15,000	103,000	31	21,100	18.67	45
Excess		35			

Notes (1) In the case of gifts *inter vivos* these rates will be reduced by 25%.
(2) The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.

RATES OF CAPITAL ACQUISITIONS TAX ON INHERITANCES

Table III

Class III

BROTHERS AND SISTERS

Slices over £ 5,000 (1)	Cumulative taxable acquisitions i.e. acquisitions over £ 5,000 (2)	Rate % (3)	Tax on Column (2) (4)	Effective rate % on total acquisitions (5)	Effective rate % under present death duty system (6)
£	£		£		
first 3,000	3,000	10	300	3.75	Nil
next 5,000	8,000	12	900	6.92	17.2
next 10,000	18,000	15	2,400	10.44	22.6
next 10,000	28,000	19	4,300	13.03	26.2
next 10,000	38,000	23	6,600	15.35	31.6
next 10,000	48,000	27	9,300	17.55	37.0
next 10,000	58,000	31	12,400	19.68	42.57
next 15,000	73,000	35	17,650	22.63	45.48
next 15,000	88,000	40	23,650	25.43	46.9
next 15,000	103,000	45	30,400	28.15	50.5
Excess		50			

Notes (1) In the case of gifts *inter vivos* these rates will be reduced by 25%.
(2) The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.

RATES OF CAPITAL ACQUISITIONS TAX ON INHERITANCES

Table IV

Class IV

NEPHEWS AND NIECES

Slices over £ 5,000 (1)	Cumulative taxable acquisitions i.e. acquisitions over £ 5,000 (2)	Rate % (3)	Tax on Column (2) (4)	Effective rate % on total acquisitions (5)	Effective rate % under present death duty system (6)
£	£		£		
first 3,000	3,000	15	450	5.63	Nil
next 5,000	8,000	18	1,350	10.38	17.2
next 10,000	18,000	22	3,550	15.43	22.6
next 10,000	28,000	26	6,150	18.64	26.2
next 10,000	38,000	30	9,150	21.28	31.6
next 10,000	48,000	35	12,650	23.87	37.0
next 10,000	58,000	40	16,650	26.43	42.57
next 15,000	73,000	45	23,400	30.00	45.48
next 15,000	88,000	50	30,900	33.23	46.9
Excess		55			

Notes (1) In the case of gifts *inter vivos* these rates will be reduced by 25%.
(2) The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.

RATES OF CAPITAL ACQUISITIONS TAX ON INHERITANCES

Table V

CLASS V

ALL OTHERS

Slices over £ 2,000 (1)	Cumulative taxable acquisitions i.e. acquisitions over £ 2,000 (2)	Rate % (3)	Tax on Column (2) (4)	Effective rate % on total acquisitions (5)	Effective rate % under present death duty system (6)
£	£		£		
first 3,000	3,000	20	600	12.0	Nil
next 5,000	8,000	22	1,700	17.0	Nil
next 10,000	18,000	25	4,200	21.0	29.6
next 10,000	28,000	30	7,200	24.0	32.8
next 10,000	38,000	35	10,700	26.75	36.8
next 10,000	48,000	40	14,700	29.40	41.6
next 10,000	58,000	45	19,200	32.00	46.4
next 15,000	73,000	50	26,700	35.60	49.6
next 15,000	88,000	55	34,950	38.83	52.8
Excess		60			

Notes (1) In the case of gifts *inter vivos* these rates will be reduced by 25%.
(2) The comparison between columns (5) and (6) is meaningful only in those cases where the entire inheritance and the entire estate respectively pass to one individual beneficiary.
(3) The effective rates in column (6) apply to strangers only.

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DIE VERANLAGUNG ZUR GEWERBESTEUER FÜR 1973; GEWERBESTEUERGESETZ MIT GEWERBESTEUER-DURCHFÜHRUNGSVERORDNUNG MIT GEWERBESTEUER-RICHTLINIEN IN DEN FÜR 1972 GELTENDEN FASSUNGEN; IM ANHANG AUSZUG AUS DEM EINFÜHRUNGSGESETZ ZU DEN REALSTEUERGESETZEN (EinfGRealStG) TABELLE DER STEUERMESSBETRAGE NACH DEM GEWERBEERTRAG ERRECHNUNG DER GEWERBESTEUER-RÜCKSTELLUNG BZW. DER GEWERBESTEUER-UEBERZAHLUNG.

published by IdW-Verlag, Düsseldorf, 1974. 284 pp., DM 17.—.
Annual publication of an annotated text of the trade tax with reference to case law and relevant by-laws; appended for filing 1973 trade tax return.

B 8188

HANDBUCH DER RECHTSPRECHUNG ZUM STEUER- (ZOLL)-STRAF- UND ORDNUNGSWIDRIGKEITENRECHT MIT VERFAHRENSFRAGEN.

by P. Pfaff. Published by Herne, Verlag Neue Wirtschafts-Briefe, 1974. 776 pp.
Monograph designed as a handbook explaining tax avoidance, tax evasion and related subject matters as governed by German legislation and case law.

B 8031

IRELAND

TOLLEY'S REPUBLIC OF IRELAND TAXATION SYNOPSIS 1973/74,

by E. L. Harvey. Published by Tolley Publishing Co., Croydon, 1974. 25 pp., £ 0.50.
A comprehesive detailed guide to taxation in the republic of Ireland, completely revised and up-to-date to include the finance act 1973.

B 8155

NETHERLANDS

HET NIEUWE FRANS-NEDERLANDSE VERDRAG TOT HET VERMIJDEN VAN DUBBELE BELASTING TEGEN DE ACHTERGROND VAN HET NATIONALE RECHT VAN BEIDE STATEN,

by R. Boon, A. Kasdorp. Published by Fenedex, Den Haag, 1973. 57 + 16 pp., Hfl. 42,50.
Brochure dealing with the new French-Nether-

lands double taxation treaty with reference to both national tax laws.

B 8186

DE WERKENDE GEHUWDE VROUW EN DE FISCUS,

by J. L. van Hedel. Published by Kluwer, Deventer, 1974. 94 pp., Hfl. 14,—.
Monograph dealing with the individual income taxation of working married women.

B 8211

TARIEF VAN DE INKOMSTENBELASTING; MICRO- EN MACROECONOMISCHE BESCHOUWINGEN OVER HET INKOMSTENBELASTINGTARIEF,

by K. van der Heeden. Published by Kluwer, Deventer, 1974. 91 pp., Hfl. 19,50. Study of the structure of the individual income tax rate under Netherlands tax law.

B 8210

BALANSCONTINUITEIT EN FOUTENLEER,

by J. J. H. Jacobs. Published by FED, Deventer, 1974. 84 pp., Hfl. 12,—.
Fed's Fiscale Brochures: IB: 3.25.
Monograph dealing with the determination of the annual profit of a business with reference to case law under Netherlands tax law.

B 8181

FISCALE PROBLEMEN RONDOM FUSIES; RAPPORT VAN DE COMMISSIE VOOR DE BESTUDERING VAN DE FISCALE PROBLEMEN RONDOM FUSIES, (voorz. M. V. M. van Leeuwe),

published by Kluwer, Deventer, 1974. 46 pp., Hfl. 7,—. Geschriften voor Belastingwetenschap, no. 136.
Report by the Committee for the study of tax problems arising from merger.

B 8148

REGISTRATIE- EN SUCCESSIEBELASTING; BESPREKING VAN HET RAPPORT VAN DE COMMISSIE VOOR DE REGISTRATIE- EN SUCCESSIEBELASTING. (Voorz. H. J. Hofstra),

published by Kluwer, Deventer, 1974. 31 pp., Hfl. 4,80
Geschriften van de Vereniging voor Belastingwetenschap, no. 135.
Text of a discussion concerning a report by the Committee for recommendations on the registration and death duties.

B 8147

SCHETS VAN EEN HERVORMING VAN ONS BELASTINGSTELSEL. EEN ECONOMISCHE BENADERING,

by Th. A. Stevers. Published by Kluwer, Deventer, 1963. 43 pp.
Speech held on January 23, 1964, on the occasion of the acceptance of extra-ordinary Professor in public finance at the Catholic Highschool at Tilburg on the subject of a proposal to reform the Netherlands tax system in line with economic principals.

B 8168

RWANDA

LES CONDITIONS D'INSTALLATION D'ENTREPRISES INDUSTRIELLES DANS LES ETATS AFRICAINS ET MALGACHE ASSOCIES; VOL. 15: REPUBLIQUE RWANDAISE,

published by Commission des Communautés européennes, Direction générale de l'aide au développement, Brussels, 1972. 8 + 71 pp.
Informative brochure providing a basic reference to the conditions relating to the setting up and the functioning of industrial enterprises in Rwanda.

B 10.543

SWITZERLAND

SYSTEM DES STEUERRECHTS; dritte, von I. Blumenstein neu bearbeitete Auflage,

by E. Blumenstein. Published by Schulthess Polygraphischer Verlag A.G., Zürich, 1971. 523 pp.
Study of the Swiss tax law system.

B 8125

SWITZERLAND / GERMANY / FRANCE

WETTBEWERBSWIRKUNGEN UNTERSCHIEDLICHER STEUERSYSTEME IM INTERNATIONALEN HANDEL UNTER BESONDERER BERÜCKSICHTIGUNG DER BESTEUERUNGSVERHÄLTNISSE IN DER SCHWEIZ, DER BUNDESREPUBLIK DEUTSCHLAND UND IN FRANKREICH,

by W. Brodmann von Ettingen. Published by

Schulthess Polygraphischer Verlag, Zürich, 1974. 247 pp.
Dissertation Nr. 502.
Thesis analysing the impact on international commercial competition arising from different tax systems with an emphasis on the taxation circumstances in Switzerland, the Federal German Republic and France.

B 8169

TOGO

LES CONDITIONS D'INSTALLATION D'ENTREPRISES INDUSTRIELLES DANS LES ETATS AFRICAINS ET MALGACHE ASSOCIES: Vol. 7: REPUBLIQUE TOGOLAISE,

Published by Commission des Communautés européennes, Direction générale de l'aide au développement, 1972. 8 + 97 pp.
Information brochure providing a basic reference to the conditions relating to the setting up and the functioning of industrial enterprises in Togo.

B 10.544

UNITED KINGDOM

BRITISH INDUSTRY AND EUROPEAN LAW,

edited by G. W. Keeton and S. N. Frommel. Published by MacMillan, London, 1974. 206 pp., £ 6.95.
Compilation of addresses and discussions of a conference held in November, 1972, and organized by the Division of Law and the Institute of Organisation and Social Studies at Brunel University. Its purpose was to give an expert view, both by English lawyers and distinguished lawyers from the European Communities, of those aspects of EEC law which will have an impact upon the operations of British firms, both within the United Kingdom and in the Common Market. The areas selected for special attention included: the legal framework, company law, corporate taxation, competition and restrictive practices, patent law and the law of insurance.

B 8195

TOLLEY'S CORPORATION TAX 1973-74: A COMPREHENSIVE DETAILED GUIDE ON CORPORATION TAX, COMPLETELY REVISED AND UP-TO-DATE TO INCLUDE THE FINANCE ACT 1973 AND RELEVANT TAX LAW TO 31 JULY 1973,

by D. E. Cox and L. J. P. Livens. Published by Tolley Publishing Co. Croydon, 1973. 59 pp., £ 1.00.

B 8156

COMPANY TAXATION 1973 - A PRACTICAL GUIDE,

by S. Marcus and J. Power. Published by Working Financial Techniques Ltd., 1973. 120 pp., £ 1.85.
Outline designed to be a practical guide to the corporation tax structure as of April 1, 1973.

B 8160

CAPITAL GAINS TAX; 2nd. ed.,

by V. Di Palma. Published by MacDonald & Evans Ltd., London, 1973. 232 pp., £ 0.95.
The M. & E. handbook series.

B 8161

THE IMPACT OF FOREIGN INVESTMENT ON THE UNITED KINGDOM,

by M. D. Steuer, P. Abell and J. Gennard. Published by Her Majesty's Stationery Office, London, 1973. 217 pp.
Study with a main purpose toward analyzing the implications of direct foreign investment in the United Kingdom for the balance of payments, for the State of British technology and for development regions.

B 8128

TOLLEY'S TAX TABLES 1974-5,

published by Tolley Publishing Co., Croydon, 1974. 17 pp., £ 0.50.
In this booklet the income tax tables, corporate tax tables and the VAT (inclusive prices tables) have been published.

B 8154

USA

AMERICAN FEDERAL TAX REPORTS; SECOND SERIES; VOLUME 32.

Published by Prentice-Hall, Inc., Englewood Cliffs, 1974.

Unabridged federal and state court decisions arising under the federal tax laws and reported in Prentice-Hall Federal Taxes during the second half of 1973.

B 8140

BITTKER, AND EUSTICE'S FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS, 3rd ed., 1974 CUMULATIVE SUPPLEMENT no. 1, WITH ANNOTATIONS THROUGH DECEMBER 31, 1973.

By J. S. Eustice. Published by Warren Gorham & Lamont, Boston, 1974.
Cumulative supplement up-dating the basic work as of December 31, 1973.

B 8145

FEDERAL ESTATE AND GIFT TAXES-CODE AND REGULATIONS AS OF APRIL 15, 1974.

Published by Commerce Clearing House, Chicago, 1974.
374 pp., $ 5.50.
Annual up dated edition containing full texts of the estate and gift tax provisions of the Internal Revenue Code and the corresponding official regulations.

B 8192

INTERNATIONAL TAX PLANNING; MATERIALS ON THE PLANNING OF INTERNATIONAL TRANSACTIONS.

By W. C. Gifford. Published by Tax Management Inc., Washington, 1974. 500 pp., $ 30.00.
Monograph furnishing problem oriented materials covering the principal US tax questions involved in planning international transactions for US corporations.

B 8166

DER EINFLUSS DES GESELLSCHAFTSRECHTS AUF DIE KONZENTRATION IN DEN USA.

By H. Hölzler. Published by J. C. B. Mohr (Paul Siebeck), Tübingen, 1974. 255 pp.
Schriften zur Konzentrationsforschung: Band 6.
Study of the impact of company law with respect to economic concentration in the USA.

B 8213

STATE AND LOCAL TAXES AND FINANCE; TEXT, PROBLEMS AND CASES,

by O. Oldman, and F. P. Schoettle. Published by The Foundation Press, Mineola, 1974. 1094 pp. University Casebook Series.
Compilation of material in the field of state and local taxes and finance for students and teachers in the social sciences and in schools of business and public administrations. The primary emphasis is on the training of lawyers.

B 8215

USA / INTERNATIONAL

SOLVING ACCOUNTING PROBLEMS FOR WORLDWIDE OPERATIONS.

Published by Business International Corporation, New York, 1974. 147 pp.
Research report analyzing a wide area of international accounting subjects. It covers, among others, the concepts of consolidation, differences in valuation practices and taxation and case studies revealing how a number of US and European firms consolidate their worldwide operations.

B 8197

1974 U.S. EXCISE TAX GUIDE.

Published by Commerce Clearing House, Inc., Chicago, 1974. 456 pp., $ 5.
Explanatory text to excise taxes. Also explained are new regulations as well as important rulings and case law.

B 8132

LOOSE-LEAF SERVICES

Received between August 1 and August 31

AUSTRIA

DIE EINKOMMENSTEUER.

Teil I, releases 3 and 4
Wirtschaftsverlag Dr. A. Orac, Wien

DIE EINKOMMENSTEUER, RECHTSPRECHUNG.

Zapletal, Hofstätter,
Teil III, releases 19 and 20
Wirtschaftsverlag Dr. A. Orac, Wien

AUSTRALIA

AUSTRALIAN CURRENT TAXATION & SERVICE,

May and June release
Butterworth & Co., Sydney

SALES TAX EXEMPTION AND CLASSIFICATIONS,

releases 14 and 15
Commissioner of Taxation, Canberra

BELGIUM

DOORLOPENDE DOCUMENTATIE INZAKE B.T.W. / LE DOSSIER PERMANENT DE LA T.V.A.,

release 55
Editions Service, Brussels

BENELUX

BENELUX PUBLICATIEBLAD,

releases 4 and 5
Staatsuitgeverij, Den Haag

CANADA

BRITISH COLUMBIA TAXATION SERVICE,

release 28
Richard de Boo, Ltd., Toronto

CANADA TAX LETTER,

releases 223 and 224
Richard de Boo, Ltd., Toronto

DENMARK

SKATTEBESTEMMELSER:

— DOBBELTBESKATNINGSOVERENSKOMSTER, release 4

— SKATTEBESTEMMELSER, release 79

— SKATTENYT, release 76

A. S. Skattekartoteket Informationskontor, Copenhagen

EEC

DROITS DES AFFAIRES DANS LES PAYS DU MARCHE COMMUN,

Tome V, release 76
Edition Jupiter, Paris

HANDBOEK VOOR DE EUROPESE GEMEENSCHAPPEN:

— KOMMENTAAR OP HET E.E.G., EURATOM EN EGKOS VERDRAG. VERDRAGSTEKSTEN EN AANVERWANTE STUKKEN releases 147 and 148

— EUROPEES MEDEDINGINGS- EN KARTELRECHT release 40

— TARIEFLIJSTEN release 126

N.V. Uitgeversmij. Æ. E. Kluwer, Deventer

FRANCE

BULLETIN DE DOCUMENTATION PRATIQUE DE TAXES SUR LE CHIFFRE D'AFFAIRES ET CONTRIBUTIONS INDIRECTES,

release 6
Editions F. Lefebvre, Paris

DOCUMENTATION PRATIQUE DE SECURITE SOCIALE ET DE LEGISLATION DU TRAVAIL,

release 3
Editions F. Lefebvre, Paris

JURIS CLASSEUR: DROIT FISCAL: CODE FISCAL «CHIFFRE D'AFFAIRES»,
release 5176
Editions Techniques, Paris

JURIS CLAUSSEUR: DROIT FISCAL: CODE FISCAL «IMPOTS DIRECTS»,
release 177
Editions Techniques, Paris

JURIS CLAUSSEUR: DROIT FISCAL: COMMENTAIRES «IMPOTS DIRECTS»,
release 1098
Editions Techniques, Paris

MEMENTO LAMY:
— FISCAL,
release K
Services Lamy, Paris

GERMANY

BECKSCHE STEUERKOMMENTARE,
release 11
Verlag C. H. Beck, München

HANDBUCH DER EINFUHRNEBENABGABEN,
release 3
v. d. Linnepe Verlagsgesellschaft K.G., Hagen

KOMMENTAR ZUM EINKOMMENSTEUERGESETZ,
release 24
Richard Boorberg Verlag, Stuttgart

STEUERN UND ZÖLLE IM GEMEINSAMEN MARKT,
releases 34 and 35
Nomos Verlagsgesellschaft m.b.H. & Co., Baden-Baden

STEUERRICHTLINIEN,
April release
C. H. Becksche Verlagsbuchhandlung, München

WORLD TAX SERIES - GERMANY,
release 61
Commerce Clearing House, Inc., Chicago

NETHERLANDS

DE BELASTINGGIDS,
release 8
Uitgeversmij. S. Gouda Quint, D. Brouwer & Zn., Arnhem

BELASTINGBERICHTEN:
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release 123

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releases 135 and 136

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release 295

— INTERNATIONALE ZAKEN,
release 112

— ALGEMENE WET, ENZ.,
release 160

— VERMOGENSBELASTING,
release: unnumbered supplement
N. Samsom N.V., Alphen a/d Rijn

BTW EN BEDRIJF,
releases 61 and 62
N. Samsom N.V., Alphen a/d Rijn

BELASTING WETGEVINGSERIE:
— LOONBELASTING,
release 30

— INKOMSTENBELASTING,
release 32

— ALGEMENE WET INZAKE RIJKSBELASTINGEN,
release 5
J. Noorduyn en Zn. N.V., Arnhem

BELASTINGWETTEN,
releases 51 and 52
D. Brouwer en Zn., Arnhem

FED'S LOSBLADIG FISCAAL WEEKBLAD,
releases 66, 67, 68 and 69
N.V. Uitgeverij Fed., Amsterdam

FISCALE WETTEN,
release 60
N.V. Uitgeverij Fed., Amsterdam

HANDBOEK VOOR IN- EN UITVOER:
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releases 170 and 171

— B II: TARIEF VAN INVOERRECHTEN,
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INKOMSTENBELASTING IN DE AGRARISCHE SECTOR,
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KLUWER'S FISCAAL ZAKBOEK,
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KLUWER'S TARIEVENBOEK,
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OMZETBELASTING (BTW) IN BEROEP EN BEDRIJF,
release 24
N.V. Uitgeversmij. S. Gouda Quint enz., Arnhem

DE SOCIALE VERZEKERINGSWETTEN,
release 79
N.V. Uitgeversmij. Æ. E. Kluwer, Deventer

VADEMECUM VOOR IN- EN UITVOER,
release 469
N.V. Uitgeversmij. Æ. E. Kluwer, Deventer
N. Samsom N.V., Alphen a/d Rijn

DE VAKSTUDIE: FISCALE ENCYCLOPEDIE:
— INKOMSTENBELASTINGEN,
release 146

— LOONBELASTINGEN 1964,
releases 101, 102 and 103

— WET OP DE OMZETBELASTING,
release 43

— SUCCESSIEWET,
release 46
N.V. Uitgeversmij. Æ. E. Kluwer, Deventer

VAKSTUDIE BELASTINGWETGEVING:
— ALCOHOL - WIJNACCIJNS,
release 11

— GEMEENTELIJKE BELASTINGEN E.A.,
release 16
N.V. Uitgeversmij. Æ. E. Kluwer, Deventer

VENNOOTSCHAPPEN, VERENIGINGEN EN STICHTINGEN:
— ALGEMEEN DEEL,
release 24
N.V. Uitgeversmij. Æ. E. Kluwer, Deventer

NORWAY

SKATTE-NYTT:
— A,
release 7
Norsk Skattebetalerforening Huitfeldts, Oslo

SOUTH AFRICA

LAW AND PRACTICE OF SOUTH AFRICAN INCOME TAX,
release 24
Butterworth & Co., Durban

SPAIN

GABINETTE DE ESTUDIOS,
June release
T-A-L-E, Madrid

SWITZERLAND

DIE STEUERN DER SCHWEIZ / LES IMPOTS DE LA SUISSE,
— TEIL I,
release 52

— TEIL II,
release 47

— TEIL III,
release 48
Verlag für Recht und Gesellschaft, Basel

UNITED KINGDOM

BRITISH TAX ENCYCLOPEDIA,
release 49
Sweet & Maxwell, Ltd., London

BRITISH TAX GUIDE,
releases 144 and 145
Commerce Clearing House, Inc., Chicago

VALUE ADDED TAX,
release 24
Butterworth & Co., Publishers, Ltd., London

U. S. A.

FEDERAL TAX GUIDE REPORTS,
releases 42, 43 and 47
Commerce Clearing House, Inc., Chicago

FEDERAL TAXES REPORT BULLETIN,
releases 29, 30, 31 and 32
Prentice Hall, Inc., Englewood Cliffs

STATE TAX GUIDE,
release 564
Commerce Clearing House, Inc., Chicago

TAX IDEAS - REPORT BULLETIN,
releases 13 and 14
Prentice Hall, Inc., Englewood Cliffs

TAX TREATIES,
release 270
Commerce Clearing House, Inc., Chicago

For Publication later this year

TAX HAVENS ENCYCLOPAEDIA

General Editor: Dr. Barry Spitz, B.A., LL.B. (Rand), Barrister,
Author of International Tax Planning

This authoritative new loose-leaf work, apart from gathering together in one place all relevant material and presenting it in an in-depth professional and regularly updated form, will enable the tax practitioner to assess in a practical way the relative advantages and disadvantages of various tax havens thus facilitating the selection of the right tax haven for his particular purposes. An introductory chapter sets out the basic principles involved when engaging in tax haven operations and refers specifically to individual chapters where appropriate. Further chapters consider the use of tax havens by taxpayers of the United Kingdom, the United States and France. The individual chapters cover altogether seventeen tax havens as follows:

1 Bahamas
2 Bermuda
2a British Virgin Islands
3 Cayman Islands
4 Gibraltar
5 Guernsey
6 Hong Kong
7 Isle of Man
8 Jersey
9 Liberia
10 Liechtenstein
11 Luxembourg
12 Nauru
13 Netherlands Antilles
14 New Hebrides
15 Panama
16 Switzerland
17 Turks and Caicos Islands

Each chapter is contributed by an expert on the tax haven aspects of the area under analysis, and all chapters contain footnotes giving full and precise references to the relevant laws and rulings in respect of each point made in the text.

No price as yet has been fixed for this major new work, but the basic charge is likely to be in the region of £25.00 with an additional charge for subsequent noter-up pages and replacement sections.
0 406 38225 5

BUTTERWORTHS,
Borough Green, Sevenoaks, Kent.

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Convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste tchécoslovaque tendant à éviter les doubles impositions en matière d'impôts sur les revenus.

SUPPLEMENT TO No. 4 (B 1974)

Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne.

SUPPLEMENT TO No. 6 (C 1974)

Convention between the Republic of Singapore and the State of Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

SUPPLEMENT TO No. 8 (D 1974)

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28TH CONGRESS OF THE INTERNATIONAL FISCAL ASSOCIATION MEXICO CITY 1974

The 28th Congress of IFA, which was held from September 23—27, 1974 in Mexico City dealt with the following two subjects:

1. *Tax consequences of domestic and foreign interests establishing corporations as vehicles for joint ventures, and*
2. *Tax problems resulting from the temporary activity abroad of employees of enterprises with international operations.*

Both subjects, which are highly topical, attracted much interest and resulted in lively discussions. The resolutions in which the conclusions of the Congress were laid down, may be found in IFA News in the December issue.
Two national reports on Australia and Ghana with respect to the first subject were submitted during the Congress. There was, therefore, no opportunity to include these reports in Volume LIXa of the CAHIERS DE DROIT FISCAL INTERNATIONAL (Studies on International Fiscal Law) which was sent this summer to IFA Members, and which contains 14 country reports on the same subject. Unfortunately, it was also impossible to have these reports duplicated and distributed at the Congress. However, since the Bureau feels that they are much too valuable to let them go to waste, it offered to publish them in the November issue of the BULLETIN. Both IFA and the authors approved of this suggestion, so that our readers may find these reports in the current issue. Similar reports were prepared on Austria, Brazil, Canada, Finland, France, Germany, Mexico, Luxembourg, Netherlands, Portugal, Spain, Switzerland, the United Kingdom and the United States and these were published in the above Volume LIXa, which can be ordered through our Bureau (see enclosed leaflet). The Bureau also envisages publishing early next year the papers submitted for the Seminar of the Andean Pact which was also held during the Congress.

The Editors

* * * ARTICLES * * *

P. ANTHONY BROWNE AND JOHN MCD. MCAULEY:

AUSTRALIA: TAX CONSEQUENCES OF DOMESTIC AND FOREIGN INTERESTS ESTABLISHING CORPORATIONS AS JOINT VENTURES*

1. DEFINITIONAL CONCEPTS

The Australian legal system is based on the English system of mixed legislative statutes and common law, similar to the United Kingdom and United States and most British Commonwealth countries. Commercial practice and political structure are also along similar lines to these other places.

The Australian constitutional system takes the form of a federation, with the federal government having specific powers under a written constitution, and the constituent state governments having the residue of powers.

Generally speaking, the states have power in relation to the formation and conduct of corporations, although the federal government has recently been moving into the area of economic control of corporations in relation to such matters as the issue of securities and price control and foreign takeovers etc.

The federal government also has power in most areas concerning the national economy, including exchange controls and foreign investment, whether in corporations or land or assets or otherwise. Many areas of the federal government's involvement in corporate and business affairs are of comparatively recent origin, and as such have been and are likely to continue to be for some time the subject of constitutional challenge before federal powers on these matters are more clearly defined.

As for the nature of business corporations formed within Australia, these acquire their legal status under the appropriate companies legislation of the particular state or federal territory where they are formed. The various states and federal territories have each adopted a more or less uniform code of corporate or company law.

Corporations so formed are of the more or less traditional type, being regarded as separate legal entities having their own legal personality and status in the eyes of the law. They are controlled by shareholders according to the votes given by the constituent documents of the corporation to the shares or classes of shares, and are managed by a board of directors.

2. TAX INCENTIVES

2.1 There are no Australian laws relating specifically to foreign investment as such, although there are some stated federal government policies intended to be implemented within the framework of existing laws on related subjects.

Generally, all forms of foreign investment in Australia require exchange control approval at the outset. The federal laws on the subject of exchange control are very

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general in scope, giving to the central bank, namely the Reserve Bank of Australia, very wide general discretions under the Banking (Foreign Exchange) Regulations, which in turn derive their authority from the federal Banking Act. In present economic conditions, the policies of the federal government and the Reserve Bank have been subject to fairly rapid change. For example, there is at present a policy against allowing borrowings from sources outside of Australia for terms of less than two years. In addition, there was until recently a requirement for up to one-third of all borrowings from sources outside of Australia to be lodged in a type of blocked account with the Reserve Bank, thus effectively increasing the interest cost of such borrowings, but this deposit requirement has recently been reduced to five percent of the overseas loan as from mid 1974. This last mentioned change is itself a good overt indicator of the recent easing of what had been for some time a somewhat restrictive policy towards foreign investment. At the present time, there are still in force certain policies of constraint against investment in Australian land for speculative purposes, and against the takeover by foreign interests of existing Australian businesses and assets.

The above exchange control policies form part of a general policy on foreign investment in Australia which was announced by the federal government in late 1972. Part of that general policy involved the introduction of new legislative machinery for the control of foreign takeovers of existing Australian business corporations and of Australian property and assets and the entering into of mining joint ventures with foreign participants.

As a result, the federal Companies (Foreign Takeovers) Act was introduced in early 1973. Subject to certain limitations and conditions expressed in this legislation, the takeover of existing Australian business corporations by foreign interests now requires prior approval from the federal Committee on Foreign Takeovers. As with most legislation of this type, there are probably technical ways by which it can be legally circumvented — for example, through the interposition of offshore companies controlled by voting debentures rather than shares — but it is not within the scope of the present discussion to analyse these matters.

As for foreign takeovers of assets as distinct from shares in companies, no specific legislation has been introduced as yet. However, it is the practice of the Reserve Bank to refer cases of this nature to the federal Committee on Foreign Takeovers, which applies principles similar to those applicable under the Companies (Foreign Takeovers) Act when advising the Reserve Bank whether or not to grant exchange control approval for the transaction in question. These principles seem to be largely ad hoc at this stage, and no clear guidelines have emerged as yet, except such general guidelines as can be gleaned from the policy statements of the federal government from time to time.

Another area of federal government intervention in foreign investment in Australia which is gaining momentum at the present time is the establishment of a federal Australian Industries Development Corporation and a federal Petroleum and Minerals Authority. The Australian Industries Development Corporation will act somewhat like an industrial development bank, and one of its likely functions in relation to foreign investment in Australia will be the borrowing from overseas sources of funds intended for investment in Austra-

lia and the channelling of these funds into the investments concerned in such a way as to maintain a greater degree of Australian equity than might otherwise have been the case. It seems likely that the proposed new Petroleum and Minerals Authority would also include among its functions a somewhat similar function in relation to foreign investment in Australian mining joint ventures.

Of course, there are many areas of governmental influence over foreign investment outside of the strictly legal or fiscal controls. For example, especially in the case of large scale projects, governments have considerable practical influence when negotiating infrastructure arrangements etc.

It will be noted than none of the abovementioned matters is strictly in the fiscal area, in the sense of being a taxation control or incentive, but nevertheless the incidental effects of taxation provisions can often be of vital importance in determining the particular form which a foreign joint venture investment will take.

Except to the limited extent implied above, there is no different legal treatment in Australia of foreign joint venture investments when compared with other forms of foreign equity investment, and there is also no relationship in this regard between the strict legal treatment of such investment and the percentage of local as compared with foreign participation which it accommodates, except perhaps to the extent that the degree of local participation may be a factor taken into account by the Reserve Bank of Australia and the Committee on Foreign Takeovers in implementing government policies from time to time.

2.2 There are no special tax incentives in Australia which directly encourage or discourage foreign investment as such, and certainly there are none which directly favour such investment where the degree of local participation is either more or less than a specified percentage.

Naturally, there are aspects of the tax laws which may favour the establishment of some particular structure rather than another in given cases, but it is probably safe to say that the tax laws have not been framed with the object of encouraging any particular form or forms of foreign investment or joint ventures and that their operation is largely fortuitous in this regard.

With regard to the constitutional framework on this subject:

2.2.1 there are no constitutional rules specifically referring to any different tax or other treatment of different types of foreign investment, and what general principles of constitutional law there are as to the prevention of discrimination as between tax payers would probably militate against such a situation; and

2.2.2 because of the foregoing, the question of offending against tax treaty provisions for the prevention of discrimination as between local and foreign based tax payers does not really arise, or has not so far arisen, as an issue in its own right.

2.3 Because there are no Australian tax incentives specifically designed to favour foreign investment as such, the question of tax sparing devices to preserve the benefit of such incentives in relation to the tax imposed by the foreign investor's country of residence does not really arise. There are such tax sparing provisions in the tax agreement between Australia and Singapore, but in that case, they are designed to preserve the benefit of certain Singapore tax incentives, and not vice

versa.

There are, of course, reciprocal tax limiting provisions in the various tax treaties — for example, in relation to dividends and interest payments — but these generally have the effect of limiting the amount of tax imposed by the country of source and thus favouring the revenue of whichever happens to be the capital exporting country.

The domestic Australian tax laws do not contain any tax sparing provisions protecting the benefit of what might happen to be a relatively low rate of Australian tax in certain cases against the inroads of higher taxes in the investor's country of residence.

2.4 The Australian income tax laws do contain incentives in favour of certain industries — for example, mining, afforestation and rural development etc. — although none of these incentives is specifically designed to either encourage or discourage foreign investment or participation as such. To a more limited extent, some incentives of the same general type are also contained in other tax laws, such as death duty and succession taxes and sales taxes.

In terms of tax revenue in Australia, income taxes, which are imposed solely by the federal government, far outweigh any of the other forms of taxation, such as customs and sales taxes, which are also imposed by the federal government, and stamp and death duties and land taxes, which are imposed generally at the state level. Because of this, it is felt desirable to restrict special tax incentives to the area of income tax law so far as economically feasible, thus enabling the other less significant types of tax to be kept simple and relatively inexpensive to collect.

3. TAX TREATMENT OF INCOME EARNED BY THE JOINT VENTURE OR PAID BY IT TO THE FOREIGN PARTICIPANTS

3.1 *Income earned by the joint venture*

3.1.1 The main types of Australian tax which would be relevant to an Australian incorporated joint venture corporation operating in Australia as envisaged would include federal income tax, sales tax and customs tariffs or import duties and also state stamp duties and land tax and local government land rates.

3.1.2 Federal income tax is imposed on the yearly "taxable income" as computed under the Income Tax Assessment Act. For this purpose, the "assessable income" is first calculated; this represents the gross receipts of an income as distinct from a capital nature. Next, "allowable deductions" are calculated; these include all outgoings of a revenue nature incurred in earning the "assessable income", plus certain concessional or incentive type deductions. The "taxable income" is then calculated as being the "assessable income" minus "allowable deductions".

Prima facie, a resident of Australia is taxed on income from all sources, whether in or out of Australia. However, there is an exemption in favour of foreign income which has been taxed in its country of source, unless that country of source happens to be a country with which Australia has a tax treaty, in which case tax credit provisions normally operate instead. A non-resident of Australia is subject to Australian income tax only on income derived from sources in Australia.

A joint venture corporation of the description presently under consideration would be regarded as a resident of Austra-

lia, even if for no other reason than the fact that it is incorporated in Australia.

At the present time (mid 1974), Australian income tax is imposed on the taxable income or profits of corporations at the rate of 47½ percent in the generality of cases.

Australia has a two-tiered income tax system in the case of corporate profits. First, there is tax imposed on the corporation itself, and then the shareholders are separately taxed on the dividends distributed to them, because such dividends must be included by a resident shareholder as part of his normal assessable income for tax purposes. This double taxation is, however, alleviated by a system of tax rebates in the case of inter-company dividends passing from one corporation to another resident corporation.

In the case of dividend and interest payments from an Australian corporation to a non-resident shareholder, a flat withholding tax is imposed, at the rate of 10 percent on interest payments and at the rate of 15 percent on dividends to countries with which Australia has a tax treaty and 30 percent to all other countries.

In the case of a "public" company, which concept includes a subsidiary of a "public" company whether the parent company is an Australian company or an overseas company, there is no obligation for tax purposes requiring profits to be distributed. However, in the case of a "private" company, an additional penal rate of tax is imposed on the company unless in effect a specified proportion, usually about one-half, of the company's profits remaining after primary company tax is distributed through to the ultimate natural person shareholders.

The foregoing is only a brief outline of the income tax system in Australia, and cannot be regarded as necessarily accurate in any particular case. Naturally, the domestic legislation and the provisions of various tax treaties contain numerous and varied qualifications on the foregoing — for example, as to the deemed source of certain types of income, the existence or non-existence of a permanent establishment, and the special treatment of royalties and mining, insurance, international transport and other types of businesses.

Federal sales tax is imposed, in effect at the wholesale level, on a wide range of goods sold within Australia. Federal customs tariffs or import duties are imposed on a wide range of goods imported into Australia. The rates of tax vary considerably, especially in the case of customs tariffs, depending on the type of goods concerned.

State stamp duties are imposed at relatively low rates on a wide range of legal and commercial documents, varying from one state to another. State land tax and local government rates are imposed at relatively low rates on the ownership of land.

3.1.3 The tax treatment of the type of joint venture corporation presently under consideration would not vary from the tax treatment of other domestic corporations, except to the extent implicit in the above description of the income tax system. For example, the income tax on dividend and interest payments to overseas residents differs from the treatment of such payments to Australian resident recipients, but that is so whether the overseas parties represent a controlling interest or an equal interest or only an isolated minority interest in the particular company.

3.1.4 If the foreign equity participation is contributed to the joint venture company by way of capital assets, then such assets

become the property of the joint venture company itself, and as such are not treated for tax depreciation purposes in any different way from any other assets acquired by the joint venture company through whatever means. Obviously, the depreciation treatment of assets can be affected by their method of acquisition, but the fact that they may be contributed by a foreign participant in the company does not per se have any significance for this purpose.

3.1.5 An Australian equity participant in an ex-Australian joint venture corporation corresponding to the type of joint venture corporation under consideration would not be subject to any special tax treatment in Australia by reason of such investment. Such an investor is treated in the same way for tax purposes as any other Australian investor in any other type of overseas corporation.

3.1.6 Although there is no special tax treatment of an Australian investor in an overseas joint venture corporation, the Australian tax incidents of such an investment may nevertheless vary from the tax treatment of an investment in a foreign subsidiary company. This is because a foreign subsidiary company will usually be treated as coming within the definition of "resident of Australia" in the Income Tax Assessment Act which would not normally be the case with a foreign joint venture corporation. Comparable consequences are also likely to arise under the provisions of the various tax treaties. The important point for present purposes, however, is that none of these possible differences in treatment is specifically directed towards the situation of a foreign joint venture corporation as such.

3.2 *Dividends distributed by the joint venture*

3.2.1 Dividends distributed by the type of joint venture corporation presently under consideration to its foreign participants would normally be subject to tax in Australia, in addition to the tax imposed on the joint venture corporation itself. Such tax takes the form of a flat withholding tax on the amount of the dividend, at the rate of 15 percent when the dividend is paid to a resident of a country with which Australia has a tax treaty and at the rate of 30 percent in the case of a dividend paid to a resident of a country with which Australia does not have a tax treaty. The foregoing is subject to certain special exceptions under the domestic income tax law and the provisions of certain tax treaties. The main such exceptions relate to situations where the foreign resident also happens to come within the definition of "resident of Australia" in the Income Tax Assessment Act or "Australian resident" in certain tax treaties, or where the foreign resident happens to have a permanent establishment in Australia and the dividends are effectively connected with that permanent establishment. Where such exceptional situations occur, the general rule is that the particular recipient of the dividend is treated for tax purposes in the same way as a normal Australian resident recipient of the dividend would be treated, subject of course to the effect of the permanent establishment provisions in the various tax treaties.
The foregoing is necessarily a general statement only, as the position on this subject can in fact become quite complicated in particular cases.

3.2.2 The tax treatment of dividends as described above does not vary in any way from the tax treatment of dividends paid

to non-residents by any other types of Australian domestic corporations.

3.2.3 The tax treatment of the joint venture corporation's dividends in the foreign participant's country of residence will of course depend on the tax laws of that particular country. It may also be affected by the provisions of a tax treaty which Australia may have with that particular country, especially if the existence of a permanent establishment is relevant. Except once again for the possible effect of tax treaty provisions in a particular case, the Australian tax treatment of dividends paid by an Australian corporation to a non-resident of Australia is not affected in any way be the fact that those same dividends may also be subject to tax in the recipient's country of residence, whether the recipient is a natural person, a corporation or a parent company etc.

3.2.4 In a case where a dividend distributed by an Australian company to a non-resident of Australia may be taxable in the recipient's country of residence as well as in Australia, there is no unilateral provision in the Australian domestic income tax law to avoid the imposition of such double taxation.

However, in the case where an Australian resident receives a dividend from an ex-Australian corporation, there is provision in the Australian tax law for the Australian recipient to be granted a credit against Australian tax for the amount of tax paid on the dividend in the other country, provided that the Australian recipient was personally liable for that tax under the law of the other country. This last mentioned condition has the effect of denying the tax credit in many cases where the tax in the other country concerned takes the form of a withholding type of tax.

As for tax treaty provisions applicable in the above situations, the general pattern under Australia's international tax agreements is that the tax in the country where the company concerned is a resident is limited to 15 percent of the amount of the dividends, and the recipient's country of residence is obliged to give a tax credit for the amount of that tax. This is, of course, subject to exceptions in special cases, such as where dual residents are involved or where the recipient of the dividend maintains in the other country a permanent establishment with which the dividend is effectively connected. At present, Australia has six comprehensive international tax agreements in force — with the United Kingdom, the United States, Canada, New Zealand, Singapore and Japan — and two limited agreements — with France and Italy, dealing solely with international air transport operations. A comprehensive agreement has also been entered into with West Germany, but has not as yet been given the force of law in Australia. Naturally, the detailed provisions relating to dividends do vary from one agreement to another, but the general effect for present purposes is the same in all of the six comprehensive agreements. It should be noted that, in the case of some of these tax agreements, there are provisions for the allowance of a credit not only in respect of the amount of tax on the dividend itself, but also in respect of a proportionate party of the tax imposed on the underlying profits out of which the dividend is paid.

It should also be noted that, in many cases, an Australian resident corporation which receives a dividend from an overseas corporation will in effect not be liable for Australian tax on that dividend in any event, because of the rebate provisions applicable to inter-company dividends as

briefly referred to in item 3.1.2 above.
There are no provisions relating specifically to dividends paid by or received from a joint venture corporation as distinct from any other type of corporation.

3.2.5 The Australian domestic tax laws do not contain any tax sparing provisions designed to preserve the benefit of special tax incentives which may be available in some other country. Tax sparing provisions of this nature are contained in one only of Australia's international tax treaties — that with Singapore. However, in that case, the provisions do not relate to dividends, but only to interest and royalties.

3.3 *Interest and similar fixed amounts payable by the joint venture*

3.3.1 Interest payable on borrowings by the type of joint venture corporation presently under consideration would, in almost all cases, be treated as an allowable deduction in computing the taxable income of the joint venture corporation for Australian tax purposes. The main prerequisite to be satisfied for such deduction is in section 51 of the Income Tax Assessment Act, which lays down the general rule for deduction of all types of business expenses, and which states that "... All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.".

3.3.2 The tax deductibility of interest is not affected by the proportion of equity and loan capital in the particular corporation.
There are no Australian provisions relating to the tax deductibility of interest as such under which interest paid by a wholly owned subsidiary of a foreign corporation could be treated differently from interest paid by any other local corporation. There is, however, a general provision relating to Australian businesses controlled abroad, under which the income tax authorities have a discretion to assess income tax without strict regard to the individual transactions of the Australian business if they feel that these transactions are being manipulated in such a way as to avoid Australian tax. These provisions are somewhat similar in principle to corresponding provisions commonly found in international tax agreements, they do not relate specifically to interest payments as such nor to the deductibility or assessability of any other specific type of transaction, and they are probably not very frequently invoked.

3.3.3 Interest paid by the type of joint venture corporation presently under consideration is normally subject to Australian income tax. If the interest is received by another resident of Australia, then it generally has to be included by that resident in his assessable income for Australian tax purposes.
If the interest is paid to a non-resident of Australia, then in the usual case, it will be subjected to Australian withholding tax. This withholding tax on interest operates in a similar way to the withholding tax on dividends, except that the rate of withholding tax on interest is 10 percent of the amount of the interest. Once again, there are exceptions to the general rule, particularly where the overseas recipient also happens to fall within the definition of a

"resident of Australia", or where the non-resident recipient has a permanent establishment in Australia and the interest receipt is effectively connected with that permanent establishment.

One class of exceptions to the general rule is perhaps worth special mention. These are exemptions available from the liability for interest withholding tax broadly in cases where the overseas borrowing is used to support Australian ownership of or substantial participation in Australian enterprises. These exemptions are available subject to the obtaining of an appropriate certificate of exemption from the Australian tax authorities, who must have regard to certain guidelines contained in the income tax legislation when granting such certificates.

In broad substance, the main such guidelines for exemption require that the borrower and user of the funds concerned must be an Australian entity as defined, the loan must not exceed an amount appropriate to the degree of Australian participation in the enterprise, and the loan funds must be used for a "qualifying use", which means in effect, for the purposes of an enterprise which is either wholly or substantially owned by an Australian entity as defined. The degree of substantial Australian participation required in connection with the above guidelines varies between 20 percent and 40 percent depending on the number of entities owning or participating in the enterprise in question. The tax regime in the case of bearer debentures issued outside of Australia for funding activities in Australia is somewhat different again, but there is provision for a type of withholding tax and for exemptions broadly corresponding to those mentioned above.

Obviously, these exemption provisions can be of primary importance in the context of joint ventures, and careful consideration of the details of the provisions is required in designing any joint venture vehicle to operate in Australia. The provisions themselves are lengthy and complex, and it is beyond the scope of the present study to explain them in detail.

3.3.4 Whether or not the interest payable in the above type of situation will be taxable in the foreign recipient's country of residence will of course depend upon the tax laws of that particular country.

3.3.5 If the interest is taxed in the foreign recipient's country of residence as well as being subjected to withholding tax in Australia in the type of situation under consideration, then there is no unilateral provision in the Australian domestic tax law to avoid this double taxation. If the situation is reversed, and a resident of Australia is receiving interest from a comparable foreign source in a country with which Australia does not have a tax treaty, then the interest will normally be completely exempt from Australian tax if tax has been paid on it in the foreign country of source; compare this system with dividends, where a rather restrictive tax credit system is used instead of exemption — see item 3.2.4 above.

Reverting to the original situation, where there could be tax on the interest in the foreign recipient's country of residence as well as Australian withholding tax on the interest, it should be noted that, even where the foreign recipient's country of residence has a system of tax credits generally for such situations, the tax credit may not always be available to the foreign recipient. This is because such tax credits are normally allowed only in respect of tax

imposed by the country of source of the interest, and the situations in which Australian withholding tax on interest can be applicable are not always cases in which another country will treat the interest in question as having an Australian source. For example, the general rule is that Australia imposes withholding tax on interest derived by non-residents which is paid either by a resident of Australia to a non-resident or by one non-resident to another — in the former case to the extent that the interest is not an outgoing incurred by the resident in carrying on business outside of Australia through a permanent establishment there, and in the latter case, to the extent that the interest is an outgoing incurred by the non-resident in carrying on business in Australia through a permanent establishment in Australia. This rule does not necessarily, of course, correspond with the general rules for determining the source of interest payments, under which factors such as the place of documentation of the loan and the place and currency of repayment of principal and payment of interest are taken into account.

Australia's various comprehensive tax treaties do contain provisions against double taxation, including double taxation of interest payments. In the case of the four modern style agreements — those with United Kingdom, New Zealand, Singapore and Japan — these provisions are similar in general principle to the provisions relating to dividends. In other words, there are reciprocal provisions under which the tax imposed in the country of source in respect of interest paid to a resident of the other country is limited to a rate of 10 percent of the amount of the interest, and there are then provisions for a tax credit to be given in the country of residence of the recipient. Once again, of course, there can be exceptions in the case of dual residents and income receipts effectively connected with permanent establishments etc. In the case of Australia's two older style tax agreements — those with the United States and Canada — there are no reciprocal tax limiting provisions applicable to the country of source of the interest, but there are reciprocal tax credit provisions. However, it should be noted that the abovementioned problem of double taxation which can arise where there is conflict between the laws of Australia and the laws of the other country concerned as to the source of interest payments is not really solved by the credit provisions in Australia's two older style tax agreements, although it is effectively solved for most purposes by the tax credit provisions in the four modern style agreements.

It should also be noted that, under the general rule contained in the Income Tax Assessment Act as already referred to above, interest payments received by a resident of Australia from sources outside of Australia which have been subjected to tax in the country of source are exempt from further tax in Australia. This general exemption rule continues to have effect in cases where the United States and Canadian tax treaties may be applicable. However, in cases where the provisions of the four modern style tax agreements limiting the amount of tax in the country of source of the interest are applicable, this general exemption rule in Australia is superseded by section 12 of Australia's federal Income Tax (International Agreements) Act, and a tax credit is allowed instead.

There are no special provisions applicable in Australia to interest payments received from a foreign joint venture corporation as distinct from any other type of foreign source.

3.3.6 The only example of a tax sparing provision applicable to preserve the benefits of a special tax incentive available in some other country is, as already mentioned above, under Australia's tax treaty with Singapore. Under article 18 of that treaty, there are tax sparing provisions to preserve the benefit of certain Singapore tax incentives granted in respect of interest and royalties under Singapore's Economic Expansion Incentives (Relief from Income Tax) Act.

3.4 *Royalties and similar payments mady by the joint venture*

3.4.1 The tax treatment of royalties can vary according to the three broad categories of royalties — namely, industrial royalties, mining royalties and cultural royalties. Under Australian domestic tax law, there are quite complicated provisions for determining the source or deemed source of royalties, but it is not possible to examine these rules in detail in the present context. It should be noted, however, that these special source rules can lead to double taxation in certain cases where the particular royalty might be treated as having a source in both Australia and in some other country concerned under the respective tax laws, and this situation can arise even where a tax treaty is involved.

As a general rule, royalties of all kinds paid by a joint venture corporation in the type of situation presently under consideration would be treated as allowable deductions in computing its taxable income for Australian tax purposes, subject mainly to such royalties constituting an outgoing of a revenue nature, as distinct from a capital nature, in accordance with the provisions of section 51 of the Income Tax Assessment Act as quoted in item 3.3.1 above.

3.4.2 The provisions governing the tax deductibility of royalty payments are not affected merely by the fact that the payer of the royalty may be a wholly owned subsidiary of a foreign corporation as distinct from a joint venture company or any other type of payer, unless of course the general provisions relating to Australian businesses controlled abroad, as referred to in item 3.3.2 above, come into force in a particular case.

3.4.3 Under Australian domestic tax law, royalty payments by the type of joint venture corporation under consideration to a non-resident of Australia would normally be subject to Australian tax. Moreover, this tax is not a withholding type of tax as in the case of dividends and interest, but the royalty is treated more or less like any other type of income derived from sources in Australia. The taxability of the royalty would be dependent on its having a source or deemed source in Australia, but the domestic rules as to source of royalties are such as to give a deemed Australian source even to some types of royalties which might not normally be regarded as having an Australian source.

The position can vary somewhat from the above where a tax treaty is applicable. For example, under Australia's four modern style tax agreements, there are reciprocal provisions limiting the amount of tax in the country of source of the royalty to 10 percent of the amount of the royalty, except in the case of the agreement with New Zealand where the limit is 15 percent of the amount of the royalty. The foregoing treaty provisions apply to most types of royalties, except for mining type royalties, although the scope is somewhat narrower in the agreement with Singapore than in the other three modern agreements. These

tax limiting provisions generally do not apply in cases where, for example, the royalty is effectively connected with a permanent establishment in the country of source.

The royalty provisions in the older style tax agreements with the United States and Canada are much narrower than the above, and they have the general effect of requiring taxation only in the country of residence of the recipient in cases of most types of cultural royalties. In cases not covered by the above special royalty provisions, the particular royalty may come within the definition of "industrial or commercial profits" — for example, as in the agreement with United Kingdom, in which case it will be subject to Australian tax if it is also effectively connected with a permanent establishment of the non-resident in Australia, but generally not otherwise. The Japanese agreement is similar in this respect to the United Kingdom agreement. In the older agreements with the United States and Canada, royalties are specifically excluded from the definition of "industrial or commercial profits", and thus, apart from the special provisions mentioned above in relation to certain cultural royalties, their taxation falls to be determined normally under the domestic laws of each country concerned.

As can be seen from the above, the position regarding royalties is nowhere near as uniform as it is in relation to dividends and interest, and it would be fair to say that there are many anomalies and some instances of double taxation inherent in the existing provisions. Because of this, it is not possible in the present context to give an accurate detailed description of the position, and in practice it is necessary to look closely at each particular case.

3.4.4 The question of taxability of the royalty receipts in the foreign participant's country of residence will of course depend upon the domestic tax laws of that particular country.

3.4.5 In a case where the royalty payment in the type of joint venture situation presently under consideration may be subject to tax in the foreign participant's country of residence as well as in Australia, there are no provisions in the domestic tax laws of Australia to alleviate such double taxation.

However, where one of Australia's comprehensive tax treaties is applicable, the general tax credit provisions in those treaties will normally avoid the incidence of double taxation, but there are nevertheless significant examples where this relief from double taxation is not available, particularly in the case of the older style treaties with United States and Canada, where there is some lack of effective provisions for resolving conflicts as to the proper source of royalties.

There are no special measures applicable in relation to foreign joint venture corporations as such when compared with royalties received from any other type of foreign source, although perhaps this should be qualified by mentioning that there are "special relationship" provisions applicable in relation to royalties under some of Australia's tax treaties, whereby the actual amount of a royalty can be adjusted to a reasonable arm's length basis for tax purposes where there is some special relationship between the payer and the payee of the royalty.

3.4.6 As mentioned above, there are no special tax sparing provisions in the Australian domestic tax law to preserve the

benefit of special tax incentives which may be available in some other country. However, as also mentioned above, there is one specific example of such a tax sparing provision in Australia's tax treaty with Singapore — namely, a provision applicable in relation to interest and royalties to preserve the benefit of certain tax incentives under Singapore's Economic Expansion Incentives (Relief from Income Tax) Act.

SUMMARY

1. *Definitional concepts*

The Australian legal system and commercial practice are along similar lines to the United Kingdom and United States.

The Australian constitutional system is a federation, with the federal government having powers relating to national economic management, but with the constituent states having powers relating to the formation and conduct of business corporations.

Business corporations are of the traditional type, having separate legal personality etc. They are controlled by shareholders and managed by a board of directors.

2. *Tax incentives*

Foreign investment in Australia tends to be controlled by federal government policies from time to time, rather than by specific laws. These policies are implemented through the application of wide discretionary powers given to various federal government agencies, particularly in the areas of exchange controls and control of foreign takeovers of existing Australian businesses.

Australia does not have a system of special tax incentives or disincentives relating to foreign investment as such, and certainly no such tax provisions specifically directed towards the degrees of local and foreign participation in Australian joint ventures.

Because of this, there are also no specific tax sparing provisions designed to preserve the benefit of local incentives. The only instance of special tax sparing provisions is in the Australia/Singapore tax treaty, there designed to preserve the benefit of certain Singapore tax incentives in respect of royalties and interest payments.

There are tax incentive provisions, relating to mining, afforestation and rural development etc., but these are not reserved exclusively for either foreign or local investment. For most practical purposes, these incentives are confined to the area of income taxes, which constitute the most significant form of taxation in Australia.

3. *Tax treatment of income earned by the joint venture or paid by it to the foreign participants*

3.1 Income earned by the joint venture

The main types of Australian taxes for present purposes are federal income tax, sales tax and customs tariffs and state stamp duty, land tax and local government land rates.

Federal income tax is generally imposed on the yearly taxable income, which is in effect gross revenue receipts minus gross revenue outgoings. Prima facie, a resident of Australia is taxed on worldwide income, but has a tax exemption for most types of foreign income which has been taxed in the country of source. A non-resident is taxed basically only on Australian source income. In the case of corporations, the tax is imposed on dividends paid to shareholders as well as on the profits of the corporation itself, but there are rebates in respect of inter-company dividends received by a resident company. In the case of non-resident recipients, a flat withholding tax is generally imposed on dividend and interest payments.

There is no special income tax treatment of a joint venture corporation as distinct from any other type of corporation, nor of an investor in such a corporation as distinct from any other type of investor.

3.2 Dividends distributed by the joint venture

Dividends distributed by the Australian joint venture corporation to a foreign participant would normally be subject to a withholding tax, at the rate of 15% for tax treaty countries and 30% for other countries. There are exceptions relating to dual residents and permanent establishment situations etc.

The tax treatment does not vary in any way merely because a joint venture corporation may be involved.

In a case of double taxation, there are no relief provisions in the Australian domestic tax law, but in the reverse case, there are tax credit provisions for an Australian resident receiving dividends from a foreign source. However, where a tax treaty is involved, the general pattern is for there to be a tax limiting provision applicable to the country of source of the dividend, with the country of residence being required to give a tax credit.

At present, Australia has six comprehensive tax treaties, comprising modern style treaties with the United Kingdom, New Zealand, Singapore and Japan, and older style treaties with the United States and Canada.

3.3 Interest and similar fixed amounts payable by the joint venture

Interest payable on borrowings by the joint venture corporation would normally be allowable deductions for Australian income tax purposes, and this is not affected in any way by the relative proportions of equity and loan capital. There is no differentiation for this purpose between joint venture corporations and wholly owned subsidiaries, except possibly under general discretionary tax adjustment provisions relating to Australian businesses controlled abroad.

Interest paid by the joint venture corporation to a non-resident participant would normally be subject to Australian withholding tax at the rate of 10%. Once again, there are exceptions relating to permanent establishment situations etc. Cases of double taxation can occur, particularly because Australian withholding tax is applied in some situations where another country might not regard the interest as having a source in Australia. The Australian domestic tax law does not contain any unilateral relief provisions for these cases, although in the reverse situation, an Australian resident receiving interest payments from a foreign source will normally be exempt from tax on those payments in Australia provided they have suffered tax in the country of source.

Australia's four modern style tax treaties contain tax limiting and tax credit provisions relating to interest similar in principle to those relating to dividends as described above. The two older style tax treaties do not contain the same type of tax limiting provisions, but they do contain relevant tax credit provisions. Nevertheless, these tax credit provisions do not solve all the conflicts as to source of interest.

Australia's only specific tax sparing provision is in the Australia/Singapore tax treaty, where it is designed to preserve the benefit of certain Singapore tax incentives in respect of interest and royalty payments.

3.4 Royalties and similar payments made by the joint venture

The tax treatment of royalties can vary according to whether they are of the industrial or mining or cultural type.

Australia has special provisions as to the source or deemed source of royalties, which can sometimes lead to cases of double taxation where there is conflict with the tax laws of another country as to the proper source.

As a general rule, royalties of all kinds payable by the Australian joint venture corporation would be allowable deductions for Australian tax purposes, provided they are of a revenue and not a capital nature. There is generally no distinction for this purpose between joint venture corporations and wholly owned subsidiaries etc., except possibly under the provisions relating to Australian businesses controlled abroad as mentioned above.

Royalties paid by the joint venture corporation to a foreign participant would normally be subject to ordinary Australian tax as distinct from a withholding type tax.

Under Australia's four modern style tax agreements, there are reciprocal tax limiting and tax credit provisions applicable in respect of most types of royalties except mining royalties. There are exceptions in the case of permanent establishment situations etc. The two older style tax treaties have much narrower provisions relating to royalties.

Even where tax treaty provisions are applicable, instances of double taxation can still occur, because of gaps in the rules for resolving source conflicts.

Royalties paid by a joint venture corporation are not treated differently from royalties paid from any other source, except that some of the tax treaties contain "special relationship" provisions which could be applicable in a joint venture situation.

As already mentioned, there are no tax sparing provisions, except for those in the Australia/Singapore tax treaty designed to preserve the benefit of certain Singapore incentives in relation to royalties and interest payments.

ADDENDUM

Since initial preparation of this report, the Australian federal government's budget for 1974-1975 has been announced. It contains proposals which are relevant to some matters dealt with in this report.

Perhaps the most significant such proposal is the introduction of a capital gains tax very similar in character to the Canadian capital gains tax system. There are also proposals for amendment of some of the existing tax incentives applicable to such areas as the mining industry, mainly by way of reduction of these incentives.

B. H. BLANKSON: *

GHANA: TAX CONSEQUENCES OF DOMESTIC AND FOREIGN INTERESTS ESTABLISHING CORPORATIONS AS VEHICLES FOR JOINT VENTURES**

I. INTRODUCTION

In a developing country it is necessary to encourage investment from both domestic and foreign sources. The form of encouragement used to attract investment will primarily depend upon the natural resources or raw materials available and the economic infrastructure of the developing country in question.

The present trend of developing economies in both industrial and less developed countries has been geared towards the interdependence of the advances being made in the technological and scientific fields. The tendency of "go-it-alone" is giving way to a meaningful dialogue between the advanced and semi-advanced countries, for instance, the advanced countries give the benefit of a rich experience acquired over the years in applying scientific methods to the management of agriculture, and the primarily agriculturally oriented countries of the third world supply the basic tools which are necessary for research and development. This situation lends itself to domestic and foreign interests establishing joint ventures.

Although there may exist a favourable investment climate in many developing countries there are factors which may militate against the establishment of joint ventures.

Constant changes in the tax laws, exchange control restrictions and an unstable political atmosphere are a few of the disturbing factors for prospective investors.

Nevertheless, international co-operation and the various groupings on the international scene, and free exchange of information amongst states tend to eliminate the fears which once prevailed.

The independence achieved by many previously dependent states and the desire of their governments to achieve international recognition and to openly volunteer information about the natural resources to be tapped for the benefit of mankind tend to encourage domestic and foreign interest to establish joint ventures. Attempts have been made by various governments to reduce the fiscal obstacles which stand in the way of the establishment of such ventures. In Ghana, for example, there are various incentives and inducements to foreign investors to invest in Ghana in joint ventures or otherwise. As will be spelled out in more detail in the following, these take the form of tax measures such as

1. Tax holidays
2. Capital allowances
3. Employment tax credits
4. Indirect tax benefits; and
5. Double taxation relief.

There are non-tax measures as well, such as guarantees for the repatriation of ori-

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** Report submitted to the 28th congress of the International Fiscal Association, Mexico City, 1974.

ginal capital and for the transfer of dividends.

The encouragement, by tax measures and otherwise, of domestic and foreign interests to engage in joint ventures is subject to influences of both a positive and a negative kind.

Positive ones may be listed as follows:

1. There is a growing awareness that the survival of mankind requires people and countries to move together in accordance with a common policy and with unity of purpose on the basis of equal rights for all.
2. Regional, continental and international associations have emerged all with the common aim of harmonising tax systems and disseminating information among member states.
3. In many countries obnoxious and discriminatory national tax laws are being eliminated.
4. Steps are being taken on the international level to eliminate over/under invoicing of cost of raw materials, semi-processed goods, and finished commodities.
5. The knowledge of tax-experts is being utilised by governments and international organisations for the benefit of both domestic and foreign interests.
6. As various governments use tax policies to regulate economic activity the effectiveness of such policies can be measured by the economic growth generated by tax induced active participation of domestic and foreign investors.

The negative influences may be listed as follows:

1. The diversity and complexity of non-tax policies pursued by various national and international authorities, sometimes act as a barrier to any meaningful negotiation to achieve development goals by the use of tax measures.
2. Certain states take an indifferent attitude to the use of more advanced technology to promote local or national interests.
3. There is genuine fear that groupings with common ties or loyalties may usurp the supra-national powers given to international organisations; language and cultural barriers also impede communications.
4. Some governments are reluctant to accept such supra-national controls and procedures necessary to implement common and harmonised tax policies adopted by such international bodies.

It would seem that the positive factors, working in favour of using tax measures to generate investment from both domestic and foreign sources outweigh the negative ones. An abundance of national resources, viz. raw materials, technical know-how, administrative expertise, and monetary reserves may sometimes tend to cloud the thinking of certain governments and lead to a narrow approach to international issues. The present economic trend however, supports the view that no single nation can be self-sufficient and complacent about its achievements and successes, they all must look to the future and involve themselves with the international community. In this respect, it can be said that Ghana has not lagged behind in the search for positive partnership. In the field of agriculture, manufacturing and industrial organisations, Ghana has made use of tax incentives to encourage both domestic and foreign resources to establish enterprises, among them joint ventures. The policy of the Government is realistic as far as granting tax concessions and incentives is concern-

ed. Typical examples of joint ventures established withing this framework, usually on the basis of special agreements, are the mighty Volta dam at Akosombo, the oil refinery at Tema, and the bauxite mine at Kibi, just to mention three important ones.

II. TREATMENT OF TAX ON INCOME FROM JOINT VENTURES

Tax is imposed on all profits after the deduction of allowable items. In so far joint ventures are not corporations, the tax regime will be the one applicable to partnerships, the partners being separately taxable each on his share of the partnership profits. Individual partners will thus pay tax at rates of between 5% and 70% of assessable income. However, a non-resident's contribution shall not be less than 30% of the taxable income.

Corporate partners pay at the company tax rate. For corporations licensed under the Customs and Excise Decree, 1972, (mining, manufacturing or agricultural companies) the rate of tax is 50%, whilst all other corporations attract a tax rate of 55%. A special, lower rate is applied to small Ghanaian owned companies (see below).

If a non-resident person carries on a trade, business, profession or vocation in Ghana, part of the operations of which are carried on outside Ghana, the full gains or profits of that trade, business, profession or vacation shall be deemed to be derived from Ghana. Provided that:

(a) a person shall not be deemed to be carrying on a trade, business, profession or vocation in Ghana by reason of a mere supply of goods or services to Ghana if his activities are carried on entirely outside Ghana;

(b) in the case of a company operating in Ghana which is a branch or subsidiary or associated company of a non-resident company, the profits shall not be less than the proportion to the total consolidated profit of the whole group of the associated companies which the turnover of that company bears to the total consolidated turnover of the group of associated companies.

Income from farms becomes liable to tax after five years. In other words, farms are exempt from the payment of income tax during a five year period from the date of their establishment. Furthermore, any losses incurred in the first five years can be carried forward.

There are certain sectors of the economy reserved for Ghanaians under the Ghanaian Business (Promotion) Act, 1970. Paragraphs 12 and 13 provide that no person other than a Ghanaian shall on or after the 30th day of June, 1971 own or be part owner of any enterprise engaged in any of the following:

(a) overseas business representation,
(b) taxi services,
(c) the sale under hire-purchase contract of taxis or vehicles intended to be used in the operation of a taxi service,
(d) commercial transportation by land,
(e) bakery,
(f) printing other than printing textiles,
(g) beauty culture,
(h) produce brokerage,
(i) advertising and publicity, and
(j) manufacture of cement blocks for sale.

The income of companies wholly owned by Ghanaians whose turnover does not exceed ¢ 200,000 will during the first five years from the date of their establishment be liable to tax as follows:

Income		
First ¢ 5,000		30%
Next ¢ 5,000		35%
Next ¢ 10,000		45%
Next ¢ 20,000	(licensed under Excise) (Ordinance 1953 No. 31)	50%
Next ¢ 20,000	(Ordinance 1953 No. 31)	55%
Over ¢ 60,000	(depending on category)	50 or 55%

If actual profits are lower than 2½% of the turnover of a corporation or 2% of the turnover of a sole trader or a partnership, a minimum income of 2½% or 2% of turnover is assessed as taxable. Manufacturing and industrial corporations established under the Capital Investments Decree, 1973 are exempt from this provision.

III. TAX ON DIVIDENDS

The rule applied to dividends distributed by Ghanaian companies provides for an imputation of tax paid by the company against the income tax on the grossed up dividends accruing to the shareholders, i.e. basically the pre-1965 U.K. system. For corporate shareholders this implies that no additional tax falls due on the distribution of a dividend, nor will there be a refund.

IV. TAX ON INTEREST, RENTS, ROYALTIES ETC.

The Income Tax Decree, 1966 provides for the deduction of tax at source from certain specified income namely, interest, rent, royalties, etc. paid to non-residents. Such income may be wholly or partially exempt from tax by reason of double taxation agreements or special arrangements affording relief from double taxation.

The payment of interest, rent, royalties, etc. is allowed in full as a charge against taxable business profits.

V. TAX INCENTIVES

(a) *Tax holiday for certain new businesses*

The Capital Investment Decree, 1973 was enacted to encourage investment of foreign capital in new businesses in Ghana. Among the benefits provided in that Act is a "Tax Holiday" for a period of between one and five years. The length of the period of the "Tax Holiday" is determined at the time approval is granted by the Capital Investments Board set up under the Decree. With respect to losses during the tax holiday period, only those referring to capital allowances may be carried forward.

(b) *Investment allowance*

Where the Commissioner is satisfied that any industrial establishment has in its basis period incurred any capital expenditure in the acquisition of any plant or machinery wholly and exclusively for the purposes of the industry carried on by such establishment, the Commissioner shall, in addition to any other capital allowances granted, grant to such establishment an investment allowance equal to five per cent of the expenditure so incurred.

(c) *Sinking Fund Allowance*

The Sinking Fund Allowance is additional to other capital allowances and, in the official view, is not to be deducted in determining the residual basis on which subsequent annual and balancing allowances are to be computed. Like the investment allowance, therefore, it is given in addition to the net cost of the asset which is

allowed in full as initial, annual and balancing allowances.
This allowance is given only to companies and consists of 10% of the qualifying expenditure. It is allowed each year provided the Commissioner is satisfied that the following conditions are satisfied:
(a) An amount of money has been set aside by the company to form a sinking fund for the replacement of plant, machinery or fixtures, buildings, structures or works of a permanent nature or the assets of mines, oil wells or mineral deposits;
(b) A separate bank account in Ghana has been opened by the company for the sinking fund; and
(c) A sum of money has been paid into that account in the year of assessment amounting to not less than the total of the capital allowances for that year and the sinking fund allowance.

(d) *Employment tax credit*
Notwithstanding the provisions of any other enactment the Board may, in order to stimulate investment in labour-intensive industries, grant to a company approved under the Decree, an employment tax credit for a period not exceeding ten years from such date as the Board may determine.

(e) *Deduction for scientific research*
In determining the chargeable income of a person who has incurred capital expenditure on scientific research for the purposes of the development or advancement of an approved project, there shall be deducted from that income, if the Board so decides, every year for four years, beginning with the year in which he incurred the said expenditure, an amount equal to twenty-five percent of such expenditure, this is *not* in addition to the capital allowances granted under the Decree (provided that no deductions shall be made for expenditure invested in property in respect of which capital allowances are granted).

(f) *Exemption from indirect taxes and charges*
(1) An approved project may be granted any or all of the following benefits, namely,
(a) up to one hundred percent exemption from import and customs duties under the Customs and Excise Decree, 1972 (N.R.C.D. 114) and purchase tax under the Purchase Tax Act, 1961 (Act 67), for imported goods which are essential for the implementation and operation of the project and which cannot within a reasonable period be produced in sufficient quantities in Ghana: in any such case the exempted goods shall not be sold unless the corresponding duties are previously paid;
(b) up to one hundred percent exemption from export or excise duties under the Customs and Excise Decree, 1972 (N.R.C.D. 114) and sales tax under the Sales Tax Act, 1965 (Act 257), on goods produced by the approved project (provided that the goods exempted from export or excise duties are cleared through Customs).
(2) Any exemption granted shall be for a period not exceeding ten years.
(3) An exemption under (a) above shall only be granted after guarantees have been given to the satisfaction of the Comptroller of Customs and Excise that the exempted goods shall be used for purposes of the approved project.

(g) *Double taxation reliefs*
With the present high rates of tax in most countries, double taxation can be a cause of hardship to the individual and a severe

deterrent to international investment. Ghana has agreements for the avoidance of double taxation with the United Kingdom, the Gambia, Nigeria, Sierra Leone, Sweden and Denmark.

CONCLUSION

In conclusion, while evidently interested in developing domestic enterprises, Ghana encourages the fruitful participation of foreign investors in its economic development, and welcomes joint ventures at the moment. Ghana is actively involved in renegotiating the existing Double Taxation Agreements. The outcome may further favour investment. The prime intention is to encourage foreign participation in domestic enterprises.

L. P. DICKS *:

INQUIRY INTO PERSONAL INCOME TAX STRUCTURE IN PAPUA NEW GUINEA

SYNOPSIS

The Papua New Guinea Government is committed to economic growth through Government spending, to the achievement of a more equitable distribution of income, and to "the maximum practical progress towards financial self-reliance". [1] *It has recognised the necessity for using tax changes to meet these commitments by the appointment of the Committee of Inquiry on Taxable Capacity and Taxation Measures (Port Moresby, 1971).*

It will be argued here that the present system of direct taxation which may have been suited to pre-independence conditions and objectives is now outdated given the growth and equity objectives of the present Government. An analysis of the present system of personal income taxation shows it to be regressive over certain income ranges and geared in terms of progressivity to income levels many times higher than those generally prevailing in the indigenous sector of the Papua New Guinea economy.

The existing tax structure could be modified to allow the Government to raise much more revenue from the taxation of personal incomes and at the same time move towards a greater equality of incomes. Such modifications would be likely to have little adverse effect on the supply of effort or investible funds, while at the same time adding little to the costs of collection.

I. BROAD VIEW OF PERSONAL INCOME TAX STRUCTURE IN PAPUA NEW GUINEA

The present structure of personal income taxation has evolved in an ad hoc manner from an income tax/surtax system based on the British/Australian system and designed to tax only those with very high incomes, together with a tax on "chargeable income" (the so-called "mini tax") designed to raise revenue from a lower range of income groups. At present every individual with a chargeable income in excess of $ 416 is liable to pay the mini tax and every individual with a taxable income in excess of $ 208 is liable to pay ordinary tax. The existing tax structure is regressive over certain crucial income ranges and a higher percentage of income is taken from those at the lower and upper income levels. A regressive tax is here interpreted as one where the rate of tax decreases as the size of the tax base increases. The peculair incidence of the tax system can be seen by examining closely Table 1.

Apart from the income ranges to which they apply, the income tax and mini tax systems differ from each other in two major areas. Firstly, the mini tax is a function of income only whereas the income tax is primarily a function of income, marital status and familiy size. Income tax is also a function of the size of life insurance

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1. The Development Programme Reviewed. Port Moresby. P.N.G., 1971, p. 3.

payments, leave fares, medical and education expenses, all of which can be written off against the tax liability. As it is the higher income groups who tend to incur such expenses, these allowances have a regressive effect on the incidence of the income tax system.

When the combined impact to the uncoordinated growth of the two interdependent tax systems is examined, the illogical nature of the present taxation of personal incomes in Papua New Guinea is apparent. Table 1 shows for Papua New Guinea the percentage of personal income taken in tax at income levels up to $ 5000; similar figures for Australia are shown for purposes of comparison of principles involved. Total tax assessments in both Papua New Guinea and Australia are a function not only of income but also of family size. The percentages are presented for both a single man and a married man with one, two, three and four children. From the table it can be seen that in Papua New Guinea taxation of income is regressive:

1) for a married man with one child over the income range of $ 1200—$ 1800
2) for a married man with two children over the income range of $ 1200—$ 2200
3) for a married man with three children over the income range of $ 1200—$ 2400
4) for a married man with four children over the income range of $ 1200—$ 2800

The married man with four children would pay 2% of his income in direct tax if he earned $ 450 per annum, but only 0.9% if his income were $ 2200. This may be compared with the smoothly progressive taxation of a married man with four children in Australia. The main reason for the difference is that in Papua New Guinea the progressive income tax is linked with the mini tax which is not progressive over its range and which is simply paid at a flat rate of $ 20 after an income of $ 1000.

It can be seen from Table 1 that taxation in Papua New Guinea does eventually become progressive at different and higher income levels. However, in Papua New Guinea these high income ranges are of little importance compared with the lower income ranges into which the vast majority of the population fall. The regressive nature of the tax over the lower income ranges is therefore a dominant feature of the existing tax structure, and is inconsistent with stated Government policy.

Although it would seem irrational in itself to link an income tax system which grants allowances against tax liability with a mini tax system which does not, the irrationality is emphasised by the very large allowances granted. These allowances which are listed in Table 2 are, after many years of paternalistic administration, still remarkably similar to the Australian allowances on which they were first based. The effect of using allowances of similar magnitude in Australia and Papua New Guinea can be seen from the two countries' tax collection statistics. In Papua New Guinea in 1970 [2] only 66,306 individuals were subject to income tax. This may be compared with a total wage employment in the monetary sector of the economy in 1970 of 128,585 of which 74,988 were classified as being in the non-primary sector, and with a total population of 2,461,768. The number of individuals paying income tax was therefore only 2.7%

2. 1970 is the last year for which the necessary figures are available.
(a) Compendium of Statistics for Papua New Guinea, Department of External Territories, Canberra, A.C.T., June 1972.
(b) Eleventh Annual Report of the Chief Collector of Taxes, Port Moresby.

of the total population. In Australia under allowances of the same magnitude 41.8% of the population paid income tax in 1969.[3]

The term individuals refers to individual tax assessments which often relate to a family rather than a single person. For both Australia and Papua New Guinea, the percentage of the population caught in the income tax net will therefore be greater than the above individual/total population percentages. The comparisons between Australia and Papua New Guinea will be distorted to the extent that family size of those paying income tax differs between them.

It is not maintained that a similar percentage of the total population should pay income tax in Australia and Papua New Guinea. However, the two percentages do indicate the very different impact which results from a developing country blindly applying a system designed for a developed economy.

Thus, what I have suggested so far is that personal incomes in Papua New Guinea are taxed under two separate and uncoordinated systems, only one of which grants personal allowances which are based on family size. The result is that over the income ranges which are of most relevance to Papua New Guinea there is little progression and some regression in the system. The use, in the income tax system, of allowances based on Australian rather than Papua New Guinea income levels, excludes the bulk of the population (97.3%) from paying any income tax. Thus the potential of personal income taxation for income redistribution is neglected. At the same time a large source of potential Government revenue is only partly exploited.

Before looking at possible improvements in the overall system of personal income taxation, the rationale behind the rates of its component parts will be examined.

II. INCOME TAX ALLOWANCES

In most countries allowances vary over time with economic conditions and the prevailing Government's philosophy on income distribution. This is because there is no rational and clear-cut way of determining allowances.

In a high income economy with no tax similar to the Papua New Guinea mini tax, allowances have the effect of increasing the progressivity of the tax. This is because the lower a taxpayer's income, the greater the percentage reduction in his taxable income brought about by allowance. In Papua New Guinea, where income is also taxed under the mini tax system (which levies increasing absolute amounts of tax up to incomes of $ 1000 and levies a constant amount in absolute terms thereafter) the allowances have the reverse effect and make the overall income tax structure less progressive by raising the starting point at which the richer section of the community begin paying income tax. The result in Papua New Guinea, as already shown, is an overall system of personal income taxation which is regressive over several income ranges.

If the allowances cannot be justified on grounds of increased progression the only other possible economic grounds are that it is only reasonable to tax an individual once his income has risen above a certain subsistence level. This subsistence level is interpreted in developed countries as something more than simply a level at which

3. 1969 is the last year for which the necessary figures are available. Year Book, Australia, 1971.

an individual can physically survive. Allowances in Papua New Guinea cannot be justified on these grounds as individuals are taxed at income of over $ 416 per annum under the mini tax system and $ 208 per annum under the taxable income system, whereas the allowance for a spouse alone for income tax is $ 460. The argument often used to defend high allowances, that income tax is only designed to catch the income of the rich, could also be used for a highly progressive income tax with low allowances. But high allowances simply imply that high income individuals deserve an income well above that of the average individual *before* they pay any extra tax and before any redistribution of income takes place. In Papua New Guinea's case, this allowance alone is almost six times the country's average per capita income of $ 83.66 [4].

As with personal allowances, there is no single accepted method of allowing for wives and children in arriving at taxable income. The methods which have been adopted vary between the extremes of giving fixed marriage and child allowances and of splitting taxable income among the individuals who comprise a family. Papua New Guinea has adopted the Australian system which is at the former extreme. Marital and child allowances are very similar to those in Australia. Again, it is difficult to see the rationale of giving a child allowance which is three times the average per capita income in Papua New Guinea and an allowance for a spouse which is almost six times the average per capita income. It could possibly be defended on the grounds that it mitigates education costs, but this implies that the tax burden of high groups should be reduced for this purpose while low income groups receive no such concession.

Given the Papua New Guinea environment of extended family arrangements, formal allowances for legal direct dependents lose much of their relevance. If no tax is to be levied in Papua New Guinea on chargeable incomes below $ 416 per annum, it might be most appropriate for no specific allowances (apart from the implicit $ 416 allowance) to be given in Papua New Guinea. One effect of no allowance for families would be that single individuals (who normally save a larger percentage of their income than families) would have a comparatively reduced tax burden. This should lead to an overall increase in saving (voluntary plus forced) in the country.

In this context, it is interesting to note the comments contained in the recent Report on Development Strategies for Papua New Guinea compiled by a team of economic consultants from the Universities of East Anglia, Manchester and Cambridge.

"Regarding rates of tax, the report (Committee of Inquiry) proposed that the present exemption level of $ 416 should be retained but that, allowing for normal phasing-in provisions, the minimum rate that should be applied — even after the wife and children's allowances — should be five percent. We endorse the latter recommendation. Regarding the exemption

4. 1970 is the last year for which the necessary figures are available. Compendium of Statistics for Papua New Guinea. Dept. of External Territories. Canberra. A.C.T. June 1972. The income portion of this statistic is comprised solely of wages, salaries and marketed primary production. It excludes subsistence sector income, non-marketed primary production and any form of business income as it is attempting to arrive at a figure approximating *cash* income per head to be compared with allowances granted. Average per capita income for the *whole* economy is approximately $ 220.

level, we consider there may be strong administrative arguments for raising this *once the commodity withholding taxes and the general consumption tax are in operation*". [5]

However, later in the Report, the consultants express grave reservations concerning the administrative problems of introducing the highly sophisticated VAT at this early stage in Papua New Guinea's development. Thus, it would appear that the consultants, by rejecting the current practicality of the VAT, are in support of a policy of not increasing the present exemption level of $ 416 but advocate raising the minimum tax rate, even after the wife and children's allowance, to five percent. I would fully support any Government action taken to implement this policy and also suggest that a higher rate of progressivity be introduced into the tax rates for both single persons and married persons with dependents and that the former class of taxpayer be given a lower exemption level than the latter. Consideration should also be given to raising the existing differential between the tax rates imposed on single persons and married persons with dependents and to making tax rates totally progressive beyond the proposed minimum rate of five percent by abandoning the two separate and unco-ordinated tax systems. These recommendations are based on the preceding discussion, the information contained in Table 1 and the oft-stated Government objective of achieving the maximum practical progress towards financial self-reliance.

III. INCOME TAX RATES

At present there is a very low progression of tax rates over the income ranges which are of most relevance to the indigenous sector of the Papua New Guinea economy. Over the first $ 1000 of taxable income the rate of tax does not rise above 2.8%. This trend continues over the remaining income ranges for both single and married persons. For example, the tax rate for a single person increases by 1.9% between $ 1000 and $ 2000; by 2.1% between $ 2000 and $ 3000; by 1.9% between $ 3000 and $ 4000; 2.1% between $ 4000 and $ 5000.

This low rate of progression is inconsistent with the Government's objective of income redistribution. However, taking also its growth objectives, it would be defended on the grounds that the extra development resulting from the increased Government expenditure made possible by the greater revenue derived from a more progressive tax rate might be outweighed by the negative effects on growth caused by a reduction in incentives to work and invest. This aspect of the problem will now be briefly discussed.

IV. PROGRESSIVE INCOME TAXATION AND DISINCENTIVES

As income tax is levied not only on the income of employees, but also on the profits of unincorporated businesses, the effect of income tax on the supply of capital and the supply of effort must be examined.

A. *The supply of effort*

The direction of the effect of an increase in taxation on the supply of effort depends on the relative magnitudes of the

5. A Report on Development Strategies for Papua New Guinea. February 1973. p. 35.

income and substitution effects. For the increase to have an adverse effect on the supply of effort the substitution effect must outweigh the income effect. It is argued here that there is little likelihood of either effect being very strong.

Taking first the incentive to work for those already residing in Papua New Guinea, it is the marginal rate of taxation which is the relevant factor. As the real rate of progression and the corresponding marginal rates are low, it is likely that only a very small percentage of employees will have incomes sufficiently high for the tax to have a significant effect in either direction on the supply of effort. Most employees with incomes high enough to subject them to heavier marginal rates of taxation are likely to be in positions where the supply of effort is determined by factors other than income.

For potential employees outside the country who are considering employment in Papua New Guinea, it is the average rather than the marginal rates of tax which are relevant. At present, up to incomes of around $ 10,000 per annum, average Papua New Guinea rates of income tax compare favourably with those in most developed countries. If rates in Papua New Guinea do rise, it is comparatively easy for a company to reduce the tax burden of its expatriate employees by paying low salaries in Papua New Guinea and a large gratuity on the completion of the contract. This latter policy is already operative in certain areas of the public and private sectors of the Papua New Guinea economy. Expatriates working on Government or allied business can always have specific arrangements regarding taxation. In addition it is likely that very few expatriates have more than a vague idea of tax levels until after taking up their position, and even then the impact of the *method* of payment often distorts their usually subjective assessment of the income tax burden.

It is considered that expatriates are unlikely to choose between different developing countries on the grounds that they have different levels of income taxation, but that they are tempted to travel to a country by the vague idea that a country has low tax rates. It is normally very difficult to determine the exact incidence of direct taxation in a country of potential development. The situation is further complicated by indirect tax levels and their effect on the cost of living. Again the potential employee is unlikely to have little more than a vague idea of the cost of living or an outdated list of the cost of a few essential commodities.

B. *The supply of capital*

Even when the possibility of tax shifting is ignored, incentives to invest can never ultimately be a function of high personal income tax rates, as a privately owned firm can always incorporate itself thus ensuring that it never pays more than the ruling rate of company tax. It is unlikely that average income tax rates up to the company tax rate will be sufficient to deter the domestic investment of domestic funds. Most investment from external sources comes via large companies whose investment levels will be affected by the company tax rate rather than the personal rates. *It is therefore likely that personal income tax rates in Papua New Guinea could be made more progressive than at present with little effect on the supply of effort or capital.*

In the context, it is interesting to note the views of the Committee of Inquiry:

"... the development of the country must

provide adequate domestic revenue, *although care must obviously be taken not to make the tax burden so heavy that it discourages the initiative and enterprise on which economic development is based or proves too hard on salary and wage earners*". 6

Later in the report:

"The Committee came to the considered judgement that there is scope to reduce the margin of advantage, by *increasing the effective personal income tax rates over the next few years by an average of about 15 percent without having a significant impact on the recruitment and retention of expatriates.* (This means, for example, that a taxpayer who now pays 10 percent might eventually pay 11.5 percent)". 7

However, the recent Report on Development Strategies for Papua New Guinea states that:

"Despite their own argument, the Committee's report judges that there is scope for increasing effective personal income tax rates by an average of about 15 percent. Given what — by international standards — are the exceptionally low rates of personal income tax on higher incomes, *the Mission believes that this is the least that should be aimed for.* The Mission does not endorse the report's recommendation that 'the rate of tax in the highest bracket of individual income should be limited to about 40 percent' ". 8

The preceding analysis of the likely effect on the supply of effort and capital of raising the progressivity of personal income tax rates in Papua New Guinea would fully support the recommendations of the more recent Report.

A major determinant of the Committee's overcautious approach to raising the progressivity of personal tax rates appears to be its heavy reliance on the proposed value-added tax as a major source of internal revenue.

"The Committee thought that taxes of this kind (value-added taxes) although they sound complicated, are really quite simple to operate. They are in force in a number of European countries. One big advantage is that large amounts of revenue can be raised from a small percentage tax. The tax is fairly easy to police, it does not need complicated bookkeeping, and it does not discriminate against particular forms of production as is usually the case with taxes of a less general characteristic. *The Committee thought that it could be easily adopted for use in Papua New Guinea*". 9

The preceding analysis would again fully support the criticism made in the more recent (East Anglia) Report of these views.

V. CONCLUSIONS

Taxation of personal income in Papua New Guinea takes place under two different systems as a person may be able to pay income tax on either taxable income or chargeable income. The systems are therefore two parts of a single personal income tax structure.

The mini tax is assessed without any allowances being taken into account and reaches a maximum of $ 20 at an income of $ 1000 after which no additional mini

6. Report of Committee of Inquiry on Taxation. September 1971 p. 1.
7. Ibid. p. 26.
8. A Report on Development Strategies for Papua New Guinea. February 1973. p. 35.
9. Report of Committee of Inquiry on Taxation. September 1971. p. 4.

tax is levied. The income tax system grants large allowances based on family size which are deducted in arriving at taxable income. The combined effect of these two unco-ordinated taxes is that personal income taxation is regressive over several income ranges which are, and will continue to be, crucial to the indigenous sector of the Papua New Guinea economy. In other words, the existing tax structure takes a higher percentage of income from those at the lower and upper income levels and a lower percentage of income from those at the middle income levels.

Comments made by Dr. John Guise on the role of indigenous middle classes in helping to build a nation raise the question of whether such a tax structure is in fact a matter of deliberate Government policy.

"Sooner or later this country must learn to look after itself financially.

The importance of a middle class is that people of this type are very careful and thoughtful about political matters. Because they have valuable possessions which they do not wish to lose, they respect law and order and will strongly support a government which is able to keep law and order. Australia has a very strong middle class which has led to one of the most stable governments in the world. Political revolutions just do not happen there. One important result is that people in other countries are happy to invest their money in Australia and this foreign investment has helped greatly to develop the country.

In other countries, which are usually called 'developing' countries, there have been serious political troubles, dictatorships and military takeovers. In most cases there was little, if any, indigenous middle class to act as a steadying influence on the governing powers. Such countries are not attractive places for foreign investment and it is not easy for them to get help in solving their problems". [10]

It is likely that personal income tax rates (for both single persons and married persons with dependents) could be made more progressive and tax allowances significantly reduced or abolished with little effect on the supply of effort or capital. The result would simultaneously be a more equitable distribution of income and a higher level of Government revenue available for development expenditure.

It is also suggested that, given the current impracticality of the VAT, there are sound economic grounds for maintaining the present exemption level of $ 416 but raising the minimum tax rate, even after any wife and children's allowances, to five percent. Further, single persons should begin to pay tax at lower income levels than married persons with dependents. At present in Papua New Guinea, both classes of taxpayer begin to pay tax above $ 416.

Consideration should also be given to raising the existing differential between the tax rates imposed on single persons and married persons with dependents. The current situation in Papua New Guinea is that both classes of taxpayer are subject to a constant rate of two percent over the $ 416—$ 700 income range and the rate differential over the $ 700—$ 5000 range is very marginal.

Finally, it is recommended that Government action be taken to make tax rates totally progressive beyond the proposed minimum rate of five percent by abandoning the two separate and unco-ordinated tax systems in favour of a single unified tax structure.

10. "Co-operatives Help to Build a Nation". Dr. J. Guise. Co-operative Federation of Queensland. Supplement to "Co-ops in the Pacific".

TABLE 1

The percentage of personal income taken in tax at income levels up to $ 5000

	Percentage taken in tax						
	Papua New Guinea					*Australia*	
Income Level $	Single	Married/ 1 child	Married/ 2 children	Married/ 3 children	Married/ 4 children	Single	Married 4 children
0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
50	0.0	0.0	0.0	0.0	0.0	0.0	0.0
100	0.0	0.0	0.0	0.0	0.0	0.0	0.0
150	0.0	0.0	0.0	0.0	0.0	0.0	0.0
200	0.0	0.0	0.0	0.0	0.0	0.0	0.0
250	0.0	0.0	0.0	0.0	0.0	0.0	0.0
300	0.0	0.0	0.0	0.0	0.0	0.0	0.0
350	0.0	0.0	0.0	0.0	0.0	0.0	0.0
400	0.0	0.0	0.0	0.0	0.0	0.0	0.0
450	2.0	2.0	2.0	2.0	2.0	0.0	0.0
500	2.0	2.0	2.0	2.0	2.0	0.0	0.0
550	2.0	2.0	2.0	2.0	2.0	0.0	0.0
600	2.0	2.0	2.0	2.0	2.0	0.0	0.0
650	2.0	2.0	2.0	2.0	2.0	0.0	0.0
700	2.0	2.0	2.0	2.0	2.0	0.0	0.0
750	2.1	2.0	2.0	2.0	2.0	0.0	0.0
800	2.3	2.0	2.0	2.0	2.0	0.0	0.0
850	2.4	2.0	2.0	2.0	2.0	0.0	0.0
900	2.6	2.0	2.0	2.0	2.0	0.0	0.0
950	2.7	2.0	2.0	2.0	2.0	0.0	0.0
1000	2.8	2.0	2.0	2.0	2.0	0.0	0.0

TABLE 1 (continued)

Income Level $	*Papua New Guinea* Single	Married/ 1 child	Married/ 2 children	Married/ 3 children	Married/ 4 children	*Australia* Single	Married 4 children
1200	3.5	1.7	1.7	1.7	1.7	5.0	0.0
1400	4.1	1.4	1.4	1.4	1.4	6.0	0.0
1600	4.5	1.4	1.3	1.3	1.3	6.8	0.0
1800	5.2	1.9	1.1	1.1	1.1	7.5	0.0
2000	5.7	2.4	1.5	1.0	1.0	8.5	0.0
2200	6.1	2.9	1.9	1.2	0.9	9.1	0.0
2400	6.5	3.4	2.4	1.6	1.0	9.8	2.3
2600	7.0	3.9	2.9	2.1	1.3	10.6	3.0
2800	7.4	4.4	3.4	2.5	1.8	11.3	3.6
3000	7.8	4.8	3.9	3.0	2.2	11.9	4.3
3200	8.1	5.2	4.3	3.4	2.6	12.7	5.0
3400	8.6	5.7	4.7	3.8	3.1	12.8	5.7
3600	8.9	6.1	5.1	4.2	3.5	13.0	6.3
3800	9.3	6.4	5.5	4.6	3.8	13.4	7.0
4000	9.7	6.8	5.9	5.1	4.2	13.9	7.6
4200	10.1	7.2	6.3	5.4	4.6	14.3	8.2
4400	10.6	7.6	6.7	5.7	5.0	15.0	8.9
4600	11.0	8.0	7.1	6.2	5.4	15.5	9.3
4800	11.3	8.4	7.4	6.6	5.7	16.1	9.6
5000	11.8	8.8	7.8	6.9	6.1	16.8	10.0

The table ignores all considerations other than marital status and number of children.

TABLE 2

Income tax allowances in Papua New Guinea and Australia

	Papua New Guinea	*Australia*
Single	Nil	Nil
Married	$ 460	$ 364
Child 1	$ 260	$ 260
Child 2	$ 260	$ 208
Child 3	$ 260	$ 208
Child 4	$ 260	$ 208

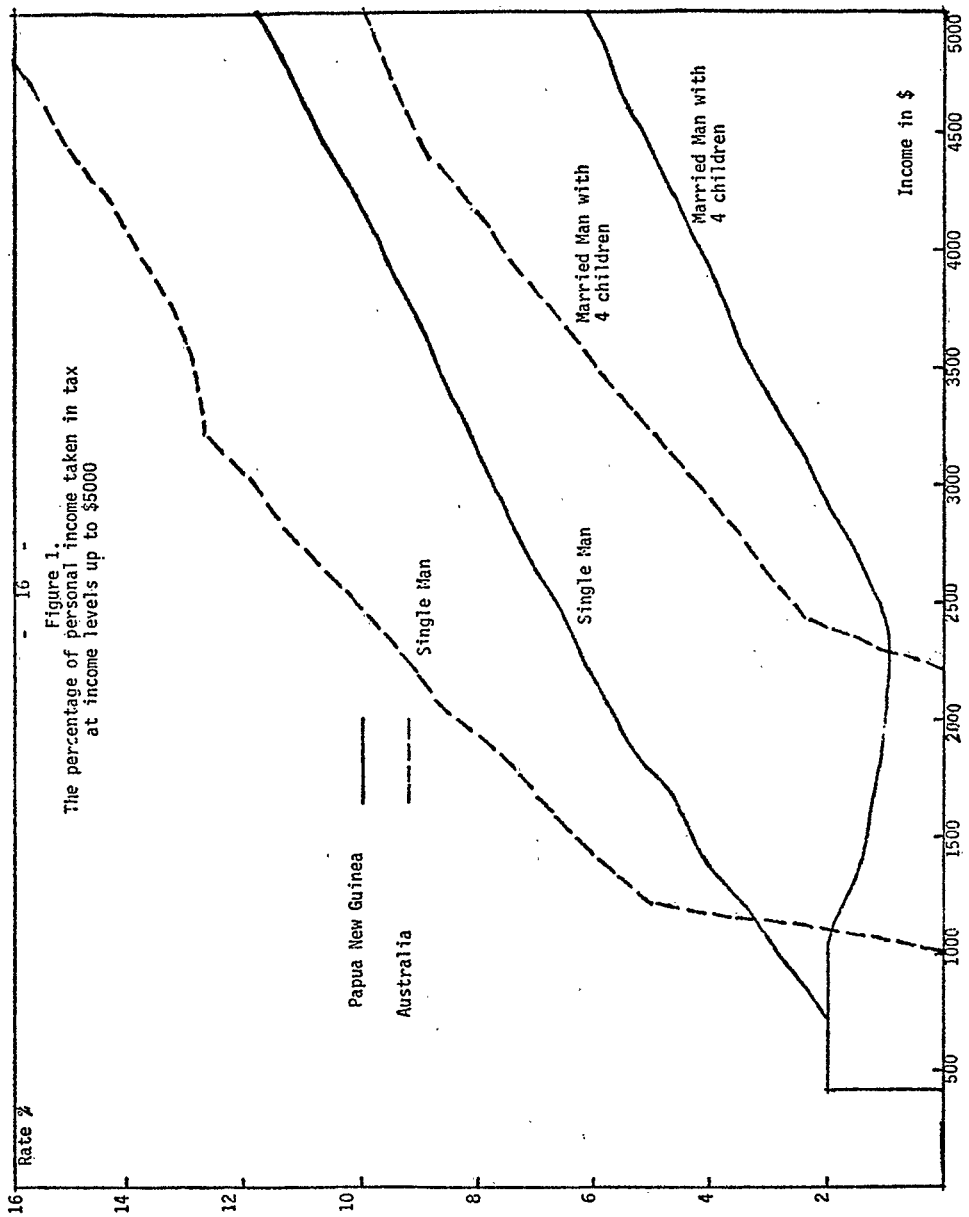

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Figure 1.
The percentage of personal income taken in tax at income levels up to $5000

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SUPPLEMENT TO No. 4 (B 1974)

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* * * ARTICLES * * *

SERGIO GARCIA GRANADOS *:

A STAMP DUTY ON VALUE ADDED — WHY NOT?

INTRODUCTION

The system known as value-added taxation is one of the most important developments in indirect taxation, and practically the only substantial one made since the turnover tax was adopted as a means of indirect taxation. It was first introduced in France in the middle 1960's, and it has rapidly extended through Europe.[1] The adoption of the system has also been seriously considered in other developed countries. The economic advantages of the system were broadly recognized, and it is likely that in the future most developed countries will adopt, in one way or another, a form of taxation on value added. The system, however, has not been as successful in developing countries, although many of the most developed (for instance Argentina, Uruguay, Brazil, and Mexico) have either introduced tax bills to establish a VAT system or have made serious attempts to do so. The convenience of adopting this system has been questioned regarding countries where a large number of the prospective taxpayers are less sophisticated than the European VAT taxpayers.

Argentina, for instance, has been postponing the implementation of a bill presented in 1969, and their VAT system is now being revised to be put into effect in 1975. Mexico had very serious discussions in 1970 on adopting a bill introducing the VAT. However, the attempt to introduce the VAT in Mexico has apparently been abandoned. Brazil, Colombia and Ecuador have adopted VAT systems for payment of some taxes, but this is mainly done for turnover taxes paid by the enterprise and not as a general value-added tax on sales and services.[2]

Apparently the implementation of the European VAT system requires more sophisticated taxpayers and tax collectors than exist in the developing world. It is unfortunate that due to these circumstances, many countries cannot benefit from the economical advantages of taxing the value added instead of the transactions. The economic advantages of the VAT have been broadly discussed by several authors [3] and it would be beyond the scope of this paper to repeat them here. However, the two main points in favor of VAT are the following: (a) By itself, the shifting of the indirect taxes makes the cascade taxes or duties a discouragement to commercial transactions by taxing the consumption. It especially discourages the trade of the goods of the small producer because these

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1. The International Bureau of Fiscal Documentation has published several studies on this subject and maintains up-to-date information on the developments of VAT in European Countries.

2. Uruguay did adopt this year a VAT similar to the European system. Sources used: Corporate Taxation in Latin America, Loose-leaf. International Bureau of Fiscal Documentation, Amsterdam.

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goods are usually handled several times before they reach the final consumer. (b) The application of a full-refund drawback system for exports can only be made through a tax where the percentage of the price represented by the tax is easy to determine. This refund is necessary if exports are not to be taxed and is especially important for maintaining free trade conditions in areas where economic integration is sought.

In many of the developing countries, customs and stamp duties are very important sources of revenue and are sometimes more important than income tax. Because of the nature of import duties it is difficult to modify this tax. However, in the case of the stamp duty, it is possible to take advantage of the experiences of the developed countries in indirect taxation, especially the tax on value added, by adopting a VAT system of computation to already existing taxes. And in the countries where stamp duty is a main way of indirect taxation, it would be possible to renew the old but effective stamp duty system for the needs of modern life.

The object of this short essay is to establish how it is possible to pay a stamp duty on value-added by adopting the theoretical fundamentals of the VAT to a tax of simple application such as the stamp duty. It would probably not be practical to adopt such a system as a main way of indirect taxation, except in countries where the stamp duty has already turned into an important indirect tax (like Peru or Guatemala). However, a stamp duty on value added would be a helpful subsidiary system for taxing agricultural areas, where taxpayers are less sophisticated and accountancy records are seldom kept. Last but not least, we think that this type of study demonstrates the true nature of value-added taxation (which is a system of levying the tax) and fosters the research towards the adaptation of such a system, to already existing indirect taxes.

I - THEORETICAL FUNDAMENTALS OF A STAMP DUTY ON VALUE ADDED

A) *The Systems of Collecting Indirect Taxes*

There are different forms of collecting indirect taxes. They are the following:

1) *The Customs Duty:* This is paid on goods which remain in deposit at customs as long as payment of the tax has not been made.

2) *Tax by Declaration of the Taxpayer:* This is paid by a declaration made by the taxpayer to the authorities on the volume of turnover, sales or any other base.

3) *The Stamp Duty:* This is paid by means of adhering stamps to the product itself (excises) or to the receipts, documents and contracts, showing a value related to the product or service. In the case of documents, it is usually paid on face value shown. Sometimes it is paid at a fixed amount on the products, for instance, excise duties on liquors, cigarettes and cigars. Or the stamp duty might be a percentage of the amount shown in the receipt or document. It is also payable by purchasing stamped paper for drafting contracts and other documents. There are usually detailed tables for levying the tax on a case-by-case basis. However, a basic percentage is usually present in the countries where stamp duty is of some importance; the rates are usually between 0.5% and 5% of face value.

B) *The Systems of Levying Indirect Taxes*

There are three forms of levying indirect taxes:

1) *Single Stage:* This is when only one of the phases of production or commercialization of the product is taxed. We have examples of this in the case of indirect taxes paid at production, importation of exportation.
2) *Cumulative Multi-Stage:* (Better known as the "Cascade System"): This is when the indirect tax is paid on all the phases of commercialization of the product or service, not taking into consideration the tax previously paid on the same product or service. Most sales taxes and stamp duties fit this category.
3) *Non-Cumulative Multi-Stage:* This is the system of the Value-Added Tax where the tax is only paid on the value added to the product or service. The taxpayer only pays the difference between the value of the products or services when he receives them and their value when he sells or renders them.

C) *Presentation of the possible types of indirect taxes*

When we make a cross-breed of the forms of collecting and of the forms of levying the indirect taxes, as explained above, we get the following types of indirect taxes:

Customs Duties

1) *Single Stage Customs Duty:* This is the typical customs duty which is paid on the products upon their importation into a country.
2) *Cascade Customs Duty:* Even though this type of customs duty does not exist any more and would be inefficient by all means, it was common until the 1700's to pay transit taxes every time products passed through straits, rivers and gates of merchant towns. The formation and strengthening of centralized states made this kind of customs duties gradually disappear.
3) *Customs Duty on Value Added:* This type of tax does not exist and it is unlikely that it will, even if in theory it is possible. It might be interesting, however, to explore further the possibilities of this tax, in combination with turnover or TVA taxes, in the case of exportation of goods within the customs unions or as a solution to the problem of free trade between countries with different tariffs for imported goods.

Turnover Taxes

4) *Single Stage Turnover Tax:* This type of tax is paid only on one phase of the product or service. Typical cases are retail sales taxes and all taxes paid on production or first sale.
5) *The Turnover Tax on Cascade:* This is the usual type of the sales taxes where any sale, (wholesale, or retail), is taxed regardless of whether or not it has been taxed before.
6) *Turnover Tax on Value Added:* This is the usual form of Value Added Tax (VAT), where only the difference between the cost and the price of sale is taxed.

Stamp Duties

7) *Single Stage Stamp Duties:* This is a stamp duty paid only on one phase of the product or service, usually at production or first sale. This is the case of excise duties paid on wines, spirits, cigarettes or cigars, where the stamp is attached to the product itself as proof of payment of the tax.
8) *Stamp Duty on Cascade:* This is the case of most stamp duties which are paid on the value of the transactions, either on the contracts themselves, on the documents, or on the receipts given for payment of services or goods. In many countries, the stamp duty has evolved into a turnover system, where stamps are not physically added to the contracts, documents or re-

ceipts, but are paid at certain periods of time (monthly, quarterly, etc.), on the basis of a declaration made by the taxpayer.
9) *Stamp Duty on Value Added:* The stamp duty on value added would be a system where the stamp duty would only be paid on the value added by the taxpayer to the service or product. Payment would be made by means of stamps in the usual way presently used for stamp duty. This is the type of tax that we will examine further in this paper.

II - A SYSTEM OF STAMP DUTY ON VALUE ADDED

A) *Importance and Spread of the Stamp Duty in Developing Countries*

The stamp duty in the last two centuries was a very important source of revenue for the Spanish and Portuguese Crowns. In Latin America, the system originated in the colonial times and was passed along to the new states at independence. The countries which have developed more complicated tax structures have introduced turnover taxes or sales taxes that surpass the stamp duty system in importance as a revenue producer. However, the stamp duty continues to exist in all of the Latin American countries. Although stamp duties have very little importance in some of these countries such as Brazil or Venezuela, in other countries such as Guatemala or Peru, it does represent a substantial tax burden.
Stamp duties also exist in most or all of the African countries even if its importance seems to be irrelevant compared to that of the stamp duty in Latin America.[4] We could not obtain any relevant documentation concerning Asia and Oceania.

B) *Why Stamp Duty?*

What is the justification of making a study on the renewal of stamp duty, when, for most people this is an obsolete form of taxation?
The stamp duty has proved to be one of the easiest systems of collecting indirect taxes in areas where the literacy rate is very low. People who cannot read and write become easily familiar with the payment of the stamp duty on documents intended to carry legal value. Concerning the acceptability of this tax, we have been amazed at the fact that in the most remote areas of our home country (Guatemala), it is possible to find Indians who can barely speak Spanish, but who will insist on the use of stamps on any document made. These persons clearly see, in spite of their lack of schooling, the link between the validity of the document and the stamp or seal attached to the paper turned into a document.
The system in itself it also very efficient where it is necessary to tax populations living outside of large urban centers, as is the case in most parts of the developing world. However, the actual stamp duty system, as we pointed out before in this paper, is inefficient and inequitable because it is applied in cascade to all of the transactions, papers, documents, receipts, etc. This fact greatly affects the goods of small producers, especially when their products are meant to be taken into the world market, because of the great number of intermediaries used for the commercialization of this type of product.
Personal observations in several Latin American countries confirm the belief that tax evasion on sales and turnover taxes in the

4. Sources used: Corporate Taxation in Latin America. African Tax Systems. Both Loose-leaf Services published by the International Bureau of Fiscal Documentation, Amsterdam. Economic Development of Latin America. Dr. Celso Furtado, Cambridge U. Press. London (1970).

less developed countries is very high, especially in the rural areas where the illiteracy rate is high. A stamp duty on value added will probably not be immediately enforceable either, but it would be easier to apply than a turnover tax on value added of the type adopted in Europe. The actual VAT would be almost unthinkable for people living in broad areas of the developing world.

C) *Main Problems to be Solved Concerning the Application of a Stamp Duty on Value Added*

There are several problems to be solved concerning the application of a stamp duty on value added, the main ones being: (1) how to determine the value added on which the tax is to be paid and how to determine how much tax has been already paid on the same transaction; (2) how to keep the documents for the records of the accountant and for the purposes of other taxes and; (3) how to simplify the application of the system for illiterate taxpayers.

1) *The Determination of the Value-Added:* There are basically two systems for the determination of the value added on an indirect tax: (a) either by a deduction from the tax base of deductible expenses which were made in relation to goods sold for services rendered by the taxpayer (expenses which have been subject already to the payment of tax); or (b) by crediting against the tax the amount already paid as tax on transactions in relation to the goods or service which are being taxed. Even if it was rejected in Europe as being complicated, this second alternative of credit against tax paid, is the one that should be adopted in the case of stamp duty at least in the case of taxpayers not keeping formal accountancy. Physical adherence of stamps[5] makes it easy to calculate how much can be credited. A taxpayer trying to figure how much his tax is, has merely to add how much has been paid in stamps in relation to the same transaction and subtract that result from the tax rate applicable.

In the case of payment by a taxpayer who pays the stamp duty by a periodical declaration, the system used would be even simpler, because the periodical declaration turns the stamp duty in practice into a turnover tax. In this case, a variant of the system for the VAT as used in Europe could be adopted, and the taxpayer would then assess his tax payable by taking credit for all the stamps which have been paid on documents relating to his turnover. It is likely that most enterprises with a substantial turnover would opt for this system. In the case of the stamp duties which are not paid by periodical declaration, a booklet would have to be formed by the successive addition of documents or photocopies that show that stamp duty has been paid.[6] The credit, of course, would be accepted if it is made either: (a) on the basis of the original documents where the stamps are attached or (b) by means of photocopies where the stamps are shown. The use of photocopies[7] or a similar system is necessary in order to allow the proportionate division of the credit for two or more different transactions, when goods bought from one person are sold to several different persons.

5. Or the seal of the revenue service on the document, stating that stamp duty is paid according to the system of periodical declaration, if the alternative of a periodical declaration exists.
6. Or the seal of the revenue service, to which footnote 5 refers, is evident.
7. As discussed in the next paragraph, it might also be possible to use statements given by Notary Publics or by some authorized government officers, when amounts are too small or where photocopying machines were not available.

2) *Keeping Documentation for Other Records:* Another problem would be created by the fact that under a stamp-on-value-added system, original documents would often have to be given away. These documents are usually the justification of expenses for the accountancy and basis for deduction in payment of other taxes. In this sense, it must be noted that the use of photocopies is a generalized practice where any kind of records are kept, and photocopies are usually accepted as evidence even if, in some cases, they must be legalized by a Notary Public. The use of photocopies for the records could be assisted by authorizing some government officers or Notary Publics (or both) to certify the existence of the documents before they are given away to third parties. This would allow keeping documents for the records in spite of delivering the stamp bearing originals.

3) *The Complicated Nature of the System:* The difficulties inherent in this system would have to be surmounted before implementing a stamp duty on value added. However, in our opinion, this system — where physical account of the stamps already paid is possible — is much simpler than the one existing in Europe, where careful records have to be kept. Both the physical adherence of stamps and the successive attachment of bills would simplify the task of the taxpayer assessing his tax. It would likewise simplify the task of the tax inspector wanting to establish if any mistakes or evasions had taken place at any of the stages. Both the taxpayer and tax inspector would have before them in the little "booklet" the complete record of the tax payment.

Finally, a program for explaining the system would be easily carried out by inspectors with a minimum degree of preparation in indirect taxation. This would make the system much more acceptable and more quickly widespread than a sales or turnover tax on value added where stamps were not used.

CONCLUSION

It is both possible and practical to adopt a system of stamp duty on value added as a form of sales or turnover tax in countries where the stamp duty is in current practice. Due to its simplicity, the system would also be applicable to tax rural areas in countries where the stamp duty is at present unimportant or non-existent.

We know that many unresolved problems have been left in solving the task of drafting a law for the application of a stamp duty on value added. We hope that this paper will encourage research towards the adaptation of the existing value-added taxation to the needs of the less-developed areas of the world.

* * * # CASE NOTE * * *

UNITED STATES:

Authority of the United States Internal Revenue Service to Obtain Information Solely to Aid Foreign Tax Authorities: United States-Canada Tax Treaty, *Decision of the United States District Court for the Southern District of New York, July 31, 1974.* * [1]

I. THE FACTS

On November 23, 1971, the bank of Tokyo (New York office) was served with a summons by the Internal Revenue Service. A. L. Burbank & Co. (New York office) was similarly served on December 10, 1971. The summonses related to the tax liability of a Canadian corporation, Westward Shipping Ltd. (hereinafter referred to as Westward).

The Bank of Tokyo summons indicated that the IRS was seeking information pertaining to American tax liability whereas the summons to Burbank indicated that they were seeking information for Canadian tax authorities as well.[2]

Westward informed these companies that they should not comply with the summonses since "... [the Internal Revenue Service] sought to compel the disclosure of information to be turned over to a foreign country".[3] On December 22, 1971 Westward's attorney made written objections to the Internal Revenue Service.

After a period of intervening hearings and stipulations,[4] the case finally was adjudicated on July 9, 1974.

During this period, it became quite clear that the information sought by the American authorities related *solely* to the *Canadian* tax liability of Westward, and not United States tax liability.[5] In fact, on February 20, 1974, the government and Westward entered into a stipulation "under which the government withdrew its claim to enforce the summonses by reason of any potential United States tax liability of Westward." [6] The summonses were then opposed [7] by Burbank and the Bank of To-

* Lee S. Bartlett, Editor, EUROPEAN TAXATION.

1. *U.S. v. A. L. Burbank,* 34 AFTR 2d 74-5762 (D.C.S.D.N.Y., 1974) P-H 1974 FED. TAXES ¶5225.

2. The summons to Burbank stated: For Information Required Pursuant to the Provisions of the Internal Revenue Code of 1954 and Article 19 of the Income Tax Treaty Between Canada and the United States. *Id.,* at 5763.

3. *Id.*

4. In this period, the IRS made no attempt to enforce the summonses but instead issued new ones. The new summonses stated that they were investigating tax liability of Burbank, and *not* Westward. After having these summonses resisted, the government apparently dropped them and chose to enforce the originals.

5. This information was discovered at an oral hearing on February 20, 1974 when the government attorney stated that there might be some question of whether there was any legitimate United States tax interest. He stated: "Now, we will meet that question of the legitimacy of the United States inquiry. However, there is one problem in that legitimacy. The records I have indicate that the United States would never have even thought about a United States tax liability unless the Canadian authorities first requested information for Canadian purposes. In other words, it is a bootstrap situation." *Id.,* at 5763.

6. *Id.*

7. Initially, both Burbank and the Bank of Tokyo made a written statement to the government that they would take no formal position with regard to the proceedings. It was understood that Westward would intervene in the case to oppose the summonses. After the government substantially changed its position vis-a-vis American tax liability, Burbank and the Bank of Tokyo opposed. The Court held that since the United States changed its position, they were relieved of their earlier written statement and could oppose. *Id.,* at 5764.

kyo, and Westward sought to intervene.[8]

II. THE LAW

26 U.S.C. sec. 7602 confers authority on the United States government to issue summonses to enforce its internal revenue laws. Sec. 7602 reads:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of *any internal revenue tax,* or collecting any such liability, the Secretary or his delegate is authorized:

To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry." (emphasis added)

Article 19 of the United States-Canada tax treaty of 1942 provides for exchange of information by the governments to prevent fiscal evasion. It reads:

"Article XIX. With a view of the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws insofar as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

Article 21 of the Treaty allows the tax authorities of each state to give information to the other. It reads in part:

"Article XXI (1). If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the [American] Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

III. THE ISSUES

(i) Did the Internal Revenue Service have authority to compel the disclosure of tax information for the use of Canada, in the absence of legitimate American tax interest?

(ii) Does a taxpayer have the right of intervention to prohibit papers and informa-

8. Intervention means:
(1) *In civil law:* The act by which a third party demands to be received as a party in a suit pending between other persons.
The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat.
(2) *In practice:* A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them.
BLACK'S LAW DICTIONARY 956 (4th ed. rev. 1968).

tion belonging to third parties from being furnished to the Internal Revenue Service?

IV. THE DECISION

A. *Summons authority*

The Court, in holding that the United States had no authority under 26 U.S.C. 7602 to obtain tax information solely for the use of Canadian authorities, reasoned that although the statute confers broad summons power to the United States, it does have its limitations.

The Court stated that "a summons issued under this section must be for a purpose relating to the determination of liability for an 'internal revenue'. No party to the present proceeding contends that the phrase 'internal revenue tax' means other than a United States tax".[9] Thus, 26 U.S.C. 7602 does not authorize a summons in this case.

The government argued that the tax treaty authorized the production of such information and since it was in conflict with internal law, the internal law must fall.[10] The Court agreed that if the tax treaty was in conflict with internal law, the Treaty would prevail. However, the Court reasoned that such was not the case since the treaty only provides "that Canada may obtain information which the United States taxing authorities have at their disposal, *or are in a position to obtain under United States revenue laws*".[11] (emphasis added). Thus, the treaty provides no independent summons authority but rather requires that the summons be issued pursuant to internal law. Therefore, there is no conflict and no summons may issue under 26 U.S.C. 7602.

B. *Taxpayer intervention*

The Court looked to the latest United States Supreme Court decision, *Donaldson v. United States*,[12] as being determinative of this issue. The Court superficially analyzed the case, stating that the majority opinion held that taxpayer intervention is permissible in enforcement of summons proceedings "when the circumstances are proper",[13] such as where the information is subject to the attorney-client privilege or in a criminal proceeding. However, the Court concluded that the Supreme Court had specifically disallowed taxpayer intervention where the summons pertained to "books, records and other papers belonging to a third party".[14] Since this case and the facts in *Cole* are parallel, the Court denied Westward's motion to intervene.

V. COMMENT

It can be expected that the government will appeal this decision. In recent years, the government has been attempting to get other countries, most notably Switzerland, to furnish information in order to assist it in combating domestic tax fraud. If other governments cannot get the assistance they need from the United States, American authorities would be hard pressed to receive foreign assistance.

Many tax treaties concluded by the United States provide for reciprocal assistance to

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9. *Burbank,* at 5765.
10. The government relied on 26 U.S.C. sec. 7852 (d) which provides: No provision of this title (the Internal Revenue Code of 1954) shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.
11. *Burbank,* at 5765.
12. 400 U.S. 517 [27 AFTR 2d 71-482] (1971).
13. *Burbank,* at 5765.
14. *In re Cole* 342 F. 2d 5 [15 AFTR 2d 481] (2d Cir.) cert. denied, 381 US 950 (1965).

combat fiscal evasion. Such is the case in the United States-France,[15] United States-United Kingdom,[16] and United States-Germany treaties.[17] These have similar provisions for informational exchanges. However, unlike the United States-Canadian one, these treaties specifically state that there is no requirement to supply information which is not procurable under its internal law. They clearly do not confer independent authority for the issuance of summonses.

Therefore, it is highly unlikely that even if the decision in this case is reversed by the Supreme Court, that it would be applicable to other tax treaties.

15. Article 26 of the United States-France tax treaty provides:
(1) The competent authorities of the Contracting States shall exchange such information as is pertinent to carrying out the provisions of this Convention or preventing fraud or fiscal evasion in relation to the taxes which are the subject of this 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 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; (emphasis added).

16. The United States-United Kingdom tax treaty is even more specific. It clearly does not require the exchange of information which is not available under the domestic law of each country.
Article 20 reads:
(1) The competent authorities of the Contracting Parties shall exchange such information (being information available under the respective taxation laws of the Contracting Parties) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present Convention.

17. Article 16 of the United States-German tax treaty does not confer independent summons power. The authorities must comply only according to their respective internal laws.
(1) The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention.
(3) In no case shall the provisions of this Article be construed so as to impose upon either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

* * * DOCUMENTS * * *

Abkommen zwischen der Bundesrepublik Deutschland und Polen:

Denkschrift (auszugsweise).[1]

Das am 18. Dezember 1972 in Warschau unterzeichnete Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen ist der erste Steuervertrag, den die Bundesrepublik mit einem sozialistischen Staat abgeschlossen hat, und der erste Vertrag zwischen beiden Staaten nach Abschluss des Warschauer Vertrages. Gegen Ende des Jahres 1970 wurden die Verhandlungen mit der Volksrepublik Polen aufgenommen. Der ersten gegenseitigen Unterrichtung in Bonn schlossen sich im Januar 1972 weitere Gespräche in Warschau an; die dritte Verhandlungsrunde endete im November 1972 mit der Paraphierung des Abkommens.

Dem Abkommen kommt unter verschiedenen Aspekten eine besondere Bedeutung zu. — Der Abkommenstext lehnt sich einerseits sachlich und redaktionell weitgehend an das von der OECD empfohlene Musterabkommen (vgl. Bundesanzeiger 76/1964) an, trägt aber andererseits auch den verschiedenartig gelagerten Interessen der unterschiedlichen wirtschaftlichen und gesellschaftlichen Systeme Rechnung. Insoweit kann er künftig als Vorbild für den Abschluss gleichartiger Abkommen mit anderen sozialistischen Staaten gelten. Dabei umfasst das Abkommen schon jetzt Bereiche, deren Regelungen zur Zeit noch in der Entwicklung sind, wie etwa die der joint ventures. Obwohl es in Polen noch keine ausdrücklichen Bestimmungen über diese sog. gemischten Gesellschaften gibt, geht das Abkommen davon aus, dass sich deutsche Unternehmer an polnischen Unternehmungen beteiligen können. Deshalb sollen unter Dividenden verstanden werden Einnahmen aus Aktien oder anderen Rechten — ausgenommen Forderungen — mit Gewinnbeteiligung sowie aus sonstigen Gesellschaftsanteilen stammende Einnahmen, die nach dem Steuerrecht des Staates, in dem die ausschüttende Gesellschaft ansässig ist, den Einnahmen aus Aktien gleichgestellt sind. Das Abkommen schränkt das Besteuerungsrecht Polens als Quellenstaat bei den Dividenden durch feste Begrenzungen und bei Zinsen und Lizenzgebühren durch Freistellung spürbar ein.

Eine zentrale Frage bei der Regelung der steuervertraglichen Beziehungen zwischen der Bundesrepublik und Polen war die Besteuerung von Bauausführungen und Montagen bzw. des dort beschäftigten Personals. Dabei galt es, zwischen der Tendenz der polnischen Seite, hierfür möglichst langfristige Freistellung von der deutschen Besteuerung zu erreichen, und dem deutschen Bestreben, diese Fristen unter dem Gesichtspunkt der Gleichbehandlung in abkommenspolitischer wie in wettbewerbspolitischer Hinsicht möglichst im Rahmen des Üblichen zu halten, einen für beide Seiten gangbaren Weg zu finden. Unter sorgfältiger Abwägung der beiderseitigen Interessen gelang schliesslich eine Einigung in dem Sinne, dass die grundsätzliche Regelung, wonach Bauausführungen und Montagen nicht als Betriebstätten anzusehen sind, wenn ihre Dauer 12 Monate nicht überschreitet, für eine Übergangszeit

1. Siehe Text Supplement F, 1974.

von 5 Jahren auf 18 Monate verlängert wird. Entsprechendes gilt für die 183-Tagefrist bei der Besteuerung des dort beschäftigten Personals.
Das Abkommen entspricht in seiner Wirkungsweise den herkömmlichen deutschen Abkommensprinzipien, d.h. die Doppelbesteuerung wird grundsätzlich durch Anwendung der Freistellungsmethode — allerdings unter Beachtung des Progressionsvorbehalts — vermieden. Nur in einigen Ausnahmefällen kommt die Anrechnungsmethode zur Anwendung.
Das Abkommen gliedert sich wie folgt auf: Die Artikel 1 bis 5 stecken den Geltungsbereich des Vertragswerkes ab und enthalten die für die Abkommensanwendung wichtigsten Definitionen. Die Artikel 6 bis 20 legen den Rahmen fest, innerhalb dessen der Quellenstaat bzw. Belegenheitsstaat Einkünfte bzw. Vermögenswerte besteuern darf. Artikel 21 bestimmt, wie der Wohnsitzstaat bei den dem Quellenstaat (Belegenheitsstaat) zur Besteuerung überlassenen Einkünften und Vermögensteilen die Doppelbesteuerung vermeidet. Die abschliessenden Artikel 22 bis 26 regeln den Diskriminierungsschutz, die zur Abkommensdurchführung notwendige Zusammenarbeit der Vertragstaaten, das Inkrafttreten und andere Fragen. Dem Abkommen ist ein Protokoll mit einigen ergänzenden Bestimmungen beigegeben.

Anlage 2

Stellungnahme des Bundesrates

Gegen das Doppelbesteuerungs-Abkommen mit der Volksrepublik Polen bestehen erhebliche Bedenken. Dieses Abkommen räumt den Bauunternehmen aus Polen weitergehende Präferenzen ein als in dem Musterabkommen der OECD vorgesehen (Protokollnotiz zu Artikel 5 des Abkommens). Für eine solche abweichende Behandlung ist kein Grund ersichtlich.
Die deutsche Bauwirtschaft steht in hartem Konkurrenzkampf und wird, wie die Vergangenheit gezeigt hat, von den osteuropäischen Bauunternehmen immer wieder unterboten. Solange dies wettbewerbsneutral geschieht, ist dagegen nichts einzuwenden. Die vorgesehene steuerliche Begünstigung kann jedoch eine Wettbewerbsverzerrung darstellen, weil nicht auszuschliessen ist, dass den polnischen Unternehmen seitens ihres Staates besondere steuerliche Erleichterungen gewährt werden.
Das Doppelbesteuerungs-Abkommen mit der Volksrepublik Polen ist das erste Abkommen dieser Art mit einem Ostblockstaat. Es ist damit zu rechnen, dass künftige Abkommen dieser Art mit Ostblockstaaten nach dem Muster dieses Abkommens abgefasst werden. Dies ist bereits beim Steuerabkommen mit der Sozialistischen Republik Rumänien so geschehen, wogegen der Bundesrat die gleichen Bedenken erheben muss.

Anlage 3

Gegenäusserung der Bundesregierung zur Stellungnahme des Bundesrates

Das Doppelbesteuerungs-Abkommen mit Polen war der erste Steuervertrag, der mit einem Staatshandelsland abgeschlossen wurde. Es zeigt, dass es möglich ist, auch mit einem Staat völlig anderer Gesellschaftsordnung auf der Grundlage der üblichen deutschen Vertragspraxis (OECD-Musterabkommen) zu steuerlichen Vereinbarungen zu kommen.
Die Besteuerung von Bau- und Montagestellen weicht insofern von der herkömmlichen Abkommenskonzeption ab, als für eine Übergangszeit von fünf Jahren der

Staat, in dem sich die Bau- oder Montagestelle befindet, nicht bereits bei 12monatiger, sondern erst bei 18monatiger Dauer der Bau- oder Montagestelle ein Besteuerungsrecht hat. Die gleiche Frist gilt für das Baustellenpersonal. Diese Regelung soll die in der ersten Phase des Aufbaus und der Entwicklung der gegenseitigen wirtschaftlichen Beziehungen im Vordergrund stehenden Bau- und Montagetätigkeiten von Steuerhemmnissen entlasten. Dabei darf nicht übersehen werden, dass diese Abkommensregel zweiseitig wirkt: Sie gilt auch für deutsche Unternehmen, die in Polen, z.B. auf dem Sektor des Anlagenbaus, tätig werden. Die Zielsetzung, bei den in Frage kommenden Unternehmen vor allem die Anfangsschwierigkeiten im anderen Staat zu mildern, wird dadurch unterstrichen, dass die Regelung auf fünf Jahre befristet ist. Durch die vereinbarte rückwirkende Anwendung des Abkommens ab 1972 endet die Übergangsfrist bereits 1976. Von dann ab gilt die Normallösung, wie sie sich in allen vergleichbaren Abkommen findet.

Die Übergangslösung für die Bau- und Montagestellen will einer Interessenlage gerecht werden, die nur vorübergehend besteht. Sie bedeutet keine auf Dauer zu sehende Umorientierung der deutschen Abkommenspolitik. So ist z.B. in dem paraphierten Abkommen mit Jugoslawien eine derartige Sonderregelung nicht enthalten.

28TH CONGRESS, MEXICO CITY, 1974

Mexico's Contribution to International Tax Law, extract from the opening address by Mitchell B. Carroll, Honorary President, IFA

Señor Honorary President of the Congress, the Minister of Finance, Lic. José Lopez Portillo, the President of the Congress, Lic. Alfonso Gonzalez Rodriguez, and the President of the IFA, Dr. Paul Gmür, as well as Licenciado Roberto Casas, Secretary of the Congress, and Prof. Dr. J. H. Christiaanse, Secretary General of the IFA. This XXVIIIth Congress of our association is an historic event. It may be recalled that in 1938 our Association was organized in the Peace Palace at The Hague, and was dedicated to avoiding fiscal conflicts between governments and to promoting friendly relations between tax collectors and taxpayers!

This objective was manifested at our first Congress at The Hague in 1939. The Association elected as its President a young man who had been the American member since 1934, and President since 1938, of the League of Nations Fiscal Committee, which was a group composed mostly of top officials of the leading countries in Europe.

The theme of the first IFA Congress was the work being done under the auspices of the League of Nations on the avoidance of double taxation through the conclusion of tax treaties. The general reporter was a brilliant young professor of the University of Ghent, Dr. Jean van Houtte. With such a good start, he became twice Minister of Finance, Prime Minister, Councillor of State, and Baron van Houtte. He is now President of Sabena Air Lines. At the Washington Congress in 1971, he was elected to succeed me as President of IFA, and I was elevated to Honorary President. At the Congress of Lausanne in 1973 he became also an Honorary President, and the Presidency was filled by Dr. Gmür.

Hardly had IFA begun its activity in the development of international law when, in September 1939, World War II began. Rising to the challenge of IFA's 1939 general reporter, Prof. van Houtte, the League of Nations Fiscal Committee held in The Hague early in 1940 a meeting of a subcommittee that I had appointed to consider the revision of the conventions for avoiding double taxation that had been drafted at the world meeting of government experts in Geneva in 1928 and the convention of 1935 on the allocation of business income for tax purposes to permanent establishments, and also to subsidiaries, in two contracting states. This was the result of the survey I had conducted in some thirty countries around the world for the Committee.

The spread of the war in Europe caused the secretariat of the League of Nations Financial Division to take refuge at Princeton, New Jersey. The work on avoidance of double taxation might have been suspended had not Lic. Luciano Wiechers, the Mexican member of the Fiscal Committee, introduced the President, on a trip I made in 1940 to Mexico City, to Licenciado Eduardo Suarez, Minister of Finance. He graciously consented to host a regional tax conference of representatives of the fiscal administrations of most of the countries of

Latin America, as well as Canada and the United States.

In the Palacio Nacional de Mexico in 1940, the Regional Tax Conference convened, with Licenciado Suarez as Honorary President, and Licenciado Wiechers, Economic Advisor to the Banco de Mexico, as President, assisted by me as the President of the League of Nations Fiscal Committee. It completed the job begun at The Hague, and combined into a single text the three conventions on the avoidance of double taxation of income and a fourth on the allocation of business income.

The chairman of the subcommittee that made this draft was the Mexican Director General of Taxes, Lic. Alfonso Cortina. After a distinguished career, which included being Mexico's Economic Minister in Washington and Ambassador at The Hague, he has risen to the exalted post of general reporter at this Congress for the first subject, the taxation of joint ventures. Hence it is opportune to recall that the model convention, in the drafting of which he had such an important role, was approved at a second Regional Conference in Mexico City in 1943. It became known as the Mexico Model Convention. It was approved by the final meeting in 1946 of the Fiscal Committee in London. This meeting also approved a London model, identical except for some amendments proposed by representatives of the capital supplying nations to encourage investments in the developing nations.

An important by-product of the drafting of the Mexico Model was the formulation, at my suggestion, by representatives of Canada and the United States, along the lines of this Mexico Model, of the first tax treaty between Canada and the United States, signed March 4, 1942. It resolved, *inter alia,* numerous tax disputes between the two governments and was welcomed by taxpayers. The U.S. followed it in the 1945 treaty with the U.K.

This treaty, in turn, together with the League of Nations model, served as a guide for officials negotiating a series of tax treaties, such as South Africa (1946), Belgium (1948), Ireland (1951), Germany and Japan (1954), Italy and the Netherlands (1955), Australia, New Zealand, Pakistan, etc.

The important work done in Mexico in 1940 and 1943 is thus immortalized in some 22 general income tax conventions between the United States and foreign governments. Those with the United Kingdom, Belgium and the Netherlands were extended to certain territories, making 32 jurisdictions in all.

But this is not the entire story. Sweden, the second country with which, in 1939, the United States concluded an income tax convention, entered into essentially similar conventions with Argentina in 1962, Brazil in 1965, and Peru in 1966.

Germany, which had concluded a treaty with the United States in 1954, signed a similar agreement with Argentina in 1966 and is reported to be negotiating with Brazil and Chile.

France, with which the U.S.A. had signed treaties in 1932 and 1967, concluded one with Brazil in 1971. An essentially similar convention was concluded by Belgium with Brazil in 1970. The U.S. treaty with the U.K. was the model for a treaty with Trinidad and Tobago in 1970.

Hence the gospel of Mexico to avoid conflicts in tax jurisdiction between nations formulated in 1940 and 1943 has spread

around the world. It has come back to countries represented in the Regional Tax Conferences of Mexico.

Licenciado Cortina will be welcomed among the prophets who have spread this doctrine of peace among tax collectors, and between them and taxpayers.

Mr. President, in closing, we must pay a special tribute to Licenciado Roberto Casas. He became imbued with enthusiasm for IFA at its Congresses in Europe. He was inspired, together with the Mexican group, many of whom have also attended our Congresses, to organize the XXVIIIth Congress in Mexico. This gathering will last in the memory of all as a most enjoyable event to commemorate the contribution of this country to the development of international tax law.

RESOLUTIONS

The texts of the resolutions on the first and second subjects are reproduced below in the original languages. Those IFA members who wish to obtain the texts in one of the other official languages used by IFA are referred to the IFA Secretariat, c/o Erasmus University, Burg. Oudlaan 50, Rotterdam (The Netherlands).

Subject I: Tax consequences of domestic and foreign interests establishing corporations as vehicles for joint ventures
(original language)

RESOLUTION

THE TWENTY-EIGHTH CONGRESS considered the taxation of joint ventures organized in the form of a corporation that is resident in the country of operation, the voting stock of which is owned by residents of that country and of another country.

1. THE CONGRESS noted with approval that in the tax practice of most countries, there is little or no discrimination directed against these ventures as compared to wholly foreign owned corporations, in respect of both the taxation of the corporate joint venture and the taxation of dividends, interest, royalties and other income paid by the joint venture to its stockholders.

2. THE CONGRESS recognized that some countries may, for economic, social or political reasons, desire to impose restrictions on the extent of foreign investment, either in particular industries or generally. While the Congress did not consider the propriety of such restrictions in the light of the importance of the free international flow of capital, it considered that the taxing system is generally not as appropriate a vehicle for accomplishing these objectives as specific non tax regulations and suggested that governments may rather wish to give preference to direct regulation to accomplish these objectives by enacting rules consistent with their purposes.
As far as developing countries are concerned, the Congress noted the proposition made by certain participants from Latin America that developing countries may consider it advisable to make use of fiscal instruments for their own particular national economic policies.

3. THE CONGRESS noted that in a few cases the tax system has been employed for restricting foreign investments, which may

be in conflict with the "nondiscrimination provision" of the 1963 OECD Double Tax Convention on Income and Capital. Since the interpretation of tax conventions should be as clear as possible for uniformity of application, the Congress suggests that IFA consider whether the nondiscrimination provision itself may be an appropriate subject for a future Congress, with the possibility of submitting its views to the OECD.

4. Several other issues treated in the General Discussion but not expressly within the scope of the directives and for that reason not treated comprehensively in the National Reports, also suggested themselves for future Congresses:

a. The consideration of allocation of expenses at the twentyninth Congress, might include the effect of the absence of a community of interest in expenses of unrelated participants in a joint venture as an element that should be taken into account in determining whether the intercompany charges should be deemed as fixed at arm's length.

b. The treatment of tax incentives in the thirtieth Congress should include consideration of tax incentives designed to encourage foreign investment in developing countries.

c. The question of the division of income taxes between the country of operation and the country of the residence of the shareholders, including, for example, the effect of an imputation system on foreign stockholders, recently studied by the Committee on Fiscal Affairs of the OECD, and the possible reduction of the 25% stock ownership criterion suggested in the OECD Draft Convention, would seem to be an appropriate area of study by future Congresses.

Sujet II: Problèmes fiscaux posés par l'activité temporaire à l'étranger des employés des entreprises à vocation internationale

RESOLUTION

LE CONGRES CONSTATE que les employés des entreprises à vocation internationale sont de plus en plus fréquemment déplacés à l'étranger en vue d'être affectés temporairement à un établissement stable ou à une société filiale de l'entreprise d'envoi;

Que les déplacements temporaires à l'étranger obligent l'expatrié à s'adapter à des conditions de vie nouvelles qui posent des problèmes notamment en ce qui concerne le conjoint et l'éducation des enfants;

Que l'expatrié est en outre soucieux dans de nombreux cas de s'assurer la possibilité de réintégrer son emploi précédent à la fin de sa mission à l'étranger et demande donc de conserver le bénéfice des avantages sociaux liés à son emploi au sein de l'entreprise d'envoi et de conserver le logement dont il disposait;

Que les déplacements temporaires à l'étranger occasionnent ainsi des frais exceptionnels entièrement justifiés et ceci tant pour l'employé que pour l'entreprise qui l'emploie;

Que le principe de l'égalité fiscale commande d'éviter des disparités injustifiées dans l'imposition des expatriés mais aussi d'assurer leur imposition effective en conformité avec les législations fiscales auxquelles ils sont soumis.

En conséquence, après examen et discussion des rapports nationaux et du rapport général qui lui ont été soumis sur la situation des expatriés temporaires (à l'exclusion des salariés en mission de courte durée):

LE CONGRES *en ce qui concerne le pays d'activité* exprime l'avis qu'il est dans l'in-

térêt d'une saine fiscalité de reconnaître la situation particulière dans laquelle se trouvent les expatriés temporaires tout en maintenant le principe de l'égalité fiscale
estime a cet effet qu'il est équitable, en conformité avec les principes de la legislation fiscale nationale, d'admettre
— soit la déduction de frais supplémentaires tels que ceux qui sont liés au logement, à l'éducation des enfants ou à des congés dans le pays d'envoi,
— soit des déductions forfaitaires ou des exemptions partielles pour des revenus d'origine étrangère destinées à tenir compte des frais supplementaires encourus par l'expatrié temporaire,
recommande tout particulièrement que tant l'expatrié temporaire que son employeur local soient autorisés à déduire de son revenu imposable les cotisations versées à des institutions de protection sociale ou de prévoyance auxquelles l'expatrié reste affilié dans le pays d'envoi, ceci en tout cas dans les mêmes conditions que s'il s'agissait d'institutions locales;
en ce qui concerne le pays d'envoi demande qu'il soit d'avantage tenu compte du caractère temporaire du séjour à l'étranger, soit en exonérant l'expatrié de l'impôt, soit en l'assujettissant à l'impôt, mais compte tenu de ses dépenses supplémentaires et des impôts qu'il doit payer dans le pays d'activité, ceci même si son conjoint et ses enfants restent domiciliés dans le pays d'envoi ou qu'il y conserve un logement;
en ce qui concerne les deux pays en cause invite les autorités compétentes, lorsqu'une convention fiscale le permet, à coopérer en vue d'éviter les abus, en échangeant dans le cadre de l'assistance administrative prévue les renseignements dont ils disposent;
attire l'attention des autorités intéressées sur la charge fiscale excessive qui peut se produire en cas de décès d'un expatrié temporaire du fait de l'assujettissement simultané de la succession aux droits dans l'Etat d'activité et invite en conséquence les Etats à tenir compte du cas des expatriés temporaires lors de la conclusion de Conventions portant sur les droits de succession.

PAR AILLEURS LE CONGRES suggère au Groupe Ad Hoc d'Experts des conventions fiscales des Nations Unies et à l'O.C.D.E. d'examiner la possibilité d'établir des directives qui permettraient aux pays signataires d'une convention fiscale de régler par un protocole additionnel le cas des expatriés temporaires en coordonnant l'imposition dans le pays d'envoi et le pays d'activité et en fixant les renseignements qui seront échangés en vue d'éviter les abus;
en ce qui concerne les pays en voie de développement note avec intérêt la proposition faite par certains participants de l'Amérique latine que le pays d'envoi doit exonérer l'expatrié temporaire ou lui accorder un crédit d'impôt même dans les cas ou l'intéressé a benéficié dans le pays d'activité d'avantages fiscaux prévus pour le développement de ce pays et INVITE les Etats intéressés à étudier la possibilité de mettre en œvre cette proposition.

AUSTRALIAN BRANCH

(i) At the Annual General Meeting of the Australian Branch held on 12 September 1974, the following officers were re-elected:

Chairman: Mr. Graeme L. Herring
Secretary: Mr. Charles J. Berg, O.B.E.
Treasurer: Mr. William J. Mulligan

(ii) The Australian Branch is sponsoring Mr. Walter O'Connor and Mr. Sidney Roberts, prominent members of the U.S. Branch, as guest speakers at the Taxation Institute of Australia's Third National Convention to be held at Hobart's Wrest Point Casino Hotel in April 1975.

(iii) The Australian Branch has made a submission to the Australian Treasurer urging that the position with regard to Australia's Double Taxation Treaties be urgently reviewed with a view to updating existing treaties and to the writing of new treaties. It was noted that the Treaty with the Federal Republic of Germany has not yet been ratified by Australia, although negotiations were concluded in October 1972.

(iv) The Australian Branch, which has its seat in the City of Sydney, has now established a Chapter in the City of Melbourne, and it is hoped that this will lead to a further increase in membership which now totals 90 individuals and 8 corporations.

(v) Mr. Gerry Wood, a guest speaker, presented a paper on "The Development and Introduction of Capital Gains Tax in Canada". This paper was enthousiastically received and proved to be very timely, since on 17 September (5 days after the meeting), the Australian Treasurer announced details of Australia's new capital gains tax, based largely upon the Canadian model.

CANADIAN BRANCH

The Canadian Branch held its Annual Meeting last week, and the new slate of officers is as follows:—

President:	Ron Anson Cartwright	*Treasurer:*	Albert Poissant
Vice-Presidents:	Marc Leduc, James Peterson, Arnold Sherman	*Secretary:*	Peter Cumyn
		Assistant Secretary:	Gilles Gagné

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Annual quick-reference guide updating material with respect to the individual income tax including the 1974 budget proposals.

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2nd ed., by V. Di Palma. Macdonald & Evans Ltd., London, 1973. 232 pp., £ 0.95. The M. & E. handbook series.
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Published by The Institute for Fiscal Studies, London, 1974. 51 pp.
Brief report of a one day conference arranged by the Institute for Fiscal Studies. Morning session on simplification was presented by H. Hudson, V. Grout, and C. Ware. The afternoon was devoted to the problem of anti-avoidance legislation and the need for change, with introduction by L. Bradford, and papers by M. Nolan and J. Chown.

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Monograph on the various methods of combining two or more businesses (merger), including taxation aspects.

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by A. M. Michaelson. Published by Practicing Law Institute, New York, 1974. 6 + 129 pp., $ 20.00. Estate Planning and Administration Practice Handbook Series, 11.
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Convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste tchécoslovaque tendant à éviter les doubles impositions en matière d'impôts sur les revenus.

SUPPLEMENT TO No. 4 (B 1974)

Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne.

SUPPLEMENT TO No. 6 (C 1974)

Convention between the Republic of Singapore and the State of Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

SUPPLEMENT TO No. 8 (D 1974)

Andean Pact: Double Taxation Conventions.

SUPPLEMENT TO No. 10 (E 1974)

Convention entre le Royaume de la Norvège et le Royaume du Maroc tendant à éviter les doubles impositions et à établir des règles d'assistance administrative réciproque en matière d'impôts sur le revenu et sur la fortune.

SUPPLEMENT TO No. 12 (F 1974)

Abkommen zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen.

Supplement: **A**
1974

Convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste tchécoslovaque, tendant à éviter les doubles impositions en matière d'impôts sur les revenus

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

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INTERNATIONAL BUREAU
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Muiderpoort - 124 Sarphatistraat - Amsterdam

A double taxation treaty between France and Czechoslovakia was signed on June 1, 1973. The treaty shall in accordance with Article 32 of the treaty enter into force on the date on which the two Governments have notified each other that the formalities constitutionally required in their respective countries have been complied with.
The full text of the French Explanatory Note to the double taxation treaty has been published in the February 1974 issue of the Bulletin for International Fiscal Documentation under Developments in International Tax Law.

TEXTE

Le Gouvernement de la République française,
et
Le Gouvernement de la République socialiste tchécoslovaque,
désireux de conclure une Convention tendant à éviter les doubles impositions en matière d'impôts sur les revenus,
sont convenus de ce qui suit:

CHAPITRE Ier
Champ d'application de la Convention

Article premier.
Personnes visées

La présente Convention s'applique aux personnes qui sont domiciliées dans un Etat contractant ou dans chacun des deux Etats.

Article 2.
Impôts visés

1. La présente Convention s'applique aux impôts sur le revenu et sur la fortune perçus dans chacun des deux Etats contractants, 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, et les impôts sur les plus-values.

3. Les impôts actuels auxquels s'applique la Convention sont:

A. — En ce qui concerne la France:

a) L'impôt sur le revenu;

b) L'impôt sur les sociétés,

y compris toute retenue à la source, tout précompte ou tout versement anticipé afférents aux impôts visés ci-dessus;

c) La contribution des patentes.

B. — En ce qui concerne la Tchécoslovaquie:

a) Le prélèvement sur les bénéfices;

b) L'impôt sur les bénéfices;

c) L'mpôt sur les salaires;

d) L'impôt sur le revenu provenant de l'activité créatrice littéraire et artistique;

e) L'impôt agricole;

f) L'impôt sur le revenu des personnes physiques,

y compris toute retenue à la source, tout précompte ou tout versement anticipé afférents aux impôts visés ci-dessus.

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 contractants se communiqueront les modifications apportées à leurs législations fiscales respectives.

CHAPITRE II

Définitions

Article 3.
Définitions générales

1. Au sens de la présente Convention, à moins que le contexte n'exige une interprétation différente:

a) Le terme «France» désigne les départements européens et les départements d'outre-mer (Guadeloupe, Guyane, Martinique et Réunion) de la République française et les zones situées hors des eaux territoriales de la France sur lesquelles, en conformité avec le droit international, la France peut exercer les droits relatifs au lit de la mer, au sous-sol marin et à leurs ressources naturelles;

— le terme «Tchécoslovaquie» désigne la République socialiste tchécoslovaque constituée par la République socialiste tchèque et par la République socialiste slovaque;

b) Les expressions «un Etat contractant» et «l'autre Etat contractant» désignent, suivant le contexte, la France ou la Tchécoslovaquie;

c) Le terme «personne» comprend les personnes physiques, les sociétés, les collectivités publiques et tous autres groupements de personnes;

d) Le terme «société» désigne toute personne morale ou toute entité qui est considérée comme une personne morale aux fins d'imposition;

e) Les expressions «entreprise d'un Etat contractant» et «entreprise de l'autre Etat contractant» désignent respectivement une entreprise exploitée par une personne domiciliée dans un Etat contractant et une entreprise exploitée par une personne domiciliée dans l'autre Etat contractant;

f) L'expression «autorité compétente» désigne:

— dans le cas de la France, le Ministre de l'Economie et des Finances ou son représentant autorisé;

— dans le cas de la Tchécoslovaquie, le Ministre des Finances de la République socialiste tchécoslovaque ou son représentant autorisé.

2. Pour l'application de la Convention par un Etat contractant, toute expression qui n'est pas autrement définie a le sens qui lui est attribué par la législation dudit 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. Pour l'application de la présente Convention, une personne est considérée comme domiciliée dans un Etat contractant quand cette personne est assujettie à l'impôt dans cet Etat, en raison de son domicile, de son siège de direction ou de tout autre critère de nature analogue.
2. Lorsque, selon les dispositions du paragraphe 1, une personne physique est considérée comme domiciliée dans chacun des Etats contractants, le cas est résolu d'après les règles suivantes:
a) Cette personne est considérée comme domiciliée dans l'Etat contractant où elle dispose d'un foyer d'habitation permanent. Lorsqu'elle dispose d'un foyer d'habitation permanent dans chacun des Etats contractants, elle est considérée comme domiciliée dans l'Etat contractant avec lequel ses liens personnels et économiques sont les plus étroits (centre des intérêts vitaux);
b) Si l'Etat contractant où cette personne a le centre de ses intérêts vitaux ne peut être déterminé, ou si elle ne dispose d'un foyer d'habitation permanent dans aucun des Etats contractants, elle est considérée comme domiciliée dans l'Etat contractant où elle séjourne de façon habituelle;
c) Si cette personne séjourne de façon habituelle dans chacun des Etats contractants ou si elle ne séjourne de façon habituelle dans aucun d'eux, elle est considérée comme domiciliée dans l'Etat contractant dont elle possède la nationalité;
d) Si cette personne possède la nationalité de chacun des Etats contractants ou si elle ne possède la nationalité d'aucun d'eux, les autorités compétentes des Etats contractants tranchent la question d'un commun accord.
3. Lorsque, selon les dispositions du paragraphe 1, une personne autre qu'une personne physique est considérée comme domiciliée dans chacun des Etats contractants, elle est réputée domiciliée dans l'Etat contractant 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.
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;

f) L'activité de l'entreprise consiste en un chantier de construction ou de montage.

4. Une personne agissant dans un Etat contractant pour le compte d'une entreprise de l'autre Etat contractant — 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 dans cet Etat de pouvoirs qu'elle y exerce habituellement lui permettant 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 d'un Etat contractant a un établissement stable dans l'autre Etat contractant 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.

6. Le fait qu'une société qui est domiciliée dans un Etat contractant contrôle ou soit contrôlée par une société qui est domiciliée dans l'autre Etat contractant 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 ces 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 contractant où ces biens sont situés.

2. L'expression «biens immobiliers» est définie conformément à la législation fiscale de l'Etat contractant où les biens considérés sont situés. L'expression englobe notamment les droits auxquels s'appliquent les dispositions légales concernant la propriété foncière 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; 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 de biens immobiliers servant à l'exercice d'une profession libérale.

Article 7.
Bénéfices des entreprises

1. Les bénéfices d'une entreprise d'un Etat contractant ne sont imposables que dans cet Etat, à moins que l'entreprise n'exerce son activité dans l'autre Etat contractant 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 la mesure où ils sont imputables audit établissement stable.

2. Lorsqu'une entreprise d'un Etat contractant exerce son activité dans l'autre Etat contractant par l'intermédiaire d'un établissement stable qui y est situé, il est imputé dans chaque Etat contractant, 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. Aucun bénéfice n'est imputé à un établissement stable du fait que cet établissement stable a simplement acheté des marchandises pour l'entreprise.

5. 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.

6. 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.

7. Les dispositions du paragraphe 1 s'appliquent, par analogie, à la contribution des patentes.

Article 8.
Navigation maritime, intérieure et aérienne

1. Les bénéfices provenant de l'exploitation en trafic international de navires ou d'aéronefs ne sont imposables que dans l'Etat contractant 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 ne sont imposables que dans l'Etat contractant 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 contractant où se trouve le port d'attache de ce navire ou de ce bateau ou, à défaut de port d'attache, dans l'Etat contractant où l'exploitant du navire ou du bateau est domicilié.

4. Les dispositions des paragraphes 1 et 2 s'appliquent, par analogie, à la contribution des patentes.

Article 9.
Entreprises associées

Lorsque:

a) Une entreprise d'un Etat contractant participe directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise de l'autre Etat contractant ou que

b) Les mêmes personnes participent directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise d'un Etat contractant et d'une entreprise de l'autre Etat contractant,

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 par 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 domiciliée dans un Etat contractant à une personne domiciliée dans l'autre Etat con-

tractant sont imposables dans cet autre Etat.

2. Toutefois, ces dividendes peuvent être imposés dans l'Etat contractant où la société qui paie les dividendes est domiciliée et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 10 p. 100 du montant brut des dividendes.

Ce paragraphe ne concerne pas l'imposition de la société pour les bénéfices qui servent au paiement des dividendes.

3. 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 à l'exception des créances, ainsi que les revenus d'autres parts sociales assimilés aux revenus d'actions par la législation fiscale de l'Etat où la société distributrice a son domicile.

4. Les dispositions des paragraphes 1 et 2 ne s'appliquent pas lorsque le bénéficiaire des dividendes domicilié dans un Etat contractant a, dans l'autre Etat contractant où la société qui paie les dividendes est domiciliée, un établissement stable auquel se rattache effectivement la participation génératrice des dividendes. Dans ce cas, les dispositions de l'article 7 sont applicables.

5. Une personne domiciliée en Tchécoslovaquie qui perçoit des dividendes distribués par une société domiciliée en France, peut demander le remboursement du précompte afférent à ces dividendes, qui a été acquitté, le cas échéant, par la société distributrice. La France peut prélever l'impôt prévu au paragraphe 2 sur le montant des sommes remboursées.

Article 11.
Bénéfices réalisés par les succursales

Lorsqu'une société domiciliée en Tchécoslovaquie dispose en France d'un établissement stable, elle peut y être assujettie à la retenue à la source dans les conditions prévues par la législation interne française. Toutefois, la base sur laquelle cette retenue est perçue est réduite d'un tiers et le taux de la retenue ne peut excéder 10 p. 100.

Article 12.
Intérêts

1. Les intérêts provenant d'un Etat contractant et payés à une personne domiciliée dans l'autre Etat contractant ne sont imposables que dans cet autre Etat.

2. Le terme «intérêts» employé dans le présent article désigne les revenus des fonds publics, des obligations d'emprunts, assorties ou non de garanties hypothécaires ou d'une clause de participation aux bénéfices, 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.

3. Les dispositions du paragraphe 1 ne s'appliquent pas lorsque le bénéficiaire des intérêts, domicilié dans un Etat contractant a, dans l'autre Etat contractant 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.

4. Les intérêts sont considérés comme provenant d'un Etat contractant lorsque le débiteur est cet Etat lui-même, une collectivité locale ou une personne domiciliée dans cet Etat. Toutefois, lorsque le débiteur des intérêts, qu'il soit ou non domicilié dans un Etat contractant, a dans un Etat contractant un établissement stable pour lequel l'emprunt générateur des intérêts a été contracté et qui supporte la charge de ces intérêts, lesdits intérêts sont réputés provenir de l'Etat contractant où l'établissement stable est situé.

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 contractant et compte tenue des autres dispositions de la présente Convention.

Article 13.
Redevances

1. Les redevances provenant d'un Etat contractant et payées à une personne domiciliée dans l'autre Etat contractant sont imposables dans cet autre Etat.
2. Toutefois, les redevances peuvent être imposées dans l'Etat contractant d'où elles proviennent et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 5 p. 100 du montant brut des redevances.
3. Nonobstant les dispositions du paragraphe 2, les redevances provenant de droits d'auteur sur des œuvres littéraires, artistiques ou scientifiques, ne sont imposables que dans l'Etat contractant où la personne qui les perçoit a son domicile.
4. 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 œuvre 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.
5. Les dispositions du paragraphe 1 ne s'appliquent pas lorsque le bénéficiaire des redevances domicilié dans un Etat contractant a, dans l'autre Etat contractant 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.
6. 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 contractant et compte tenu des autres dispositions de la présente Convention.

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, ou de l'aliénation de parts ou de droits analogues dans une société dont l'actif est composé principalement de biens immobiliers sont imposables dans l'Etat contractant où ces biens immobiliers sont situés.
2. Les gains provenant de l'aliénation de biens mobiliers faisant partie de l'actif d'un établissement stable qu'une entreprise d'un Etat contractant a dans l'autre Etat contractant, ou de biens mobiliers constitutifs

d'une base fixe qu'une personne domiciliée dans un Etat contractant a dans l'autre Etat contractant pour l'exercice d'une 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.

Toutefois, les gains provenant de l'aliénation de navires ou d'aéronefs exploités en trafic international et de biens mobiliers affectés à l'exploitation desdits navires ou aéronefs ne sont imposables que dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

3. Les gains provenant de l'aliénation de tous biens autres que ceux qui sont mentionnés aux paragraphes 1 et 2 ne sont imposables que dans l'Etat contractant où le cédant est domicilié.

Article 15.
Professions indépendantes

1. Les revenus qu'une personne domiciliée dans un Etat contractant tire d'une profession libérale ou d'autres activités indépendantes de caractère analogue ne sont imposables que dans cet Etat, à moins que cette personne ne dispose de façon habituelle dans l'autre Etat contractant d'une base fixe pour l'exercice de ses activés. Si elle 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 «professions libérales» 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, 20, 21 et 22, les salaires, traitements et autres rémunérations similaires qu'une personne domiciliée dans un Etat contractant 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 contractant. 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'une personne domiciliée dans un Etat contractant reçoit au titre d'un emploi salarié exercé dans l'autre Etat contractant 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;

b) Les rémunérations sont payées par un employeur ou au nom d'un employeur qui n'est pas domicilié dans 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 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, sont imposables dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

Article 17.
Tantièmes

Les tantièmes, jetons de présence et autres

rétributions similaires qu'une personne domiciliée dans un Etat contractant reçoit en sa qualité de membre du conseil d'administration ou de surveillance d'une société domiciliée dans l'autre Etat contractant sont imposables dans cet autre Etat.

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 contractant où ces activités sont exercées.

Article 19.
Pensions

Sous réserve des dispositions du paragraphe 1 de l'article 20, les pensions y compris les pensions de sécurité sociale, et les autres rémunérations similaires versées à une personne domiciliée dans un Etat contractant au titre d'un emploi antérieur, ne sont imposables que dans cet Etat.

Article 20.
Fonctions publiques

1. Les rémunérations, y compris les pensions, versées par un Etat contractant ou l'une de ses collectivités locales, ou par une personne morale de droit public de cet Etat, 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 collectivité ou à cette personne morale de droit public dans l'exercice de fonctions de caractère public, sont imposables dans cet Etat.

Toutefois, cette disposition ne s'applique pas lorsque les rémunérations sont versées à des personnes physiques domiciliées dans l'autre Etat, qui possèdent la nationalité de cet autre Etat.

2. 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 contractants ou l'une de ses collectivités locales ou par une personne morale de droit public de cet Etat.

3. La qualité de personne morale de droit public se détermine d'après la législation de l'Etat où la personne morale est constituée.

Article 21.
Professeurs

Un professeur qui était domicilié dans un Etat contractant avant le début de son séjour dans l'autre Etat contractant et qui enseigne dans un établissement d'enseignement de l'autre Etat contractant pendant une durée n'excédant pas deux ans est exonéré d'impôt dans cet autre Etat à raison de la rémunération qu'il reçoit pour cet enseignement.

Article 22.
Etudiants

1. Les sommes qu'un étudiant ou un stagiaire qui est, ou qui était auparavant domicilié dans un Etat contractant et qui séjourne dans l'autre Etat contractant 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.

2. Les étudiants des établissements d'enseignement de l'un des Etats contractants, qui exercent une activité rémunérée dans l'autre Etat contractant en vue d'obtenir une formation pratique relative à leurs études, ne sont pas soumis à l'impôt dans ce dernier Etat à raison de la rémunération versée à ce titre, à condition que la durée de cette activité ne dépasse pas 183 jours par année civile.

Article 23.
Revenus non expressément mentionnés

Les éléments du revenu d'une personne domiciliée dans un Etat contractant qui ne sont pas expressément mentionnés dans les articles précédents de la présente Convention ne sont imposables que dans cet Etat.

CHAPITRE IV

Imposition de la fortune

Article 24.
Fortune

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 contractant 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 contractant 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 ne sont imposables que dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.
4. Tous les autres éléments de la fortune d'une personne domiciliée dans un Etat contractant ne sont imposable que dans cet Etat.

CHAPITRE V

Dispositions pour éviter la double imposition

Article 25.

La double imposition est évitée de la manière suivante:
A. — En France:
a) Les revenus autres que ceux visés à l'alinéa *b* ci-dessous sont exonérés des impôts français énumérés à l'article 2, paragraphe 3 A, lorsque ces revenus sont imposables en Tchécoslovaquie en vertu de la présente Convention;
b) Pour ce qui est des revenus visés aux articles 10, 13, 17 et 18 qui ont supporté l'impôt tchécoslovaque conformément aux dispositions desdits articles, la France accorde aux personnes domiciliées en France qui perçoivent de tels revenus de source tchécoslovaque un crédit d'impôt correspondant à l'impôt perçu en Tchécoslovaquie; ce crédit d'impôt, qui ne peut excéder le montant de l'impôt perçu sur les revenus en cause, s'impute sur les impôts français énumérés à l'article 2, paragraphe 3 A, dans les bases desquels lesdits revenus sont inclus;
c) Nonobstant les dispositions des alinéas *a* et *b*, l'impôt français peut être calculé sur le revenu imposable en France en vertu de la présente Convention, au taux corres-

pondant au montant global du revenu imposable conformément à la législation française.

B. — En Tchécoslovaquie:

a) Les revenus autres que ceux visés à l'alinéa *b* ci-dessous sont exonérés des impôts tchécoslovaques énumérés à l'article 2, paragraphe 3 B, lorsque ces revenus sont imposables en France en vertu de la présente Convention;

b) Pour ce qui est des revenus visés aux articles 10, 13, 17 et 18 qui ont supporté l'impôt français conformément aux dispositions desdits articles, la Tchécoslovaquie accorde aux personnes domiciliées en Tchécoslovaquie qui perçoivent de tels revenus de source française un crédit d'impôt correspondant à l'impôt perçu en France; ce crédit d'impôt, qui ne peut excéder le montant d'impôt perçu sur les revenus en cause, s'impute sur les impôts tchécoslovaques énumérés à l'article 2, paragraphe 3 B, dans les bases desquels lesdits revenus sont inclus;

c) Nonobstant les dispositions des alinéas *a* et *b*, l'impôt tchécoslovaque peut être calculé sur le revenu imposable en Tchécoslovaquie en vertu de la présente Convention, au taux correspondant au montant global du revenu imposable conformément à la législation tchécoslovaque.

CHAPITRE VI

Dispositions spéciales

Article 26.
Non-discrimination

1. Les nationaux d'un Etat contractant domiciliés ou non dans l'autre Etat contractant ne sont soumis dans cet autre Etat contractant 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 d'un Etat contractant;

b) Toutes les personnes morales, sociétés de personnes et associations constituées conformément à la législation en vigueur dans un Etat contractant.

3. Les apatrides domiciliés dans un Etat contractant ne sont soumis dans l'autre Etat contractant 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.

4. L'imposition d'un établissement stable qu'une entreprise d'un Etat contractant a dans l'autre Etat contractant 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 un Etat contractant à accorder aux personnes domiciliées dans l'autre Etat contractant les déductions personnelles, abattements et réductions d'impôt en fonction de la situation ou des charges de famille qu'il accorde aux personnes domiciliées sur son territoire.

5. Les entreprises d'un Etat contractant, dont le capital est en totalité ou en partie, directement ou indirectement, détenu ou contrôlé par une ou des personnes domiciliées dans l'autre Etat contractant, ne sont soumises dans le premier Etat contractant 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.

6. Le terme «imposition» désigne dans le présent article les impôts de toute nature ou dénomination.

Article 27.
Procédure amiable

1. Lorsqu'une personne domiciliée dans un Etat contractant estime que les mesures prises par un Etat contractant ou par chacun des deux Etats entraînent ou entraîneront pour elle une imposition non conforme à la présente Convention, elle peut, indépendamment des recours prévus par la législation nationale de ces Etats, soumettre son cas à l'autorité compétente de l'Etat contractant où elle est domiciliée.

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 contractant, en vue d'éviter une imposition non conforme à la Convention.

3. Les autorités compétentes des Etats contractants s'efforcent, par voie d'accord amiable, de résoudre les difficultés auxquelles peut donner lieu 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 contractants peuvent communiquer directement entre elles en vue de parvenir à un accord comme il est indiqué aux paragraphes précédents. Si des échanges de vues oraux semblent devoir faciliter cet accord, ces échanges de vues peuvent avoir lieu au sein d'une Commission composée de représentants des autorités compétentes des Etats contractants.

Article 28.
Echange de renseignements

1. Les autorités compétentes des Etats contractants échangeront les renseignements nécessaires pour appliquer les dispositions de la présente Convention et celles des lois internes des Etats contractants relatives aux impôts visés par la Convention dans la mesure où l'imposition qu'elles prévoient est conforme à la Convention. 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 contractants l'obligation:

a) De prendre des dispositions administratives dérogeant à sa propre législation ou à sa pratique administrative ou à celles de l'autre Etat contractant;

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 contractant;

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 29.
Fonctionnaires diplomatiques et consulaires

1. Les dispositions de la présente Convention ne portent pas atteinte aux privilèges fiscaux dont bénéficient les membres des missions diplomatiques et leurs domestiques privés ainsi que les membres de postes consulaires en vertu, soit des règles

du droit des gens, soit de dispositons conventionnelles.
2. Dans la mesure où, en raison des privilèges fiscaux dont bénéficient les membres des missions diplomatiques et leurs domestiques privés ainsi que les membres de postes consulaires en vertu, soit des règles du droit des gens, soit de dispositions conventionnelles, le revenu ou la fortune ne sont pas imposables dans l'Etat accréditaire, le droit d'imposition est réservé à l'Etat accréditant.
3. Aux fins de la Convention, les membres des missions diplomatiques et leurs domestiques privés ainsi que les membres de postes consulaires d'un Etat contractant accrédités dans l'autre Etat contractant ou dans un Etat tiers qui ont la nationalité de l'Etat accréditant, sont réputés être domiciliés dans l'Etat accréditant s'ils y sont soumis aux mêmes obligations en matière d'impôts sur le revenu et sur la fortune, que les personnes domiciliées dans ledit Etat.
4. La Convention ne s'applique pas aux organisations internationales, à leurs organes ou à leurs fonctionnaires, ni aux membres des missions diplomatiques, à leurs domestiques privés et aux membres de postes consulaires d'un Etat tiers lorsqu'ils se trouvent sur le territoire d'un Etat contractant et ne sont pas traités comme des personnes domiciliées dans l'un ou l'autre Etat contractant en matière d'impôts sur le revenu et sur la fortune.

Article 30.
Extension territoriale

1. La présente Convention peut être étendue, telle quelle ou avec les modifications nécessaires, aux territoires d'outre-mer de la République française, qui perçoivent des impôts de caractère analogue à ceux 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 entre les Etats contractants par échange de notes diplomatiques ou selon toute autre procédure conforme à leurs dispositions constitutionnelles.
2. A moins que les deux Etats contractants n'en soient convenus autrement, lorsque la Convention sera dénoncée par l'un d'eux en vertu de l'article 33, elle cessera de s'appliquer, dans les conditions prévues à cet article, à tout territoire auquel elle a été étendue conformément au présent article.

Article 31.
Application de la Convention

Les autorités compétentes des Etats contractants déterminent les modalités d'application de la présente Convention.

CHAPITRE VII

Dispositions finales

Article 32.
Entrée en vigueur

1. La présente Convention sera approuvée conformément aux procédures constitutionnelles applicables dans chacun des deux Etats. Elle entrera en vigueur dès l'échange des notes constatant que les formalités nécessaires ont été accomplies dans les deux Etats.
2. Ses dispositions s'appliqueront pour la première fois:
A. — En France:

— aux impôts perçus par voie de retenue à la source sur les dividendes, intérêts et redevances mis en paiement postérieurement à la date d'entrée en vigueur;
— aux autres impôts perçus sur les revenus afférents à l'année civile de la date d'entrée en vigueur ou aux exercices clos au cours de ladite année.

B. — En Tchécoslovaquie:
— aux impôts perçus sur les revenus afférents à l'année civile de la date d'entrée en vigueur.

Article 33.
Dénonciation

La présente Convention restera en vigueur sans limitation de durée. Toutefois, à partir de l'année 1975, chaque Etat contractant pourra, moyennant un préavis minimum de six mois notifié par la voie diplomatique, la dénoncer pour la fin d'une année civile.

Dans ce cas, la Convention s'appliquera pour la dernière fois:

A. — En France:
— aux impôts perçus par voie de retenue à la source sur les dividendes, intérêts et redevances mis en paiement avant la fin de l'année civile pour la fin de laquelle la dénonciation aura été notifiée;
— aux autres impôts perçus sur les revenus afférents à l'année civile pour la fin de laquelle la dénonciation aura été notifiée et pour les exercices clos au cours de ladite année.

B. — En Tchécoslovaquie:
— aux impôts perçus sur les revenus afférents à l'année civile pour la fin de laquelle la dénonciation aura été notifiée.

En foi de quoi, les soussignés dûment autorisés à cet effet par leurs gouvernements respectifs, ont signé la présente Convention.

Fait à Paris, le 1er juin 1973, en double exemplaire, en langues française et tchèque, les deux textes faisant également foi.

Pour le Gouvernement de la République française:
Gilbert de Chambrun.

Pour le Gouvernement
de la République socialiste tchécoslovaque:
Juraje Sedlaka.

Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale entre le Gouvernement de la République française et le Gouvernement de la République tunisienne

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

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A double tax treaty was signed between France and Tunisia on May 28, 1973. The treaty shall enter into force on the first day of the month following the date on which the contracting States have exchanged the notifications stating that the legal requirements have been complied with.

TEXT

Le Gouvernement de la République française et le Gouvernement de la République tunisienne, désireux d'éliminer les doubles impositions et d'assurer une assistance mutuelle administrative entre la France et la Tunisie, sont convenus de ce qui suit:

TITRE PREMIER

Dispositions générales

CHAPITRE Ier

Champ d'application de la Convention

Article 1er
Personnes visées

1. La présente Convention s'applique aux personnes qui sont des résidents d'un Etat contractant ou de chacun des deux Etats.

2. Le terme «personne» désigne:
a) Toute personne physique;
b) Toute personne morale;
c) Tout groupement de personnes physiques qui n'a pas la personnalité morale.

Article 2
Portée territoriale

Pour l'application de la présente Convention:
Le terme «France» désigne les départements européens et d'outre-mer (Guadeloupe, Guyane, Martinique et Réunion) de la République française et les zones adjacentes aux eaux territoriales de la France sur lesquelles, en conformité avec le droit international, la France peut exercer les droits relatifs au lit de la mer, au sous-sol marin et à leurs ressources naturelles;

Le terme «Tunisie» désigne le territoire de la République tunisienne et les zones adjacentes aux eaux territoriales de la Tunisie sur lesquelles, en conformité avec le droit international, la Tunisie peut exercer les droits relatifs au lit de la mer, au sous-sol marin et à leurs ressources naturelles.

Article 3
Domicile fiscal

1. Au sens de la présente Convention, l'expression «résident d'un Etat contractant» 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. Lorsque, selon la disposition du paragraphe 1, une personne physique est considérée comme résident de chacun des Etats contractants, le cas est résolu d'après les règles suivantes:

a) Cette personne est considérée comme résident de l'Etat contractant où elle dispose d'un foyer d'habitation permanent. Lorsqu'elle dispose d'un foyer d'habitation permanent dans chacun des Etats contractants, elle est considérée comme résident de l'Etat contractant avec lequel ses liens personnels et économiques sont les plus étroits (centre des intérêts vitaux);

b) Si l'Etat contractant 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 dess Etats contractants, elle est considérée comme résident de l'Etat contractant où elle séjourne de façon habituelle;

c) Si cette personne séjourne de façon habituelle dans chacun des Etats contractants ou si elle ne séjourne de façon habituelle dans aucun d'eux, elle est considérée comme résident de l'Etat contractant dont elle possède la nationalité;

d) Si cette personne possède la nationalité de chacun des Etats contractants ou si elle ne possède la nationalité d'aucun d'eux, les autorités compétentes des Etats contractants tranchent la question d'un commun accord.

3. Lorsque, selon la disposition du paragraphe 1, une personne autre qu'une personne physique est considérée comme résident de chacun des Etats contractants, elle est réputée résident de l'Etat où se trouve son siège de direction effective.

Article 4
Etablissement stable

1. Au sens de la présente Convention, l'expression «établissement stable» désigne une installation fixe d'affaires où une 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 magasin de vente;

h) Un chantier de construction, où des opérations temporaires de montage ou des activités de surveillance s'y exerçant, lorsque ce chantier, ces opérations ou ces activités ont une durée supérieure à six mois ou lorsque ces opérations temporaires de montage ou activités de surveillance, faisant suite à la vente de machines ou d'équipement, ont une durée supérieure à trois mois et que les frais de montage ou de surveillance dépassent 10 p. 100 du prix de ces machines ou équipement.

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 à expédier à l'entreprise elle-même dans l'autre Etat contractant;
e) Une installation fixe d'affaires est utilisée aux seules fins de publicité, de fourniture d'informations, de recherche scientifique ou d'activités analogues qui ont pour l'entreprise un caractère préparatoire ou auxiliaire à condition qu'aucune commande n'y soit recueillie.

4. Lorsqu'une personne agit dans un Etat contractant pour le compte d'une entreprise de l'autre Etat contractant (autre qu'un agent jouissant d'un statut indépendant) elle est considérée comme ayant un établissement stable dans le premier Etat, si elle dispose dans cet Etat de pouvoirs qu'elle exerce habituellement et qui lui permettent de négocier et de conclure des contrats pour l'entreprise ou pour le compte de l'entreprise.

5. Une entreprise d'assurances de l'un des Etats contractants est considérée comme ayant un établissement stable dans l'autre Etat contractant dès l'instant que, par l'intermédiaire d'un représentant n'entrant pas dans la catégorie des personnes visées à l'alinéa 6 ci-après, elle perçoit des primes sur le territoire dudit Etat ou assure des risques situés sur ce territoire.

6. On ne considère pas qu'une entreprise d'une Etat contractant a un établissement stable dans l'autre Etat contractant du seul fait qu'elle y exerce son activité par l'entremise d'un courtier, d'un commissionnaire ou de tout autre intermédiaire jouissant d'un statut indépendant, à condition que ces personnes agissent dans le cadre ordinaire de leur activité.

7. Le fait qu'une société domiciliée dans un Etat contractant contrôle ou soit contrôlée par une société qui est domiciliée dans l'autre Etat contractant ou qui y effectue des opérations commerciales (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 ces deux sociétés un établissement stable de l'autre.

Article 5
Biens immobiliers

L'expression «biens immobiliers» est définie conformément à la législation fiscale de l'Etat contractant où les biens 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; les navires et aéronefs ne sont pas considérés comme biens immobiliers.

Article 6
Non-discrimination

1. Les nationaux d'un Etat contractant ne sont soumis dans l'autre Etat contractant 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 personnes physiques qui possèdent la nationalité d'un Etat contractant;

b) Toutes les personnes morales, sociétés de personnes et associations constituées conformément à la législation en vigueur dans un Etat contractant.

3. Les apatrides résidents de l'un ou l'autre des Etats ne sont soumis dans un Etat contractant 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 Etat se trouvant dans la même situation.

4. L'imposition d'un établissement stable qu'une entreprise d'un Etat contractant a dans l'autre Etat contractant 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 un Etat contractant à accorder aux résidents de l'autre Etat contractant 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.

5. Les entreprises d'un Etat contractant, dont le capital est en totalité ou en partie, directement ou indirectement, détenu ou contrôlé par un ou plusieurs résidents de l'autre Etat contractant, ne sont soumises dans le premier Etat contractant 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.

6. Le terme «imposition» désigne dans le présent article les impôts de toute nature ou dénomination visés aux articles 9, 30, 38 et 39 de la présente Convention.

Les dispositions de la présente Convention ne doivent pas faire obstacle à l'application de dispositions fiscales plus favorables prévues par la législation de l'un des Etats contractants en faveur des investissements.

Article 7
Autorités compétentes

Pour l'application des dispositions contenues dans la présente Convention, l'expression «autorités compétentes» désigne:

— dans le cas de la France, le Ministre de l'Economie et des Finances;

— dans le cas de la Tunisie, le Ministre des Finances,

ou leurs représentants dûment délégués ou autorisés.

Article 8
Règle d'interprétation

Pour l'application de la présente Convention par l'un des Etats contractants, tout terme non défini dans cette Convention recevra, à moins que le contexte ne l'exige autrement, la signification que lui donnent les lois en vigueur dans l'Etat considéré, en ce qui concerne les impôts visés dans cette Convention.

TITRE II

Doubles impositions

CHAPITRE Ier
Impôts sur les revenus

Article 9
Impôts visés

1. Le présent chapitre s'applique aux im-

pôts sur le revenu perçus pour le compte de chacun des Etats contractants et de ses collectivités locales, quel que soit le système de perception.
2. Sont considérés comme impôts sur le revenu les impôts perçus sur le revenu total, ou sur des éléments du revenu, y compris les impôts sur les gains provenant de l'aliénation de biens mobiliers ou immobiliers, les impôts sur le montant des salaires ainsi que les impôts sur les plus-values.
3. Les impôts actuels auxquels s'applique la Convention sont:
a) En ce qui concerne la France:
— l'impôt sur le revenu;
— l'impôt sur les sociétés ainsi que toutes retenues, tous précomptes décomptés sur ces impôts.
b) En ce qui concerne la Tunisie:
— l'impôt de la patente;
— l'impôt sur les bénéfices des professions non commerciales;
— l'impôt sur les traitements et salaires, pensions et rentes viagères;
— l'impôt agricole;
— l'impôt sur le revenu des valeurs mobilières;
— l'impôt sur le revenu des créances, dépôts, cautionnements et comptes courants (I.R.C.);
— la contribution personnelle d'Etat.
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 contractants se communiqueront, à la fin de chaque année, les modifications apportées à leurs législations fiscales respectives.

Article 10
Revenus immobiliers

1. Les revenus des biens immobiliers, y compris les bénéfices des exploitations agricoles et forestières, sont imposables dans l'Etat où ces biens sont situés.
2. 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.
3. Les dispositions des paragraphes 1 et 2 s'appliquent également aux revenus provenant des biens immobiliers d'une entreprise ainsi qu'aux revenus de biens immobiliers servant à l'exercice d'une profession libérale.

Article 11
Bénéfice des entreprises

1. Les bénéfices d'une entreprise d'un Etat contractant ne sont imposables que dans cet Etat, à moins que l'entreprise n'exerce son activité dans l'autre Etat contractant 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 la mesure où ils sont imputables audit établissement stable.
2. Lorsqu'une entreprise d'un Etat contractant exerce son activité dans l'autre Etat contractant par l'intermédiaire d'un établissement stable qui y est situé, il est imputé, dans chaque Etat contractant, 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. Pour la détermination des bénéfices d'un établissement stable, sont admises en

déduction les dépenses engagées aux fins de l'activité de cet établissement stable, y compris les dépenses effectives de direction et les frais généraux réels d'administration, frais engagés soit dans l'Etat où est situé cet établissement stable soit ailleurs.

4. S'il est d'usage, dans un Etat contractant, 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 contractant 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. 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 de motifs valables et suffisants de procéder autrement.

6. Les participations d'un associé aux bénéfices d'une entreprise constituée sous forme de «société de fait» ou «d'association en participation» ne sont imposables que dans l'Etat où ladite entreprise a un établissement stable.

7. Nonobstant les dispositions du paragraphe premier du présent article, les bénéfices réalisés par une entreprise d'un Etat contractant et provenant de loyers de biens meubles et immeubles y compris la location pour l'utilisation de films cinématographiques à usage commercial, de redevances, d'honoraires de services techniques, d'intérêts, de dividendes, de gains en capital, de tantièmes pour la direction des affaires d'une entreprise, ou de rémunération et honoraires quelconques provenant de l'autre Etat seront imposables dans ce dernier Etat même en l'absence d'établissement stable dans ledit Etat lorsqu'une autre disposition de la Convention en attribue le droit d'imposer audit Etat et dans les conditions prévues par cette autre disposition.

Article 12
Entreprises associées

Lorsque:

a) Une entreprise d'un Etat contractant participe directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise de l'autre Etat contractant, ou que

b) Les mêmes personnes participent directement ou indirectement à la direction, au contrôle ou au capital d'une entreprise d'un Etat contractant et d'une entreprise de l'autre Etat contractant, 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 les entreprises indépendantes,

les bénéfices qui, sans ces conditions, auraient été obtenus par 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 13
Navigation maritime et aérienne

1. Les bénéfices provenant de l'exploitation, en trafic international, de navires ou d'aéronefs ne sont imposables que dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

2. Si le siège de la direction effective

d'une entreprise de navigation maritime est à bord d'un navire, ce siège est réputé situé dans l'Etat contractant où se trouve le port d'attache de ce navire ou, à défaut de port d'attache, dans l'Etat contractant dont l'exploitant du navire est un résident.

3. Les dispositions du paragraphe 1 s'appliquent aussi aux bénéfices provenant de la participation à un pool, à une exploitation en commun ou à un organisme international d'exploitation.

Article 14
Dividendes

1. Les dividendes payés par une société qui est résidente d'un Etat contractant à une personne résidente de l'autre Etat contractant sont imposables dans cet autre Etat.

2. Par ailleurs, sous réserve des dispositions de l'article 15, ces dividendes peuvent être imposés dans l'Etat contractant dont la société qui paie les dividendes est un résident, et selon la législation de cet Etat.

3. Le terme «dividendes» employé dans le présent article désigne les revenus provenant d'actions ou bons de jouissance, parts de mine, parts de fondateurs ou autres parts bénéficiaires à l'exception des créances, ainsi que 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.

4. Lorsque les dividendes distribués par une société résidente de France donnent lieu à la perception du précompte mobilier, les bénéficiaires de ces revenus résidents de Tunisie peuvent en obtenir le remboursement, sous déduction, le cas échéant, de la retenue à la source afférente au montant des sommes remboursées lorsque lesdits revenus ne sont pas imposables à leur nom en Tunisie.

5. Si le bénéficiaire résident de l'un des deux Etats possède un établissement stable dans l'autre Etat, et si les revenus visés au paragraphe 1 ci-dessus se rattachant à l'activité dudit établissement stable, l'impôt est perçu dans ce dernier Etat.

Article 15
Répartition des bases d'imposition

1. Lorsqu'une société résidente de l'un des Etats contractants s'y trouve soumise au paiement d'un impôt frappant les distributions de dividendes et qu'elle possède un ou plusieurs établissements stables sur le territoire de l'autre Etat contractant à raison desquels elle est également soumise dans ce dernier Etat au paiement d'un même impôt, il est procédé à une répartition, entre les deux Etats, des revenus donnant ouverture audit impôt, afin d'éviter une double imposition.

2. La répartition prévue au paragraphe qui précède s'établit, pour chaque exercice, sur la base du rapport:

$\frac{A}{B}$ pour l'Etat dans lequel la société n'a pas son domicile fiscal;

$\frac{B - A}{B}$ pour l'Etat dans lequel la société a son domicile fiscal,

la lettre A désignant le montant des bénéfices comptables provenant à la société de l'ensemble des établissements stables qu'elle possède dans l'Etat où elle n'a pas son domicile fiscal, toutes compensations étant faites entre les résultats bénéficiaires et les résultats déficitaires de ces établissements. Ces bénéfices comptables s'entendent de ceux qui sont réputés réalisés dans lesdits établissements, au régard des dispositions

des articles 11 et 12 de la présente Convention;
la lettre B désignant le bénéfice comptable total de la société, tel qu'il résulte de son bilan général.
Pour la détermination du bénéfice comptable total, il est fait abstraction des résultats déficitaires constatés pour l'ensemble des établissements stables de la société dans un Etat quelconque, toutes compensations étant faites entre les résultats bénéficiaires et les résultats déficitaires de ces établissements.
Dans le cas où le résultat comptable total d'un exercice est nul ou négatif, la répartition s'effectue sur les bases antérieurement dégagées.

3. En l'absence de bases antérieurement dégagées, la répartition s'effectue selon une quotité fixée par commune entente entre les autorités compétentes des Etats contractants intéressés.

4. Lorsque les bénéfices distribués comprennent des produits de participations détenues par la société dans le capital d'autres sociétés et que ces participations remplissent, pour bénéficier des régimes spéciaux auxquels sont soumises les sociétés affiliées, les conditions exigées en vertu de la législation interne soit de l'Etat du domicile fiscal de la société, soit de l'autre Etat, selon qu'elles figurent à l'actif du bilan concernant l'établissement stable situé dans le premier ou dans le second Etat, chacun desdits Etats applique à ces bénéfices distribués, dans la mesure où ils proviennent du produit des participations régies par sa législation interne, les dispositions de cette législation, en même temps qu'il taxe la partie desdits bénéfices qui ne provient pas du produit de participations dans la mesure où l'imposition lui en est attribuée suivant les modalités prévues au paragraphe 2 ci-dessus.

Article 16
Redressements

1. Quand, à la suite de contrôles exercés par les administrations fiscales compétentes, il est effectué, sur le montant des bénéfices réalisés au cours d'un exercice, des redressements ayant pour résultat de modifier la proportion définie au paragraphe 2 de l'article 15, il est tenu compte de ces redressements pour la répartition, entre les deux Etats contractants, des bases d'imposition afférentes à l'exercice au cours duquel les redressements interviennent.

2. Les redressements portant sur le montant des revenus à répartir, mais n'affectant pas la proportion des bénéfices réalisés dont il a été tenu compte pour la répartition des revenus faisant l'objet desdits redressements, donnent lieu, selon les règles applicables dans chaque Etat, à une imposition supplémentaire répartie suivant la même proportion que l'imposition initiale.

Article 17
Obligations des sociétés

1. La répartition des bases d'imposition visée à l'article 15 est opérée par la société et notifiée par elle à chacune des administrations fiscales compétentes, dans le délai qui lui est imparti par la législation de chaque Etat pour déclarer les distributions de produits imposables auxquelles elle procède.
A l'appui de cette répartition, la société fournit à chacune desdites administrations, outre les documents qu'elle est tenue de produire ou de déposer en vertu de la législation interne, une copie de ceux produits ou déposés auprès de l'administration de l'autre Etat.

2. Les difficultés ou contestations qui

peuvent surgir au sujet de la répartition des bases d'imposition sont réglées d'une commune entente entre les administrations fiscales compétentes.
A défaut d'accord, le différend est tranché par la commission mixte prévue à l'article 41.

Article 18
Intérêts

1. Les intérêts provenant d'un Etat contractant et payés à une personne domiciliée sur le territoire de l'autre Etat contractant sont imposables dans cet autre Etat.
2. Par ailleurs, l'Etat contractant d'où proviennent ces intérêts a le droit de les imposer, si sa législation interne le prévoit, à un taux qui ne peut excéder 12 p. 100 du montant versé.
3. Le terme «intérêt» employé dans le présent article désigne les revenus des fonds publics, des obligations d'emprunt, assorties ou non de garanties hypothécaires ou d'une clause de participation aux bénéfices, et des créances de toute nature, ainsi que de tous autres produits assimilés aux revenus de sommes prêtées par la législation fiscale de l'Etat du débiteur.
4. Les intérêts sont considérés comme provenant d'un Etat contractant lorsque le débiteur est cet Etat lui-même, une subdivision administrative, une collectivité locale ou une personne domiciliée dans cet Etat. Toutefois, lorsque le débiteur des intérêts, qu'il soit ou non domicilié dans un Etat contractant, a, dans un Etat contractant, un établissement stable pour les besoins duquel a été réalisé l'emprunt productif des intérêts et qui supporte la charge de ces intérêts, lesdits intérêts sont réputés provenir de l'Etat contractant où l'établissement stable est situé.
5. Les dispositions des paragraphes 1 et 2 ne s'appliquent pas lorsque le bénéficiaire des intérêts, domicilié dans un Etat contractant, a, dans l'autre Etat contractant d'où proviennent les intérêts, un établissement stable auquel se rattache effectivement la créance qui les produit. Dans ce cas, l'article 10 concernant l'imputation des bénéfices aux établissements stables est applicable.
6. 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 aux législations nationales des Etats contractants et compte tenu des autres dispositions de la présente Convention.
7. Par dérogation aux dispositions qui précèdent, les intérêts des prêts et crédits consentis par un Etat contractant à un résident de l'autre Etat ne sont pas imposés dans l'Etat d'où ils proviennent.

Article 19
Redevances

1. Les redevances versées pour la jouissance de biens immobiliers ou l'exploitation de mines, carrières ou autres ressources naturelles ne sont imposables que dans celui des Etats contractants où sont situés ces biens, mines, carrières ou autres ressources naturelles.
2. Les redevances non visées au paragraphe 1 provenant d'un Etat contractant et payés à une personne résidente dans l'autre

Etat contractant sont imposables dans cet autre Etat. Toutefois, ces redevances peuvent être imposées dans l'Etat contractant d'où elles proviennent, si la législation de cet Etat le prévoit, dans les conditions et sous les limites ci-après:

a) La redevance versée en contrepartie de l'usage ou du droit à l'usage de droits d'auteur sur les œuvres littéraires, artistiques ou scientifiques, non compris les films cinématographiques et de télévision, qui sont payées dans l'un des Etats contractants, peuvent être imposées dans le premier Etat, mais l'impôt ainsi établi ne peut excéder cinq pour cent du montant brut de ces redevances;

b) Les redevances provenant de la concession de licences d'exploitation de brevets, dessins et modèles, plans, formules ou procédés secrets, provenant de sources situées sur le territoire de l'un des Etats contractants et payées à une personne résidente de l'autre Etat, peuvent être imposées dans le premier Etat, mais l'impôt ainsi établi ne peut excéder quinze pour cent du montant brut de ces redevances;

c) Les rémunérations pour la fourniture d'informations concernant des expériences d'ordre industriel, commercial ou scientifique ainsi que les rémunérations pour des études techniques ou économiques peuvent être imposées dans le premier Etat, mais l'impôt ainsi établi ne peut excéder quinze pour cent de leur montant brut;

d) Les sommes payées pour la concession de licences d'exploitation, de marques de fabrique ou de commerce, pour la location du droit d'utilisation de films cinématographiques et de télévision ainsi que les rémunérations analogues pour l'usage ou le droit à usage d'équipements agricoles, industriels, portuaires, commerciaux ou scientifiques peuvent être imposées dans le premier Etat mais l'impôt ainsi établi ne peut excéder vingt pour cent de ces sommes;

e) Les sommes, en provenance d'un Etat contractant et payées pour l'utilisation de films cinématographiques ou d'émissions de radiodiffusion et de télévision versées à un établissement public de l'autre Etat contractant, sont exonérées dans le premier Etat.

3. Si une redevance est supérieure à la valeur intrinsèque et normale des droits pour lesquels elle est payée, les dispositions des paragraphes 1er et 2 ne s'appliquent qu'à la partie de cette redevance qui correspond à cette valeur intrinsèque et normale.

4. Les dispositions des paragraphes 1 et 2 ne s'appliquent pas lorsque le bénéficiaire des redevances ou autres rémunérations entretient dans l'Etat contractant d'où proviennent ces revenus un établissement stable ou une installation fixe d'affaires servant à l'exercice d'une profession libérale ou d'une autre activité indépendante et que ces redevances ou autres rémunérations sont à attribuer à cet établissement stable ou à cette installation fixe d'affaires. Dans ce cas, ledit Etat a le droit d'imposer ces revenus conformément à sa législation.

Article 20
Gains en capital

1. Les gains provenant de l'aliénation des biens immobiliers, tels qu'ils sont définis à l'article 5 ainsi que les gains provenant de l'aliénation de parts ou de droits analogues dans une société dont l'actif est composé principalement de biens immobiliers, sont imposables dans l'Etat contractant 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

d'un Etat contractant a dans l'autre Etat contractant ou de biens mobiliers constitutifs d'une base fixe dont dispose un résident d'un Etat contractant dans l'autre Etat contractant pour l'exercice d'une 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. Toutefois, les gains qu'un résident de l'un des Etats retire de l'aliénation de navires ou d'aéronefs exploités en trafic international ainsi que les biens mobiliers affectés à l'exploitation de tels navires ou aéronefs ne sont imposables que dans cet Etat.

Article 21
Professions indépendantes

1. Les revenus qu'un résident d'un Etat contractant tire d'une profession libérale ou d'autres activités indépendantes de caractère analogue ne sont imposables que dans cet Etat. Toutefois, ces revenus sont imposables dans l'autre Etat contractant dans les cas suivants:
a) Si l'intéressé dispose de façon habituelle dans l'autre Etat contractant d'une base fixe pour l'exercice de ses activités; en ce cas seule la fraction des revenus qui est imputable à ladite base fixe est imposable dans l'autre Etat contractant; ou
b) Si son séjour dans l'autre Etat contractant s'étend sur un période ou des périodes d'une durée totale égale ou supérieure à 183 jours pendant l'année fiscale à raison des revenus réalisés pendant cette période dans cet autre Etat.
2. L'expression «profession libérale» comprend en particulier les activités indépendantes d'ordre scientifique, littéraire, éducatif ou pédagogique, ainsi que les activités indépendantes des médecins, avocats, ingénieurs, architectes et comptables.

Article 22
Professions dépendantes

1. Les salaires, traitements et autres rémunérations similaires qu'un résident d'un Etat contractant 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 contractant. Si l'emploi y est exercé, les rémunérations reçues à ce titre sont imposables dans cet autre Etat.
2. Nonobstant les dispositions du paragraphe 1er, les rémunérations qu'un résident d'un Etat contractant reçoit au titre d'un emploi salarié exercé dans l'autre Etat contractant 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 au titre d'un emploi salarié exercé à bord d'un navire ou d'un aéronef en trafic international sont imposables dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

Article 23
Tantièmes

Les tantièmes, jetons de présence et autres rétributions similaires qu'un résident d'un Etat reçoit en sa qualité de membre

du conseil d'administration ou de surveillance d'une société qui est un résident de l'autre Etat contractant sont imposables dans cet autre Etat, sous réserve de l'application des articles 21 et 22 ci-dessus, en ce qui concerne les rémunérations perçues par les intéressés en leurs autres qualités effectives.

Article 24
Artistes et sportifs

1. Nonobstant les dispositions des articles 21 et 22, 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 contractant où ces activités sont exercées.
2. Lorsque les produits de l'activité personnelle qu'un artiste ou un sportif exerce en cette qualité reviennent à une autre personne, ces produits, nonobstant les dispositions des articles 11, 21 et 22, sont imposables dans l'Etat contractant dans lequel l'artiste ou le sportif exerce son activité.
3. Les dispositions des paragraphes 1 et 2 ne s'appliquent pas aux revenus d'activités exercées dans un Etat contractant par des organismes sans but lucratif de l'autre Etat contractant ou par des membres de leur personnel, sauf si ces derniers agissent pour leur propre compte.

Article 25
Pensions

Les pensions, rentes viagères et autres rémunérations similaires, versées à un résident d'un Etat contractant au titre d'un emploi antérieur, ne sont imposables que dans cet Etat.

Article 26
Fonctions publiques

1. Réserve étant faite de l'application de dispositions résultant d'accords particuliers, les rémunérations versées par un Etat contractant ou l'une de ses collectivités locales, ou un établissement public de cet Etat, soit directement soit par prélèvement sur des fonds qu'ils ont constitués sont imposables dans les conditions prévues par l'article 22.
2. Les rémunérations visées au paragraphe 1 qui ne sont pas imposées dans l'Etat dont le bénéficiaire est un résident demeurent imposables dans l'autre Etat.

Article 27
Etudiants et stagiaires

1. Les sommes qu'un étudiant ou un stagiaire qui est, ou qui était auparavant, un résident d'un Etat contractant et qui séjourne dans l'autre Etat contractant à seule fin d'y poursuivre ses études ou sa formation, reçoit pour couvrir les 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.
Il en est de même de la rémunération qu'un tel étudiant ou stagiaire reçoit au titre d'un emploi exercé dans l'Etat contractant où il poursuit ses études ou sa formation à la condition que cette rémunération soit strictement nécessaire à son entretien.
2. Un étudiant d'une université ou d'un autre établissement d'enseignement supérieur ou technique d'un Etat contractant qui exerce une activité rémunérée dans

l'autre Etat contractant uniquement en vue d'obtenir une formation pratique relative à ces études n'est pas soumis à l'impôt dans ce dernier Etat à raison de la rémunération versée à ce titre, à condition que la durée de cette activité ne dépasse pas une année ou celle du stage nécessaire à sa formation lorsqu'elle est supérieure à une année.

Article 28
Revenus non expressément mentionnés

Les éléments du revenu d'un résident d'un Etat contractant qui ne sont pas expressément mentionnés dans les articles précédents de la présente Convention ne sont imposables que dans cet Etat.

Article 29
Dispositions pour éliminer la double imposition

La double imposition est évitée de la manière suivante:

1. *Dans le cas de la France:*

a) Les revenus qui sont exclusivement imposables en Tunisie sont exonérés des impôts français visés à l'article 9 mais la France conserve le droit de calculer l'impôt au taux correspondant à l'ensemble des revenus imposables d'après sa législation;

b) En ce qui concerne les revenus visés aux articles 18, 19, 23 et 24 ci-dessus, la France peut, en conformité avec les dispositions de sa législation, les comprendre dans la base des impôts visés à l'article 9 pour leur montant brut; mais elle accorde sur le montant des impôts afférents à ces revenus une réduction correspondant au montant des impôts prélevés en Tunisie sur ces mêmes revenus;

c) Les dividendes imposés en Tunisie au titre des articles 14 et 15 ci-dessus ouvrent droit à un crédit calculé dans les conditions prévues dans le protocole annexé à la Convention;

d) Les redevances imposées en Tunisie au titre de l'article 19, paragraphe 2 *b* ci-dessus, ouvrent droit à un crédit égal à 20 p. 100 de leur montant brut.

2. *Dans le cas de la Tunisie:*

Lorsqu'un résident reçoit des revenus qui, conformément aux dispositions de la présente Convention, sont imposables en France, la Tunisie déduit de l'impôt qu'elle perçoit sur les revenus du résident un montant égal à l'impôt payé en France.

Toutefois, la somme déduite ne peut excéder la fraction de l'impôt sur le revenu, calculé avant la déduction, correspondant aux revenus imposables en France.

CHAPITRE II

Impôts sur les successions

Article 30
Impôts visés

1. Le présent chapitre est applicable aux impôts sur les successions perçus pour le compte de chacun des Etats contractants.

Sont considérés comme impôts sur les successions: les impôts perçus par suite de décès sous forme d'impôts sur la masse successorale, d'impôts sur les parts héréditaires, de droits de mutation ou d'impôts sur les donations pour cause de mort.

2. Les impôts actuels auxquels s'applique le présent chapitre sont:

En ce qui concerne la France:

L'impôt sur les successions.

En ce qui concerne la Tunisie:

L'impôt sur les successions.

Article 31
Biens immobiliers

Les biens immobiliers (y compris les accessoires) ne sont soumis à l'impôt sur les successions que dans l'Etat contractant où ils sont situés; le cheptel mort ou vif servant à une exploitation agricole ou forestière n'est imposable que dans l'Etat contractant où l'exploitation est située.

Article 32
Biens meubles compris dans l'actif d'un établissement stable

Les biens meubles corporels ou incorporels laissés par un défunt ayant eu au moment de son décès son domicile dans l'un des Etats contractants et investis dans une entreprise commerciale, industrielle ou artisanale de tout genre sont soumis à l'impôt sur les successions suivant la règle ci-après:
a) Si l'entreprise ne possède un établissement stable que dans l'un des deux Etats contractants, les biens ne sont soumis à l'impôt que dans cet Etat; il en est ainsi même lorsque l'entreprise étend son activité sur le territoire de l'autre Etat contractant sans y avoir un établissement stable;
b) Si l'entreprise a un établissement stable dans les deux Etats contractants, les biens sont soumis à l'impôt dans chaque Etat dans la mesure où ils sont affectés à un établissement stable situé sur le territoire de cet Etat.
Toutefois, les dispositions du présent article ne sont pas applicables aux investissements effectués par le défunt dans les sociétés à base de capitaux (sociétés anonymes, sociétés en commandite par actions, sociétés à responsabilité limitée, sociétés coopératives, sociétés civiles soumises au régime fiscal des sociétés de capitaux) ou sous forme de commandite dans les sociétés en commandite simple.

Article 33
Biens meubles affectés à l'exercice d'une profession libérale

Les biens meubles corporels ou incorporels rattachés à des installations permanentes et affectés à l'exercice d'une profession libérale dans l'un des Etats contractants ne sont soumis à l'impôt sur les successions que dans l'Etat contractant où se trouvent ces installations.

Article 34
Autres biens meubles

1. Les biens meubles corporels, y compris les meubles meublants, le linge et les objets ménagers ainsi que les objets et collections d'art autres que les meubles visés aux articles 32 et 33, ne sont soumis à l'impôt sur les successions que dans celui des Etats contractants où ils se trouvent effectivement à la date du décès.
Toutefois, les bateaux et les aéronefs ne sont imposables que dans l'Etat contractant où ils ont été immatriculés.
2. Les actions, parts bénéficiaires, parts de fondateurs et titres assimilés ainsi que les obligations négociables et titres assimilés émis par les sociétés de capitaux sont imposables dans l'Etat du siège de la société émettrice.
Les créances de toute nature sont imposables dans l'Etat dont le débiteur est le résident.

Article 35
Biens non mentionnés

Les biens de la succession auxquels les articles 31 à 34 ne sont pas applicables ne sont soumis aux impôts sur les successions que dans l'Etat contractant où le défunt avait son domicile au moment de son décès.

Article 36
Déduction du passif

1. Les dettes afférentes aux entreprises visées aux articles 32 et 33 sont imputables sur les biens affectés à ces entreprises. Si l'entreprise possède, selon le cas, un établissement stable ou une installation permanente dans les deux Etats contractants, les dettes sont imputables sur les biens affectés à l'établissement ou à l'installation dont elles dépendent.
2. Les dettes garanties, soit par des immeubles ou des droits immobiliers, soit par des bateaux ou aéronefs visés à l'article 34, soit par des biens affectés à l'exercice d'une profession libérale dans les conditions prévues à l'article 33, soit par des biens affectés à une entreprise de la nature visée à l'article 32, sont imputables sur ces biens. Si la même dette est garantie à la fois par des biens situés dans les deux Etats, l'imputation se fait sur les biens situés dans chacun d'eux proportionnellement à la valeur taxable de ces biens.
Cette disposition n'est applicable aux dettes visées au paragraphe 1 que dans la mesure où ces dettes ne sont pas couvertes par l'imputation prévue à ce paragraphe.
3. Les dettes non visées aux paragraphes 1 et 2 sont imputées sur les biens auxquels sont applicables les dispositions de l'article 35.
4. Si l'imputation prévue aux trois paragraphes qui précèdent laisse subsister dans un Etat contractant un solde non couvert, ce solde est déduit des autres biens soumis à l'impôt sur les successions dans ce même Etat. S'il ne reste pas dans cet Etat d'autres biens soumis à l'impôt ou si la déduction laisse encore un solde non couvert, ce solde est imputé sur les biens soumis à l'impôt dans l'autre Etat contractant.

Article 37
Taux progressif

Nonobstant les dispositions des articles 31 à 36, chaque Etat contractant conserve le droit de calculer l'impôt sur les biens héréditaires qui sont réservés à son imposition exclusive, d'après le taux moyen qui serait applicable s'il était tenu compte de l'ensemble des biens qui seraient imposables d'après sa législation interne.

CHAPITRE III
Autres droits d'enregistrement et droits de timbre

Article 38
Droits d'enregistrement

1. Les droits afférents à un acte ou un jugement soumis à l'obligation de l'enregistrement sont, sous réserve des dispositions des paragraphes 2 et 3 ci-après, dus dans l'Etat où l'acte est établi ou le jugement rendu.
Lorsqu'un acte ou un jugement établi ou rendu dans l'un des Etats contractants est présenté à l'enregistrement dans l'autre Etat contractant, les droits applicables dans ce dernier Etat sont déterminés suivant les

règles prévues par sa législation interne, sauf imputation, le cas échéant, des droits d'enregistrement qui ont été perçus dans le premier Etat sur les droits dus dans cet autre Etat.

2. Sous réserve des alinéas *a* et *b* ci-après, les actes constitutifs de sociétés ou modificatifs du pacte social ne donnent lieu à la perception du droit proportionnel d'apport que dans l'Etat où est situé le siège statutaire de la société. S'il s'agit de fusion ou d'opération assimilée, la perception est effectuée dans l'Etat où est situé le siège de la société absorbante ou nouvelle.

a) Le droit d'apport exigible sur les immeubles et les fonds de commerce apportés en propriété ou en usufruit ainsi que le droit au bail ou le bénéfice d'une promesse de bail portant sur tout ou partie d'un immeuble n'est perçu que dans celui des Etats contractants sur le territoire duquel ces immeubles ou ces fonds de commerce sont situés.

b) Lorsqu'une société ayant son siège social dans l'un des Etats contractants et possédant un ou plusieurs établissements stables sur le territoire de l'autre Etat contractant procède à une augmentation de capital par incorporation de réserves ou est imposée à raison de ses réserves, l'augmentation de capital ou les réserves sont imposées dans les conditions fixées aux articles 15 à 17.

3. Les actes ou jugements portant mutation de propriété, d'usufruit d'immeuble ou de fonds de commerce, ceux portant mutation de jouissance d'immeuble et les actes ou jugements constatant une cession de droit à un bail ou au bénéfice d'une promesse de bail portant sur tout ou partie d'un immeuble ne peuvent être assujettis à un droit de mutation et à la taxe de publicité foncière que dans celui des Etats contractants sur le territoire duquel ces immeubles ou ces fonds de commerce sont situés.

Article 39
Droits de timbre

Les actes ou effets créés dans l'un des Etats contractants ne sont pas soumis au timbre dans l'autre Etat contractant lorsqu'ils ont effectivement supporté cet impôt au tarif applicable dans le premier Etat, ou lorsqu'ils en sont légalement exonérés dans ledit Etat.

TITRE III

Dispositions diverses

Article 40
Echange de renseignements

1. Les autorités compétentes des Etats contractants échangeront les renseignements nécessaires pour appliquer les dispositions de la présente Convention et celles des lois internes des Etats contractants relatives aux impôts visés par la Convention dans la mesure où l'imposition qu'elles prévoient est conforme à la Convention. 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 premier ne peuvent en aucun cas être interprétées comme imposant à l'un des Etats contractants:

a) De prendre des dispositions administratives dérogeant à sa propre législation ou à sa pratique administrative ou à celle de l'autre Etat contractant;

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 contractant;
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 41
Procédure amiable

1. Lorsqu'un résident d'un Etat contractant estime que les mesures prises par un Etat contractant ou par chacun des deux Etats 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 contractant 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 contractant, en vue d'éviter une imposition non conforme à la Convention.
3. Les autorités compétentes des Etats contractants s'efforcent, par voie d'accord amiable, de résoudre les difficultés ou de dissiper des doutes auxquels peut donner lieu 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 contractants peuvent communiquer directement entre elles en vue de parvenir à un accord comme il est indiqué aux paragraphes précédents. Si des échanges de vues oraux semblent devoir faciliter cet accord, ces échanges de vues peuvent avoir lieu au sein d'une commission composée de représentants des autorités compétentes des Etats contractants.
5. Les autorités compétentes des deux Etats contractants se concerteront pour déterminer, d'un commun accord et dans la mesure utile, les modalités d'application de la présente Convention.

Article 42
Fonctionnaires diplomatiques et consulaires

1. 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.
2. Dans la mesure ou, en raison des privilèges fiscaux dont bénéficient les fonctionnaires diplomatiques ou consulaires, en vertu des règles générales du droit des gens ou aux termes des dispositions d'accords internationaux particuliers, le revenu n'est pas imposable dans l'Etat accréditaire, le droit d'imposition est réservé à l'Etat accréditant.
3. Aux fins de la présente Convention, les membres d'une mission diplomatique ou consulaire d'un Etat contractant accréditée dans l'autre Etat contractant ou dans un Etat tiers qui sont ressortissants de l'Etat accréditant, sont réputés être résidents de l'Etat accréditant s'ils y sont soumis aux mêmes obligations, en matière d'impôts sur le revenu, que les résidents dudit Etat.
4. La Convention ne s'applique pas aux organisations internationales, à leurs organes et fonctionnaires, ni aux personnes qui,

membres de missions diplomatiques ou consulaires d'Etat tiers, sont présentes dans un Etat contractant et ne sont pas considérées comme résidentes de l'un ou l'autre Etat contractant au regard des impôts sur le revenu.

Article 43
Entrée en vigueur

La présente Convention sera approuvée selon les dispositions constitutionnelles en vigueur dans chacun des deux Etats. Elle entrera en vigueur le premier jour du mois qui suivra l'échange des notifications constatant que, de part et d'autre, il a été satisfait à ces dispositions, étant entendu qu'elle produira ses effets pour la première fois:

— en ce qui concerne les impôts sur les revenus, pour l'imposition des revenus de l'année au cours de laquelle l'échange des notifications aura eu lieu ou des exercices clos au cours de cette année. Toutefois, en ce qui concerne les revenus visés aux articles 14 à 19, la Convention s'appliquera aux sommes mises en paiement à partir de son entrée en vigueur;

— en ce qui concerne les droits d'enregistrement et les droits de timbre, pour les actes ayant acquis date certaine, les jugements intervenus et les successions ouvertes postérieurement à l'entrée en vigueur de la Convention.

Article 44
Dénonciation

La Convention restera en vigueur sans limitation de durée.

Toutefois, à partir du 1er janvier de la cinquième année suivant celle de son entrée en vigueur, chacun des Gouvernements contractants peut notifier à l'autre son intention de mettre fin à la présente Convention, cette notification devant intervenir avant le 30 juin de chaque année. En ce cas, la Convention cessera de s'appliquer à partir du 1er janvier de l'année suivant la date de la notification, étant entendu que les effets en seront limités:

— en ce qui concerne l'imposition des revenus, aux revenus acquis ou mis en paiement dans l'année au cours de laquelle la notification sera intervenue;

— en ce qui concerne les droits d'enregistrement et les droits de timbre, aux actes ayant acquis date certaine, aux jugements intervenus et aux successions ouvertes au plus tard le 31 décembre de ladite année.

En foi de quoi les soussignés, dûment autorisés à cet effet, ont signé la présente Convention.

Fait en deux exemplaires à Tunis, le 28 mai 1973.

Pour le Gouvernement de la République française:

VALERY GISCARD D'ESTAING,
Ministre de l'Economie et des Finances.

Pour le Gouvernement de la République tunisienne:

MOHAMED FITOURI,
Ministre des Finances.

Protocole

Au moment de procédér à la signature de la Convention fiscale conclue ce jour entre le Gouvernement de la République française et le Gouvernement de la République tunisienne, les soussignés sont convenus des déclarations suivantes qui font partie intégrante de la Convention.

I. — *Application de l'article 11*

Pour la détermination des bénéfices d'un établissement stable:

1. Aucune déduction, autre que les remboursements des dépenses réellement effectuées, n'est admise au titre des frais de siège de l'entreprise ou de l'un quelconque de ses autres établissements comme redevances, honoraires ou autres paiements analogues au titre de licences d'exploitation, de brevets ou d'autres droits analogues, ou de commissions pour des services rendus ou pour une activité de direction ou sauf dans le cas d'un établissement bancaire, des intérêts sur des sommes prêtées au siège de l'entreprise ou à l'un quelconque de ses autres établissements.

2. Une quote-part des dépenses communes effectives de direction et des frais généraux du siège de l'entreprise est imputée aux résultats des différents établissements stables de l'entreprise au prorata du chiffre d'affaires réalisé par chacun d'eux, ou, à défaut, selon toute autre méthode appropriée.

II. — *Application de l'article 29*

1. Pour la détermination du crédit prévu à l'article 29 paragraphe 1, il est fait application de la formule suivante

$$\frac{100 - (25 + t)}{2}$$

dans laquelle la lettre t correspond au taux de l'impôt prélevé à la source en Tunisie sur les dividendes.

2. Pour les dividendes versés par des sociétés tunisiennes et qui bénéficient effectivement du taux réduit sur les revenus de valeurs mobilières en vertu du paragraphe 4 de l'article 4 de la loi n° 72-38 du 27 avril 1972, portant création d'un régime particulier pour les industries produisant pour l'exportation, le crédit prévu à l'alinéa 1 ci-dessus est déterminé selon la formule:

$$\frac{100 - (20 + t)}{2}$$

Fait à Tunis, le 28 mai 1973.

Pour le Gouvernement de la République française:

VALERY GISCARD D'ESTAING,
Ministre de l'Economie et des Finances.

Pour le Gouvernement de la République tunisienne:

MOHAMMED FITOURI,
Ministre des Finances.

Convention between the Republic of Singapore and the State of Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXVIII, No. 6, June/juin 1974
INTERNATIONAL BUREAU
OF FISCAL DOCUMENTATION
Muiderpoort - 124 Sarphatistraat - Amsterdam

A double taxation treaty was concluded between Israel and Singapore on May 20, 1972. The treaty will enter into force on the date when all things have been done to give the treaty force of law in Israel and Singapore.

TEXT

The Government of the Republic of Singapore and the Government of the State of Israel,
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
Personal scope

This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2
Taxes covered

1. This Convention shall apply to taxes on income imposed on behalf of each Contracting State irrespective of the manner in which they are levied.
2. The existing taxes which are the subject of this Convention are —

(a) in Singapore:
the income tax (hereinafter referred to as "Singapore tax");
(b) in Israel:
(i) the income tax (including capital gains tax and company tax);
(ii) the security levy;
(hereinafter referred to as "Israeli tax").

3. This Convention shall also apply to any other taxes of a substantially similar character which are subsequently imposed in addition to, or in place of, the existing taxes.

4. If by reason of changes made in the taxation law of either Contracting State, it seems desirable to amend any article of this Convention without affecting the general principles thereof the necessary amendments may be made by mutual consent by means of an exchange of diplomatic notes or in any other manner in accordance with their constitutional procedures.

Article 3
General definitions

1. In this Convention, unless the context otherwise requires:
(a) the term "Singapore" means the Republic of Singapore:
(b) the term "Israel" means the State of Israel;
(c) the terms "a Contracting State" and "the other Contracting State" mean Singapore or Israel, as the context requires;
(d) the term "tax" means Singapore tax or Israeli tax, as the context requires;
(e) the term "person" comprises an individual, a company and any other body of persons which is treated as an entity for tax purposes;
(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" 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 "competent authority" means, in the case of Singapore, the Minister for Finance or his authorised representative; and in the case of Israel, the Minister of Finance or his authorised representative.
2. As regards the application of this Convention by either 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 this Convention.

Article 4
Fiscal domicile

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, residene, place of management or any other criterion of a similar nature.
2. Where, by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his 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 closer (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, 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 the control and management of its business is exercised.

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, oil well, quarry or other place of extraction of natural resources;

(g) a plantation, farm, orchard or vineyard;

(h) a building site or construction or installation or assembly project which exists for more than six 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. An enterprise of a Contracting State, notwithstanding it has no fixed place of business in the other Contracting State, shall be deemed to have a permanent establishment in that other Contracting State if it carries on supervisory activities therein for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State.

5. 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) notwithstanding he has no fixed place of business in the former Contracting State shall be deemed to be a permanent establishment in the first-mentioned Contracting State if —

(a) he has, and habitually exercises a general authority in the first-mentioned Contracting State to conclude contracts in the name of the enterprise;

or

(b) he maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise.

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 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.

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 Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute for 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. 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 payments as conderation 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 and to income from immovable property used for the performance of professional services.

Article 7

Business profits

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 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 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 (including transportation) 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 Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

Shipping and air transport

1. Profits which an enterprise of a Contracting State derives from the operation of ships or aircraft in international traffic shall be exempt from tax of the other Contracting State.

2. The provisions of paragraph 1 of this Article shall likewise apply in respect of participations in pools, in a joint business or in an international operations agency of any kind by enterprises engaged in the operation of ships or aircraft in international traffic.

3. The exemption mentioned in paragraph

1 of this Article shall not affect the provisions of Article 13 as regards the taxation of employees of enterprises of either Contracting State engaged in the operation of ships and aircraft in international traffic.

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 resident in a Contracting State to a resident of the other Contracting State who is subject to tax in that other Contracting State in respect of such dividends shall be exempt from any tax in the first-mentioned Contracting State which is chargeable on dividends in addition to the tax chargeable in respect of the profits or income of the company.
2. The term "dividends" as used in this Article means income from shares as well as income assimilated to income from shares according to the taxation law of the Contracting State of which the company making the distribution is a resident.
3. The provisions of paragraph 1 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.
4. 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 undistributed profits consist wholly or partly of profits or income arising in such other State.
5. - *(a)* Dividends shall be deemed to arise in Israel if paid by a company resident there.
(b) Dividends shall be deemed to arise in Singapore
(i) if paid by a company resident there, out of profits accumulated after 1965; or
(ii) if paid by a company resident there out of profits accumulated before 1966, and qualifying as dividends arising in Singapore under Article VII of the 1968 Double Taxation Agreement between Singapore and Malaysia.

Article 11
Interest

1. Interest arising in a Contracting State and paid to a resident of the other Con-

tracting 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 15 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

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 according to 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 political sub-division, 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 shall be taxable only in that other State. However, the tax so charged shall not exceed 15 per cent of the amount of such royalties.

2. 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, 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, or scientific experience.

3. The provisions of paragraph 1 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.

4. 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.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, 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 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 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.

Article 13
Personal services

1. Subject to the provisions of Articles 14, 16, 17 and 18, salaries, wages and other similar remuneration or income for personal (including professional) services derived by a resident of a Contracting State, shall be taxable only in that Contracting State, unless the services are performed in the other Contracting State. If the services are so performed, such remuneration or income as is derived therefrom may be taxed in that other Contracting State.

2. Notwithstanding the provisions of paragraph 1, remuneration or income derived by a resident of a Contracting State for personal (including professional) services performed in the other Contracting State shall be exempt from tax of that other Contracting State if —

(a) the recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned; and

(b) the remuneration or income is paid by or on behalf of, a person who is a resident of the first-mentioned Contracting State; and

(c) the remuneration or income is not borne by a permanent establishment which that person has in the other Contracting State.

3. A resident of a Contracting State shall be exempt from tax in the other Contracting State on remuneration for services performed on ships or aircraft in international traffic.

Article 14
Directors' fees

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 Contracting State.

Article 15
Artists and athletes

1. Notwithstanding the provisions of Article 13, income derived by public entertainers, such as theatre, motion picture, radio or television artists, and musicians, and by athletes, from their personal services as such may be taxed in the Contracting State in which these services are performed.

2. The provisions of paragraph 1 shall not apply to remuneration or profits, sa-

laries, wages and similar income derived from services rendered in a Contracting State by public entertainers if the visit to that Contracting State is substantially supported by public funds of the Government of the other Contracting State.

3. 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 these services by such an enterprise may be taxed in the first-mentioned State unless the enterprise is substantially supported from the public funds of the Government of the other Contracting State in connection with the provision of such services.

4. For the purposes of this Article the term "Government" shall include any local authority or statutory body of either Contracting State.

Article 16
Public funds

1. Remuneration paid by, or out of funds created by a Contracting State, a political sub-division, a local authority or a statutory body thereof to any individual in respect of an employment shall be taxable only in that State. If, however, the employment is exercised in the other Contracting State by a resident of that other State not being a citizen or national of the first-mentioned State, the remuneration shall be taxable only in that other State.

2. The provisions of Articles 13 and 14 shall apply to remuneration in respect of an employment in connection with any business carried on by a Contracting State, a political subdivision, a local authority or a statutory body thereof for the purpose of profits.

3. For the purposes of paragraph 1, the term "a citizen or national" in the case of Israel includes any individual who is eligible to Israeli citizenship according to the laws of Israel.

Article 17
Teachers

An individual who is a resident of a Contracting State immediately before making a visit to the other Contracting State, and who, at the invitation of any university, college, school or other similar educational institution, which is recognised by the competent authority in that other Contracting State, visits that other Contracting State for a period not exceeding two years solely for the purpose of teaching or research or both at such educational institution shall be exempt from tax in that other Contracting State on his remuneration for such teaching or research.

Article 18
Students and trainees

1. An individual, who immediately before visiting a Contracting State, is a resident of the other Contracting State and is temporarily present in the first-mentioned Contracting State solely as a student at a recognised university, college or school in that first-mentioned Contracting State, or as a business apprentice therein, shall be exempt from tax in the first-mentioned Contracting State in respect of —

(a) all remittances from the other Contracting State for the purposes of his maintenance, education, or training; and

(b) any remuneration for personal services rendered in the first-mentioned Contracting State with a view to supplementing the resources available to him for such purposes.

2. An individual, who immediately before visiting a Contracting State, is a re-

sident of the other Contracting State and is temporarily present in the first-mentioned Contracting State for a period not exceeding three years for the purpose of study, research or training solely as a recipient of a grant, allowance or award from a scientific, educational, religious and charitable organisation or under a technical assistance programme entered into by the Government of one of the Contracting States, shall be exempt from tax in the first-mentioned Contracting State on —

(a) the amount of such grant, allowance or award; and

(b) any remuneration for personal services rendered in the first-mentioned Contracting State provided such services are in connection with his study, research or training or are incidental thereto.

3. An individual, who immediately before visiting a Contracting State, is a resident of the other Contracting State and is temporarily present in the first-mentioned Contracting State for a period not exceeding twelve months solely as an employee of, or under contract with, the Government or an enterprise of the second-mentioned Contracting State for the purpose of acquiring technical, professional or business experience shall be exempt from tax in the first-mentioned Contracting State on —

(a) all remittances from the second-mentioned Contracting State for the purposes of his maintenance, education or training; and

(b) any remuneration for personal services rendered in the first-mentioned Contracting State, provided such services are in connection with his studies or training or are incidental thereto, in an amount not in excess of 12,000 Singapore dollars or its equivalent in Israeli currency.

4. For the purpose of this Article the term "Government" shall include any local authority or statutory body of either of the Contracting States.

Article 19

Limitation of relief

Where this Convention provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Convention in the first-mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State.

Article 20

Elimination of double Taxation

1. Subject to the laws of Singapore regarding the allowance as a credit against Singapore tax of tax payable in any country other than Singapore, Israeli tax payable in respect of income derived from Israel shall be allowed as a credit against Singapore tax payable in respect of that income. Where such income is a dividend paid by a company which is a resident of Israel to a company which is a resident of Singapore and which owns not less than 25 per cent of the share capital of the company paying the dividend, the credit shall take into account Israeli tax payable by that company in respect of its income. The credit shall not, however, exceed that part of the Singapore tax, as computed before the credit is given, which is appropriate to such item of income.

2. The term "Israeli tax payable" shall be deemed to include the amount of Israeli tax which would have been paid if the Israeli tax had not been exempted or reduced in accordance with the special incentive laws designed to promote economic development in Israel, effective on the date of signature of this Convention, or which may be introduced in future in the Israeli taxation laws in modification of, or in addition to, the existing laws.

3. Subject to the laws of Israel regarding the allowances as a credit against Israeli tax of tax payable in any country other than Israel, Singapore tax payable in respect of income derived from Singapore shall be allowed as a credit against Israeli tax payable in respect of that income. The credit shall not, however, exceed that part of the Israeli tax, as computed before the credit is given, which is appropriate to such item of income. Where such income is a dividend paid by a company which is a resident of Singapore to a company which is a resident of Israel and which owns not less than 25 per cent of the share capital of the company paying the dividend, such dividend shall be excluded from the basis upon which Israeli tax is imposed.

4. The term "Singapore tax payable" shall be deemed to include the amount of Singapore tax which would have been paid if the Singapore tax had not been exempted or reduced in accordance with the special incentive laws designed to promote economic development in Singapore, effective on the date of signature of this Convention, or which may be introduced in future in the Singapore taxation laws in modification of, or in addition to, the existing laws.

5. The provisions of paragraphs 2 and 4 of this Article shall not apply to royalties as defined in paragraph 2 of Article 12.

Article 21
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 "national" means —

(a) in respect of Singapore all individuals possessing the citizenship of Singapore and all legal persons, partnerships, associations and other entities deriving their status as such from the laws in force in Singapore;

(b) in respect of Israel all individuals possessing the nationality of Israel and all legal persons, partnerships, associations and other entities deriving their status as such from the laws in force in Israel.

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.

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 State are or may be subjected.

5. In this Article the term "taxation" means taxes which are the subject of this Convention.

Article 22
Mutual agreement procedure

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, nothwithstanding 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. They may also consult together for the elimination of double taxation in cases not provided for in 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.

Article 23
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 concerned with the assessment or collection of the taxes which are the subject of this 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.

Article 24
Diplomatic and consular officials

1. 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.

2. The Convention shall not apply to International Organisations, to organs or officials thereof and to persons who are members of a diplomatic or consular mission of

a Third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income.

Article 25
Entry into force

This Convention shall come into force on the date when the last of all such things shall have been done in Singapore and in Israel as are necessary to give this Convention the force of law in Singapore and Israel respectively, and shall thereupon have effect —

(a) in Singapore:
as respects Singapore tax for years of assessment beginning on or after the first day of January 1972;

(b) in Israel:
as respects Israeli tax for assessment years which correspond to years of income beginning on or after the first day of April 1971.

Article 26
Termination

This Convention shall continue in effect indefinitely, but the Government of either of the Contracting States may, on or before 30 June in any calendar year (not earlier than the year 1976), give to the other Contracting Government written notice of termination and, in such event, this Convention shall cease to be effective —

(a) in Singapore:
as respects Singapore tax for the years of assessment beginning on the first day of January of the calendar year next following that in which such notice is given;

(b) in Israel:
as respects Israeli tax for assessment years beginning on the first day of April of the calendar year following that in which such notice is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Convention.

Done in Jerusalem, in duplicate the twenty-seventh day of September of the year 1971 in the English language.

For the Government of
the Republic of Singapore:
WAN FOOK HOY

For the Government of
the State of Israel:
MOSHE NEUDORFER

Made this 20th day of May, 1972.

DECISION No 40

The COMMISSION OF THE CARTAGENA AGREEMENT,

IN ACCORDANCE WITH: Article 89 of the Cartagena Agreement and article 47 of Decision No 24 of this Commission.

WHEREAS, pursuant to initiative of the Board, the Commission must approve a convention for the avoidance of double taxation between Member Countries, and, Likewise, it must approve a model convention for subscribing to agreements on double taxation between Member Countries and other countries outside the subregion.

DECIDES:

Article 1st: The Convention for the Avoidance of Double Taxation between Member Countries, attached hereto as Annex I, is hereby approved.

Article 2nd: The Model Convention for the Avoidance of Double Taxation between Member Countries and Other Countries Outside the Subregion, attached hereto as Annex II, is hereby approved.

Article 3rd: Before June 30th, 1972, the Member Countries shall adopt the necessary measures to implement the Convention for the Avoidance of Double Taxation between the Member Countries, in order that the same may enter into force in accordance with the provisions of Article 21 of said Convention.

Article 4th: Should there be any difficulties or doubts arising out of the application of the Convention for the Avoidance of Double Taxation between Member Countries, that cannot be solved through the consultation proceedings referred to in Article 20 of said Convention, the pertinent information shall be submitted to the Fiscal Policy Council for its consideration. If the intervention of the Council is not conducive to the solution of the problem, the Member Countries may resort to the proceedings established in Section D of Chapter II of the Cartagena Agreement. For the purposes of this article, the Fiscal Policy Council may convene at the request of any Member Country.

Article 5th: The conventions for the avoidance of double taxation that the Member Countries may subscribe with other countries outside the Subregion, shall be guided by the Model Convention referred to in article 2nd of this Decision.

Before subscribing such conventions, each Member Country shall hold consultations with the other Member Countries, within the Fiscal Policy Council.

Article 6th: The Member Countries that have subscribed conventions for the avoidance of double taxation prior to the date of this Decision, shall endeavor to harmonize the provisions of such conventions with those of the Model Convention.

Supplement D
1974

ANDEAN PACT:
DOUBLE TAXATION CONVENTIONS[1]

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXVIII, No. 8, August/août 1974

INTERNATIONAL BUREAU
OF FISCAL DOCUMENTATION

Muiderpoort - 124 Sarphatistraat - Amsterdam

PRESENTATION

On May 26, 1969, representatives of the Governments of Bolivia, Chile, Colombia, Ecuador, and Peru met and executed an Agreement, designated as "Agreement of Cartagena," whereby the five countries committed themselves to a subregional integration scheme within the context of the Montevideo Treaty and the Latin American Free Trade Area. The Commission of the Cartagena Agreement was created as the principal organ of the new subregion.

In its Seventh Period of Ordinary Sessions, held from November 8th through the 16th, 1971 in Lima, Peru, the Commission adopted Decision 40 whereby a Convention for the Avoidance of Double Taxation among the five member countries was adopted. By the same Decision 40, approval was given to a model convention for the Avoidance of Double Taxation between a member country and a country outside the Andean Subregion.

In view of the obvious interest in this Decision, and of the fact that no official English version has been made available yet, our Program hereby presents an unofficial English translation of the document.

Our Program trusts that this version will be a useful reference tool in any technical research or discussion regarding international double taxation.

Gerson A. da Silva
Director
Office of Public Finance

1. Technical documentation No. 29/72 PCT/DT/22. Unofficial English version published by the Organization of American States, Public Finance Program (Washington).

ANNEX I

Convention for the Avoidance of Double Taxation Between Member Countries

CHAPTER I

SCOPE OF THE CONVENTION AND GENERAL DEFINITIONS

Article 1st: Scope of the Convention

This Convention shall apply to persons who are residents of any of the Member Countries with respect to taxes imposed on income and on net wealth. It shall apply principally and specifically to the following taxes:

In Bolivia, to the schedular income taxes established by law of May 3, 1928, as amended, to the tax on "total income" imposed by Supreme Decree No 8619 of January 8, 1969, and to the additional income taxes.

In Colombia, to the national income tax and to the supplementary taxes on net wealth and on excess profits, regulated by Law No 81 of December 22, 1960, with the amendments and additional provisions contained in Law No 21 of 1963, Decree No 1366 of 1967, Law No 63 of 1968 and Law No 27 of 1969.

In Chile, to the taxes regulated by the income tax law, contained in article 5th of Law No 15564 of February 14, 1964, and to the tax on net wealth established by Law No 17073 of December 31, 1968, as amended by Law 17416 of March 9, 1971.

In Ecuador, to the general tax on global income, and to the supplementary and proportional taxes of schedular nature regulated by Supreme Decree No 329 of February 29, 1964, as amended.

In Peru, to the income tax, to the corporation's net wealth tax and to the real estate tax, regulated, respectively, by Titles I, II and III of Supreme Decree No 287-HG of August 9, 1968, and amending, supplementary and related provisions.

This Convention shall also apply to any future amendments of the above-mentioned taxes, and to any other tax established by any Member Country after the signing of this Convention, which, by virtue of its taxable base or its taxable subject matter, is substantially and economically similar to the above-cited taxes.

Article 2nd: General Definitions

For the purposes of this Convention, and unless otherwise defined:

a) The terms "one of the Member Countries" "another Member Country" shall serve to designate, severally, Bolivia, Colombia, Chile, Ecuador, or Peru;

b) The expressions "territory of one of the Member Countries" and "territory of another Member Country" mean, severally, the territories of Bolivia, Colombia, Chile, Ecuador, or Peru;

c) The word "person" shall serve to designate:

1. An individual
2. A juridical person
3. Any other entity or body of persons, whether associated or not, which are liable to taxation.

d) An individual shall be deemed to be a resident of the Member Country in which said individual has his or her habitual abode.

A business enterprise shall be deemed to be a resident of the Country specified in its articles of constitution.

In the absence of articles of constitution, or if no Country of residence is specified therein, the business enterprise shall be deemed to be a resident of the Country wherein its actual managerial control is established.

Where the determination of the Country of residence under these rules is not possible, the competent authorities of the Member Countries affected shall decide the issue by mutual agreement.

e) The word "source" means the activity, right, or property, that generates, or may generate, the income.

f) The term "business activities" means activities undertaken by business enterprises.

g) The word "enterprise" means an organization constituted by one or more persons, that undertakes a profit-making activity.

h) The terms "enterprise of a Member Country" and "enterprise of another Member Country" mean an enterprise that is a resident of any Member Country.

i) The word "royalty" means any benefit, thing of value, or sum of money paid for the use, or for the privilege of using, copyrights, patents, industrial drawings or models, exclusive processes or formulas, trade marks, or other intangible property of a similar nature.

j) The term "capital gains" means the profit obtained by a person in the alienation of property not habitually acquired, produced or transferred in his ordinary line of business activity.

k) The word "pension" means a periodic payment made in consideration of services rendered or injuries sustained; and the word "annuity" means a certain sum of money payable periodically during the life of the beneficiary, or during a certain period of time, gratuitously, or in consideration of payments made or appreciable in money.

l) The term "competent authority" means, in the case of:

Bolivia, the Minister of Finance;

Colombia, the Minister of the Treasury and Public Credit;

Chile, the Minister of the Treasury;

Ecuador, the Minister of Finance;

Peru, the Minister of Economy and Finance.

Article 3rd: Meaning of undefined terms

Any word or term not defined in this Convention shall have the meaning assigned thereto by the legislation in force, in each of the Member Countries.

CHAPTER II
TAX ON INCOME

Article 4th: Tax jurisdiction

Irrespective of the nationality or country of residence of a person, income of whatever nature received by such person shall be taxable only by the Member Country wherein the source of such income is situated, except for the cases specified in this Convention.

Article 5th: Income from real property

Income of whatever kind from real property shall be taxable only by the Member Country wherein such real property is situated.

Article 6th: Income from rights to exploit natural resources

Any benefit received from leasing or subleasing, or from transferring or granting, any right to exploit or use in any manner whatsoever the natural resources of one of

the Member Countries, shall be taxable only by such Member Country.

Article 7th: Business profits

Profits resulting from business activities shall be taxable only by the Member Country wherein such business activities have been undertaken.

It is understood that a business enterprise undertakes activities in the territory of a Member Country, when it has in such Member Country any of, but not limited to, the following:

a) An office or place of business management;
b) A factory, plant, industrial workshop or assembly shop;
c) A construction project in progress;
d) A place or facility wherein natural resources are extracted or exploited, such as a mine, well, quarry, plantation, or fishing boat;
e) An agency or premises for the sale of goods;
f) An agency or premises for the purchase of goods;
g) A depository, storage facility, warehouse, or any similar establishment used for receiving, storing or delivering goods;
h) Any other premises, office or facilities the purpose of which is preparatory or auxiliary to the business activities of the enterprise;
i) An agent or representatieve.

Where a business enterprise undertakes activities in two or more Member Countries, each one of them may tax the income from sources within its territory. If the activities are undertaken through representatives, or through the use of facilities such as the ones indicated in the preceding paragraph, the profits earned shall be attributed to such persons or facilities, provided that they are totally independent from the business enterprise.

Article 8th: Profits of transportation enterprises

The profits earned by a transportation enterprise from its air, land, sea, lake or river operations, shall be liable to taxation only by the Member Country of which such enterprise is a resident.

Article 9th: Royalties from the use of patents, trade marks and technology

Royalties derived from the use of patents, trade marks, non-patented technical knowledge, or other similar intangible property, within the territory of one of the Member Countries, shall be taxable only by such Member Country.

Article 10th: Interest

Interest derived from loans shall be taxable only by the Member Country in the territory of which the loan has been used. Subject to rebuttal, it is presumed that the loan has been used in the country from which the interest payment has been made.

Article 11th: Dividends and shares of profit

Dividends and shares of profit shall be taxable only by the Member Country of which the business enterprise paying them is a resident.

Article 12h: Capital gains

Capital gains shall be taxable only by the Member Country wherein the property is situated at the time of the sale, except for capital gains derived from the alienation of:

a) Ships, aircraft, buses and other transportation vehicles, which shall be taxable only by the Member Country

wherein such vehicles are registered at the time of the alienation thereof, and

b) Negotiable instruments, shares of stock and other securities, which shall be taxable only by the Member Country in which territory they have been issued.

Article 13th: Income from the rendering of personal services

Remunerations, fees, wages, salaries, benefits and similar compensation received as payments for services rendered by employees, professionals, or technicians, or for personal services in general, shall be taxable only in the territory wherein such services are rendered, except for wages, salaries, remunerations and similar compensation received by:

a) Persons rendering services to a Member Country in the discharge of official duties duly accredited, which shall be taxable only by such Member Country, even if the services are rendered within the territory of another Member Country.

b) The crews of ships, aircraft, buses and other transportation vehicles engaged in international traffic, which shall be taxable only by the Member Country of which the employer is a resident.

Article 14th: Professional Service and Technical Assistance Business Enterprises

Income received by business enterprises engaged in rendering professional services or technical assistance, shall be taxable only by the Member Country wherein such services or assistance are rendered.

Article 15h: Pensions and annuities

Pensions, annuities and other periodic income of a similar character shall be taxable only by the Member Country wherein the source of such income is situated.

The source is considered to be situated in the territory of the country where the contract providing for such periodic income is executed, and, if there is no contract, in the country from which the payment of such income is made.

Article 16th: Public entertainment activities

Income derived from artistic or public entertainment activities shall be taxable only by the Member Country wherein such activities have been carried out, without regard to the time which the persons performing such activities stay in the territory of such Member Country.

CHAPTER III

TAXES ON NET WEALTH

Article 17th: Taxes on net wealth

Net wealth situated within the territory of a Member Country shall be taxable only by said Member Country.

Article 18th: Status of transportation vehicles, loans and securities

For the purposes of the preceding Article, it is understood that:

a) Aircraft, ships, buses and other transportation vehicles, as well as the personal property used in the operation thereof, are situated in the Member Country wherein their respective ownership is registered;

b) Loans, shares of stock and other securities are situated in the Member Country of which the debtor, or the issuing enterprise, is a resident.

CHAPTER IV
GENERAL PROVISIONS

Article 19th: Tax treatment applicable to persons residing in other Member Countries

With respect to taxes which are subject to this Convention, no Member Country shall apply to persons who are residents of other Member Countries a treatment less favorable than that applied to its own residents.

Article 20th: Consultations and information

The competent authorities of the Member Countries shall hold consultations among themselves, and exchange the information necessary for deciding by mutual agreement any difficulty or doubt which may arise out of the application of this Convention, and for establishing the administrative controls required for the avoidance of fraud and tax evasion.

The information exchanged pursuant to the provisions of the preceding paragraph shall be considered as confidential, and shall not be transmitted to any person other than the authorities responsible for the administration of taxes which are subject to this Convention.

For the purposes of this Article, the competent authorities of the Member Countries may communicate directly among themselves.

Article 21st: Entry into force and effect

The Member Countries shall deposit with the Secretariat of the Board of the Cartagena Agreement the instruments of implementation of this Convention.

This Convention shall enter into force and effect:

a) With respect to individuals, for income received or accrued on and after the first day of January following the date of deposit of the above-mentioned instruments by all the Member Countries.
b) With respect to business enterprises, for income received or accrued during the first accounting period starting after the aforesaid deposit.
c) With respect to taxes on net wealth, as of the first day of January following the date of the aforesaid deposit.

ANNEX II

Model Convention for the Avoidance of Double Taxation Between Member Countries and Other Countries Outside the Subregion

TITLE OF THE CONVENTION

Convention between (State A) and (State B) for the avoidance of double taxation with respect to taxes on income and taxes on capital and net wealth.

PREAMBLE

(The preamble of the Convention shall be drafted in accordance with the procedures and provisions in force in the Contracting States).

CHAPTER I

SCOPE OF THE CONVENTION AND GENERAL DEFINITIONS

Article 1st: Scope of the Convention

The taxes subject to this Convention are:

In the case of (State A): . . .

In the case of (State B): . . .

This Convention shall also apply to any future amendments of the above-mentioned taxes, and to any taxes established by each Contracting State after the signing of this Convention, which, by virtue of their tax base or their taxable matter, are substantially and economically similar to any of the above-cited taxes.

Article 2nd: General Definitions

For the purposes of this Convention, and unless otherwise defined:

a) The terms "one of the Contracting States" and "the other Contracting State" mean (State A) or (State B), as the context requires.

b) The expressions "territory of one of the Contracting States" and "territory of the other Contracting State" mean the territory of (State A) or the territory of (State B), as the context requires.

c) The word "person" means:

1. An individual
2. A juridical person

d) An individual shall be deemed to be a resident of the Contracting State in which said individual has his or her habitual abode.

A business enterprise shall be deemed to be a resident of the State specified in its articles of constitution. In the absence of articles of constitution, or if no State of residence is specified therein, the business enterprise shall be deemed to be a resident of the State wherein its actual managerial control is established.

Where the determination of the State of residence under these rules is not possible, the competent authorities of the Contracting States shall decide the issue by mutual agreement.

e) The word "source" means the activity, right, or property, that generates, or may generate, the income.

f) The term "business activities" means activities undertaken by business enterprises.

g) The word "enterprise" means an organization constituted by one or more persons, that undertakes a profit making activity.

h) The terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean an enterprise that is a resident of one of the Contracting States.

i) The word "royalty" means any benefit,

thing of value, or sum of money, paid for the use, or for the privilege of using, copyrights, patents, industrial drawings or models, exclusive processes or formulas, trade marks, or other intangible property of a similar nature.

j) The term "capital gains" means the profit obtained by a person in the alienation of property not habitually acquired, produced, or transferred, in his ordinary line of business activity.

k) The word "pension" means a periodic payment made in consideration of services rendered or injuries sustained; and the word "annuity" means a certain sum of money payable periodically during the life of the beneficiary, or during a certain period of time, gratuitously, or in consideration of payments made or appreciable in money.

l) The term "competent authority" means, in the case of (State A), the . . ., and in the case of (State B), the . . .

Article 3rd: Meaning of Undefined Terms

Any word or term not defined in this Convention shall have the meaning assigned thereto by the legislation in force of each Contracting State.

CHAPTER II

TAX ON INCOME

Article 4th: Tax Jurisdiction

Irrespective of the nationality or State of residence of a person, income of whatever nature received by such person shall be taxable only by the Contracting State wherein the source of such income is situated, except for the cases specified in this Convention.

Article 5th: Income from Real Property

Income of whatever kind from real property shall be taxable only by the Contracting State wherein such real property is situated.

Article 6th: Income from Rights to Exploit Natural Resources

Any benefit received from leasing or subleasing, or from transferring or granting, any right to exploit or use in any manner whatsoever the natural resurces of one of the Contracting States, shall be taxable only by such Contracting State.

Article 7th: Business Profits

Profits resulting from business activities shall be taxable only by the Contracting State wherein such business activities have been undertaken.

It is understood that a business enterprise carries out activities in the territory of a Contracting State, when it has in such Contracting State, any of, but not limited to, the following:

a) An office, or place of business management;
b) A factory, plant, industrial workshop, or assembly shop;
c) A construction project in progress;
d) A place or facility wherein natural resources are extracted or exploited, such as a mine, well, quarry, plantation, or fishing boat;
e) An agency, or premises, for the sale of goods;
f) An agency, or premises, for the purchase of goods;
g) A depository, storage facility, warehouse, or any similar establishment used for receiving, storing or delivering goods;

h) Any other premises, office, or facilities, the purpose of which is preparatory or auxiliary to the business activities of the enterprise;
i) An agent or representative.

Where a business enterprise undertakes activities in both Contracting States, each one of them may tax income from sources within its territory. If the activities are undertaken through representatives, or through the use of facilities, such as the ones indicated in the preceding paragraph, the profits earned shall be attributed to such persons or facilities, provided that said persons or facilities are totally independent from the business enterprise.

Article 8th: Profits of Transportation Enterprises

The profits earned by a transportation enterprise from its air, land, sea, lake or river operations, shall be liable to taxation only by the Contracting State of which such enterprise is a resident.

Article 8th: Alternative

The profits earned by a transportation enterprise from its air, land, sea, lake or river operations in any of the Contracting States, shall be taxable only by such Contracting State.

Article 9th: Royalties from the Use of Patents, Trade Marks and Technology

Royalties derived from the use of patents, trade marks, non-patented technical knowledge, or other similar intangible property, within the territory of one of the Contracting States, shall be taxable only by such Contracting State.

Article 10th: Interest

Interest derived from loans shall be taxable only by the Contracting State in the territory of which the loan has been used. Subject to rebuttal, it is presumed that the loan has been used in the Contracting State from which the interest payment has been made.

Article 11th: Dividends and shares of profit

Dividends and shares of profit shall be taxable only by the Contracting State of which the business enterprise paying them is a resident.

Article 12: Capital Gains

Capital gains shall be taxable only by the Contracting State wherein the property is situated at the time of the sale, except for capital gains derived from the alienation of:

a) Ships, aircraft, buses, and other transportation vehicles, which shall be taxable only by the Contracting State wherein such vehicles are registered at the time of the alienation thereof, and
b) Negotiable instruments, shares of stock and other securities, which shall be taxable only by the Contracting State in which territory they have been issued.

Article 13th: Income from the Rendering of Personal Services

Remunerations, fees, wages, salaries, benefits, and similar compensation, received as payments for services rendered by employees, professionals or technicians, or for personal services in general, shall be taxable only in the territory wherein such services have been rendered, except for wages, salaries, remunerations, and sim-

ilar compensation, received by:

a) Persons rendering services to a Contracting State in the discharge of official duties duly accredited, which shall be taxable only by such Contracting State, even if the services have been rendered within the territory of the other Contracting State.
b) The crews of ships, aircraft, buses and other transportation vehicles engaged in international traffic, which shall be taxable only by the Contracting State of which the employer is a resident.

Article 14th: Professional Service and Technical Assistance Business Enterprises

Income received by business enterprises engaged in rendering professional services or technical assistance, shall be taxable only by the Contracting State wherein such services or assistance are rendered.

Article 15th: Pensions and Annuities

Pensions, annuities, and other periodic income of a similar character, shall be taxable only by the Contracting State wherein the source of such income is situated. The source is considered to be situated in the territory of the State where the contract providing for such periodic income is executed, and, if there is no contract, in the State from which the payment of such income is made.

Article 16th: Public Entertainment Activities

Income derived from artistic or public entertainment activities shall be taxable only by the Contracting State wherein such activities have been carried out, without regard to the time that the persons performing said activities stay in the territory of such Contracting State.

CHAPTER III

TAXES ON NET WEALTH

Article 17th: Taxes on net wealth

Net wealth situated within the territory of one of the Contracting States shall be taxable only by such Contracting State.

Article 18th: Status of Transportation Vehicles, Loans, and Securities

For the puposes of the preceding Article, it is understood that:

a) Aircraft, ships, buses, and other transportation vehicles, as well as the personal property used in the operation thereof, are situated in the Contracting State wherein their respective ownership is registered.
b) Loans, shares of stock, and other securities, are situated in the Contracting State of which the debtor, or the issuing enterprise, is a resident.

CHAPTER IV

GENERAL PROVISIONS

Article 19th: Consultations and Information

The competent authorities of the Contracting States shall hold consultations between themselves and exchange the information necessary for deciding by mutual agreement any difficulty or doubt which may arise out of the application of this Convention, and for establishing the administrative controls required for the

avoidance of fraud and tax evasion.
The information exchanged pursuant to the provisions of the preceding paragraph shall be considered as confidential, and shall not be transmitted to any person other than the authorities responsible for the administration of the taxes which are subject to this Convention.
For the purposes of this Article, the competent authorities of the Contracting States may communicate directly between themselves.

Article 20th: Ratification
This Convention shall be ratified by the governments of the Contracting States in accordance with their respective constitutional and legal requirements.
The instruments of ratification shall be exchanged at... as soon as possible.
Upon the exchange of the instruments of ratification, this Convention shall have effect and apply:

a) With respect to income of individuals, to income received on and after the first day of January of the calendar year following the year of the ratification.
b) With respect to business profits, to profits received during the first fiscal year starting after the ratification of this Convention.
c) With respect to other taxes, to those in which the assessment thereof corresponds to the calendar year following the year of the ratification.

Article 21st: Effectiveness and termination
This Convention shall remain in force and effect indefinitely, but either of the Contracting States, from the first day of January to the 30th day of June of any calendar year, may denounce the Convention by giving notice thereof in writing to the other Contracting States, and, in such event, the Convention shall cease to have effect:

a) With respect to income of individuals, as of the first day of January of the calendar year immediately following the year in which such notice is given.
b) With respect to income of juridical persons, after the closing of the fiscal year the beginning of which would have occurred during the calendar year in which notice of termination of this Convention is given.
c) With respect to the other taxes, as of the first day of January of the calendar year following the year in which such notice is given.

In testimony whereof, the respective plenipotentiaries have hereunto set their hands and seals.

Made at .....
on the .....day of..... in .....
copies ..... in
the ..... language, and .....
copies in the ..... language,
with the ..... copies being
equally valid and authentic.

Convention entre le Royaume de la Norvège et le Royaume du Maroc tendant à éviter les doubles impositions et à établir des règles d'assistance administrative réciproque 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. XXVIII, No. 10, October/octobre 1974

Muiderpoort - 124 Sarphatistraat - Amsterdam

A double taxation treaty was signed between Norway and Morocco on May 5, 1972. The treaty is subject to ratification before entering into force.

TEXTE

Le Royaume de la Norvege,
et
Le Royaume du Maroc
désireux d'éviter les doubles impositions et d'établir des règles d'assistance administrative réciproque en matière d'impôts sur le revenu et sur la fortune,
ont décidé de conclure une convention et désigné à cette fin, comme plénipotentiaires:
Sa Majeste le roi de la Norvège:
S. E. Monsieur Olav Ivar Leif Paul Moltke-Hansen
Ambassadeur Extraordinaire et Plenipotentiaire du Royaume de la Norvège
Sa Majeste le roi du Maroc:
S. E. Monsieur Mustapha Faris,
Ministre des Finances du Gouvernement du Royaume du Maroc
lesquels, après avoir vérifié leurs pleins pouvoirs trouvés en bonne et due forme, sont convenus des dispositions suivantes:

I. CHAMP D'APPLICATION DE LA CONVENTION

Article 1.
Personnes visées

La présente Convention s'applique aux personnes qui sont des résidents d'un Etat contractant ou de chacun des deux Etats.

Article 2.
Impôts visés

(1) La présente Convention s'applique aux impôts sur le revenu et sur la fortune perçus pour le compte de chacun des Etats contractants, de ses subdivisions politiques et de ses collectivités locales, quel que soit le système de perception.
(2) Sont considérés comme impôts sur le revenu ou impôts sur la fortune, les impôts perçus sur le revenu global ou sur la fortune globale, 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 présente Convention sont notamment:

1. en ce qui concerne le Maroc:

(a) l'impôt agricole;

(b) la taxe urbaine et les taxes y rattachées;

(c) l'impôt sur les bénéfices professionnels et la réserve d'investissements;

(d) le prélèvement sur les traitements publics et privés, les indemnités et émoluments, les salaires, les pensions et les rentes viagères et l'emprunt obligatoire;

(ci-après dénommés «l'impôt marocain»);

2. en ce qui concerne la Norvège:

(a) l'impôt d'Etat et l'impôt communal sur le revenu ou sur la fortune;

(b) l'impôt spécial d'Etat au titre de l'aide aux pays en voie de développement;

(c) l'impôt sur les rémunérations des artistes nonrésidents;

(d) l'impôt sur les salaires des gens de mer;

(ci-après dénommés «l'impôt norvégien»).

(4) La présente Convention s'appliquera aussi aux impôts futurs de nature identique ou analogue qui s'ajouteraient aux impôts actuels ou qui les remplaceraient.

(5) Les autorités compétentes des Etats contractants se communiqueront, à la fin de chaque année, les modifications apportées à leurs législations fiscales respectives.

II. DEFINITIONS

Article 3.
Définitions générales

(1) Au sens de la présente Convention, à moins que le contexte n'exige une interprétation différente:

1. le terme «Maroc» désigne le Royaume du Maroc et, employé dans un sens géographique, le territoire du Maroc ainsi que le territoire adjacent aux eaux territoriales du Maroc et considéré comme territoire national aux fins d'imposition et où le Maroc, conformément au droit international, peut exercer ses droits relatifs au sol et au sous-sol marins ainsi qu'à leurs ressources naturelles (plateau continental);

2. le terme «Norvège», employé dans un sens géographique, désigne le Royaume de Norvège, ainsi que le territoire adjacent aux eaux territoriales de la Norvège et où la Norvège, conformément à sa législation nationale et au droit international, peut exercer ses droits souverains relatifs au sol et au sous-sol marins ainsi qu'à leurs ressources naturelles; ce terme ne désigne pas le Svalbard (Spitzberg), l'île Jan Mayen et les possessions norvégiennes situées hors d'Europe;

3. les expressions «un Etat contractant» et «l'autre Etat contractant» désignent, suivant le contexte, le Maroc ou la Norvège;

4. le terme «personne» comprend les personnes physiques, les sociétés et tous autres groupements de personnes;

5. le terme «société» désigne toute personne morale ou toute entité qui est considérée comme une personne aux fins d'imposition;

6. les expressions «entreprise d'un Etat contractant» et «entreprise de l'autre Etat contractant» désignent respectivement une entreprise exploitée par un résident d'un Etat contractant et une entreprise exploitée par un résident de l'autre Etat contractant;

7. le terme «nationaux» désigne toutes les personnes physiques qui possèdent la nationalité d'un Etat contractant et toutes les personnes morales, sociétés de personnes et associations constituées conformément à

la législation en vigueur dans un Etat contractant;
8. l'expression «autorités compétentes» désigne:
(a) en ce qui concerne le Maroc, le Ministre chargé des Finances ou son délégué.
(b) en ce qui concerne la Norvège, le Ministre des Finances et des Douanes ou son délégué.
(2) Pour l'application de la présente Convention par un Etat contractant, toute expression qui n'est pas autrement définie a le sens qui lui est attribué par la législation dudit 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 d'un Etat contractant» 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) Lorsque, selon la disposition du paragraphe (1), une personne physique est considérée comme résident de chacun des Etats contractants, le cas est résolu d'après les règles suivantes:
1. Cette personne est considérée comme résident de l'Etat contractant où elle dispose d'un foyer d'habitation permanent. Lorsqu'elle dispose d'un foyer d'habitation permanent dans chacun des Etats contractants, elle est considérée comme résident de l'Etat contractant avec lequel ses liens personnels et économiques sont les plus étroits (centre des intérêts vitaux);
2. Si l'Etat contractant où cette personne a le centre de ses intérêts vitaux ne peut pas être déterminé, ou si elle ne dispose d'un foyer d'habitation permanent dans aucun des Etats contractants, elle est considérée comme résident de l'Etat contractant où elle séjourne de façon habituelle;
3. Si cette personne séjourne de façon habituelle dans chacun des Etats contractants ou si elle ne séjourne de façon habituelle dans aucun d'eux, elle est considérée comme résident de l'Etat contractant dont elle possède la nationalité;
4. Si cette personne possède la nationalité de chacun des Etats contractants ou si elle ne possède la nationalité d'aucun d'eux, les autorités compétentes des Etats contractants tranchent la question d'un commun accord.
(3) Lorsque, selon la disposition du paragraphe (1), une personne autre qu'une personne physique est considérée comme résident de chacun des Etats contractants, elle est réputée résident de l'Etat contractant 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:
1. un siège de direction;
2. une succursale;
3. un bureau;
4. une usine;
5. un magasin de vente;
6. un atelier;
7. une mine, une carrière ou tout autre lieu d'extraction de ressources naturelles;
8. un chantier de construction ou de montage dont la durée dépasse six mois.
(3) On ne considère pas qu'il y a établis-

sement stable si:
1. il est fait usage d'installations aux seules fins de stockage, d'exposition ou de livraison de marchandises appartenant à l'entreprise;
2. des marchandises appartenant à l'entreprise sont entreposées aux seules fins de stockage, d'exposition ou de livraison;
3. des marchandises appartenant à l'entreprises sont entreposées aux seules fins de transformation par une autre entreprise;
4. une installation fixe d'affaires est utilisée aux seules fins d'acheter des marchandises ou de réunir des informations pour l'entreprise;
5. une installation fixe d'affaires est utilisée, pour l'entreprise, aux seules fins de publicité, de fourniture d'informations, de recherche scientifique ou d'activités analogues qui ont un caractère préparatoire ou auxiliaire.

(4) Une personne agissant dans un Etat contractant pour le compte d'une entreprise de l'autre Etat contractant — 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 dans cet Etat de pouvoirs qu'elle y exerce habituellement lui permettant de conclure des contrats au nom de l'entreprise, à moins que l'activité de cette personne soit limitée à l'achat de marchandises pour l'entreprise.

(5) On ne considère pas qu'une entreprise d'un Etat contractant a un établissement stable dans l'autre Etat contractant 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 d'un Etat contractant contrôle ou est contrôlée par une société qui est un résident de l'autre Etat contractant 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 ces sociétés un établissement stable de l'autre.

III. IMPOSITION DES REVENUS

Article 6
Revenus immobiliers

(1) Les revenus provenant de biens immobiliers sont imposables dans l'Etat contractant où ces biens cont situés.

(2) 1. Sous réserve des dispositions de l'alinéa 2 ci-après, l'expression «biens immobiliers» est définie conformément au droit de l'Etat contractant où les biens considérés sont situés.

2. L'expression «biens immobiliers» 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; les navires 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

Bénéfices des entreprises

(1) Les bénéfices d'une entreprise d'un Etat contractant ne sont imposables que dans cet Etat, à moins que l'entreprise n'exerce son activité dans l'autre Etat contractant 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 la mesure où ils sont imputables audit établissement stable.

(2) Lorsqu'une entreprise d'un Etat contractant exerce son activité dans l'autre Etat contractant par l'intermédiaire d'un établissement stable qui y est situé, il est imputé, dans chaque Etat contractant, 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 et les frais généraux afférents aux services rendus au profit de cet établissement stable, soit dans l'Etat où est situé cet établissement stable, soit ailleurs.

(4) 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.

Cette disposition ne peut être interprétée comme empêchant un Etat contractant de compter dans le calcul des bénéfices imputables à un établissement stable qui y est situé, les bénéfices provenant des actions, des créances, des droits ou d'autres biens qui sont effectivement rattachés à cet établissement stable.

(5) Le terme «bénéfices» employé dans dans le présent article comprend les bénéfices revenant à un associé d'une société de personnes à raison de sa participation.

Article 8

Navigation maritime et aérienne

(1) Les bénéfices provenant de l'exploitation, en trafic international, de navires ou d'aéronefs ne sont imposables que dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

(2) Si le siège de la direction effective d'une entreprise de navigation maritime est à bord d'un navire, ce siège est réputé situé dans l'Etat contractant où se trouve le port d'attache de ce navire.

(3) Les bénéfices provenant de l'exploitation, en trafic international, de navires ou d'aéronefs tirés par ces entreprises d'une participation à un pool, à une exploitation en commun ou à un organisme international d'exploitation ne sont imposables que dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé.

(4) Les dispositions des paragraphes (1) et (3) ne s'appliquent aux bénéfices tirés par le groupement de navigation aérienne norvégien, danois et suédois, SCANDINAVIAN AIRLINES SYSTEM (SAS), que dans la mesure de la quotité de ceux-ci attribuée au participant norvégien audit groupement, DET NORSKE LUFTFARTSELSKAP A/S.

Article 9

Entreprises associées

Lorsque

1. une entreprise d'un Etat contractant participe directement ou indirectement à la

direction, au contrôle ou au financement d'une entreprise de l'autre Etat contractant, ou que

2. les mêmes personnes participent directement ou indirectement à la direction, au contrôle ou au financement d'une entreprise d'un Etat contractant et d'une entreprise de l'autre Etat contractant,

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 par 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 d'un Etat contractant à un résident de l'autre Etat contractant sont imposables dans cet autre Etat.

(2) Toutefois, ces dividendes peuvent être imposés dans l'Etat contractant dont la société est un résident, et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 15 pour cent du montant brut des dividendes.

Ce paragraphe ne concerne pas l'imposition de la société pour les bénéfices qui servent au paiement des dividendes.

(3) Le terme «dividendes» désigne les revenus provenant d'actions, actions ou bons de jouissance, parts de mine, parts de fondateur ou autres parts bénéficiaires à l'exception des créances, ainsi que les revenus d'autres parts sociales assimilés aux revenus d'actions par la législation fiscale de l'Etat contractant dont la société distributrice est un résident.

(4) Les dispositions des paragraphes (1) et (2) ne s'appliquent pas lorsque le bénéficiaire des dividendes, résident d'un Etat contractant, a, dans l'autre Etat contractant 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.

(5) Lorsqu'une société qui est un résident d'un Etat contractant tire des bénéfices ou des revenus de l'autre Etat contractant, 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 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.

Article 11
Intérêts

(1) Les intérêts provenant d'un Etat contractant et payés à un résident de l'autre Etat contractant sont imposables dans cet autre Etat.

(2) Toutefois, ces intérêts peuvent être imposés dans l'Etat contractant d'où ils proviennent et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 10 pour cent de leur montant brut.

(3) Le terme «intérêts» désigne les revenus de fonds publics, des obligations d'emprunts, assorties ou non de garanties hypothécaires ou d'une clause de participation aux bénéfices, 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.

(4) Les dispositions des paragraphes (1)

et (2) ne s'appliquent pas lorsque le bénéficiaire des intérêts, résident d'un Etat contractant, a, dans l'autre Etat contractant 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) Les intérêts sont considérés comme provenant d'un Etat contractant lorsque le débiteur est cet Etat lui-même, une de ses subdivisions politiques, une de ses collectivités locales, ou un résident de cet Etat. Toutefois, lorsque le débiteur des intérêts, qu'il soit ou non résident d'un Etat contractant, a dans l'un des Etats contractants un établissement stable pour lequel l'emprunt générateur des intérêts a été contracté et qui supporte la charge de ces intérêts, lesdits intérêts sont réputés provenir de l'Etat contractant où l'établissement stable est situé.

(6) 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 contractant et compte tenu des autres dispositions de la présente Convention.

Article 12
Redevances

(1) Les redevances provenant d'un Etat contractant et payées à un résident de l'autre Etat contractant sont imposables dans cet autre Etat.

(2) Toutefois, ces redevances peuvent être imposées dans l'Etat d'où elles proviennent et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 10 pour cent de leur montant brut.

(3) Le terme «redevances» 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 et de télévision, 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, les rémunérations pour l'usage ou la concession de l'usage d'un équipement agricole, industriel, commercial ou scientifique ne constituant pas un bien immobilier visé à l'article 6 et pour des informations ayant trait à une expérience acquise dans le domaine agricole, industriel, commercial ou scientifique, ainsi que les rémunérations pour des études économiques ou techniques.

(4) Les dispositions des paragraphes (1) et (2) ne s'appliquent pas lorsque le bénéficiaire des redevances, résident d'un Etat contractant, a, dans l'autre Etat contractant 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) Les redevances sont considérées comme provenant d'un Etat contractant lorsque le débiteur est cet Etat lui-même, une de ses subdivisions politiques, une de ses collectivités locales ou un résident de cet Etat. Toutefois, lorsque le débiteur des redevances, qu'il soit ou non résident d'un Etat contractant, a dans un Etat contractant un établissement stable pour lequel le contrat donnant lieu au paiement des redevances a été conclu et qui supporte comme telle la charge de celles-ci, ces redevances sont

réputées provenir de l'Etat contractant où est situé l'établissement stable.

(6) Si, par suite de relations spéciales existant entre le débiteur et le créancier ou que l'un et l'autre entretiennent avec tierces personnes, le montant de 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 contractant et compte tenu des autres dispositions de la présente Convention.

Article 13
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 contractant 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 d'un Etat contractant a dans l'autre Etat contractant, ou de biens mobiliers constitutifs d'une base fixe dont dispose un résident d'un Etat contractant dans l'autre Etat contractant pour l'exercice d'une 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 ou d'aéronefs exploités en trafic international, ainsi que les biens mobiliers affectés à leur exploitation, ne sont imposables que dans l'Etat contractant où les bénéfices provenant de cette exploitation sont imposables en vertu des dispositions de l'article 8.

(4) Les gains provenant de l'aliénation de tous biens autres que ceux qui sont mentionnés aux paragraphes (1), (2) et (3) ne sont imposables que dans l'Etat contractant dont le cédant est un résident.

Article 14
Professions libérales

(1) Les revenus qu'un résident d'un Etat contractant tire d'une profession libérale ou d'autres activités indépendantes de caractère analogue ne sont imposables que dans cet Etat. Toutefois, ces revenus sont imposables dans l'autre Etat contractant dans les cas suivants:

1. si l'intéressé dispose de façon habituelle, dans l'autre Etat contractant, d'une base fixe pour l'exercice de ses activités, mais uniquement dans la mesure où ils sont imputables à cette base fixe; ou

2. si l'intéressé exerce ses activités dans l'autre Etat contractant pendant une période ou des périodes — y compris la durée des interruptions normales de travail — excédant au total 183 jours au cours de l'année civile.

(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 15
Emplois

(1) Sous réserve des dispositions des articles 16, 18 et 19, les salaires, traitements et autres rémunérations similaires qu'un résident d'un Etat contractant reçoit au titre d'un emploi salarié ne sont imposa-

bles que dans cet Etat, à moins que l'emploi ne soit exercé dans l'autre Etat contractant. 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 d'un Etat contractant reçoit au titre d'un emploi salarié exercé dans l'autre Etat contractant ne sont imposables que dans le premier Etat si:

1. le bénéficiaire séjourne dans l'autre Etat pendant une période ou des périodes y compris la durée des interruptions normales de travail n'excédant pas au total 183 jours au cours de l'année civile considérée; et

2. les rémunérations sont payées par un employeur ou au nom d'un employeur qui n'est pas résident de l'autre Etat; et

3. 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) Les dispositions des paragraphes (1) et (2) sont applicables aux rémunérations versées par l'un des Etats contractants ou par l'une de ses subdivisions politiques ou l'une de ses collectivités locales à une personne physique résidente de l'autre Etat contractant au titre de services rendus. Toutefois, lorsque ces rémunérations ne sont pas soumises à l'impôt de l'Etat où réside le bénéficiaire, l'imposition est réservée à l'Etat du débiteur.

(4) Nonobstant les dispositions précédentes du présent article, les rémunérations au titre d'un emploi exercé à bord —

1. d'un navire en trafic international sont imposables dans l'Etat contractant où le siège de la direction effective de l'entreprise est situé;

2. d'un aéronef en trafic international et d'un aéronef exploité par le groupement SCANDINAVIAN AIRLINES SYSTEM (SAS), visé au paragraphe (4) de l'article 8, ne sont imposables que dans l'Etat contractant dont celui qui reçoit lesdites rémunérations est un résident.

Article 16
Tantièmes

Les tantièmes, jetons de présence et autres rétributions similaires qu'un résident d'un Etat contractant reçoit en sa qualité de membre du conseil d'administration ou de surveillance d'une société qui est un résident de l'autre Etat contractant sont imposables dans cet autre Etat.

Article 17
Artistes et sportifs

(1) Nonobstant les dispositions des articles 14 et 15, les revenus que les professionels 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 contractant où ces activités sont exercées.

(2) Nonobstant les dispositions des articles 7, 14 et 15, la règle énoncée au paragraphe (1) du présent article s'applique également aux revenus obtenus par les personnes exploitant ou organisant les activités y mentionnées.

(3) Les dispositions des paragraphes (1) et (2) ne s'appliquent pas aux revenus d'activités exercées dans un Etat contractant par des organismes sans but lucratif de l'autre Etat contractant ou par des membres de leur personnel, sauf si ces derniers agissent pour leur propre compte.

Article 18
Pensions

Les pensions et autres rémunérations similaires provenant d'un Etat contractant et

payées à un résident de l'autre Etat contractant au titre d'une emploi antérieur, ne sont imposables que dans cet autre Etat.

Article 19
Chercheurs et étudiants

(1) Les rémunérations versées à une personne physique qui est, ou qui était auparavant, un résident d'un Etat contractant et qui séjourne temporairement dans l'autre Etat contractant à seule fin d'y poursuivre ses études au niveau élevé, ou s'y livrer à des recherches scientifiques, pendant une période n'excédant pas deux ans, dans une université ou dans une autre institution d'enseignement supérieur ou de recherche scientifique, ne sont imposable que dans le premier Etat.

(2) Les sommes qu'un étudiant, un apprenti ou un stagiaire qui est, ou qui était auparavant, un résident d'un Etat contractant et qui séjourne dans l'autre Etat contractant 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.

(3) Les rémunérations versées à un étudiant ou à un apprenti commercial qui est, ou était auparavant, un résident d'un Etat contractant au titre d'un emploi salarié exercé dans l'autre Etat contractant, ne sont pas imposables dans cet autre Etat, à condition que ledit emploi se rattache directement à ses études ou à sa formation, ou que l'emploi soit exercé à la seule fin de son entretien.

Article 20
Revenus non expressément mentionnés

Les éléments du revenu d'un résident d'un Etat contractant qui ne sont pas expressément mentionnés dans les articles précédents de la présente Convention ne sont imposables que dans cet Etat.

IV. IMPOSITION DE LA FORTUNE

Article 21
Fortune

(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 contractant 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 contractant où est situé l'établissement stable ou la base fixe.

(3) La fortune constituée par des navires et des aéronefs exploités en trafic international, ainsi que les biens mobiliers affectés à leur exploitation, ne sont imposables que dans l'Etat contractant où les bénéfices provenant de cette exploitation sont imposables en vertu des dispositions de l'article 8.

(4) Tous les autres éléments de la fortune d'un résident d'un Etat contractant ne sont imposables que dans cet Etat.

V. DISPOSITIONS POUR ELIMINER LES DOUBLES IMPOSITIONS

Article 22
Méthode d'exemption

(1) En ce qui concerne les résidents de la Norvège, la double imposition est évitée de la manière suivante:

1. Les revenus provenant du Maroc — à l'exclusion des revenus visés au 2. ci-après — et les éléments de la fortune situés au Maroc, qui sont imposables dans cet Etat en vertu des articles précédents, sont exonérés de l'impôt norvégien. Cette exonération ne limite pas le droit de la Norvège

de tenir compte, lors de la détermination du taux de l'impôt et des cotisations sociales norvégiens, des revenus et des éléments de fortune ainsi exonérés.

Dans le cas des dividendes définis au paragraphe 3 de l'article 10 la première phrase s'applique seulement, lorsque les dividendes sont payés par une société par actions résidente du Maroc à une société de capitaux résidente de la Norvège, qui dispose directement d'au moins 10 pour cent du capital assorti d'un droit de vote de la première société. Les actions ou parts susvisées de la société du Maroc sont, aux mêmes conditions, exonérées de l'impôt norvégien perçu sur la fortune.

2. L'impôt perçu au Maroc conformément aux dispositions de cette Convention est imputé sur l'impôt que la Norvège perçoit sur les revenus suivants:

(a) les dividendes non visés à l'alinéa 1;
(b) les intérêts visés à l'article 11;
(c) les redevances visées à l'article 12.

3. Pour les besoins de l'imputation visée au paragraphe (1) alinéa 2 a ci-dessus, aussi longtemps que les dividendes sont exonérés ou imposés à un taux inférieur au taux visé au paragraphe (2) alinéa 2 de l'article 10 en vue de promouvoir le développement économique du Maroc, le montant de l'impôt marocain imputable sera de 15 pour cent du montant brut des dits dividendes.

4. Pour les besoins de l'imputation visée au paragraphe (1) alinéa 2 b ci-dessus, aussi longtemps que les intérêts sont exonérés ou imposés à un taux inférieur au taux visé au paragraphe (2) de l'article 11 en vue de promouvoir le développement économique du Maroc, le montant de l'impôt marocain imputable sera de 10 pour cent du montant brut des dits intérêts; toutefois lorsque les dits intérêts sont versés par les institutions visées au Protocole final, le montant de l'impôt marocain imputable sera de 15 pour cent.

(2) En ce qui concerne les résidents du Maroc, la double imposition est évitée de la manière suivante:

1. Lorsqu'un résident du Maroc reçoit des revenus non visés au 2. ci-après qui sont imposables en Norvège conformément aux dispositions de cette Convention, le Maroc exempte de l'impôt ces revenus, mais il peut, pour calculer le montant de ses impôts sur le reste du revenu de ce résident, appliquer le même taux que si les revenus en question n'avaient pas été exemptés.

2. En ce qui concerne les revenus visés aux articles 10, 11 et 12 ci-dessus, le Maroc peut, conformément aux dispositions de sa législation interne les comprendre dans les bases des impôts visés à l'article 2; mais il accorde sur le montant des impôts afférents à ces revenus et dans la limite de ce montant, une réduction correspondant au montant des impôts prélevés par la Norvége sur ces mêmes revenus.

VI. DISPOSITIONS SPECIALES

Article 23
Non-discrimination

(1) Les nationaux d'un Etat contractant ne sont soumis dans l'autre Etat contractant 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) L'imposition des biens immobiliers, d'un établissement stable ou d'une base fixe qu'une entreprise ou un résident d'un Etat contractant a dans l'autre Etat contractant n'est pas établie dans cet autre Etat d'une façon moins favorable que l'imposition des entreprises ou des résidents de

cet autre Etat qui exercent la même activité.

En particulier:

(a) dans le calcul des revenus tirés de biens immobiliers qu'un résident d'un Etat contractant possède dans l'autre Etat contractant, sont admises en déduction les dépenses exposées pour l'entretien et la conservation de ces biens, dans les conditions qui s'appliquent aux résidents de cet autre Etat. Les intérêts de dettes contractées aux mêmes fins sont également admis en déduction dans les mêmes conditions;

(b) dans le calcul de la fortune visée aux paragraphes (1) et (2) de l'article 21, sont admises en déductions les dettes contractées pour les besoins de biens immobiliers, d'un établissement stable ou d'une base fixe.

La disposition de l'alinéa 1er du présent paragraphe ne peut être interprétée comme obligeant un Etat contractant à accorder aux résidents de l'autre Etat contractant 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.

Cette disposition ne peut non plus être interprétée comme empêchant un Etat contractant d'imposer le total des bénéfices imputables à l'établissement stable dont dispose dans cet Etat une société de l'autre Etat, au taux fixé par sa législation nationale, à condition que celui-ci n'excède pas le taux maximum applicable à l'ensemble ou à une fraction des bénéfices non distribués des sociétés résidentes de ce premier Etat.

(3) Les entreprises d'un Etat contractant, dont le capital est en totalité ou en partie, directement ou indirectement, détenu ou contrôlé par un ou plusieurs résidents de l'autre Etat contractant, ne sont soumises dans le premier Etat contractant 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.

(4) La disposition du paragraphe (1) ne peut être interprétée comme obligeant la Norvège à accorder aux nationaux du Maroc, qui ne sont pas nés en Norvège de parents norvégiens, la remise exceptionnelle d'impôt quelle accorde à ses propres nationaux et aux personnes nées en Norvège de parents norvégiens, en vertu de l'article 22 de la loi norvégienne de l'impôt pour les districts ruraux et de l'article 17 de la loi norvégienne de l'impôt pour les villes.

(5) Le terme «imposition» désigne dans le présent article les impôts de toute nature ou dénomination.

Article 24

Procédure amiable

(1) Lorsqu'un résident d'un Etat contractant estime que les mesures prises par un Etat contractant 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 contractant 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 contractant, en vue d'éviter une imposition non conforme à la Convention.

(3) Les autorités compétentes des Etats contractants s'efforcent, par voie d'accord amiable, de résoudre les difficultés ou de dissiper les doutes auxquels peuvent don-

ner lieu l'interprétation ou l'application de la présente Convention. Elles peuvent aussi se concerter en vue d'éviter la double imposition dans les cas non prévus par la présente Convention.

(4) Les autorités compétentes des Etats contractants peuvent communiquer directement entre elles en vue de parvenir à un accord comme il est indiqué aux paragraphes précédents et à toute autre fin prévue par la présente Convention.

Article 25

Echange de renseignements

(1) Les autorités compétentes des Etats contractants échangeront les renseignements nécessaires pour appliquer les dispositions de la présente Convention. 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 et des réclamations et recours y relatifs, ainsi qu'aux autorités judiciaires.

(2) Les dispositions du paragraphe (1) ne peuvent en aucun cas être interprétées comme imposant à l'un des Etats contractants l'obligation:

1. de prendre des dispositions administratives dérogeant à sa propre législation ou à sa pratique administrative ou à celle de l'autre Etat contractant;
2. 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 contractant;
3. 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 26

Fonctionnaires diplomatiques et consulaires

(1) 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.

(2) Dans la mesure où, en raison des privilèges fiscaux dont bénéficient les fonctionnaires diplomatiques ou consulaires, en vertu des règles générales du droit des gens ou aux termes des dispositions d'accords internationaux particuliers, le revenu ou la fortune ne sont pas imposables dans l'Etat accréditaire, le droit d'impositions est réservé à l'Etat accréditant.

(3) Aux fins de la présente Convention, les membres d'une mission diplomatique ou consulaire d'un Etat contractant accréditée dans l'autre Etat contractant ou dans un Etat tiers qui sont ressortissants de l'Etat accréditant, sont réputés être résidents de l'Etat accréditant s'ils y sont soumis aux mêmes obligations, en matière d'impôts sur le revenu et sur la fortune, que les résidents dudit Etat.

(4) La présente Convention ne s'applique pas aux Organisations internationales, à leurs organes ou à leurs fonctionnaires, ni aux personnes qui sont membres d'une mission diplomatique ou consulaire d'un Etat tiers, lorsqu'ils se trouvent sur le territoire d'un Etat contractant et ne sont pas traités comme des résidents dans l'un ou l'autre Etat contractant en matière d'impôts sur le revenu et sur la fortune.

Article 27

Extension territoriale

(1) La présente Convention peut être étendue, telle quelle ou avec les modifications nécessaires à toute partie du territoire

de la Norvège qui est spécifiquement exclue du champ d'application de la Convention en vertu de la disposition du paragraphe (1), 2, de l'article 3, dans laquelle les impôts sont perçus qui sont de caractère analogue à ceux 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 entre les Etats contractants par échange de notes diplomatiques ou selon toute autre procédure conforme à leurs dispositions constitutionnelles.

(2) A moins que les deux Etats contractants n'en soient convenus autrement, lorsque la Convention sera dénoncée par l'un d'eux en vertu de l'article 29, elle cessera de s'appliquer, dans les conditions prévues à cet article à tout territoire auquel elle a été étendue conformément au présent article.

VII. DISPOSITIONS FINALES

Article 28
Entrée en vigueur

(1) La présente Convention sera ratifiée; les instruments de ratification seront échangés aussitôt que possible à Rabat.

(2) La présente Convention entrera en vigueur dès l'échange des instruments de ratification et elle s'appliquera:

1. aux impôts dus à la source sur les revenus attribués ou mis en paiement à partir du premier jour du mois suivant celui de l'échange des instruments de ratification;

2. aux autres impôts établis sur des revenus de périodes imposables prenant fin à partir du 1er janvier de l'année de cet échange.

Article 29
Dénonciation

La présente Convention restera indéfiniment en vigueur; mais chaque Etat contractant pourra, jusqu'au 30 juin inclus de toute année civile à partir de la cinquième année à dater de celle de sa ratification, la dénoncer, par écrit et par la voie diplomatique, à l'autre Etat contractant. En cas de dénonciation avant le 1er juillet d'une telle année, la Convention s'appliquera pour la dernière fois:

1. aux impôts dus à la source sur les revenus attribués ou mis en paiement au plus tard le 31 décembre de l'année de la dénonciation;

2. aux autres impôts établis sur des revenus de périodes imposables prenant fin au plus tard le 31 décembre de la même année.

FAIT à Rabat, le 5 mai 1972 en double exemplaire en langue française.

Pour le Royaume de la Norvège:
Olav I. L. P. Moltke-Hansen
Pour le Royaume du Maroc:
Mustapha Faris

PROTOCOLE FINAL

Au moment de procéder à la signature de la Convention en vue d'éviter les doubles impositions en matière d'impôts sur le revenu et sur la fortune conclue ce jour entre le Royaume de la Norvège et le Royaume du Maroc, les Plénipotentiaires soussignés sont convenus des dispositions suivantes qui forment partie intégrante de cette Convention.

Les organismes spécialisés en vue de concourir au développement économique du Maroc, dont il est question à l'article 22, paragraphe (1), alinéa 4, sont les suivants:

— Caisse nationale de crédit agricole;
— Fonds d'équipement communal;
— Office chérifien des phosphates;
— Office national de l'électricité;
— Offices régionaux de mise en valeur agricole;
— Bureau de recherches et de participations minières;
— Bureau d'études et de participations industrielles;
— Office national marocain du tourisme;
— Office national des chemins de fer;
— Office de commercialisation et d'exportation;
— Régie d'aconage du port de Casablanca;
— Caisse des prêts immobiliers du Maroc;
— Banque nationale pour le développement économique;
— Banque centrale populaire;
— Maroc-Chimie;
— SEPYK (Société d'exploitation de pyrotine de Ketara);
— S.E.F.E.R.I.F. (Société d'exploitation de fer du Rif);
— C.O.T.E.F. (Complexe textile de Fès);
— S.C.P. (Société chérifienne des pétroles);
— SAMIR (Société anonyme marocaine italienne de raffinage);
— COMANAV (Compagnie marocaine de navigation);
— RAM (Royal Air Maroc);
— LIMADET (Lignes maritimes du détroit).

Abkommen zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

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A double taxation treaty was signed between the German Federal Republic and Poland on December 18, 1972. The treaty which is subject to rectification will generally be effective as of January 1, 1972.[1]

TEXT

Die Bundesrepublik Deutschland und die Volksrepublik Polen, von dem Wunsche geleitet, zwecks Entwicklung und Erleichterung ihrer wirtschaftlichen Beziehungen ein Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen zu schliessen,

Haben folgendes vereinbart:

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 in einem der beiden Vertragstaaten 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 oder unbeweglichen Vermögens, der Lohnsummensteuern sowie der Steuern vom Vermögenszuwachs.

(3) Zu den zur Zeit bestehenden Steuern, für die dieses Abkommen gilt, gehören insbesondere

a) in der Bundesrepublik Deutschland:
die Einkommensteuer einschliesslich der Ergänzungsabgabe zur Einkommensteuer,
die Körperschaftsteuer einschliesslich der Ergänzungsabgabe zur Körperschaftsteuer,
die Vermögensteuer und
die Gewerbesteuer;

1. See also under "Documents" in this issue.

b) in der Volksrepublik Polen:
podatek dochodowy (die Einkommensteuer),
— podatek od wynagrodzen (die Lohnsteuer),
podatek wyrównawczy (die Ergänzungsteuer zur Einkommensteuer oder Lohnsteuer) und
podatek dochodowy od spółdzielczości (die Einkommensteuer der Genossenschaften).

(4) Dieses Abkommen gilt auch für alle Steuern gleicher oder ähnlicher Art, die künftig neben den zur Zeit bestehenden Steuern oder an deren Stelle erhoben werden.

(5) Die Bestimmungen dieses Abkommens über die Besteuerung des Einkommens oder des Vermögens gelten entsprechend für die nicht nach dem Einkommen oder dem Vermögen berechnete Gewerbesteuer.

Artikel 3

(1) Im Sinne dieses Abkommens, wenn der Zusammenhang nicht anderes erfordert:

a) bedeuten die Ausdrücke „ein Vertragstaat" und „der andere Vertragstaat", je nach dem Zusammenhang, die Bundesrepublik Deutschland oder die Volksrepublik Polen und, wenn für Zwecke dieses Abkommens im geographischen Sinne verwendet, das Gebiet, in dem das Steuerrecht des betreffenden Staates gilt;

b) umfasst der Ausdruck „Person" natürliche Personen und Gesellschaften;

c) bedeutet der Ausdruck „Gesellschaft" juristische Personen oder Rechtsträger, die für die Besteuerung wie juristische Personen behandelt werden;

d) bedeuten die Ausdrücke „Unternehmen eines Vertragstaates" und „Unternehmen des anderen Vertragstaates", je nachdem, ein Unternehmen, das von einer in einem Vertragstaat ansässigen Person betrieben wird, oder ein Unternehmen, das von einer in dem anderen Vertragstaat ansässigen Person betrieben wird;

e) bedeutet der Ausdruck „zuständige Behörde" auf seiten der Bundesrepublik Deutschland den Bundesminister der Finanzen und auf seiten der Volksrepublik Polen den Minister der Finanzen.

(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.

b) Kann nicht bestimmt werden, in welchem Vertragstaat die Person die engeren persönlichen und wirtschaftlichen Beziehungen 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.

(3) Ist nach Absatz 1 eine andere als eine natürliche Person in beiden Vertragstaaten ansässig, so gilt sie als in dem Vertragstaat ansässig, in dem sich der Ort ihrer tatsächlichen Geschäftsleitung befindet.

Artikel 5

(1) Im Sinne dieses Abkommens bedeutet der Ausdruck „Betriebstätte" 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 Geschäftsstelle,
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 Betriebstätten 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 besteu-

ert 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 Vergütungen 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 die 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 seine 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) Zu den Gewinnen eines Unternehmens eines Vertragstaates im Sinne dieses Artikels gehören alle Einkünfte, die das Unternehmen aus diesem Vertragsstaat, aus dem anderen Vertragstaat oder aus einem Drittstaat bezieht. Gehören jedoch zu den Gewinnen Einkünfte im Sinne des Artikels 10, so werden die Bestimmungen jenes Artikels

durch die Bestimmungen dieses Artikels nicht berührt.

Artikel 8

(1) 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.

(2) Gewinne aus dem Betrieb von Schiffen, die der Binnenschiffahrt dienen, können nur in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet.

(3) Befindet sich der Ort der tatsächlichen Geschäftsleitung eines Unternehmens der See- oder Binnenschiffahrt 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.

(4) Absätze 1 bis 3 gelten entsprechend für Beteiligungen eines Unternehmens der Schiff- oder Luftfahrt an einem Pool, einer Betriebsgemeinschaft oder einem anderen internationalen Betriebszusammenschluss.

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) 5 vom Hundert des Bruttobetrages der Dividenden, wenn der Empfänger eine Gesellschaft ist, die unmittelbar über mindestens 25 vom Hundert des Kapitals der die Dividenden zahlenden Gesellschaft verfügt;

b) 15 vom Hundert des Bruttobetrages der Dividenden in allen anderen Fällen.

(3) Solange in einem Vertragstaat der Satz der Steuer vom Gewinn einer Gesellschaft für den ausgeschütteten Gewinn niedriger ist als der Satz der Steuer für den nicht ausgeschütteten Gewinn und der Unterschied 20 vom Hundert oder mehr beträgt, darf abweichend von Absatz 2 die Steuer, die in diesem Staat von den Dividenden erhoben wird, 25 vom Hundert des Bruttobetrages der Dividenden zuzüglich der Ergänzungsabgabe betragen, wenn die Dividenden von einer in diesem Vertragstaat ansässigen Gesellschaft stammen und von einer in dem anderen Vertragstaat ansässigen Gesell-

schaft bezogen werden, der entweder selbst oder zusammen mit anderen Personen, von denen sie beherrscht wird oder die mit ihr gemeinsam beherrscht werden, unmittelbar oder mittelbar mindestens 25 vom Hundert der stimmberechtigten Anteile der in dem erstgenannten Staat ansässigen Gesellschaft gehören.

(4) Der in diesem Artikel verwendete Ausdruck „Dividenden" bedeutet Einnahmen aus Aktien oder anderen Rechten — ausgenommen Forderungen — mit Gewinnbeteiligung sowie aus sonstigen Gesellschaftsanteilen stammende Einnahmen, die nach dem Steuerrecht des Staates, in dem die ausschüttende Gesellschaft ansässig ist, den Einnahmen aus Aktien gleichgestellt sind.

(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 nur in dem anderen Staat besteuert werden.

(2) Der in diesem Artikel verwendete Ausdruck „Zinsen" bedeutet Einkünfte aus öffentlichen Anleihen, aus Schuldverschreibungen, auch wenn sie durch Pfandrechte 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.

(3) Absätze 1 und 2 sind 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.

(4) Zinsen gelten dann als aus einem Vertragstaat stammend, wenn der Schuldner in diesem Staat ansässig 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 und trägt die Betriebstätte die Zinsen, so gelten die Zinsen als aus dem Vertragstaat stammend, in dem die Betriebstätte liegt.

Artikel 12

(1) Lizenzgebühren, die aus einem Vertragstaat stammen und von einer in dem anderen Vertragstaat ansässigen Person bezogen werden, können nur in dem anderen Staat besteuert werden.

(2) Der in diesem Artikel verwendete Ausdruck „Lizenzgebühren" bedeutet Vergütungen jeder Art, die für die Benutzung

oder für das Recht auf Benutzung von Urheberrechten, Patenten, Warenzeichen (trade mark oder trade name), 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 oder für die Benutzung oder das Recht auf Benutzung von kinematographischen Filmen oder Bandaufnahmen für Fernsehen oder Rundfunk gezahlt werden.

(3) 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 Lizenzgebühren gezahlt werden, tatsächlich zu dieser Betriebstätte gehören. In diesem Fall ist Artikel 7 anzuwenden.

(4) 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) 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 und Zahnärzte.

Artikel 14

(1) Vorbehaltlich der Artikel 15, 16 Absatz 2, 17 und 18 können Gehälter, Löhne und ähnliche Vergütungen, die eine in einem Vertragstaat ansässige natürliche 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 diesem anderen Staat besteuert werden.

(2) Ungeachtet des Absatzes 1 können Vergütungen, die eine in einem Vertragstaat ansässige natürliche Person für die in dem anderen Vertragstaat ausgeübte unselbständige oder selbständige Tätigkeit bezieht, nur in dem erstgenannten Staat versteuert werden, wenn

a) der Empfänger sich in dem anderen Staat insgesamt nicht länger als 183 Tage während des betreffenden Kalenderjahres aufhält und
b) die Vergütungen von einer Person oder für eine Person gezahlt werden, die nicht in dem anderen Staat ansässig ist, und
c) die Vergütungen nicht von einer Betriebstätte getragen werden, welche die

Person, die die Vergütungen zahlt, 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 oder an Bord eines Schiffes, das der Binnenschiffahrt dient, ausgeübt wird, in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet.

Artikel 15

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 16

(1) Ungeachtet der Artikel 13 und 14 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.

(2) Abweichend von Absatz 1 können Einkünfte aus Tätigkeiten der in Absatz 1 genannten Art bei Personen, die im Rahmen des vom Entsendestaat gebilligten Kulturaustausches auftreten, nur in dem Staat besteuert werden, in dem sie ansässig sind.

Artikel 17

(1) Vergütungen, die von einem Vertragstaat oder einer seiner Gebietskörperschaften unmittelbar oder aus einem von diesem Staat oder der Gebietskörperschaft errichteten Sondervermögen an eine natürliche Person für die diesem Staat oder der Gebietskörperschaft in Ausübung öffentlicher Funktionen erbrachten Dienste gewährt werden, können in diesem Staat besteuert werden.

(2) Auf Vergütungen für Dienstleistungen, die im Zusammenhang mit einer kaufmännischen oder gewerblichen Tätigkeit eines der Vertragstaaten oder einer seiner Gebietskörperschaften erbracht werden, finden die Artikel 14 und 15 Anwendung.

Artikel 18

(1) Die Vergütungen von Hochschullehrern und anderen Lehrern, die in einem Vertragstaat ansässig sind und während eines vorübergehenden Aufenthalts von höchstens 2 Jahren in dem anderen Vertragstaat an einer Universität oder anderen nicht Erwerbszwecken dienenden Lehr- oder Forschungsanstalt eine Lehrtätigkeit ausführen oder wissenschaftliche Forschung betreiben, können nur in dem erstgenannten Staat besteuert werden.

(2) Zahlungen, die ein Stipendiat, Student, Praktikant oder Lehrling, 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 19

Die in den vorstehenden Artikeln nicht ausdrücklich erwähnten Einkünfte einer in einem Vertragstaat ansässigen Person können nur in diesem Staat besteuert werden.

Artikel 20

(1) Unbewegliches Vermögen im Sinne des Artikels 6 Absatz 2 kann in dem Vertrag-

staat 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 Schiffe, die der Binnenschiffahrt dienen, sowie bewegliches Vermögen, das dem Betrieb dieser Schiffe und Luftfahrzeuge dient, können nur in dem Vertragstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleistung des Unternehmens befindet.
(4) Alle anderen Vermögensteile einer in einem Vertragstaat ansässigen Person können nur in diesem Staat besteuert werden.

Artikel 21

(1) Bei einer in der Bundesrepublik Deutschland ansässigen Person wird die Steuer wie folgt festgesetzt:
a) Von der Bemessungsgrundlage für die Steuer der Bundesrepublik Deutschland werden die Einkünfte aus Quellen innerhalb der Volksrepublik Polen und die in der Volksrepublik Polen gelegenen Vermögenswerte ausgenommen, die nach diesem Abkommen in der Volksrepublik Polen besteuert werden können, soweit nicht Buchstabe b) anzuwenden ist. Die Bundesrepublik Deutschland wird jedoch die so ausgenommenen Einkünfte und Vermögenswerte bei der Festsetzung des Steuersatzes berücksichtigen.
Auf Dividenden ist Satz 1 nur anzuwenden, wenn die Dividenden einer in der Bundesrepublik Deutschland ansässigen Kapitalgesellschaft von einer in der Volksrepublik Polen ansässigen Gesellschaft gezahlt werden, deren stimmberechtigte Anteile zu mindestens 25 vom Hundert der erstgenannten Gesellschaft gehören. Von der Bemessungsgrundlage für die Steuer der Bundesrepublik Deutschland werden ebenfalls Beteiligungen ausgenommen, deren Dividenden nach dem vorstehenden Satz von der Steuerbemessungsgrundlage ausgenommen sind oder bei Zahlung auszunehmen wären.
b) Die Steuer, die nach dem Recht der Volksrepublik Polen und in Übereinstimmung mit diesem Abkommen für die nachstehenden, aus Quellen innerhalb der Volksrepublik Polen stammenden Einkünfte gezahlt wird, wird unter Beachtung der Vorschriften des Steuerrechts der Bundesrepublik Deutschland über die Anrechnung ausländischer Steuern auf die von diesen Einkünften in der Bundesrepublik Deutschland erhobene Steuer angerechnet:
1. Dividenden, die nicht unter Buchstabe a) fallen,
2. Einkünfte im Sinne des Artikels 15,
3. Einkünfte im Sinne des Artikels 16 Absatz 1.

(2) Bei einer in der Volksrepublik Polen ansässigen Person wird die Steuer wie folgt festgesetzt:
a) Von der Bemessungsgrundlage für die Steuer der Volksrepublik Polen werden die Einkünfte aus Quellen innerhalb der Bundesrepublik Deutschland und die in der Bundesrepublik Deutschland gelegenen Vermögenswerte ausgenommen, die nach diesem Abkommen in der Bundesrepublik Deutschland besteuert werden können, soweit nicht Buchstabe b) anzuwenden ist. Die Volksrepublik Polen wird jedoch die so ausgenommenen Einkünfte und Vermögenswerte bei der Festsetzung des Steuersatzes berücksichtigen. Auf Dividenden ist Satz 1 nur anzuwenden, wenn die Dividenden einer in der Volksrepublik Po-

len ansässigen Gesellschaft von einer in der Bundesrepublik Deutschland ansässigen Gesellschaft gezahlt werden, deren stimmberechtigte Anteile zu mindestens 25 vom Hundert der erstgenannten Gesellschaft gehören. Von der Bemessungsgrundlage für die Steuer der Volksrepublik Polen werden ebenfalls Beteiligungen ausgenommen, deren Dividenden nach dem vorstehenden Satz von der Steuerbemessungsgrundlage ausgenommen sind oder bei Zahlung auszunehmen wären.

b) Die Steuer, die nach dem Recht der Bundesrepublik Deutschland und in Übereinstimmung mit diesem Abkommen für die nachstehenden, aus Quellen innerhalb der Bundesrepublik Deutschland stammenden Einkünfte gezahlt wird, wird unter Beachtung der Vorschriften des Steuerrechts der Volksrepublik Polen über die Anrechnung ausländischer Steuern auf die von diesen Einkünften in der Volksrepublik Polen erhobene Steuer angerechnet:

1. Dividenden, die nicht unter Buchstabe a) fallen,
2. Einkünfte im Sinne des Artikels 15,
3. Einkünfte im Sinne des Artikels 16 Absatz 1.

Artikel 22

(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 Abkommen nicht entsprechende Besteuerung vermieden wird.

(3) 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.

(4) Die zuständigen Behörden der Vertragstaaten können für die Zwecke der Anwendung dieses Abkommens unmittelbar miteinander verkehren.

Artikel 23

(1) Die zuständigen Behörden der Vertragstaaten werden gegenseitig die zur Durchführung dieses Abkommens erforderlichen Informationen austauschen. Alle so ausgetauschten Informationen sind geheim zu halten und dürfen nur solchen Personen oder Behörden mitgeteilt werden, die mit der Veranlagung und Erhebung der unter dieses 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 geltenden Gesetzen oder im üblichen Verwaltungsverfahren dieses oder des anderen Vertragstaates nicht beschaffbar sind,
c) Informationen zu erteilen, die ein Han-

dels-, Geschäfts- oder Berufsgeheimnis, ein Geschäftsverfahren preisgeben würden oder deren Erteilung der öffentlichen Ordnung widerspräche.

Artikel 24

Entsprechend dem Vier-Mächte-Abkommen vom 3. September 1971 wird dieses Abkommen in Übereinstimmung mit den festgelegten Verfahren auf Berlin (West) ausgedehnt.

Artikel 25

(1) Dieses Abkommen bedarf der Ratifikation; die Ratifikationsurkunden sollen so bald wie möglich in Bonn ausgetauscht werden.

(2) Dieses Abkommen tritt einen Monat nach dem Austausch der Ratifikationsurkunden in Kraft und ist anzuwenden:

a) in der Bundesrepublik Deutschland auf die Steuern, die für den Veranlagungszeitraum 1972 und die folgenden Veranlagungszeiträume erhoben werden oder erhoben worden sind;
b) in der Volksrepubliek Polen auf die Steuern, die für den Veranlagungszeitraum 1972 und die folgenden Veranlagungszeiträume erhoben werden oder erhoben worden sind;
c) in beiden Vertragstaaten auf die im Abzugsweg erhobenen Steuern von Erträgen, die nach dem 31. Dezember 1971 gezahlt werden.

Artikel 26

Dieses Abkommen bleibt auf unbestimmte Zeit in Kraft, jedoch kann jeder der Vertragstaaten bis zum dreissigsten Juni eines jeden Kalenderjahres nach Ablauf des dritten Jahres seit dem Jahre des Inkrafttretens das Abkommen gegenüber dem anderen Vertragstaat schriftlich kündigen; in diesem Fall ist das Abkommen nicht mehr anzuwenden:

a) in der Bundesrepublik Deutschland auf die Steuern, die für den Veranlagungszeitraum, der auf den Veranlagungszeitraum folgt, in dem die Kündigung ausgesprochen wird, und für die folgenden Veranlagungszeiträume erhoben werden;
b) in der Volksrepublik Polen auf die Steuern, die für den Veranlagungszeitraum, der auf den Veranlagungszeitraum folgt, in dem die Kündigung ausgesprochen wird, und für die folgenden Veranlagungszeiträume erhoben werden;
c) in beiden Vertragstaaten auf die im Abzugsweg erhobenen Steuern von Erträgen, die nach dem 31. Dezember des Kündigungsjahres gezahlt werden.

GESCHEHEN zu Warschau am 18. Dezember 1972 in zwei Urschriften, jede in deutscher und polnischer Sprache, wobei jeder Wortlaut gleichermassen verbindlich ist.

Für die Bundesrepublik Deutschland
Dr. Ruete
Für die Volksrepublik Polen
Krzak

Protokoll

Die Bundesrepublik Deutschland und die Volksrepublik Polen
haben anlässlich der Unterzeichnung des Abkommens zwischen den beiden Staaten zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen am 18. Dezember 1972 in Warschau die nachstehenden Bestimmungen vereinbart, die Bestandteil des Abkommens bilden.

(1) *Zu den Artikeln 2 und 21*
Bei der Anwendung dieser Artikel in der Volksrepublik Polen gilt die Gewinnabgabe der polnischen staatlichen Unternehmen als Steuer der Volksrepublik Polen im Sinne dieser Artikel.

(2) *Zu Artikel 5*
Eine Bauausführung oder Montage, die in einem Vertragstaat von einem Unternehmen des anderen Vertragstaates unterhalten wird, gilt nicht als Betriebstätte, wenn ihre Dauer 18 Monate nicht überschreitet. Diese Regel gilt nur für den in Artikel 25 genannten Veranlagungszeitraum und die vier folgenden Veranlagungszeiträume.
Es besteht Übereinstimmung, dass Gewinne, die ein Unternehmen eines Vertragstaates aus dem Betrieb von Schienen- und Kraftfahrzeugen im internationalen Verkehr bezieht, in dem anderen Staat nur unter den Voraussetzungen der Artikel 5 und 7 besteuert werden dürfen.

(3) *Zu Artikel 14*
Bei einer Person, die in einem Vertragstaat nach Artikel 4 ansässig ist und im anderen Vertragstaat vorübergehenden Aufenthalt im Sinne des Artikels 14 Absatz 2 nimmt, um in diesem Vertragstaat bei einer Bauausführung oder Montage, die von einem Unternehmen des erstgenannten Staates unterhalten wird, als Arbeitnehmer dieses Unternehmen tätig zu sein, tritt anstelle der in Artikel 14 Absatz 2 Buchstabe a) genannten Frist die Dauer des vorübergehenden Aufenthalts, sofern dieser Aufenthalt die Frist nicht überschreitet, innerhalb deren die Bauausführung oder Montage nach dem Schlussprotokoll zu Artikel 5 keine Betriebstätte begründet. Diese Regel gilt nur für den in Artikel 25 genannten Veranlagungszeitraum und die vier folgenden Veranlagungszeiträume.

(4) *Zu den Artikeln 2 bis 20*
Keine der Bestimmungen dieser Artikel ist so zu verstehen, dass in einem Vertragstaat eine Besteuerung vorgenommen wird, die dieser Staat bei Personen, die in einem dritten Staat ansässig sind, mit dem er kein solches Abkommen zur Vermeidung der Doppelbesteuerung hat, nicht vornehmen würde.

(5) *Zu Artikel 21*
Artikel 21 Absatz 1 Buchstabe a) des Abkommens gilt nur dann, wenn die Betriebstätte oder die Gesellschaft, an der die Beteiligung besteht, ihre Einnahmen ausschliesslich oder fast ausschliesslich aus folgenden innerhalb der Volksrepublik Polen ausgeübten Tätigkeiten bezieht: Herstellung oder Verkauf von Gütern oder Waren, technische Dienstleistung oder Bank- bzw. Versicherungsgeschäfte. Sind diese Voraussetzungen nicht erfüllt, ist Artikel 21 Absatz 1 Buchstabe b) anzuwenden, bei der Besteuerung des Vermögens ist die in Übereinstimmung mit dem Abkommen in der Volksrepublik Polen erhobene Steuer von den in der Volksrepublik Polen belegenen Vermögenswerten nach Massgabe der Vorschriften des Steuerrechts der Bundesrepublik Deutschland über die Anrechnung ausländischer Steuern auf die in der Bundesrepublik Deutschland erhobene Steuer anzurechnen.

(6) *Zu Artikel 23*
Die zuständigen Behörden der Vertragstaaten unterrichten sich gegenseitig über wesentliche Änderungen ihrer Steuergesetze und beraten auf Verlangen gemeinsam, ob Änderungen des Abkommens erwünscht sind.
Für die Bundesrepublik Deutschland
Dr. Ruete
Für die Volksrepublik Polen
Krzak