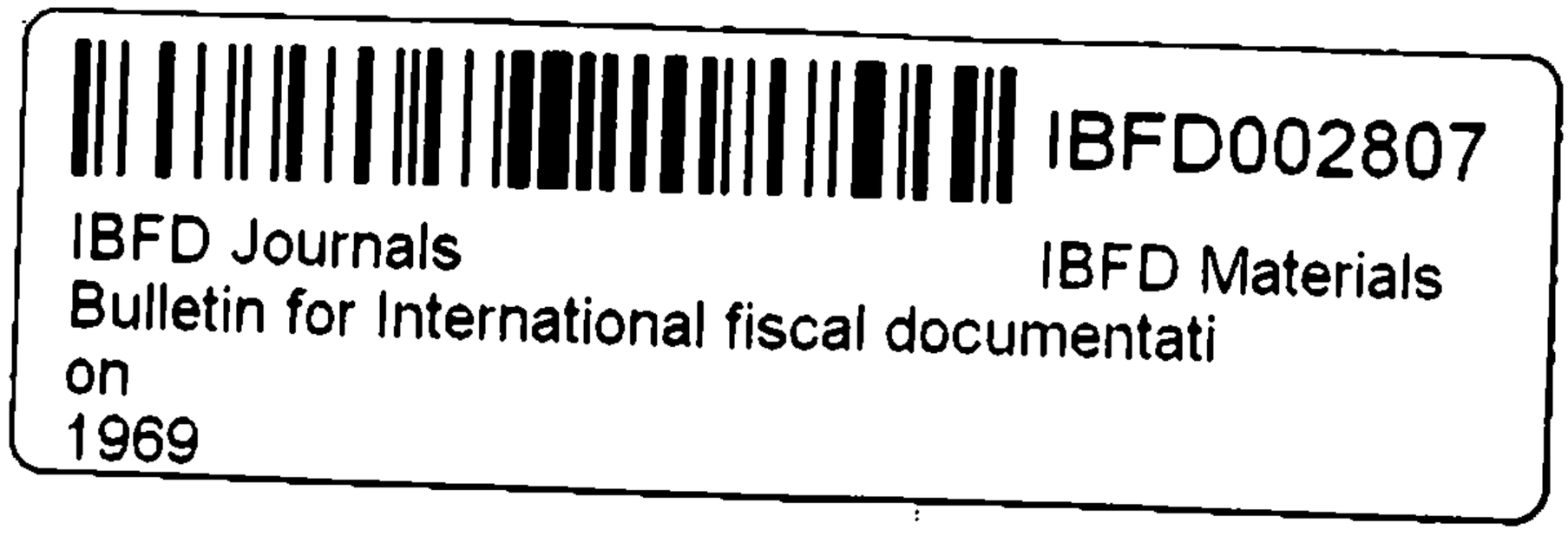

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International Bureau of Fiscal Documentation
Bureau Intern. de Documentation Fiscale

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EDITORIAL:

A new O.E.C.D. study

The Organisation for Economic Co-operation and Development has published a new report, *Border Tax Adjustments and Tax Structures, in O.E.C.D. Member Countries**, which has been prepared by the Taxation and Competition Division of the O.E.C.D. Directorate for Financial Affairs. The report, which is descriptive and does not give new thoughts, normally reflects the position as of March 1, 1967, but in a number of cases changes which have taken place between March 1967 and the end of March 1968 have been included. This is especially true for the so-called "Country Chapters", which give an overall view of the tax adjustments applied to exports and imports in the 21 O.E.C.D. member countries i.e. Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

The statistical part of the report is very informative. In this part figures for 1963, 1964 and 1965 are generally used. The general consumption taxes as a percentage of total taxation prove to be the highest in Turkey and the lowest in Portugal. Portugal however takes a middle place in comparison with *all* consumption taxes as a percentage of total taxation. Norway is the country with the highest percentage of total consumption taxes in relation to G.N.P. at market prices, the U.S. being the lowest.While figures of G.N.P. at market prices may be of primary interest in determining the effects of tax systems together with border tax adjustments on international competition, for the purpose of comparing direct taxes GNP at factor cost is perhaps a purer concept. France has the highest percentage of profits taxes plus employers' social security charges in relation to GNP at factor cost, while Turkey has the lowest percentage.

A special table is devoted to a comparison of rates of undistributed profits. It should be emphasized that without detailed analysis of particular companies in particular situations it is impossible to get an idea of comparative tax burdens. On the other hand, it would be going too far to say that no importance can be attached to general figures. The figures do give some idea of the burden of taxation in certain respects. They help, for instance, to form a view as to when the possibilities of financing out of retained profits are greatest.

A special part of the report is devoted to the current discussion on shifting, not only as regards the shifting of consumption taxes, but also the shifting of direct taxes. The views of leading experts are stated without however any specific conclusion being reached. It is impossible to come to an overall conclusion, unless that conclusion is that, even in the case where profits taxes are not shifted, they are still likely to have an effect on capital flows as distinct from commodity flows and therefore in the choice of the location of an enterprise.

Dr. J.C.L. HUISKAMP

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POLL TAXES, PAYROLL TAXATION, AND SOCIAL SECURITY

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POLL TAXES, PAYROLL TAXATION, AND SOCIAL SECURITY

POLL TAXATION

Introduction

1. A poll tax has been defined as a tax of uniform amount levied on each individual. With the slight modification that occasionally the levy has been on the household rather than on the individual, poll taxes have a lengthy history and are by no means yet defunct. A poll tax of this kind has the merit of simplicity of concept and of being easy for taxpayers to understand. It is not necessarily easy to collect. If the yield is to be worthwhile, and the levy therefore of substantial amount, the merit of simplicity inevitably involves the demerit of inequity, because capacity to pay is not uniform.

2. Present-day thinking on tax administration is that collection costs should be kept as low as possible consistent with efficiency of enforcement and equity of application. Accordingly taxes which, while having a wide impact, can be collected from a relatively small number of payers of the first instance tend to be favoured. Such taxes include import duties, internal turnover taxes on producers and wholesalers, and income tax on employees which can be collected at source by their employers.

3. On the test of administrative economy a universal poll tax of modest amount on everyone (or even on every male over 16 or 21) is unsatisfactory. If the tax is only collected from time to time in emergency situations (see para 7) the administrative cost of setting up and then scrapping collection machinery is likely to be excessive. Even if the tax is collected annually the cost of reaching all taxpayers, however remote their location, is likely to be much bigger than the cost of collecting other taxes.

4. Poll taxes, which take no account of income or family expenditure, are usually reckoned to be inequitable and regressive and this factor, coupled with relatively heavy administrative cost[1], militates against the use of a simple poll tax for general revenue in modern conditions.

5. Although a poll tax often commences as a fixed sum per head or per family it is almost inevitable, if it continues to exist as a fiscal measure, that the tax will be converted to a graduated poll tax, and, later still, into an income tax (see para 32).

6. *Survival of Poll Taxes*

Simple poll taxes survive, however, in a number of applications both as taxation and also as quasi-taxation constituting compulsory or contractual fixed sum contributions for general benefits for the contributors. Examples include the fixed fees or licence dues which are referred to in paragraphs 23 et seq., to social security levies of fixed, equal, contributions yielding fixed, equal, benefits on the "Beveridge" principle referred to in paragraphs 59 et seq., and self-imposed levies, e.g., by groups of professionals, businessmen or artisans, or by property-owners or -occupiers to provide benefits or services which would otherwise have to be financed by equivalent taxation imposed by the State.

7. *Historical Applications*

In Britain poll taxes can be traced at least to

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1. For example, it is understood that the Graduated Personal Tax in Kenya costs about 10% to collect. The Cox Committee in Sierra Leone in 1957 found that the exactions of poll tax collectors were sometimes about 3 times the legal amount of the tax due from taxpayers.

1377 when a fixed sum of a groat per head was charged. Subsequent taxes were graduated and the levy of 1380 achieved historical fame as a cause of the Peasants' Revolt of 1381. Poll taxes were collected intermittently when the king needed money and the yield depended a good deal on the energy and efficiency of the administration at the time of the impost.

8. Exemption is another factor which inevitably enters the picture quite soon. In Britain, for example, the 1379 poll tax exempted persons under 16 and was on a scale ranging from 1 groat to 10 marks. The Poll Tax of 1641 in Charles II's reign raised £400,000 and was repeated on several occasions. After 1688 poll taxes remained a favourite way of raising money to finance wars. The so-called poll tax levied in 1667 (graduated from 1/– for poorer persons and from £50 for dukes) was based on a number of criteria including earned income and the value of public appointments, was scheduled to yield £1,256,347 mainly to finance the naval war with Holland, and was commented on by Pepys in his diary. The yield appears to have been much less than the estimate.

9. In the U.S.A. poll taxes on a historical pattern of a flat rate of $1 or $2 per head survived longer, being used by some of the States in the Reconstruction period following the war of 1861–1865, inter alia, as a voting test. Most States, however, had abolished poll taxes by 1920.

10. *Poll Taxes as Factor in Monetising the Economy*

The problems which beset the earlier European administrators in Africa included that of raising revenue to run the country from a largely subsistence economy. It is not proposed here to go through the arguments that little economic progress is possible until a monetary system is operating fairly widely in the economy. It is, however, a matter of history that the levying of poll or hut taxes was advocated and employed by administrators such as Lugard, Johnston and Cameron, for example, in Nigeria, Tanganyika (now Tanzania), and Uganda.

11. Although a number of these taxes have been superseded by or absorbed in income taxation, some measure of poll taxation still remains and is referred to in paragraphs 16–41. The introduction of (sometimes fairly rough and ready) poll or hut taxes was, however, originally intended to be merely a step on the way to the introduction of more equitable taxation, e.g. on income.

12. One effect of imposing a tax in money terms was, of course, to face the payer with the need to earn money in one way or another by the sale of produce or his services and so gradually to become accustomed to the use of cash and thus to its superiority over barter as a commercial process. Initially, however, payment of poll or hut taxes in kind instead of in cash was accepted by the administration.

13. In few countries, if any, are the poor entirely exempt from taxation. Even though the lowest income groups are usually excluded from direct taxes, there is an inevitable impact of indirect taxation. Indirect taxes, however, only impinge on the poor man if he has money with which to buy taxed goods. If the effect of poll taxes is to monetise the economy, such taxes may thereupon be dropped and tax revenue made up by levies on objects of mass consumption particularly in the semi-luxury or non-necessity class, e.g. cigarettes, liquor, transistor radios, for which a demand has arisen and the taxation of which is more easily defensible.

14. *Supersession of Poll Taxes*

Essentially, therefore, one would expect poll

taxes, especially the simple or crude universal poll tax, to be a transitional means of raising revenue until the economy becomes more developed and more sophisticated.

15. *Survival of Poll Taxes as Local Revenue*
In practice, however, poll taxes often form local revenue and because new sources of local revenue, which do not infringe on national or federal tax rights, are hard to find, the old taxes tend to survive[2]. Being usually fixed in terms of money, the burden of such levies lessens with the normal gradual erosion of the value of money, although there are examples (see paragraphs 31-41) of rates being increased when a revenue crisis arose. Because poll taxes are essentially regressive it is only as relatively trivial local levies that one expects to find them surviving in a developing economy, the main needs for increased revenue being met by more equitable taxes.

16. *Poll Taxes in Modern Conditions*
In modern times the case for a poll tax as a general contribution to revenue is often made in one form or another on the grounds that all citizens "ought" to contribute at least something to revenue however small their means. The case for such a contribution is usually asserted rather than reasoned. If, however, it is accepted that most countries now operate a universal suffrage it may be that the case could be interpreted (although it is not so expressed in practice) as an inversion of the historical libertarian war-cry of "no taxation without representation" into a plea that "Representation involves (or justifies) Taxation".

17. It is not that the advocates of poll taxes want to make suffrage depend upon payment of taxes in the manner of the Reconstruction levies in the U.S.A. but rather that there seems to exist a feeling that the privileges of citizenship which include suffrage, and welfare benefits, justify some form of universal direct taxation.

18. The manifestation of pleas for what is in essence some form of poll tax may sometimes be in the shape of a call for a tax on bicycles where these are widely used by the lower income groups, or for taxes on household pets or on some other object of widespread use.

19. Poll taxes in the modern sense are of widespread application if the term is expanded to cover levies, fees, and licences charged at a fixed rate per head in respect of particular activities of individuals rather than, in the case of the historical poll taxes, the mere fact of existing and residing in a particular place at a certain time.

20. Modern poll taxes in this extended sense may be divided into three distinct categories, those which are pure taxes entering into general revenue, those which are specifically linked with some service or privilege accorded by Government, and those which are connected with social security. It may be noted that although some countries employ a national registration system, normally for security purposes, whereby the whole population (except young children) are required to carry identity cards containing a photograph, a signature and perhaps a thumb-print, the fee charged for the card is usually only just enough to cover administration expenses. Although the operation involves setting up a collecting organisation to receive the fees, and hence the basic framework for a poll tax, it is not usual to use the occasion to collect a larger fee than necessary in order to derive revenue from the operation.

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2. Note, for example, that the medieval "octroi", a local "Customs" duty in small French towns, was still operating in the late 1930's and still survives in parts of rural India.

21. *General Poll Taxes*

This category includes those (both fixed and graduated) which still survive e.g. in Africa (see paragraphs 31-41), the Philippines, and the U.S.A., and also the business and professional poll taxes to be found, for example, in Malaysia and the Philippines.

22. The following are illustrative of the *fixed* poll tax which enters general revenue:–

Philippines Residence Tax: Class A.

This is a tax of 0.50 peso (= U.S.$0.13, £0.1.1d.) on all inhabitants over 18 years of age who have been employed for more than 30 days at no less than P0.50 per day (i.e. a minimum monthly total wage of P.15.00 = U.S. $3.75, £1. 11. 3d.).

Central Pacific:

In areas of the Pacific local revenue is raised from poll taxes. For example, in the Solomon Islands the strong growth of indigenous local government since the end of World War II has entailed the use of poll taxes charged on males between the ages of 21 and 65, at rates varying from A$4 to A$11 (approximately £2 to £5. 10. 0d.) according to district, as the mainstay of local revenue. (In Fiji and in Papua New Guinea there are graduated poll taxes—see paragraphs 40 et seq.—which enter into national revenue).

Africa:

Fixed poll taxes survive, usually as a source of local revenue, in parts of Sierra Leone, Tanzania, and Uganda, and also in Ghana and the Sudan. In general, however, (see paragraphs 34-36, 38 and 39) poll taxation in Africa has tended to evolve into graduated poll taxes and/or income tax.

23. *Fixed "Taxes" or Charges for Specific Services*

Many countries levy fees, usually in fixed amounts, in connection with the granting of certain privileges or the rendering of services. Almost invariably the charge is a flat sum which has no measure of graduation to the means of the individual. Included in this category are licences to drive a vehicle, to use a gun[3], to operate a radio or television receiver, to sell dangerous drugs, to store explosives, run a crematorium, a food shop, or a restaurant, a taxi or a hire car. All of these licences involve supervision by the central or local authority to protect the public from any breach of the licence conditions and to ensure to the licensee the untrammelled use of his privilege.

24. In some instances, e.g., a licence for a dog or a gun, the charge made is usually nominal[3] and may not reflect precisely the cost of administration (although a good

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3. Recent political assassinations in the U.S.A. have brought to light the information, according to some sources, that 200 million small arms are privately owned by U.S. citizens, many of the arms not being subject to registration or licence fee. Pressure is now building up at least to have country wide registration of private arms and the feeling is growing that too many guns are privately owned. The fascinating revenue prospect thus opens up that a discouragingly high annual registration fee (instead of a purely nominal one) might produce immediately a very substantial revenue, and in the longer term a reduction of the number of guns in private hands. A substantial initial registration fee would in any event be required to cover administration costs if another proposal were adopted, i.e. that all guns should be "fingerprinted". This would involve firing a test bullet from each registered gun and keeping a photographic record of the ballistic imprint of the striations made on the bullet as it passes along the gun-barrel.
Administration expenses also tend to increase in others of the fields where licence fees are charged, e.g. dog licences may be linked with the administration of anti-rabies injection campaigns to keep the dog population healthy and avoid consequential risks to human health.

case could in many instances be made out for this). The licence itself is a tangible symbol of the registration and the control which is implicit in the registration.

25. In other cases where the privilege or service received by the licensee is broadly the same for all under each category there are obviously grounds for making the charge the same for each because each receives similar value for his money. It is obvious also, however, that the case for graduation in the region of national taxes in general, and the case for equal payment for equal services in the region of specific or quasi-taxation, may come into conflict on the border-line between the two regions.

26. Where services or privileges are provided by Government it is administratively impossible for the charges for those services which are not borne out of national taxation to be graduated to the means of the taxpayer. In special cases, however, relief may be given to the poor or afflicted by other mechanisms. For example, in the case of a poor or disabled person, with no possibility of earning his or her own livelihood, a state assistance allowance may be made to cover a number of inescapable liabilities including rent and local rates or property assessment, and licence fees on motorised invalid carriages may be forgone for the disabled. In the case of the blind it is customary, apart from rendering financial assistance, to exempt them from licence fees, for example, in respect of guide dogs and radio receivers.

27. Where vehicles are concerned, the charges for a driving licence, for insurance, and for use of the vehicle on the highways are not graduated to the means of the individual except to the extent that the fee for a large vehicle is usually larger than that for a small one and a rich man will generally use a larger vehicle than the poor man. Other factors enter into consideration in this connection. It is arguable that use of the roads to drive a potentially death-dealing vehicle is a privilege which should be paid for in full by each user in order to inculcate a proper appreciation of the privilege and attendant responsibilities. By the same token the penalties for traffic offences generally have more relationship to the gravity of the offence than to the status of the offender.

28. In the case of a service such as radio and television programmes, provided for a fee by the State or a quasi-State organisation, it is possible to make out an "aesthetic" case for a flat-rate licence fee for all users, so that all have an equal interest in seeing that they obtain good artistic and educational value for their money, and thus in the maintenance of high standards. In practice, a flat-rate fee *is* usually charged, which may be reduced or exempted for the incapacitated or the very poor.

29. In general there is comparatively little political heat engendered from the fact that (for example) a millionaire and an unskilled labourer must each pay the same, generally quite small, fee for a licence to keep a dog or a sporting gun and the many other fixed fees of this kind referred to above, and thus pay for the administrative cost of the control exercised. There is, therefore, an incentive to governments to remove as many items as possible from (or not to include them in) the realm of national taxation and leave them to the more specific "non-tax" fields covered by licensing arrangements. The same principle is also in point, and will be referred to later, in connection with social security provisions in conditions where it is possible either to leave these to private initiative or to deal with them through a national self-financing scheme.

30. Although the modern tendency is for more and more social and other services to be undertaken by the State, there is also developing a tendency to try to minimise

the burden of direct taxation, in which category it is usual to include social security contributions.

POLL TAXATION IN AFRICA

31. *General.* As already noted, poll taxes were introduced into various African countries by the European administrators who were responsible for "opening up" these countries in the late nineteenth and early twentieth centuries.

32. In the earliest stages the administrative pioneers were insistent on the need to establish poll taxes at the earliest opportunity even though payment initially might have to be accepted partly or wholly in kind and even though the tax could not be made effective in all areas from the outset. The tax was, however, seen as a step on the road to establishing an effective income tax, which could more easily be evolved from poll taxation than introduced without such a background. This tax evolution has in fact taken place in several countries.

33. *Kenya.* In Kenya a hut tax was introduced in 1901. The obvious way of reducing liability to a hut tax is for as many persons as possible to crowd into one hut. There is thus, as happened in Kenya, usually a swift change in taxable base from the hut to its occupants, particularly other adults living in the hut in addition to the principal occupier and his wife. (On the other hand a fixed hut tax operates as a rough kind of wealth tax where the wealthier man has several huts occupied by his several wives in a polygamistic society.)

34. The usual trouble with a recessive levy such as a hut or poll tax was evident in Kenya, i.e. that there are some persons who are simply too poor to pay and have to be exempted. Once exemptions begin they have to be reduced to some kind of order, involving a means or income test, and the seeds of income tax are then sown. A graduated personal tax, the half-way house to income tax, was recommended in Kenya by the Marchant Committee of 1950 and introduced as a Central Government tax in 1957. (Income tax, chargeable upon persons with higher incomes, had already been introduced in 1936.) The scale of fixed payments ranged from 25/- to 200/-.

35. As from 1st January, 1964, the tax was replaced by a Local Government Graduated Personal Tax ranging from 48/- to 600/-. Since the graduation is by reference to income levels it appears possible that ultimately the local tax will evolve into a formal income tax perhaps administered jointly, on a revenue-sharing basis, with the Central Government income tax (cf. Sweden where the income tax due to the Central and Local Governments is collected jointly and then distributed proportionately to the respective authorities.)

36. *Sierra Leone.* In Sierra Leone a House Tax was established in 1898 at the rate of 5/- for small and 10/- for large houses. Within a few years, however, the 10/- rate was abolished and the tax became one on the family unit rather than the dwelling.

37. In 1937 various levies by the Chiefs were consolidated into a single Chiefdom tax of 4/-per head. The method of administering these two poll taxes gave rise to abuse and over-exaction by the collectors, however, and in 1957 the Cox Committee on Local Government recommended a Graduated Poll Tax for local revenue purposes.

38. *Uganda.* In Uganda the hut tax imposed in 1899 evolved into a poll tax by 1907. In 1955 graduation was permitted and within three or four years most local authorities had adopted the graduation principle with the result that local government revenue doubled between 1953 and 1956.

39. *Nigeria.* In Eastern Nigeria hut and poll taxes originally formed local revenues but not all local authorities used these taxes. The Regional Government in 1956 restricted the local authorities' personal tax powers to a limit of 5/– per taxpayer and absorbed its own direct taxes into a progressive income tax. The 5/– ceiling on local poll taxes was subsequently raised to 15/– as the need for revenue increased.

40. *Government Graduated Poll Taxes*

In general, simple poll taxes survive in Africa mainly as local taxation, while central governments have evolved income tax systems—exactly in fact as was envisaged by the early administrators. Somewhat in contrast to the general line of tax evolution in Africa is the introduction of a type of graduated poll taxation in recent years in Fiji and in Papua New Guinea. Ordinary income tax applies to incomes from a level which is considerably higher than per capita national income and it was desired to obtain a tax contribution from those below the income tax limits.

41. Accordingly a system of tax at a fixed percentage on income without adjustment for personal reliefs has been instituted. The tax payable is subject to a ceiling and is offset against income tax where the payer is liable to both taxes. The graduation is directly related to income but in each case exemption is granted where earnings are below subsistence level. In Papua New Guinea the tax (known as Wine Tax) is charged only on emoluments. In Fiji the graduated tax has a wider coverage. In the case of persons engaged in agriculture the tax is computed by reference to crop proceeds reduced by various percentages which are intended to exclude all cost elements other than the earnings of the proprietor and his labour force.

BUSINESS AND PROFESSIONAL POLL TAXES

42. Large annual licence fees for certain types of business such as liquor shops, casinos, betting agencies, are common and many countries also derive revenue usually by more moderate annual fees on more general businesses. For example, Barbados recently increased its registration fee on wholesale liquor dealers to $1,500 per annum, general wholesalers now pay $500 and retailers $100 per annum. A useful illustration of the operation of fixed and graduated business poll taxes is afforded by experience in the last dozen years in Malaysia.

43. *Malaysia: Introduction of Business Tax*

A Business Licence Tax was originally introduced in the States of Malaya (on 1st January, 1953) for the specified purpose of raising revenue to help pay for education. Limited companies were taxed according to the amount of share capital, i.e.:–

	Annual licence fee
Subscribed Share Capital:	
less than $100,000	$ 300
$100,000–$500,000	$ 600
$500,000 or more	$1,000

44. *Practical Adoption of Graduation: Non-corporate Taxpayers*

Non-corporate businesses were charged a fixed sum of $100 per year (about £12) if in single proprietorship. Partnerships were charged $100 per partner up to a maximum of $300. These fees were, however, reduced to $25, for sole proprietors and for partners, with a maximum of $75 for partnerships in rural areas.

45. The administration, moreover, effectively had power to graduate the tax by abating the amount payable, where it seemed reasonable to do so, from $100 to $50, or $25, or even to NIL. Abatements were in-

creasingly claimed and in order to "compute" them it was the normal practice to try to determine the profits of the business and base the abatement on the bracket in which the profits fell. In this form the tax became a crude sort of income tax. There were, of course, the usual difficulties with the border-line cases in view of the fairly substantial differences between the tax payable at the different levels. The smallest and poorest business-men were continually agitating for the repeal of the tax.

46. *Application to Corporate Bodies*
As far as companies were concerned, the tax represented a further levy on *issued* capital in addition to the stamp duty payable on nominal capital. If there was any particular logic in further taxation of corporate capital this could more economically have been done through the medium of stamp duties and the rates of such duties were in fact modified in the new Companies Act of 1966.

47. *Yield*
The total yield from the Business Licence Tax was about $5 million (approximately U.S. $1.7, £0.7 million) a year. No material increase could, however, be looked for in subsequent years without increasing the rates of tax.

48. *Comparison of Business Licence Tax with Income Tax*
Contemporary with the Business Licence Tax there was an orthodox income tax on incomes which had been introduced in 1948 and was becoming better administered and increasingly productive. The static $5 million Business Tax yield tended to become irrelevant as a crude and less equitable income tax as the income tax system developed and increased rates of tax produced substantial increased income tax revenue.

49. *Abolition on achievement of Self-Government*
The States of Malaya achieved self-government in 1955 and the first general election was won by the Alliance Party. The Party had promised in its election manifesto to repeal the Business Licence Tax and did so on assuming office so that the tax was abolished with effect from 31st December, 1955, after three years' existence.

50. *Survival of Business Registration*
The system of business registration (which existed side by side with the licence tax) remained, producing a revenue of a little more than the cost of administration. The functions of the registration system were to provide the public with information about "who owns what" business and especially to feed the income tax department with up-to-date information on new businesses, changes in proprietorship, etc. The registration fee (an initial sum of $20 plus $5 for each three-year registration period) could not be properly regarded as a revenue-oriented levy.

51. *Re-introduction of "Business Tax"*
A change in the business registration fee was, however, introduced in the States of Malaya (now known as West Malaysia) in the Budget Statement of 19th January, 1967. The initial payment was increased to $25 and the fee of $5 per three-year period increased to $25 per year. The smallest businesses, including rubber smallholders with less than 25 acres, are exempt from the fee which is being levied in the context of a need to raise revenue urgently for the joint purposes of economic development and defence. It was expected that a revenue of $3.5 million per year would result in due course.

52. Somewhat similar levies also exist in the other Malaysian States of Sabah and

Sarawak (and pre-date the incorporation of these States into Malaysia in 1963). In Sarawak the levy is substantial, being higher than the old States of Malaya levy but is graded according to the area in which business is being carried on—there being four different levels. The size of the burden was also counter-balanced by income tax rates which are at present lower than in Western Malaysia. In Sabah the levy was lower and was more on the lines of a registration fee. At the time of introduction of the Sarawak tax and later, at a time, before Independence was achieved, when it was materially increased, the reaction from the traders seems to have been stronger than in the case of the introduction of the income tax. There was in fact a sort of traders' "strike" when the increase (made at the time for urgent budgetary reasons) was brought in.

53. *"Poll Tax" Element in Development Tax*
To the taxes referred to above must be added one feature of the new Development Tax proposed for Malaysia as a whole in the 1967 Budget on business, professional and property income. This tax, while representing in general a schedular tax of 5 per cent on these classes of income, includes a minimum charge provision which stipulates that the tax shall not be less than $100 (U.S. $33.33) in the case of partnerships, clubs, associations, etc., and $500 (U.S. $166.67) on companies. Where the income is below $2,000 and $10,000 respectively, therefore, there is effectively a fixed poll tax on these types of organisation. The minimum does not, however, apply to individuals, who were instead exempt from the 5 per cent charge, originally if their income was below $500. Subsequently the income limit was raised to $2,000 as it was found that hardship sometimes arose at the old level.

54. *Professions*
Philippines. Poll taxes on the professions are imposed, inter alia, in the Philippines where they are known as "privilege taxes". These are levied at two levels—P.50 annually (U.S. $12.50, U.K. £5. 4. 2.) is payable by surveyors, pharmacists, nurses, chiropodists, jockeys, actors, etc., while the higher rate of P.75 (U.S. $19, U.K. £7. 18. 4.) applies to lawyers, doctors, architects, accountants, etc.

55. The nomenclature of the Philippines levy confirms that the raison d'être is that persons exercising a profession are in a privileged position and that some extra taxation is justified. It may be noted, however, that in the Philippines there are also parallel taxes on employments, businesses and limited companies, so that the privilege tax does not discriminate against professional men and women.

56. *Ceylon, Singapore and Barbados*
In Ceylon a fixed tax on the professions materially heavier than the Philippines levy was imposed for a brief period and then abolished. In Singapore legislation was enacted in 1959 to levy a tax of this kind but it was never brought into practical effect. The Barbados 1968 Budget increased the annual registration fees for barristers, doctors, dentists and other professionals to B.$120 per annum (U.S. $60).

57. *Other Examples*
Other examples of some sort of special taxation on the professions such as the poll taxation referred to above, a turnover tax on gross receipts, or schedular taxation at somewhat higher rates than those on employees are encountered fairly frequently. Sometimes the motivation appears to be simply a feeling that those exercising professions are more affluent than employees

and have a greater taxable capacity which is not fully exhausted by income tax on their declared income. Sometimes a tax is levied deliberately because the view is taken that professionals have more scope than employees for tax evasion and that it will never be possible to ensure that income tax on the former is fully enforced. It is not normally sound policy, however, to supplement deficiencies in tax yield caused by evasion by imposing another tax in addition and where this course is taken the additional tax is often of short duration.

58. Other fixed levies upon professional persons are often self-imposed through their professional societies, usually as a condition of annual registration. In some cases, however, the registration fee is payable under a governmental enactment, but it is more correctly to be regarded as a fee to cover administration costs than a tax.

APPLICATION OF FIXED CONTRIBUTIONS TO SOCIAL SECURITY FINANCE

59. The Beveridge Report of 1942 in Britain strongly advocated fixed rather than graduated contributions by the insured and the matter is considered at greater length a little later in these notes. The significant feature of this proposal, however, was that it was made in the historical context that several of the benefits now to be provided by the State had previously been provided by individuals for themselves by fixed[4] contributions to friendly societies, insurance companies, hospital savings schemes, etc. Because the fixed payment (and fixed benefit) system already existed and was obviously acceptable to the contributors it was proposed in effect that the State merely retained the status quo. The "responsible citizen" argument was used to justify this further, i.e. it was argued that the insured should realise that they could not obtain more than certain benefits for certain contributions, that they should have a direct interest in economic administration and should not regard the government as a dispenser of largesse for which no payment was necessary.

60. In the currently fashionable trend of governments to try to reduce direct taxation in order to limit its disincentive effect on enterprise, the accent has mainly been on reduction of taxes on income. There is probably, however, scope for using the Beveridge argument to justify the reverse process of hiving-off to re-transfer some elements of social security from the public to the private sector.

61. An example of this process (which, however, was undertaken for a different reason) was the scope for "opting out" provided in the scheme for earnings-linked supplementary pensions in Britain. A person could only opt out if he could demonstrate that he was already suitably covered by a private scheme run by his employer. There was thus no question of possible hardship through an improvident employee opting out and then neglecting to make proper provision for his retirement. The advantage of the opting out clause was that, to the extent to which options were made, the "visible" tax burden was lightened.

62. Although in this example of "hiving-off" the particular levy was a graduated one, the same principle could be equally applied to benefits which are paid for by fixed payments. Where a fixed benefit is provided for a fixed payment but increasing numbers of contributors wish to provide superior benefits for which they are prepared to pay, privately, whatever increased contribution is necessary, it may be possible to do some

4. Fixed, that is, by reference to the benefits to be provided, without relation to the means of the contributor.

hiving-off with the requisite assurance of proper alternative provision being made. The consequence, incidentally, will not only be some degree of lightening of the tax burden but a shift from fixed or poll taxation to a somewhat more graduated[5] private provision.

63. *Development from fixed to graduated contributions*

In the case of direct taxes it has been noted above that the general tendency is for these to evolve from fixed to graduated levies as the need for increased revenue arises or where the regressive nature of a fixed charge becomes too oppressive. The same tendency may be noted in the case of social security contributions and benefits and will be discussed further in the following paragraphs on Payroll Tax and Social Security.

PAYROLL TAXATION AND SOCIAL SECURITY

Payroll Taxation: general

64. The advantage of taxation consisting of levies on payroll, which may be on the total emoluments paid, or on the emoluments of employees within certain income brackets linked to particular social service benefits, is that such levies are not popularly regarded as taxation at all although they are recorded as such in National Income statistics. Within reason, therefore, it may be expedient from a political aspect to transfer some social service expenditure, paid for out of general taxation, to one or more specific self-financing schemes, funded where appropriate. If the revenue required for such social services can be derived from contributions by the beneficiaries and their employers if any, the burden on general taxation will be lightened providing greater scope for reducing direct taxes and giving economic incentives to entrepreneurs etc.

65. *Extension of scope of social security levies beyond payrolls*

Where payroll taxation is related specifically to defined social security benefits it will be desirable eventually to extend the levies beyond payrolls (i.e. levies on employers and employees) to the self-employed and the rentier class who are within the appropriate age-groups, and accordingly to give other categories an entitlement to share equally with employees in the benefits.

66. *Administrative and other advantages*

Taxation of payrolls as such, i.e., other than for specific social security benefits, has the administrative advantage over more generalised taxation that the number of taxpayers (the employers) is limited[6]. Employers as a class are also a more sophisticated and more business-like group of taxpayers than the public as a whole. Politically, payroll taxation has the advantage, where it is levied solely on the employer, of being a tax apparently on the "rich" rather than on the public at large[7]. (See also paras. 150 et seq. on S.E.T. in the U.K.)

67. *Considerations of Equity*

Pure payroll taxation, however, offends the principle of tax neutrality. There is no reason in equity for taxing the employer-employee relationship as distinct, for example, from the partnership, or the contractor-sub-contractor relationship. Where pure payroll

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5. Graduated, that is, to the quality of benefit required.

6. This is especially so when the smaller employers are excluded from the incidence of the tax by providing a minimum monthly or yearly limit of total payroll below which no tax applies, a feature of the payroll taxes in Australia and Malaysia.

7. In practice the tax will be shifted as far as possible to the price of the goods or services sold. (See paras. 148 or 158).

tax is levied, therefore, there should normally be some deliberate economic motive for over-riding strict equitable considerations. The various types of payroll taxation are examined in more detail in the ensuing paragraphs.

Social Security Contributions—Specific versus Graduated Levies

68. Although the main forms of direct taxation are generally graduated according to income or wealth, social security contributions are sometimes charged at a flat rate per head, forming a kind of poll tax (see paragraphs 1-63).

69. State Social Security schemes normally combine three elements, insurance against "social" risks such as sickness or unemployment, provision for old age or retirement, and redistribution of resources from those with none or few to those with many dependents, e.g., by means of family allowances. Because the levies are either fixed, or graduated by reference to *income*, there is a substantial transference, even where incomes are the same, from bachelors to men with several children, and from the healthy to the sickly.

70. In the case of sickness and unemployment some of the earliest schemes provided a flat rate of benefit in return for a flat rate of contribution. This was the case with the limited scheme introduced by Lloyd George in Britain in 1911 and the principle was retained by the Beveridge proposals[8] of 1942 which were adopted more or less intact by the British Government in 1945.

71. *Case for Fixed Levies*

The Beveridge Report[8] put strongly the case for collecting contributions from the employee or other insured person rather than for providing non-contributory schemes. The historical background in Britain was one of a tremendous public interest in contributing to private schemes covering various aspects of social security such as sickness and burial insurance, and private hospital insurance schemes which provided cover against exceptional expenses on hospitalisation. There was a strong and evident desire by the public not to depend on charity. It would have been unstatesmanlike not to have retained this principle in a scheme which was expected to make very heavy demands upon the national revenue.

72. Paragraph 274 of the Report[8] gave the following succinct grounds for having fixed rather than graduated contributions, and for making the proposed social service scheme contributory rather than non-contributory.

> "(a) The insured persons themselves can pay and like to pay, and would rather pay than not do so. It is felt and rightly felt that contribution irrespective of means is the strongest ground for repudiating a means test[9].
>
> (b) It is desirable to keep the Social Insurance Fund self-contained with defined responsibilities and defined sources of income. The citizens as insured persons should realise that they cannot get more than certain benefits for certain contributions, should have a motive to support measures for economic administration, should not be taught to regard the State as the dispenser of gifts for which no one needs to pay.
>
> (c) To require contribution on an insurance document for each individual has administrative convenience, particularly for a scheme which, while it covers all citizens, takes account of their different

8. "Social Insurance and Allied Services" 1942, Sir William Beveridge, H.M.S.O. Cond 6404.
9. See paragraph 75.

ways of livelihood and classifies them, giving different benefits according to their needs. Contribution provides automatically the record by which the insured person's claim to be qualified for any particular benefit can be tested".

73. The Beveridge proposals deliberately stressed the principle of *fixed* contributions, in contrast to various schemes in Europe, and in Australia and New Zealand, where the contributions were proportional to income. While the future appears to belong to the graduation principle both in respect of levies and benefits (see paragraphs 105-107 below) the recommendations of the climacteric Beveridge Report have to be understood in the context of the period in which they were made.

74. The proposal by Beveridge of fixed *levies* was part of a six-point scheme which also included fixed *benefits* (see paragraph 72(b) above). The view taken regarding benefits, for those in the middle or higher income groups, greater than the fixed amounts projected for the insured population in general was that these should be provided on the initiative of the individual through participation in voluntary schemes, not through the national scheme. In practice private schemes of sickness and hospital insurance had been flourishing before the Report and continued to flourish after the National Scheme was introduced, as a means by which the more affluent could supplement the basic benefits nationally provided.

75. A factor influencing the Report, and in fact tending to pervade it throughout, was the abhorrence by poor persons of the "Means Test", then of recent memory, a mechanism adopted (by a coalition "National" Government) in time of financial stringency for limiting the amount paid out of public revenue as public assistance to the unemployed and needy. Restrictions on benefit were imposed by taking into account all sources of private assistance available to the applicant including his savings and capital resources, and the means of members of his family living in the same dwelling. The means test was widely and bitterly criticised as inquisitorial and degrading to the individual in the circumstances of the years of the Great Depression of the 1930's when it was applied. The wheel has now almost turned full circle in that there is growing realisation that some social security benefits provided by the Government in Britain are unduly costly because they are provided regardless of means, some of the recipients being not in real need of assistance, and that some reconsideration is necessary. The principle of "means testing" has in effect (in 1968/69) been restored to a limited extent in connection with family allowances (which are allowed for children where there is more than one dependent child in the family). The Government now recoups some of the allowances paid to those in the higher income groups through the income tax machinery.

76. *Other Advantages of fixed levies and benefits*

Apart from the Beveridge arguments, that self-respect and good citizenship demand that a person pay the specific price that a specific amount of insurance costs, there are clearly administrative advantages in the simplicity of specifying that fixed dues are payable and fixed benefits distributable. Where schemes are funded and where the system of gumming stamps to a contribution card as evidence of payment is adopted, it is clearly essential on grounds of administrative practicability to limit the number of different amounts payable by different classes of contributor e.g. males, females,

children, the sick, the unemployed, and pensioners.

77. The actuarial computations of what level of contributions will assure a certain level of benefit are also simpler when neither contribution nor benefit is tied to variable factors such as the level of income at a particular time.

78. *Regression – fixed contributions*

The regressive effect of having fixed contributions regardless of income or personal circumstances is undeniable but is mitigated by the fact that the employee's contribution only provides part of the cost of the scheme, perhaps only a third[10], the remainder being provided by the employer and by the State out of general taxation. Moreover, as mentioned earlier (para. 69), the element of regression is materially counteracted by the fact that fixed social benefits bring substantially greater relief to the man with the larger number of qualifying dependents.

79. It may also be argued that there are limits to the extent to which it is possible to eliminate regression. No one expects that the premium to be paid for vehicle insurance or for ordinary private life or fire insurance, should be abated according to the means of the payer. They payer receives full value for his money and that is the end of the matter. (See however paras. 121/122)

80. *The "Charity" syndrome*

The personal factor, stressed by Beveridge, and hingeing on the connotation of "charity", has two aspects. The proposition that a sturdy citizenry dislikes the idea of dependence on charity, and hence would rather provide benefits from its own contributions and reduce the amount to be raised out of general taxation, is important to Ministers of Finance who wish to keep the size of the national budget, and hence the apparent burden of taxation, within bounds. The principle of self-reliance on the part of the insured person and eventual beneficiary is not only helpful initially in limiting, or excluding altogether, governmental commitment to support the scheme out of general taxation, the benefit continues as the scheme develops.

81. It is notorious that the cost of social security grows from year to year, usually at a faster rate than projected, because of the continuing development and refinement of social services and benefits. If at least some of the "open-ended" commitments for future government expenditure can be hived off to the private sector this cannot but be helpful to the Budget exercise. Self-reliance or self-help (or a dislike of "charity") is thus a quality worth encouraging not only for the politico-social purpose of building up national morale, but also for the subtler fiscal reason of limiting demands on the national purse.

FUNDING OF SOCIAL SECURITY SCHEMES

To Fund or not to Fund

82. Although it is preferable to fund the resources to provide, e.g. retirement benefits, which are wholly subscribed by private sector employees and employers, some social security schemes are not funded at all and there are arguments for both courses. Pensions for civil servants are often not funded (see para. 111) – civil service salaries are somewhat less than rates of pay prevailing in the private sector to take account inter alia of the noncontributory pension benefit accruing to the civil servant. The pension is only payable if the civil servant is still in his post at the age of retirement so that the cost of providing it is somewhat less than in a

10. e.g. where contributions are tripartite and provided by employee, employer and State.

"guaranteed" pension scheme but it also makes it more difficult to compute the precise resources required to meet future pension commitments.

83. *Case for not funding*
The reasoning for not funding pensions is briefly that in any period the pensions payable to the retired part of the community must be borne, in real terms, by the rest of the community—the actual financial arrangements for achieving this result are of minor importance.
84. Moreover, because of the continual secular erosion of the value of all money, whatever financial provision is made in a pensioner's working life may prove inadequate on his retirement. It may thus be argued that the attempt to make proper pre-provision is a lost cause and one it is pointless to pursue.
85. If it takes on average say, 5% or 10% of the G.N.P. to support those of the community who are on retirement pensions it is argued that a levy of this amount should be made to meet the current cost. This system has the advantage that the pensions and the contributions will both be on current values and so long as the age distribution of the population remains stable the percentage levy may continue at the same rate. If the pensioner's cost of living rises this will usually be symptomatic of an increase in G.N.P. so that the means to cope with higher prices will automatically be provided by the percentage levy on the higher "base".
86. This, however, is somewhat theoretical. A levy of, say, 5% or 10% of G.N.P. could have to be translated into the form of administrable taxes which could collect the sum involved roughly in proportion to each person's share of G.N.P. Income tax would be the most obvious tax tool but some citizens are not liable to income tax although producing a contribution to G.N.P. To avoid raising income tax to disincentive levels it might be necessary to raise some of the money from indirect taxation[11] with consequential difficulties in avoiding regression and ensuring equity in incidence.

Arguments against non-funded Retirement Benefits
87. The main argument against current, non-funded, financing of social security commitments, however, is the psychological one that if the retired are to be supported by current levies on the rest of the community there will be the stigma of dependence (or "charity"!) which does not arise at all where retired persons live on provisions they have made themselves during their working lives.
88. The difficulty about the erosion of the amounts contributed, arising from the erosion of the value of money in general, may be overcome, where retirement provisions are made in the private sector, by giving trustees wide investment powers so that the accumulating funds may be invested in equity shares or real estate in order to preserve the value in money terms of the provisions made (see paragraphs 100 and 101).
89. Although there may be little difference in real terms there is a good deal of difference in impact, if the, say, 5% or 10% of G.N.P. required each year to provide retirement benefits is in the form of payments by contributors who will one day themselves benefit from those contributions directly, rather than by way of contributions to the present-day welfare of others whose working life is over. If the real value of their contribu-

11. Note, for example, Canada's 3% manufacturer's sales tax (out of a total manfr.'s sales tax of 11%) which is earmarked for retirement pensions.

tions can be preserved by wise investment policies the financial independence and morale of the eventual pensioners will also be preserved.

90. As regards developing countries, the point has already been made that social security provisions should, at least initially, rest as lightly as possible on the national budget. Accordingly every attempt should be made to fund future retirement benefits as far as possible out of current provisions made by employers and employees and as little as possible out of subsidies or subventions from general state revenue.

91. In these circumstances the non-funding course referred to above, as a result of which retirement benefits would be largely financed out of current general taxation is not to be recommended for developing countries.

92. The possibilities of avoiding funding within other fields of social security are referred to in paragraphs 108 et seq. below.

93. For the reasons given above it is usual in the case of social security schemes which are financed by actual contributions from employees and employers, (and the self-employed if they are included in the scheme) to put the sums collected, together with any contributions or subsidies from the Government, into a fund from which commitments are met in due course. Such funds are audited and periodically examined by actuaries to determine whether the current rate of contributions is adequate to ensure eventual payment of the promised benefit.

94. In the case of a newly-independent country there is usually the laudable urge to increase social security benefits beyond those prevailing when the country was run by the "colonial" power. The urge comes from the very human desire to do more for the poor, the sick and the aged, and also from a desire to give some tangible benefits to mark the change from tutelage to an independent status. Unfortunately, the same change of political status is often not an auspicious occasion for the imposition of higher taxes and there is thus a danger of contributions and benefits becoming out of alignment.

95. The development of social security schemes in the developed countries has been a lengthy process usually spread at least over several decades and accompanied by a certain amount of trial and error. Countries newly setting up such schemes can draw on the accumulated experience and wisdom of the pioneers. In general a developing country commencing in this field will be well advised to start with a limited scheme and expand it only as quickly as an efficient administrative machine can be built up. This usually makes good political sense also because an elected government, hoping to obtain re-election at the end of its term, will want to keep some social improvements in hand for introduction nearer the time of the next election, so that in this instance the demands of sound finance and shrewd politics may well be compatible.

Development of social security schemes

96. To start with the simple, and then develop into the more sophisticated, is usually the soundest policy in most aspects of finance and taxation. In the case of financial provision for retirement, for example, the simplest type of scheme is to accumulate into a fund the combined contributions of employees and employers to provide an ultimate provident benefit for the employee on retirement. The benefit consists of the accumulated contributions plus compound interest thereon, the interest being provided by the investment of the funds during the accumulation period. The beneficiary thus receives exactly what has been saved by him, and on his behalf, and has been effectively

protected from his own possible improvidence during his working life. Since what is paid out is the actual contributions plus accumulated interest, no actuarial reviews are necessary. (Investment policy is discussed below in paras. 100 et seq.).

97. This, the simplest type of scheme, has been adopted both in the private and public sectors in various countries, notably Malaysia, Singapore and Fiji. Although the principle of the fixed identifiable contributions is a simple one, good management and sound investment policies are essential to success. On the management side best results are likely to be obtained by setting up an independent board to manage the funds for schemes set up or sponsored by Government. (In the private sector it is also usual to have a board of trustees containing representatives of both employees and employer and also some professional or other outside persons).

Separation from Civil service

98. The advantages of taking the scheme outside government are several. The employee's contributions are in less danger of being regarded as a form of taxation by the contributor and more likely to be regarded as the cost of a self-provided benefit by a self-respecting citizen in the tradition deemed important by Beveridge. If staff independent of the civil service, are provided the board is less likely to suffer from the recruitment and under-manning problems that from time to time beset most civil services. It will be possible to pursue a more "commercial" policy on staff recruitment conditions and pay-scales. There will be no need to consider precise pay relativities with government departments nor to adopt other conditions which sometimes hamper the efforts of civil services to recruit, retain and remunerate adequately staff of the calibre required.

Administrative Expenses

99. It is vital to keep the cost of management low so that the funds available to the beneficiaries are not unduly eroded. This is more likely to be possible when the board is independent and is not expected, for example, to act as an unpaid source of useful statistics for government. Any services provided for others, including government departments and agencies, should be charged and paid for in full to preserve the funds which the board holds as trustee for the contributors. Additionally it should normally be adequate to provide the generality of contributors (other than those retiring during the year) with statements of the moneys accumulated to their account certainly not more frequently than yearly, and possibly only at two-yearly or three-yearly intervals. What has however to be weighed against the cost of computing individual balances, including the interest addition is the value of, in effect, providing an "external" check on the workings of the fund by giving the contributors an opportunity to compare their own records with the official ones, correct errors and detect any cases of embezzlement at an early stage.

Investment Policy

100. Investment policy is equally important—the increase in world interest rates over the past twenty years has involved erosion of trust capital when this was held in the form of undated or long-dated low-yielding gilt-edged securities and actual losses when such holdings had to be sold in order to pay out benefits. This particularly applied in the case of certain private sector funds where the number of contributing members decreased for one reason or another. In general the accumulated interest on more recent investments would probably counterbalance any loss on capital

realisation referred to so that the contributor would not be in danger of receiving less in money terms than has been contributed by and for him but clearly he should be assured as far as possible at least of the actual money contributed plus interest. The other danger is of erosion by decreases in the buying power of the moneys accumulated as the value in real terms slowly (or where inflation is rampant, rapidly) declines over the period of accumulation.

101. The first of these dangers (i.e. of changes in interest rates and market values of gilt-edged securities) can be partly eliminated by judicious buying in the gilt-edged market, only of short-dated stocks of suitable maturity dates. The erosion in real terms is more difficult to cope with but if the trustees are armed with wide powers of investment, as is currently fashionable, so that they can invest in such "hedges" against inflation as equity shares and real estate, at least some protection can be given.

Benefits

102. On the benefits side, in the case of the "basic" scheme referred to in paras. 96–101 the simplest procedure is to pay out the amount accumulated in the form of cash benefits to the beneficiary when he reaches the qualifying retirement age. At a later stage of development an option may be given to beneficiaries to choose between a lump sum and an annuity of equivalent value to serve as a life pension, with perhaps some provision for the pension to continue during the lifetime of the wife should she survive her husband-pensioner.

103. The retirement provision has a built-in relationship to the level of the emoluments because all the contributions will have been based on the remuneration actually received—it is usual to provide from 5% to 15% of the pay in both the employer's and the employee's contributions. This provision is not necessarily adequate in the case of someone who has spent a long period at a low salary and whose elevation has occurred mainly towards the end of his employed life. In the case of civil servants the problem is sometimes solved by computing the pension on the average of the last three years' remuneration—in the case of a specifically-contributed pension the funds to achieve this result simply do not exist because the sums paid into the fund have throughout been based on the actual salary. Moreover, this basis may not do justice to private sector employees, e.g. manual workers, whose peak earning years may have been a few years before retirement.

104. A more sophisticated system of provision for retirement is to use the insurance principle, either by contracting with an insurance company to handle the whole scheme, or by employing actuarial principles in a scheme run by a public or private sector agency. The need for this type of scheme can be simply demonstrated from the example quoted above. If the beneficiary survives to retirement age he becomes entitled to the full sum accumulated for him. If he then dies prematurely without enjoying a lengthy retirement, at least the sum accumulated is available to his widow. If, however, he dies prematurely during the period of his employment his heirs would become entitled only to the sum accumulated up to the time of death which might well give inadequate security. This deficiency and those caused by premature retirement due to failing health, can be covered if insurance is used, or actuarial principles followed simply by slightly increasing the payments by all contributors to cover the risk.

Graduated Contributions and Benefits

105. Once a departure is made from fixed

contributions and fixed retirement benefits, there is no reason why contributions should not be made proportional to salary. This may be achieved, where only retirement benefits are involved, by collecting a fixed percentage of salary from both employee and employer. The contribution will then vary directly with the remuneration.

106. Where other benefits are provided and/or it is necessary to know precisely and quickly how many contributions have been made (as a qualification for one benefit or another) the system of stamped contribution cards may be adopted. This method although more tedious for employers and contributors has the virtue (by providing for stamps to be stuck on each week) of providing a quick visual record of what contributions have actually been made.

107. Even where "stamped cards" are adopted for the reason stated it is possible to have graduated contribution rates. One rather neat plan is to divide the most common salary limits for full-time employees into groups each with an upper and lower limit and then adopt the median figure in each group for the purpose of charging contributions. For example, with weekly earnings falling into the ranges U.S. $25 to $50, $50 to $100, $100 to $150 etc. the respective medians would be $37.50, $75 and $125 and contributions would be charged at the appropriate percentage of the median.

Where Funding inappropriate or unnecessary

108. On the other hand, funding is hardly possible, or appropriate e.g. in the case of a scheme to provide free medical attention. If a person fell ill during a particular year he would be entitled to free attention if insured under such a scheme. If he remained healthy throughout the year no "credit" for him would exist to be carried forward. Moreover, the cost of providing free medical attention (such as the salaries of doctors and nurses) has to be met year by year—the cost is not accumulated on a contingent basis in the same way as for pensions. Accordingly, there is little cause to do any funding and the contributions can be fixed annually by reference to the annual cost of providing the medical services.

Government Contributions

109. Whether social services are funded or not, the fiscal importance for government lies in the extent to which it allows itself to become involved in paying out of general taxation for any deficiency between contributions and costs. Fiscal dangers lurk when two or more political parties try to outbid each other during electioneering in promising more services at less cost to the beneficiary so that employee contributions tend to become fixed or ossified because neither party will incur the odium of increasing them, while government's commitment becomes so completely open-ended that in the end the sky may become the limit. It is preferable instead that regular actuarial reviews of the rates of social service contributions should be made, usually resulting in minor adjustments to the charge, so that the public is attuned to such developments as being in the ordinary nature of things rather than that the increase of such contributions should become a major political issue.

Separation of Funds

110. Many countries run separate funds for the various social services which are catered for by government schemes and this is consistent with the principle of bringing home to the beneficiaries the individual cost of each of the services provided. Sometimes, however, various schemes are brought

together, and financed by a single combined contribution, for administrative convenience.

111. Where government is the employer it is not uncommon for the pensions of civil servants to be provided on a non-funded basis. Since the government's salary bill, including remuneration for current work, and pensions as a deferred payment for past work, constitute an annual charge on the Budget and have in any case to be provided out of taxation, funding would not have many merits and an incidental advantage of not funding is a considerable saving in administrative time. The non-funding policy is also occasionally followed by commercial enterprises, sometimes to conserve capital and sometimes because there is not a satisfactory system of allowing deductions for income tax purposes in respect of provisions made in advance of actual requirements on the retirement of employees (see paragraphs 113-117).

112. Where funds from retirement schemes are invested wholly in government or other securities one important effect of funding pensions and provident schemes, however, is the impact on capital markets. The funds set aside are available for investment either at fixed interest or, nowadays, in "trustee" equities and the liberalisation of the trustee investment laws in a number of countries has created a demand for blue chip equities, investment in which is likely to increase in due course the capital resources of the fund, the increased demand being itself a factor in the price rise. Increases in contributions to such retirement funds have, however, a disinflationary result, reducing the resources available to buy consumer goods. At a time when government is trying to take inflationary pressures out of the economy it is obviously a happy development if employees clamouring for wage increases can be induced instead to take these in the form of fringe benefits such as improved retirement entitlements rather than as cash emoluments which finance a major part of consumer demand.

Tax Reliefs for Contributions

113. The granting of "incentives", such as tax reliefs for contributions by employer and employee, and by the self-employed, and exempting from tax the investment income of the funds set up by the trustees of approved pension and provident schemes, are clearly well-advised. Such incentives are in fact provided by a very large number of countries. The amount given up in taxation is a comparatively small price to pay for the total cash value of the social security thus generated by private effort and which, if it had to be provided wholly by the State, would cost several times as much, the total cost (instead of only the cost of the tax relief) having to be met out of general taxation.

114. There is in any event a strong case in equity for allowing tax deductions for contributions to pension schemes because the pensioners themselves will be taxed in due course on the pension received, which in effect forms deferred remuneration. If the pension and the net remuneration after pension contributions are assessed to tax the total amount assessed will in fact be exactly equal to what the employee has received from the employer and will be taxed only when the recipient has effective use of the money.

115. As far as the employer is concerned, where he sets up a formal pension fund which is approved for tax purposes he should normally receive a deduction in the computation of his taxable profits for the gross remuneration he pays to the employee, plus the employer's contribution to the pension fund. The total of these two items represents his actual outlay. No deduction will be

due to him when the pension becomes payable, however, because he will then incur no expenditure, the pension being payable out of the accumulated joint contributions of the employee and himself which have already been allowed for tax purposes.

116. An important incidental advantage to Government is that pension and provident funds in the private sector are eager customers for dated gilt-edged issues and therefore assist in the successful floating of State loan issues. It is fairly common, moreover, for developing countries to stipulate that insurance companies, or pension and provident funds which handle the contributions made to provide for retirement should hold a fair proportion of their resources in securities issued by Government. This ensures that Government will be able to borrow a substantial amount of the amounts saved and may devote the resources thus mobilised to development projects.

117. It may be noted in passing that should Government, by the sale of its own securities, be in a position to borrow the whole of the sums contributed the situation would be roughly the same as if Government had operated an unfunded scheme and put the contributions into general revenue (perhaps earmarked for capital projects) leaving benefits to be paid in due course out of revenue.

Redistribution: relationship of individual contributions to benefits

118. While taxation in general is normally redistributive in character, contributory social security schemes are not necessarily so. Where a scheme is fully contributory, with no State subsidy from general taxation, there is no redistribution if what is secured is merely a retirement benefit exactly proportionate to the contributor's own contributions. Where contributions and other types of benefits are on a flat-rate basis on Beveridge lines the redistributive effect is confined to the extent to which bachelors subsidise those with dependents, the healthy subsidise the sickly, and those in regular employment the unemployed, and of course to the extent that the funds are augmented by the Government's contribution from *general* taxation drawn from all taxpayers.

119. It has been pointed out elsewhere (para. 79) that there is perhaps a limit beyond which "redistribution" should not ordinarily go. If the burden of general taxation is materially graduated against the wealthy, as most tax structures are, it may be overdoing things if the same principle is taken too far in devising contributory social security schemes. The basic principle of any contributory scheme should be "value for money" for all contributors, although it is relatively easy to justify the redistribution effects referred to in paragraph 118 as being within the bounds of "insurance", e.g. against sickness, unemployment and premature retirement, and the fact that the young tend to subsidise the old, and the single the married.

120. It is another matter, for example, to levy contributions on employees proportional to their remuneration in order to provide pensions rated according to need rather than to the contributions actually made. The proper place for this kind of arrangement is in the taxation structure itself, but in this sphere payroll taxes may be admitted if they are levies, based on payroll, which have no direct relation to social security benefits. In other words it is permissible for the employer's contributions to revenue (based in effect on labour as a factor of production, rather than on some other criterion such as turnover or capital) to be used to finance a scheme of need-related pensions but, except to the limited extent indicated above, not for the employee's own identifiable contributions to be so used.

121. *Redistribution: application in sphere of insurance*

It may be worth noting in passing that even in such a strictly private venture as automobile insurance, which is usually a private bargain in which the State takes no part, there are redistributive elements. The redistribution is not however from rich to poor except coincidentally. Excessive amounts are paid by the skilled, the cautious, and the mature and responsible driver, and inadequate sums by the unskilled, the reckless and the irresponsible. The difference between the premiums paid by the two classes was until recently a maximum of $33^1/^3\%$[12] although the difference in value received was vastly greater—in the case of a motorist who drives for years without accident or insurance claim the difference is almost infinite. Recent thinking, however, has led to a more realistic appraisal of the matter and wider premium differentials are likely to be encountered in future.

122. The "redistribution" referred to in para. 121 in the case of "commercial" car insurance is a good example of redistribution being obtained with little, if any, protest by those who were paying (despite "no claims" abatements of up to $33^1/^3\%$ in their premiums) an excessive amount compared with the risks run by the insurance company in the case of the "good" driver. Such "voluntary" redistribution is also secured to a major degree in private health insurance schemes and to a lesser extent in private pension and provident schemes where these contain an insurance element.

Opting Out

123. The purpose of the government in setting up national social security schemes is partly redistribution, and partly insurance. It is therefore good policy, as suggested above, to encourage private schemes which achieve the same result without burdening the national budget, and without swelling the ranks of bureaucracy, but at the same time maintaining the Beveridge principle of encouraging the citizen to be self-reliant in these days of "Welfare States". The granting of tax relief as a means of official encouragement has already been referred to, the device of allowing persons to opt out of schemes which are provided for the generality of the population is also a useful way of limiting the government's financial commitments. The option method has been recently adopted in Britain in connection with the provision of supplementary earnings-related pensions although not with the object of limiting Budgetary liabilities. The option is allowed, with the safeguard that the scheme must be approved, and with the incentive that contributions to a private scheme are tax-deductible.

Case for tax relief

124. It has already been noted (see para. 114) that the principle of allowing pension contributions as deductions for tax purposes is logical and equitable rather than a generous gesture on the part of the taxation authority. The current earnings or "take-home-pay" are effectively reduced by sums which will eventually be paid out again in the form of pensions which represent "deferred pay" and which are themselves taxable on receipt. If in the absence of a contributory pension scheme an employer sets up a non-contributory scheme whereby pensions are paid to retiring employees, their salaries, while working, would be somewhat less than would be payable in the absence of such a scheme, but not by any defined amount. The same ultimate tax result would be achieved by the

12. In the U.K. and certain Commonwealth countries.

employer as in the case of a formal scheme with tax-deductible contributions. With an approved scheme he may deduct the full salaries paid plus his own pension contribution but receives no deduction when pensions are paid. With an informal scheme he receives a deduction for the somewhat lower salaries payable and for the actual cost to him of the pensions when they are paid.

125. The funded type of scheme with the greater security provided by investment and alienation of the contributions, which insures the employee, for example, against the untimely bankruptcy of his employer, is to be preferred and, as indicated above, by allowing tax deductions, Government is merely taxing the actual emoluments, current and deferred.

Exemption from Tax of Investment Income of Pension and Provident Funds

126. As well as making employer and employee retirement contributions tax deductible it is common for tax regimes also to provide exemption or abatement of tax on the invested income produced by the funded contributions. There is a limited case for this in that if the interest, dividends etc., accrued individually to the contributor—beneficiaries some part of the total might be exempt, or taxable only at the lowest personal rate because of the domestic circumstances and tax status of those individuals.

127. The stronger reason for exemption is an extension of that referred to in paragraph 112, i.e. the accumulated interest, dividends, rents, etc., will eventually be paid out to the beneficiaries and then be taxed fully in their hands. The tax exemption granted on the investment income while it accumulates is therefore merely a tax deferment and during the deferment period the interest does not provide anyone with spendable income.

128. It is important to distinguish the above from the argument sometimes put forward that all personal investment income should be exempted when it derives from savings out of earned income. The argument is that as the earnings have already been taxed, to tax income from savings out of the earned income is a form of double taxation. This argument will not hold water because the taxpayer in effect creates a new source of income in addition to his earnings and receives income from both sources concurrently. No further tax accrues if he withdraws his investment plus accumulated interest etc. and spends the money.

129. The contributor to an approved Pension/Provident Scheme also in effect receives back his savings (capital) plus interest but where he receives this in the formal shape of a pension he is fully taxed on the receipts. He does not receive the pension until the earnings source is extinguished. It may be noted that the contributor to a provident fund who receives his benefits in lump sum form, tax free, has the best of both worlds since he is allowed a tax deduction for his contributions and tax exemption on the ultimate benefit.[13] This can only be justified on the basis of encouraging such schemes as a half-way stage to properly constituted pension plans.

(to be continued)

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13. If the beneficiary then invests his lump sum in an annuity or in some other income-producing form he will of course be taxable on the income obtained.

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SUPS

SAAD AL-NIMRY:

RECENT DEVELOPMENTS IN TAXATION IN THE HASHEMITE KINGDOM OF JORDAN

The taxation system in the Hashemite Kingdom of Jordan has gone through many developments in the last fifty years. Up to 1918 that portion of the Kingdom east of the River Jordan was under Ottoman Rule and the tax system was the same as that applied in Syria. After World War I the Ottoman system prevailed but was gradually displaced by laws similar to those promulgated in Palestine, which was then under the British Mandate. In 1948 the British withdrew from Palestine and consequently is was partitioned by decision of the United Nations. That part of Palestine known today as West Bank was annexed to East Jordan and at the time of annexation the Laws were those enacted by the Mandatory Power. Gradually the Laws, financial or otherwise, were brought into unification in both East and West Banks. As a result great modifications took place and the taxation system ruling in the Kingdom at present is fairly modern, though it needs an overall reconsideration in the light of modern thinking and the needs of the country.

The financial Laws to which I shall refer here are more or less recent and, therefore, I shall not speak about their origins. Further, the laws which I shall mention in this article exclude those relating to Municipalities, Chambers of Commerce & Industry, and Autonomous Institutions owned by the Government of the Hashemite Kingdom of Jordan. Only Government revenue Laws are dealt with, including duties which, if set aside, will distort the general picture of Government revenue.

I shall now describe the main laws of taxation in Jordan.

1. CUSTOMS DUTIES AND EXCISE, 1962 AND AMENDMENTS TO DATE

All imports into Jordan are liable to duty except those goods specified to be duty free. Duty is levied according to a tariff approved by the Council of Ministers on the joint recommendations of the Minister of Finance and Minister of National Economy. If goods are imported from a country other than the country of origin an additional duty is imposed. Inspection fees of 1% are levied on all goods imported or exported. The Customs Department collects other fees on the importation of goods which are administered by the Ministry of Finance, Municipalities or other bodies, according to the conditions of the Laws pertaining thereto. Duty will be levied on goods in transit or goods in the Free Zone whenever they are used for local consumption.

Duty is levied on the value of goods compoted according to the invoice issued by the exporter together with cost of transport and insurance or any other costs. Invoices must be certified by the Chambers of Commerce and authenticated up to the Jordan Consul in places where there is a Consul. A fine of 2% of the value will be added to the assessed value of goods in cases where invoices are not authenticated.

In cases where the carrier does not agree to the evaluation the equivalent of the duty will be received in kind. Invoices are not required for goods whose value does not exceed JD 30, or goods which are duty free. Perishable goods are sent for examination in the Government laboratories to ascertain that there is no danger to public health. Travellers are subject to inspection and duty when they

bring in mercantile materials. Bonded warehouses are established either by Government or individuals.
Porterage fees are collected as follows:
20 fils for each parcel weighing 100 kgs. and not more than 500 kgs.
30 fils for each parcel weighing more than 500 kgs.
Goods may remain for seven days in the warehouses of the Customs for clearing, after which period fees for storage are imposed as follows:
100 fils per day for each 100 kgs. or part thereof in respect of tobacco and alcohols.
50 fils per day for each 100 kgs. or part thereof in respect of other goods.
Goods are allowed to remain in bonded warehouses for one year against payment of fees.
Exemptions from duty are those listed below:
Goods imported in the name of His Majesty the King.
Goods imported by the Government.
Goods falling under treaties and agreements.
Goods imported for the diplomatic corps.
Goods belonging to religious, scientific, technical or philanthropic institutions.
Plant and machinery for agricultural use and dairy products and animals for breeding.
Aeronautical institutions.
Equipment for municipalities, the Phosphates Corporation, the Potash Corporation, and mines.
Goods for the refugees and needy.
Advertisement films and medical samples.
The Army grocery stores.
Personal effects of travellers and emigrants.
Contraband is subject to a fine equal to the value of the goods plus the duty if they are not prohibited from import, and to twice their value if they are prohibited from import.
The most recent tariff in the Hashemite Kingdom of Jordan was introduced in 1962. It is ad valorum and takes into consideration two main objects. First, the insurance of an adequate revenue to the Government. Second, the protection of local industry and agriculture. The customs department applies the International Classification of goods. Generally speaking the duty is 20% on the value of imported goods.

The following is a summary of rates on main classes:

Class	*Rate*
1. Live animals	Exempt
2. Meat	11%
3. Fishes	15%
4. Dairy products, etc.	5-25%
5. Animal products not included in other classes	Exempt
6. Plants	Exempt– 15%
7. Vegetables	20% with variations
8. Fruits	20% with variations
9. Coffee and tea etc.	Duty is levied on weight, other items 11%
10. Cereals	Exempt except rice
11. Flour, etc.	2% – 15%
12. Industrial oil grains	11-15%
13. Raw materials	11%
14. Other plant products	Exempt

Class	*Rate*
15. Fats & oils	Exempt – 70%
16. Industrial food products	15%
17. Sugar & its products	Varied, exempt – 35%
18. Cocoa	11 – 35%
19. Products made basically from grains	5 – 15 – 35%
20. Products made basically from vegetables	11 – 35 – 50%
21. Miscellaneous food products	15 – 35%
22. Alcohols	duty is levied on weight 48 Fils – 600 Fils per one liter.
23. Residues and by-products	Exempt
24. Salt, sulphur, etc.	Exempt – 5% – 25%
25. Raw metals	Exempt
26. Coal, oils, etc.	Exempt. Duty on benzine is on weight – 13 Fils per one liter. Other products 11%
27. Industrial chemical products	varied
28. Non-organic chemical products	Exempt – 11%
29. Organic chemical products	Exempt – 11%
30. Pharmaceuticals	Exempt
31. Fertilizers	Exempt
32. Tanning & dyes	11%
33. Perfumes	11-40%
34. Soaps, etc.	15 – 35%
35. Glues	11%
36. Explosives	11%
37. Photographic materials	Exempt – 11%
38. Miscellaneous chemical products	Exempt – 11%
39. Raisins, etc.	Exempt – 10% – 30%
40. Rubber	Exempt – 11% – 15% Tyres pay 55 Fils per kg.
41. Hides, etc.	15%
42. Skins, etc.	15 – 30%
43. Furs, etc.	15 – 25%
44. Timber, etc.	5 – 11% timber pays 850 Fils or JD 1.2 or JD 2 per cu.ft. according to type.
45. Cork, etc.	11 – 15%
46. Mattresses, etc.	25 – 35%
47. Materials used in paper industry	Exempt
48. Card-paper, etc.	11%
49. Office equipment, etc.	Exempt
50. Silk, etc.	Exempt – 11%
51. Weaving materials, etc.	Exempt – 11%
52. Metal thread, etc.	5 – 20%

Class	*Rate*
53. Wool, etc.	Exempt
54. Hump, etc.	Exempt
55. Cotton	8, 11, 20%
56. Weaving material (short)	Exempt, 11%
57. Weaving materials of plant	Exempt, 20%
58. Carpets, etc.	25%
59. Stuffing materials, etc.	5, 11, 15, 20%
60. Knittings	25%
61. Clothing	25, 30, 50%
62. Other kinds of clothing	25%
63. Used clothes	20%
64. Footwear	25 – 55%
65. Headwear	25%
66. Umbrellas, etc.	25%
67. Feather, etc.	20%
68. Materials made of stone, cement, etc.	5, 11, 25%
69. Chinawear	15%
70. Glass	5, 15, 30%
71. Pearls, precious stones, etc.	Exempt, 1, 5, 15, 25%
72. Coins	Exempt
73. Iron, etc.	Exempt, 5, 11, 20, 30%
74. Brass, etc.	Exempt, 5, 11, 25%
75. Nickel, etc.	11, 15, 25%
76. Aluminium	5, 11, 25%
77. Magnesium, etc.	11%
78. Lead, etc.	5, 11%
79. Zink, etc.	5 – 11%
80. Tin, etc.	5 – 11%
81. Other Metals	11%
82. Tools, cutting equipment, etc.	5 – 15%
83. Various types of ordinary metals	11 – 15 – 50%
84. Boilers, machinery, etc.	Exempt, 5 – 15% – 30%
85. Electric equipment, etc.	5, 11, 15, 20%
86. Traction equipment	Exempt
87. Motor-cars, etc.	Exempt, 50, 75%
88. Aeroplanes	Exempt
89. Ships, etc.	Exempt
90. Photographic equipment, etc.	5, 15, 20%
91. Haurological	15%
92. Musical instruments	15%
93. Arms, etc.	15, 25, 30, 35%
94. Miscellaneous manufactured products not-included in other classes	11, 30, 50%

Class	*Rate*
95. Sculpture materials, etc.	30 – 50%
96. Sweepers, etc.	11 – 25 – 35%
97. Toys, etc.	11 & 25%
98. Miscellaneous manufactured products	11, 15, 25%
99. Artistic collections	11%

In Jordan Customs duties are the most important source of Government revenue. They contribute approximately 50% of total inland revenue together with Excise.

Excise

The following are the major items on which excise is levied: tobacco products, matches, lime, alcohols, salt and petroleum products. The duty is variable.

Fees on Industrial Products

Fees are imposed on local industrial products at different rates of the value of manufactured goods. Fees are imposed at present on the production of batteries, detergents and vegetable oils.

2. UNIFIED ADDITIONAL FEES AND TAXES, 1966

All imported goods are subject to an additional duty of 9% of their value. The revenue from this additional levy is allocated as follows:

$\frac{1}{18}$ to Husein Sports City

$\frac{1}{18}$ to Social Welfare

$\frac{1}{9}$ to the University of Jordan

$\frac{2}{9}$ to Municipalities

$\frac{5}{9}$ to Customs.

Additional fees are also imposed as a percentage of excise duty: on alcohols, ranging from 45% to 145%; and on tobacco, at 20% of excise duty plus 20 Fils on each packet of cigarettes.

3. INCOME TAX, 1964

Income Tax is levied on income from any profession, business, trade or employment. Tax is also payable on rents, interest, retirement benefits, trade marks, or any other source of income such as profits accruing from the sale of industrial products outside Jordan. For the purposes of the Law the income of the wife is considered as income to the husband.

Exemptions

A. Appropriations of His Majesty the King
B. Local authorities
C. Trade unions
D. Cooperative societies
E. Religious, philanthropic, cultural and educational institutions and Waqf.
F. Pension and savings Funds
G. Diplomatic Corps, provided there is reciprocal treatment
H. The blind
I. Pensions paid to the wounded or disabled
J. Gratuities
K. Non-resident ship owners
L. Concessions or agreements
M. Agriculture and animal breeding
N. Students of universities
O. Allowances of the Jordan Diplomatic Corps
P. Industries exempted by Government decision
Q. Foreign investments approved by Government

R. Salaries of non-Jordanian employees in Jordan Embassies
S. Dividends paid to shareholders in limited companies
T. Interest on the National Debt.

Deductions Allowed

A. Expenses incurred in the production of income
B. Interest paid on loans
C. Rent
D. Replacement of machines
E. Maintenance of buildings & machinery
F. Doubtful Debts
G. Payment into pension or savings fund, etc.
H. Depreciation on buildings and machinery
I. Payments made annually by a cooperative society to its members
J. Taxes, licenses and fees paid to Government
K. Donations to philanthropic institutions approved by the Government
L. Losses of the tax year.

No expenses are allowed unless proper accounts are maintained.

Expenses not allowed

1. Personal expenses
2. Any expense not wholly incurred in the production of income
3. Cost of constructions or maintenance which adds to the value of capital
4. Any amount withdrawn to be used as capital
5. Any loss or expense which could be recovered by means of an insurance policy or compensation agreement
6. Rent paid for purposes other than income
7. All losses or expenses or capital losses or provisions not allowed
8. Any amounts paid as income tax

Personal & Family Reliefs

		J.D.
1. Personal Relief		150
2. Wife Relief		100
3. 1st Child Relief	25	
2nd Child Relief	20	
3rd Child Relief	15	
4th Child Relief	10	
		70
4. University education for each child		200
5. Dependents		50
6. Salaried people are allowed deductions of 15% of income to a maximum of		200

Rate of Tax

Tax is levied on income of persons other than companies according to the following rates:

		Fils
of each JD. of the first	400 JDs.	50
of each JD. of the next	400 JDs.	70
of each JD. of the next	400 JDs.	100
of each JD. of the next	400 JDs.	150
of each JD. of the next	400 JDs.	200
of each JD. of the next	400 JDs.	250
of each JD. of the next	400 JDs.	300
of each JD. of the next	200 JDs.	350
of each JD. of the next	2000 JDs.	400
of each JD. of the next	2000 JDs.	450
Remainder		500

The rate of tax on limited companies is 250 Fils per 1 JD. and is not available for a credit by individuals. Oil companies are liable to a tax of 50% on chargeable income. Companies are required to deduct the tax at source and pay it to the Income Tax Department. Likewise, employers have to deduct the tax at source and if they fail to do so they become liable for payment of the tax. 8 JDs are deducted as a maximum from income tax chargeable to persons who have life insurance policies. 10% of income tax is additionally levied in accordance with the Social Services Act.

Returns

Taxpayers or their agents are required to submit returns to the assessing officer. If they fail to do so the assessing officer will ask them to submit returns. Non-compliance with this request gives the assessing officer the right to make the assessment.

Assessments

Assessment is made on the basis of the taxpayer's return. The assessing officer may accept the return or amend it at his discretion. He inspects the books of accounts and may ask for any additional information or witnesses. He will send a notice to the assessed person who can object to the assessing officer within 15 days from the date of the notice. A hearing may take place and an adjustment may be made. In cases where the assessed person is not satisfied he may appeal within 15 days of the second notice to the Income Tax Court of Appeal, and to the High Court of Justice if the amount of tax exceeds JD. 100 if the person is not satisfied with the decision of the Court of Appeal. The Minister of Finance or his delegate has the right to review assessment within five years from the tax year provided that such review will not involve errors or personal relief. Review is subject to appeal whenever the tax is increased.

Collection of Tax

The tax assessed must be paid within thirty days after the notice of assessment is received.

The assessing officer may agree to payment of tax by instalments.

Article 60 of the Law provides for payment on account of 50% of the tax of the previous year on June 30 of every tax year. This payment will be set off against final assessment. Non-payment of tax entails the incurring of fines ranging on a progressive scale from 10% to 25% of the tax due. If the taxpayer declines to pay, tax will be collected in accordance with provisions of the Law of Collection of Government Dues. Persons who are leaving the country must obtain a clearance from the Income Tax Department.

Income Tax in Jordan accounts for approximately 1 million JDs per year in the general revenue of the Government.

4. STAMP DUTY LAW, 1952 AND AMENDMENTS TO 1967

Duty is levied on all documents and papers by affixing and cancelling revenue stamps in the amounts specified in the schedules. Duty is of two kinds: proportional and fixed. If the duty exceeds JD. 10 a receipt is issued instead of using stamps. Duty levied on monthly salaries of Government officials is deducted from salaries. The duty is chargeable to the person who initiates the instrument. Whenever there is an agreement between a person and the Government that person pays the duty. Inspectors are appointed to insure the execution of the Law. Disagreements as to the value of the duty are referred to the Minister of Finance. A fine is imposed on any document presented to a Government Department or court without stamps. The fine is three times the duty chargeable with a minimum of 500 Fils. Documents drawn up in Jordan would be null and void if stamp duty is not observed unless stamps are affixed together with the fine. Any person who forges or imitates a stamp of revenue is subject to a sentence of not more than ten years of imprisonment with hard labour.

Proportional fees	*Rate*
1. Contracts, guarantees, Bills of Exchange, etc.	The rate ranges from 10 Fils to 50 Fils according to amount
2. Tickets of entertainment houses	10 Fils – 250 Fils
3. Deeds of property	20 Fils – 90 Fils
4. Tenders, etc.	50 Fils – 100 Fils
5. Assessment of value of property or rent, etc.	10 Fils – 1000 Fils

Fixed Fees	J.D.	Fils
1. Agreements involving no value		250
2. Cheques		10
3. Guarantees involving no value		250
4. Export manifest		50
5. A certificate issued by a Government Department		50
6. Any document not subject to duty presented to a Government Department		10
7. Petitions		30
8. Concession granted by the Government	10.	–
9. Authority to investigate mines	5.	–
10. Licence for investigating mines	5.	–
11. Contract for leasing land, water etc.	6.	–
12. (a) Special Power of Attorney		250
(b) General Power of Attorney	1.	–
13. Receipts		10
14. Copy of an official document		100
15. Copies of registrations		10
16. Customs document		50
17. Import manifest		20
18. Instruments registered by a public notary		100
19. Monthly salaries		20

Exemptions

1. Government Loans to the public
2. All instruments relating to Government activity made up outside Jordan
3. Agreements entered into between a cooperative society and a member
4. Agreements for compensation in accordance with Labour Law
5. Decisions of arbitrators
6. Drafts drawn by one bank on another
7. Letters issued from one bank to another for payment of an amount
8. Coupons of dividends
9. Certificates of service or school certificates
10. Copies of Manifest
11. Proxies
12. Receipts issued by Government or against donations
13. Transfers of government bonds
14. All Government transactions.

According to the provisions of the National Guard Tax Act of 1954 a fifty percent. surcharge is imposed on stamp duties.
Stamp duty provides about JD. 100,000 of Government revenue per year. However, if the Law is strictly enforced, the revenue may come up to JD. 500,000.

5. SOCIAL SERVICES TAX LAW 1953 AND AMENDMENTS TO 1967

This is an additional tax and is imposed as follows:

A – 5 fils on each head of sheep or goats, and 20 fils on each head of camel or oxen.
B – 5% on land tax.
C – 10% on income tax.

The proceeds of the tax are spent on:

1. Philanthropic purposes.
2. Mosques, sermons, guidance & churches.
3. Education and culture.
4. Old people's homes.
5. Homes for orphans and young offenders.
6. Any similar project.

The administration of expenditure is vested in a special council and the Ministry of Social Welfare.
Revenue from this tax is approximately 150,000 JDs.

6. ANIMALS TAX, 1963

This tax is levied on livestock entering into the Kingdom at the following rates:
800 fils on each head of camels, buffaloes, oxen, & pigs
200 fils on each head of sheep or goats.
Revenue from this tax is comparatively small.

7. LAND & BUILDINGS TAX LAW WITHIN THE MUNICIPAL AREAS, 1954, AND AMENDMENTS TO DATE

A committee is appointed every five years to undertake the assessment of rents. Rent is defined as the rent obtainable for the year after the deduction of one fifth of it against use and depreciation of value. If the building is rented, actual rent is accepted provided it is reasonable. A notice of assessment is sent to the landlord who can object to the decision of the committee within 30 days. The tax inspector may lodge an objection if he feels assessment is not adequate. The committee of assessment will look into the objection and make a decision, which decision can be appealed to a higher committee of appeal whose decision is final.

Exemptions

1. Property of the King
2. Property of Government and Municipalities
3. Property owned and used by Foreign Embassies
4. All land & buildings within the Walls of Jerusalem
5. Buildings erected by Bedouins for six years from the date of initiation.
6. Property of cultures, sports or social clubs

Rate

The rate on buildings, including the land on which it stands, is 17% of the net yearly rent.
The rate on land is 10% of the net annual rent. In addition 3% education tax and 3% sewage tax are levied.

Collection

The tax is payable within the fiscal year. A graded fine, up to an amount of 50% of the tax, is imposed if payment is delayed beyond the end of the fiscal year.
42% of the proceeds of the tax are allocated to Municipalities. Recently a law was passed transferring all proceeds to Municipalities.

8. LAND TAX LAW 1955, AND AMENDMENTS

This law is intended for agricultural land and industrial buildings in the rural districts. It is based on estimated net annual rent and the procedure for assessment, appeal, and collec-

tion, etc. is similar to that for the property tax discussed under section 7 above.
Tax is imposed on agricultural land according to the schedule set out below, and on industrial buildings at a rate of 5% of the net annual rent.

Schedule of Tax

Class of land	Description	Rate JD. Fils	
1	Land planted with bananas	1.500	per donum or part thereof
2	Land planted with citrus	.600	,, ,, ,,
3	Land planted with other fruits	300	,, ,, ,,
	A – Irrigated	100	,, ,, ,,
	B – Dry land	90	,, ,, ,,
4	Irrigated land of first class	70	,, ,, ,,
5	Irrigated land of second class	35	,, ,, ,,
6	Dry land of first class	30	,, ,, ,,
7	Dry land of second class	20	,, ,, ,,
8	Dry land of third class	10	,, ,, ,,
9	Dry land of fourth class	5	,, ,, ,,

Tax on Classes 6 – 9 was recently repealed.
In good years this tax yields roughly half a million JDs per year.

9. LICENCES & FEES

There are three important types of licence. They are:

1. Transport licences on vehicles which yield 250,000 JDs per year.
2. Registration and driving licences which yield 300,000 JDs per year.
3. Import licences which yield 600,000 JDs. per year.

The fee for import licences is 4% of the value of imported goods, the other two mentioned above are varied according to schedules.
The important Trade Licences Law of 1966 no longer provides Government revenue since all proceeds are now allocated to the municipalities.
Fees are very numerous but the following is a list of the most important fees and the annual revenue which they provide:

	JD.
Court fees	200,000
Land registration fees	300,000
Passport fees	150,000
Veterinary fees	100,000
Post Office fees (which were excessively raised last year)	1,000,000

Other revenue sources are the following:

1. Revenue of State Domain (which is very small).
2. Dividends from limited companies in which the Government is a shareholder, together with the share in the profits of the Central Bank of Jordan. Total receipts from these sources amount to JDs 3 million per year.
3. Government returns from Tapline amounting to JDs. 1.5 million per year.
4. Miscellaneous receipts.

Inland revenue in the Hashemite Kingdom of Jordan has proved insufficient to support total expenditure, which is in the neighbourhood of 60 million Jordan Dinars. Expenditure on such a scale has only been possible by means of Grants in Aid and Loans from various sources.

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MAX HUBERT BROCHIER:

FRANCE: LE PLAN FISCAL D'AUSTÉRITÉ

1 SUPPRESSION DE LA TAXE SUR LES SALAIRES

A compter du premier décembre 1968, la taxe sur les salaires est supprimée pour les entreprises soumises à la T.V.A. Mais les collectivités locales, qui recevaient les bénéfices de cette taxe, recevront des ressources équivalentes.

Cependant la taxe sera maintenue en ce qui concerne les membres des professions libérales, les entreprises non soumises à la T.V.A. et pour celles qui n'y sont que partiellement soumises, à proportion du chiffre d'affaires qui échappe à cet impôt.

Elle restera donc en vigueur principalement pour les établissements du secteur financier (banques, assurances), secteurs des spectacles, organismes sociaux et collectivités administratives.

Toutefois les départements et les communes en seront expréssément éxonérées. La taxe continuera d'autre part d'être perçue sur les pensions et retraites.

2 SUPPRESSION DE LA TAXE SUR LA CIRCULATION DES VIANDES

La taxe de la circulation des viandes est purement et simplement supprimée.

Le montant de la taxe de circulation, qui avait été instituée en 1951 et qui était payée par les abatteurs, était depuis le décret du 21 FEVRIER 1968, de 15 Centimes par kilogramme de viande net. Il avait été, en raison de l'application de la T.V.A. à l'élevage, ramené le premier janvier 1969, de 62,5 Centimes à 25 Centimes.

3 AUGMENTATION DES TAUX DE LA T.V.A.

Les différents taux de la taxe à la valeur ajoutée sont portés de 6 à 7 pour cent, de 13 à 15 pour cent, de 16,66 pour cent à 19 pour cent, et de 20 à 25 pour cent.

Simultanément le taux de la taxe sur les activités financières est relevé de 13 à 15 pour cent. Ces majorations entrent en vigueur le PREMIER DECEMBRE 1968 et s'appliquent donc pour la première fois lors du versement que les entreprises feront au Trésor en JANVIER 1969.

Corrélativement, les versements éffectués par les petites entreprises soumises au régime du forfait, seront relevés.

En outre, l'article 4 propose une nouvelle procédure pour la levée de la T.V.A. Cette procédure aura pour conséquence de soumettre tous les redevables aux mêmes obligations, mais elle accordera un délai supplémentaire pour les dépôts du relevé du chiffre d'affaires.

Pendant ce délai, les entreprises devront verser un acompte qu'elles auront évalué elles mêmes et régularisent leur situation le mois suivant.

Il est précisé que les collectivités locales recevront un versement représentatif de la taxe locale en remplacement de la taxe sur les salaires.

Le versement du Trésor aux communes sera indexé annuellement sur l'évolution de la masse des traitements et salaires, telle qu'elle résulte des déclarations fournies par les employeurs à l'administration fiscale.

Enfin la substitution du versement à la taxe ne modifie en rien les règles de répartition de cette ressource.

4 CONTRÔLE SUR LES DEVISES ET VALEURS ÉTRANGÈRES

Le Journal Officiel du 25 Novembre 1968 a

publié plusieurs décrets et arrêtés du Ministre de l'Economie et des Finances, réglementant les relations financières avec l'étranger pour le contrôle des changes.
C'est ainsi que les opérations de change, mouvement de capitaux et règlements de toute nature entre la France et l'étranger, ou en France entre résidents et non résidents, ne peuvent désormais, sauf autorisation spéciale préalable du Ministre de l'Economie et des Finances, être effectués que par l'entremise d'intermédiaires agréés par le Ministre de l'Economie et des Finances ou de l'administration des Postes et Télécommunications.
Sont prohibés tous transferts ou opérations de changes en FRANCE tendant à la constitution d'avoirs à l'étranger ou à la détention en France de moyens de paiement sur l'étranger. Sont également prohibés sauf autorisation préalable, l'importation et l'exportation de moyens de paiement (billets, chèques, effets) ainsi que de valeurs mobilières.
L'importation et l'exportation de l'or sont également soumises à autorisation préalable.
De plus, les résidents sont tenus de procéder au rapatriement et le cas échéant, à la cession sur le marché des changes, de toutes créances sur l'étranger ou sur un non résident nées de l'exportation de marchandises, de la rémunération de services et d'une manière générale, de tous les revenus ou produits encaissés à l'étranger ou versés par un non résident.
Ces dispositions sont applicables aux créances nées antérieurement à la date de publication dudit décret encaissées depuis moins de quatre mois ou dont le paiement est devenu éxigible durant cette période.
Il est par ailleurs précisé que les valeurs mobilières étrangères les devises étrangères ainsi que tous titres représentatifs d'une créance sur l'étranger, détenues en FRANCE, doivent être déposées chez un intermédiaire habilité par le Ministre de l'Economie et des Finances, que ces avoirs appartiennent à un résident ou à un non résident.
Un autre Décret relatif au contrôle de la position en francs et en devises des établissements bancaires et financiers vis à vis de l'étranger, précise que les créances en francs et en devises étrangères que les établissements bancaires et financiers détiennent sur l'étranger et les engagements en francs et en devises qu'ils ont à l'égard de l'étranger, sont soumis au contrôle du Ministre de l'Economie et des Finances, lequel peut déléguer son pouvoir de contrôle à la BANQUE DE FRANCE ou à la Caisse Centrale de coopération économique.
Par ailleurs, une circulaire relative à l'exécution des transferts à destination de l'étranger, stipule que les intermédiaires agréés sont habilités à procéder à tout paiement à l'étranger, dont le montant ne dépasse pas 250 francs et qu'ils sont tenus de s'assurer de l'identité du donneur d'ordre et de la relever.

5 RESTRICTION SUR LES DEVISES ET LES VALEURS ÉTRANGÈRES

Les Français se rendant en voyage touristique à l'étranger, n'ont plus droit qu'à une allocation de devises de 700 francs.
Une attestation devra être remplie au moment du change des devises et être remise à la douane.
Selon qu'il s'agit d'un résident ou d'un non résident, c'est à dire d'une personne ayant sa résidence habituelle en FRANCE depuis plus ou moins de six mois, les modalités sont différentes.
Les résidents ont droit, dans tous les cas jusqu'au 31/12/68, à une tolérance de 200 francs en billets français puis à une allocation en devises de 500 francs, s'il s'agit d'un voyage touristique.
S'il s'agit d'un voyage d'affaires, une allocation spéciale de 200 francs par jour est prévue

avec un maximum global de 2.000 frcs. Cette allocation ne pourra toutefois être délivrée que sous la forme de chèques de voyages, chèques, accréditifs ou virements. Un montant maximum de 100 francs pourra toutefois être délivré en billets étrangers.
Les frontaliers ont droit à moins d'argent lorsqu'ils passent la frontière: les personnes qui se rendent à l'étranger pour un séjour inférieur à 24 heures, ne sont autorisées à exporter qu'une somme maximum de cinquante francs sous forme de francs français.
Quant aux non résidents, ils sont autorisés à exporter sans justification 200 francs en billets français, 500 francs en billets étrangers, et les moyens de paiement établis à leur nom à l'étranger.
Pour exporter plus de 500 francs en devises étrangères, un non résident devra toutefois faire la preuve qu'il a bien importé ces billets.

6 IMPORTATION DE DEVISES ET DE FRANCS

Sont autorisées l'importation par les voyageurs résidents et non résidents, de tous moyens de paiement libellés en devises et l'importation des billets de banque français ou émis par les Instituts d'émission liés au Trésor français par un compte d'opération.
A leur sortie de France, les voyageurs non résidents sont autorisés à réexporter le reliquat non utilisé des moyens de paiement libellés en devises étrangères qu'ils ont précédemment importées.
Ils peuvent obtenir, auprès d'un intermédiaire agréé, la conversion en devises, des francs qu'ils détiennent, à la condition de justifier qu'ils ont précédemment acquis ceux ci depuis leur entrée en FRANCE, par cession de devises.

7 INTERDICTION DES CARTES DE CRÉDIT À L'ÉTRANGER

Cette conversion ne peut être effectuée qu'à concurrence de 500 francs et au vu du bordereau d'échanges initial qui sera annoté par l'intermédiaire agréé.
Est interdite, par les résidents français, l'utilisation de cartes de crédit à l'étranger.

8 TRAVAILLEURS ÉTRANGERS ET FRONTALIERS

En ce qui concerne le transfert des salaires perçus en FRANCE par les travailleurs étrangers, l'autorisation générale est applicable, de même aux travailleurs frontaliers de toutes nationalités.
Le montant du salaire transférable est la rémunération dite de base qui figure sur le bulletin de paye c'est à dire la somme que reçoit effectivement le travailleur. Ces transferts peuvent être effectués soit par le travailleur lui même soit par son employeur.
En ce qui concerne le transfert au profit d'émigrants, les intéressés peuvent, sans autorisation de la Banque de France ou de la Caisse Centrale de coopération économique, obtenir le transfert d'une somme au plus égale à 5.000 francs par personne.
Enfin, tout découvert en comptes étrangers en francs de même que d'une façon générale, toute avance consentie à un non résident, sont subordonnés à l'autorisation du Ministre de l'Economie et des Finances ou de la Banque de France ou de la Banque de Coopération économique. Les intermédiaires agréés, par exception, sont autorisés à accorder à leurs correspondants étrangers, des découverts en comptes étrangers en francs.

GERMANY:

GESETZ ÜBER MASSNAHMEN ZUR AUSSENWIRTSCHAFTLICHEN ABSICHERUNG GEMÄSS § 4 DES GESETZES ZUR FÖRDERUNG DER STABILITÄT UND DES WACHSTUMS VOM 29. NOVEMBER 1968*

This law introduced a special turnover tax on export transactions during the period November 29, 1968 to March 31, 1970, and a special refund of turnover tax with respect to imported goods during the period November 20, 1968 to March 31, 1970, in order to provide temporary assistance to the French economy. For more details, see European Taxation November/December 1968, special issue on the Turnover Tax on Value Added in Europe.

Der Bundestag hat das folgende Gesetz beschlossen:

SONDERVORSCHRIFTEN FÜR DIE EINFUHR

§ 1

Vergütung für die Einfuhr

(1) Entsteht in der Zeit vom 20. November 1968 bis 31. März 1970 eine Einfuhrumsatzsteuerschuld, so wird dem Schuldner bei der Entrichtung der Steuer eine Vergütung gewährt. Die Vergütung beträgt für die Einfuhr der in der Anlage 1 zum Umsatzsteuergesetz bezeichneten Gegenstände zwei vom Hundert, für die Einfuhr der übrigen Gegenstände vier vom Hundert der Bemessungsgrundlage für die Einfuhr (§ 11 des Umsatzsteuergesetzes) abzüglich des Betrages an Verbrauchsteuern.

(2) Absatz 1 gilt nicht für die Einfuhr von Gegenständen, die in der Zeit nach dem 19. November 1968 ohne Erhebung der Sonderumsatzsteuer (§ 2) ausgeführt worden sind.

(3) Ist die Vergütung bei der Entrichtung der Einfuhrumsatzsteuer noch nicht gewährt worden, so wird Absatz 1 von der zuständigen Zollstelle nur auf Antrag angewendet. In dem Antrag ist die Nummer des Belegs über die Festsetzung der Einfuhrumsatzsteuer anzugeben.

SONDERVORSCHRIFTEN FÜR DIE AUSFUHR

§ 2

Steuergegenstand

(1) Die Ausfuhr von Gegenständen, die ein Unternehmer im Sinne des § 2 des Umsatzsteuergesetzes in der Zeit vom 29. November 1968 bis 31. März 1970 bewirkt, unterliegt einer Sonderumsatzsteuer. Eine Ausfuhr von Gegenständen durch den Unternehmer liegt vor,

1. wenn der Unternehmer eine Ausfuhrlieferung (§ 4 Nr. 1 des Umsatzsteuergesetzes) bewirkt hat,
2. wenn der Unternehmer eine Lohnveredelung für ausländische Auftraggeber (§ 4 Nr. 2 des Umsatzsteuergesetzes) bewirkt hat,
3. wenn der Unternehmer einen Gegenstand zur gewerblichen Verwendung oder zum Zwecke der Veredelung durch einen

* Published in Bundesgesetzblatt I, 30. November 1968.

anderen in das Ausland verbracht hat, soweit nicht durch die Ausfuhr des Gegenstandes die Voraussetzungen der Nummer 1 oder 2 bei einem anderen Unternehmer erfüllt sind. Eine Ausfuhr zur gewerblichen Verwendung liegt nicht vor, wenn der Gegenstand erkennbar nur zur vorübergehenden Verwendung im Ausland, insbesondere zu Beförderungszwecken, ausgeführt wird. Das gleiche gilt bei der Ausfuhr von Gegenständen, die nur zur vorübergehenden Verwendung oder nur zur Durchfuhr eingeführt worden sind und für die keine Einfuhrumsatzsteuerschuld entstanden ist.

(2) Absatz 1 Nr. 1 und 2 findet auch Anwendung, wenn im Sinne der §§ 6 und 7 des Umsatzsteuergesetzes ein ausländischer Abnehmer oder Auftraggeber nicht vorhanden ist oder der Ausfuhrnachweis oder der buchmäßige Nachweis nicht erfüllt ist.

(3) Werden in den Fällen des Absatzes 1 Nr. 1 durch die Ausfuhr eines Gegenstandes mehrere Ausfuhrlieferungen bewirkt, so ist Unternehmer im Sinne des Absatzes 1 der Unternehmer, der die erste Ausfuhrlieferung bewirkt hat. Satz 1 ist in den Fällen des Absatzes 2 entsprechend anzuwenden.

(4) Die Vorschriften über den gesonderten Ausweis der Steuer in einer Rechnung und über den Vorsteuerabzug (§ 14 Abs. 1 und § 15 des Umsatzsteuergesetzes) sind nicht anzuwenden.

(5) Die Absätze 1 bis 4 finden auf die Ausfuhr von Gegenständen in die Zollanschlüsse keine Anwendung, soweit diese Gegenstände dort verbleiben. Das gleiche gilt für die Ausfuhr der in § 4 Nr. 8 und 17 des Umsatzsteuergesetzes bezeichneten Gegenstände.

§ 3

Bemessungsgrundlage

(1) Die Bemessungsgrundlage ist

1. in den Fällen des § 2 Abs. 1 Nr. 1 und 2 das vereinbarte Entgelt. Dieses Entgelt erhöht sich um die Bemessungsgrundlage für die Einfuhr eines Gegenstandes, der dem Unternehmer zur Bearbeitung oder Verarbeitung zur Verfügung gestellt worden ist, wenn für die Einfuhr des Gegenstandes eine Vergütung nach § 1 gewährt wurde. Werden Bearbeitungen oder Verarbeitungen von mehreren Unternehmern bewirkt, so ist die Hinzurechnung bei demjenigen Unternehmer vorzunehmen, der die erste Bearbeitung oder Verarbeitung des eingeführten Gegenstandes vornimmt,
2. in den Fällen des § 2 Abs. 1 Nr. 3 der gemeine Wert.

(2) Die Umsatzsteuer und die mit der Ausfuhr verbundenen Beförderungskosten einschließlich der mit der Beförderung zusammenhängenden Nebenkosten gehören nicht zur Bemessungsgrundlage.

§ 4

Steuersätze

Die Steuer beträgt vier vom Hundert der Bemessungsgrundlage. Sie ermäßigt sich auf zwei vom Hundert für die Ausfuhr der in der Anlage 1 zum Umsatzsteuergesetz bezeichneten Gegenstände.

§ 5

Entstehung der Steuerschuld, Verfahren

(1) Die Steuerschuld entsteht mit Ablauf des Voranmeldungszeitraums (§ 18 Abs. 2 des Umsatzsteuergesetzes), in dem die Ausfuhr bewirkt worden ist.

(2) Für die Berechnung, Veranlagung, Voranmeldung und Entrichtung der Steuer sind § 16 Abs. 1 bis 4 und § 18 Abs. 1 bis 4 des Umsatzsteuergesetzes entsprechend anzu-

wenden. § 22 Abs. 1 des Umsatzsteuergesetzes ist mit der Maßgabe anzuwenden, daß aus den Aufzeichnungen des Unternehmers die Bemessungsgrundlage, der Zeitpunkt der Ausfuhr sowie die Menge und handelsübliche Bezeichnung des ausgeführten Gegenstandes zu ersehen sein müssen.

AUSNAHMEN

§ 6

Marktordnungswaren

Die Vorschriften der §§ 1 und 2 sind auf die in der Anlage zu diesem Gesetz bezeichneten Gegenstände nicht anzuwenden.

§ 7

Freihafenverkehre

(1) Steuerfrei ist die Ausfuhr eines Gegenstandes, der im Rahmen eines zollamtlich bewilligten Freihafen-Veredelungsverkehrs (§ 53 des Zollgesetzes vom 14. Juni 1961 — Bundesgesetzbl. I S. 737 — in der jeweils geltenden Fassung) oder einer zollamtlich besonders zugelassenen Freihafenlagerung (§ 61 Abs. 2 des Zollgesetzes) in einen Freihafen verbracht wird, wenn der Gegenstand, der daraus hergestellte Gegenstand oder Ersatzgut (§ 53 Abs. 1 des Zollgesetzes) nachweislich in das Inland eingeführt wird oder sich bei Außerkrafttreten des Gesetzes noch im Freihafen befindet.

(2) Eine Vergütung nach § 1 wird nicht gewährt, wenn ein Gegenstand wieder eingeführt wird, der im Rahmen eines zollamtlich bewilligten Freihafen-Veredelungsverkehrs (§ 53 des Zollgesetzes) oder einer zollamtlich besonders zugelassenen Freihafenlagerung (§ 61 Abs. 2 des Zollgesetzes) in einen Freihafen ausgeführt worden ist. Sie wird gleichfalls nicht gewährt für Gegenstände, die aus den in Satz 1 genannten Gegenständen hergestellt worden oder Ersatzgut (§ 53 Abs. 1 des Zollgesetzes) sind.

ÜBERGANGSREGELUNG

§ 8

In den Fällen des § 2 entsteht keine Steuerpflicht bei der Ausfuhr von Gegenständen, die in Erfüllung von vor dem 23. November 1968 abgeschlossenen Verträgen bewirkt worden ist. Steuerpflichtig sind jedoch

1. Ausfuhren auf Grund von Verträgen, die am 23. November 1968 keine endgültigen Preisabsprachen enthielten (insbesondere Vorverträge, Rahmenverträge, Verträge mit Preisvorbehalts- oder Preisgleitklauseln oder mit Steuerklauseln) und
2. Ausfuhren, die nach dem 23. Dezember 1968 bewirkt worden sind.

ERMÄCHTIGUNGEN

§ 9

(1) Um die Erfassung der in § 2 bezeichneten Ausfuhren sicherzustellen, kann der Bundesminister der Finanzen durch Rechtsverordnung anordnen, daß der Ausführer (§ 8 Abs. 1 der Außenwirtschaftsverordnung vom 22. August 1961 — Bundesgesetzblatt I S. 1381) der zuständigen Zollstelle zusammen mit der Vorlage des Ausfuhrscheins oder der Ausfuhrkontrollmeldung (§ 8 Abs. 3 und § 15 Abs. 6 der bezeichneten Verordnung) die Angaben macht, die für die steuerliche Behandlung von Bedeutung sind.

(2) Die Bundesregierung wird ermächtigt, durch Rechtsverordnung

1. zu bestimmen, daß die Vorschriften der §§ 1 und 2 nicht mehr anzuwenden sind, oder
2. die in diesem Gesetz festgelegten Vomhumdertsätze (§§ 1 und 4) gleichmäßig zu senken,

wenn die beim Inkrafttreten dieses Gesetzes drohenden Gefahren außenwirtschaftlicher Störungen des gesamtwirtschaftlichen Gleich-

gewichts nicht mehr bestehen oder die gesamtwirtschaftliche Lage, insbesondere die Erfordernisse eines hohen Beschäftigungsstandes und eines angemessenen Wirtschaftswachstums, dies verlangt.

(3) Der Bundesminister der Finanzen oder die von ihm beauftragte Stelle kann unbeschadet der Vorschrift des § 131 der Reichsabgabenordnung die Steuer gemäß § 2 im Einzelfall ermäßigen oder erlassen, soweit der Unternehmer nachweist, daß er durch Entrichtung der vollen Steuer auf Grund von bereits am 23. November 1968 bestehenden Verträgen bei den in Betracht kommenden Einkunftsarten im gesamten Veranlagungszeitraum einen Verlust erlitten hat. Soweit der Unternehmer im Verlauf des Veranlagungszeitraums durch Vorlage geeigneter Unterlagen einen voraussichtlichen Jahresverlust auf Grund der Entrichtung der Steuer glaubhaft macht, kann der Bundesminister der Finanzen oder die von ihm beauftragte Stelle die Steuer stunden.

(4) Die Bundesregierung wird ermächtigt, um eine gleichmäßige Behandlung der Gegenstände sicherzustellen, die einer Marktordnung der Europäischen Wirtschaftsgemeinschaft unterliegen, durch Rechtsverordnung die Anlage zu diesem Gesetz um diejenigen Gegenstände zu erweitern, die nach Inkrafttreten dieses Gesetzes einer solchen Marktordnung unterworfen werden.

GELTUNG IM LAND BERLIN

§ 10

Dieses Gesetz gilt nach Maßgabe des § 12 Abs. 1 des Dritten Überleitungsgesetzes vom 4. Januar 1952 (Bundesgesetzbl. I S. 1) auch im Land Berlin. Rechtsverordnungen, die auf Grund dieses Gesetzes erlassen werden, gelten im Land Berlin nach § 14 des Dritten Überleitungsgesetzes.

INKRAFTTRETEN

§ 11

Dieses Gesetz tritt am Tage nach seiner Verkündung in Kraft und mit Ablauf des 31. März 1970 außer Kraft.

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TAXATION WITH TEARS

The Bureau recently received two small booklets having the intriguing and significant title "Taxation with tears". The author is G.L. Borg who is a tax attorney in Malta.

The first booklet comprises the text of a talk delivered under the auspices of The Royal University of Malta in May 1968, concerning the frustration and disillusionment arising from the misapplication of the Malta Income Tax. The main source of discontent is the widely held view that the public is unable to present adequately its case before the Revenue.

The second booklet comprises some proposals on administrative changes, which were forwarded by Mr. Borg to the Secretary of the Income Tax Commission which had been set up to study and report to the Minister of Finance on changes required in order to achieve the simplification of the present system of income taxation. The first booklet seems especially valuable reading for anyone who is concerned with the application of tax laws.

In the spirit of the booklets the tears can be seen as flowing not only as a result of the behaviour of the tax investigation officials who, as Mr. Borg describes them, regard themselves as the champions of a society struggling single-handed with breaches of the law and who practise a discriminatory interpretation of certain provisions of the Income Tax Act. The discontent also arises as a result of the continued non-publication of tax appeal reports and the suppression of information as regards departmental practice.

Malta is not the only country suffering from these problems. The lack of information as regards departmental practice is a complaint, which is frequently expressed even in more developed societies. Clarity and openness in fiscal matters are essential in order to counteract the potential which exists in a tax system for it to be used as an instrument of tyranny.

DR. J.C.L. HUISKAMP

H.W.T. PEPPER:

POLL TAXES, PAYROLL TAXATION, AND SOCIAL SECURITY

II*

TRANSFERABILITY AND COMPATIBILITY OF RETIREMENT RIGHTS

General

130. The more enlightened and progressive employers often devise a generous pension or provident scheme as one of the fringe benefits intended to attract and retain high-calibre employees. Civil servants in many countries are entitled to (non-contributory) pensions on retirement but may lose all pension rights if they leave their employment before retirement age[14].

131. In both cases the conditions of employment are designed to promote employee loyalty, and continuity of service, which of itself is an asset to an employer, who incurs considerable expenditure on advertising, recruitment, training and absorption in connection with new staff if he has a high rate of staff turnover. A somewhat restrictive[14] pension entitlement is the price a civil servant pays for some compensating advantages e.g. security of employment and better-than-average holidays.

132. In order to secure a properly ordered system of benefits on retirement for employees in general, however, taking private and government employment retirement schemes together, it is necessary that an employee who changes his job should be able to have transferred with him the pension entitlement which accrued during his previous service. Provided these partial accumulations of pension rights can be aggregated for the purpose of ensuring complete benefits on retirement, no burden need fall on the State's social security apparatus for this class of employee. The State may of course be involved as *employer* but this is a different matter.

Compatibility

133. In order that the various component contributions under different pension schemes, including notional contributions in the case of non-contributory schemes, may be assembled into a whole for the purpose of computing a pension, there has to be some degree of compatibility among all such schemes. This compatibility would exist, for example, in the rare circumstances that all the employers of a particular employee during his entire career happened to have retirement schemes operated by the same insurance company, or if all the employers provided retirement benefit in the form of a lump sum cash payment, the accumulation of which was based simply on the actual contributions in cash by employer and employed plus interest.

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* The first part has been published in the January 1969 issue.

14. In a number of countries a civil servant who leaves before retirement age has no pension entitlement. This is mitigated in some cases, e.g. in the United Kingdom, by a provision that where a person reaches the age of 50 before leaving government service, the pension he would have drawn at 60 or later (appropriately abated because of the reduced length of service) may be frozen until he reaches full retirement age.

134. Failing the coincidental compatibility just referred to, compatibility could be achieved fairly simply by inserting a clause in all retirement benefit schemes making plain the exact form and value of accrued entitlement which will be transferable when an employee leaves his employment before retirement age. Whatever has been subscribed by employer and employee during the contribution period whether as a simple cash accumulation or as a premium to secure pension entitlement, is capable of being given a cash value or an equivalent in terms of insurance value which can be taken into account by the receiving pension scheme of the new employer. This can, if necessary, be achieved by passing compelling legislation.

Transferability

135. The question of transferability may be a harder nut to crack, because some retirement schemes (including those for civil servants in some countries) were designed specifically to make it more worthwhile for employees to remain in their jobs than seek a fresh post. Perhaps the best answer to this problem is that efficiency is not best served by keeping employees against their will. If the pay and terms of employment are not sufficiently attractive to retain an employee, which means usually that his talents would be better rewarded elsewhere there should be no "tied benefits" obstacle to his moving.[15]

136. Accordingly it appears desirable that transferability of employees with accrued employment benefits should be secured, if necessary by legislation in the general case. This does not preclude the imposition of restrictive covenants by employers in special circumstances. For example, a civil servant who had been given expensive education or training to acquire certain scientific or professional skills which would have a substantial value in the private sector might reasonably be bound before undergoing the training by a covenant for 5 years or longer to serve Government for that minimum period when he returns. Similar considerations would apply in the private sector e.g. where an employee was likely to be working on secret processes etc. which had been developed by his own firm but knowledge thereof would be valuable to a rival firm whom the employee wishes to join.

ACCOUNTING FOR CONTRIBUTIONS

137. Certain social security benefits are traditionally linked specifically to the contributions made by the beneficiary. For example, unemployment or sickness benefit may become payable only after the contributor has qualified by contributing for a minimum period of, say, six months, and the benefits themselves may be limited in time. Such restrictions are necessary (a) to preserve the

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15. An example of deferred benefits being employed in a somewhat different context was encountered in the Solomon Islands where the problem is sometimes that of securing continuity of labour, e.g., on coconut plantations. There was a tendency in some areas for workers not to transfer to other employers but to return to their villages after a few months work. One plantation evolved a scheme whereby standard wages were increased each year for a period of 10 years. In addition 10% was withheld from pay and held on deposit along with an equal contribution by the employer. On leaving "prematurely" the employee would collect only his own accumulated contributions but could collect the whole sum accumulated if he served 10 years or more or if he were dismissed earlier on grounds of redundancy. The scheme, which also provided for holidays on full pay, was successful in maintaining an adequate labour force.

solvency of the fund, and (b) to prevent abuse arising from malingering by work-shy contributors. In other words what is provided is an insurance scheme where the benefits are necessarily limited by the available funds. The funds are built up in times of full employment and diminished in times of economic depression and of epidemics of sickness.

138. Preservation of the insurance principle is probably desirable in that this ensures that a close watch will be kept on abuse. The national insurance of unemployment and sickness is only intended to cope with involuntary unemployment and sickness. "Voluntary" cases where the contributor unduly prolongs his absence from work beyond what is really necessary for recovery from sickness, or fails to keep a job for reasons under his own control, such as lack of punctuality, or dishonesty, are not within the scope and intention of the scheme. The device of a limitation of the period of benefit is some, though not a complete, safeguard against fraud. After the expiry of the benefit period cases are transferred to be dealt with, if appropriate, by public assistance funds derived from general revenue.

139. Other types of social security benefit such as the "instant" benefit of a free visit to a doctor's consulting room, may be available without a qualifying period because there is little danger of abuse and no question of building up funds to pay out in weekly maintenance benefits. In fact, in the example quoted, the doctor's fee may be "commuted" by capitation fees paid globally for a large number of patients only a proportion of whom may actually take advantage of the free service in the course of any particular year.

140. Keeping records of *all* contributions made by all contributors in respect of each of the various benefits they pay for would obviously be a tremendous task and obviously also it would serve little purpose in the case of the instant benefits which do not lend themselves to funding nor to serious abuse by the contributor.

141. While it is vital to keep the total cost, for example, of free health services, in step with the contributions that pay for them, retention of records of individual contributions is not really necessary.

142. On the other hand it is usual to relate state retirement pensions, which are provided on a contributory basis, to a certain length of contributory period, which entails records of individual contributions being kept in a greater or lesser degree of detail. In Britain, for example, the entitlement to the basic retirement pension is related to the number of *weeks* the pensioner has been contributing, as evidenced by insurance cards on which stamps have been gummed. As time goes on, however, and the potential beneficiaries become more and more a body of persons who have been contributing during the whole of their working lives, the danger of pensions being claimed by those who have not fully contributed for them recedes. The point may possibly come when the administrative cost of recording and checking the qualification for pensions may exceed the possible losses by fraudulent claims, which could in any event only be made by those over sixty-five years of age. This would certainly become the case eventually for employees if the principle of a flat-rate "subsistence" retirement pension were retained leaving it to separate private or State schemes to supplement the basic pension the entitlement to which might be proved merely by proof of age and of residence.

143. The future, however, is certain to see the extension of earnings-related pension and other retirement benefits. When two men retire at the same date, one of whom has

been earning £5,000 a year, and the other £500 a year, a pension which would be just adequate for the latter would be inadequate for the former. No modern society on either side of the Iron Curtain is so egalitarian that it has a smaller gap than a 1 : 10 ratio between the lowest and highest salaries including fringe benefits. Where the more provident employees have been in the habit of making their own private provision in proportion to earnings it is unlikely that any general scheme which "took over" the full responsibility in a country for all retirement benefits on which the pensioner would expect to live could do other than take proportionate account of the earnings of the respective pensioners. Another factor likely to complicate book-keeping is the probable increase in mobility of labour across frontiers and of reciprocal arrangements so that one country will become responsible reciprocally for the retirement pensions of employees who have spent material parts of their working lives in the territory of the other country which is party to the arrangement.

144. Where the pension falls short of what is deemed to be the minimum required, in the transitional period, during which those qualifying for pension will not have contributed for a long enough period at the full rate required for full benefit, it is likely that the balance, at least up to subsistence level, will be made up by the State from funds appropriated from general revenue.

145. As time goes on and a larger and larger proportion of beneficiaries come to have made full provision by their contributions for retirement the need for separately recording the contributions of each diminishes even in the case of earnings-related pensions. It might, for example, be possible at some stage to adopt (over the range of taxable incomes) the records of the income tax administration, for the three-year period before retirement, or whatever other base period is chosen for computing pension eligibility, thus obtaining automatically the advantage of a check on the sums declared as earnings for income tax purposes. As understatement for income tax would reduce the pension below the figure that the true earnings would have justified the cross-reference between social security and income tax will have beneficial effects on the administration of each.

146. Advanced costing methods may in the future indicate possible scope for abandoning customary but uneconomic record-keeping on an individual basis in some social security sectors. Moreover the development of computers for general statistical purposes may in some cases produce a low-cost by-product of data which will be of use to the social security department in checking the costs of benefits against contributions and assist in keeping general financial control at minimum cost.

ECONOMIC IMPACT OF PAYROLL TAXATION

Burden of Payroll Contributions:

147. Some useful discussion on the impact of increased social security contributions (broadly similar to the imposition of pure payroll taxation) took place after the Beveridge Report[16] (which provided for flat rate contributions and benefits) was published in 1942 in the United Kingdom.

148. The main causes for contention at that time were the potential burden on employees and/or employers and the possible effect on

16. Report "Social Insurance & Allied Services". Sir William Beveridge. H.M.S.O. Cmd. 6404.

exports. Professor N. Kaldor[17] argued that the employers' contributions and those of the employees both fell upon the employees because the former was "a tax on wages which enters into the prime costs of production and it raises the prices of commodities in the same way as any other increase in prime costs. A tax on wages tends to raise prices not merely by the amount of the tax but in proportion to the increase in prime costs it represents". Subject to a qualification regarding exports, Professor Kaldor considered that practically the whole burden fell on employees, the majority of whom were manual workers.

149. Professor A.C. Pigou[18] pointed out that the redistributive effect, achieved at a comparatively trifling administrative cost, involved a substantial gain in human welfare achieved by transferring purchasing power from less to more needy citizens—including those with large families. The general consensus seemed to be that since the scheme was mainly redistributive (see paras. 118 et seq.) altering somewhat the incidence of expenditure on welfare, rather than a plan to increase the total expenditure materially, there should be little net impact on manufacturing costs (but see also para. 160).

150. *Development of "economic" payroll taxation in U.K.*

A plan for a payroll tax designed as an economic regulator in conditions of labour shortage was projected in Britain in 1961 as a proposal by the then Chancellor, The Hon. Selwyn Lloyd, in Clause 26 of the Finance Bill of that year. It was designed to raise £200 million by means of a 4/- per capita levy (known as a "surcharge") on all employees in respect of whom National Insurance was payable.

151. A payroll tax had in fact previously been suggested, inter alia, by Sir Oliver Franks, Chairman of Lloyds Bank in his statement in January, 1961 on the bank's trading results. He advocated the tax as a means of encouraging the use of labour in capital-heavy rather than labour-heavy industries.

152. The Selwyn Lloyd proposal was not for the immediate institution of the tax but the creation of powers authorising the Treasury to impose such a tax if it considered it expedient to do so "with a view to regulating the balance between demand and resources in the United Kingdom".

153. The flat rate proposals of the Beveridge Plan (which were accepted by Government) derived partly out of the historical development on similar lines of privately financed social security provisions, which the national scheme was intended to replace. The case for flat rate contributions for social security purposes is discussed above in paragraphs 71 et seq.

154. *Introduction of Selective Employment Tax*

The Selwyn Lloyd proposal for a payroll tax as an economic regulator was also for a flat-rate levy (4/- per week per capita) and the flat rate principle (varying the rate only between male and female employees[19]) has been adopted in the Selective Employment Tax (SET) introduced in Britain in September, 1966. The SET combined the levies on employees in general (25/- per capita for males and 12/6d.per capita for females) with exempting provisions for certain types of

17. Article in Manchester Guardian 10th and 11th February, 1943 "Beveridge Plan's Real Cost".

18. Article in Manchester Guardian 7th and 8th June, 1943 "Costs and the Beveridge Plan".

19. An amendment in 1967 halved the charge for a part-time employee where the weekly hours of work did not exceed 21. An amendment in 1968 increased the rate for males from 25/- to 37/6 d. from September, 1968.

economic activity and bonuses of 7/6d. per head in respect of employees in industry. The economic motivation of SET—it was designed to encourage the movement of employees from service industries to productive industry—was enhanced by another device, REP (Regional Employment Premiums), designed to encourage industry to move to certain locations.

Graduation of Social Security Levies

155. The graduation of social security contributions partly as an economic measure, had been advocated by the National Economic Development Council in its 1963 report on "Conditions Favourable to Faster Growth". The Council adduced the following reasons for graduation-

(a) graduation would ensure that revenue would increase automatically with rising earnings and economic expansion;
(b) a higher level of benefits in relation to earnings would be practical and would reduce the financial hardship of unemployment; and
(c) graduation "would also bring more directly into industrial calculations the costs, in relation to the advantages, of a trained and skilled working force".

156. Since 1963 the graduation principle in social security benefits in the U.K. has been partly achieved by additional measures separate from the main national insurance scheme, e.g., the supplementary pensions scheme and the schemes for earnings-linked sickness and unemployment benefits, and redundancy benefits.

Although the graduation of payroll tax with the wage level solves the problem of the oppressive impact of fixed levies on low-paid, part-time, or handicapped workers the administrative expense would be increased compared with that incurred in the British SET. Collection costs for SET are at present minimised by using the machinery already employed for collecting the flat-rate contributions for national insurance. In effect, considerations of what is administratively feasible have played at least a minor part in shaping the incidence of the tax.

157. It had long been suggested in Britain that there was scope for extending turnover taxation from certain consumer goods to various "consumer" service industries. Turnover taxation on consumer goods actually consisted of a tax at wholesaler level (known as "purchase tax") which could not readily have been applied without modifications, say, to hairdressing, and stockbroking. In addition a general payroll tax had, as mentioned, been proposed because low manpower productivity and overmanning were regarded as fairly general faults in the U.K. economy.

158. The SET, as a selective[20] tax, has been criticised as likely to encourage overmanning in the industries entitled to premiums or "labour subsidies" under the taxing arrangements. There has been the usual problem associated with selective taxation of deciding whether to tax borderline cases. It is not yet clear that the tax is producing results, in the way of encouraging more efficient use of labour, better than those which might have been obtained by a general tax of lower amount, evenly spread over all labour costs. SET has in practice been passed on to the consumer in higher prices, broadly in the same way as a sales tax, but some service industries, e.g. department stores, have complained of erosion of profits because of the time-lag between the imposition or increase in the tax and the recoupment by price increases.

20. E.g., manufacturing industry is in general exempt and instead receives a premium which is enhanced in the less developed regions.

159. Other examples of payroll taxation as a deliberate economic regulator are rare. To a minor extent payroll tax in Australia and Malaysia has an economic function although its main purpose is to raise money for social security. In Australia payroll tax is raised to pay for family allowances; in Malaysia it is intended for general social services including hospital expenditures but is not specifically earmarked for this. Both countries abate payroll tax to encourage exports, Australia by giving relief proportionate to the excess of actual exports over the level for a previous year. Malaysia abates payroll tax pro rata where 20 per cent or more of industrial production is exported.

160. The obverse of the above occurred in 1966 in Italy—the Government considered that payroll taxation (all based on specific social security provisions but which may be as high as 30 per cent to 50 per cent of the payroll) was depressing industry and trade unduly. The Government accordingly undertook to pay some of the burden from national sources—specifically out of government securities to be issued to cover the rebates. France, in the draft Finance Bill, 1969, presented on 4 September, 1968, by the French Council of Ministers, is proposing to reduce its payroll tax rates—at present 5 per cent on salaries up to Fr. 30,000, 10 per cent on the part between Fr. 30,000 and Fr. 60,000 and 16 per cent on the excess over Fr. 60,000—to 4.25 per cent, 8.5 per cent, and 13.6 per cent. The example of the "regional" abatement provided from the British R.E.P. (Regional Employment Premiums) referred to above (paragraph 158) has been recently followed in Italy by a law introduced in August, 1968, whereby a substantial abatement (12½ per cent of Payroll) in respect of payroll levies is to be granted to employers with more than 35 employees who carry on their activities in the underdeveloped region of the Mezzogiorno.

161. *Payroll taxation, subsidies on capital industrial expenditure*

If payroll taxation is used deliberately as an incentive to economy in the use of labour, by making labour dearer, it may be noted that a somewhat similar effect may be produced by cheapening productive capital (factories, machinery, etc.) by subsidies or tax reliefs which make labour expensive by comparison. In conditions of full employment both incentives would be likely to have an impact although it would appear that payroll taxation should come first, the revenue generated then perhaps being used to subsidise mechanisation, modernisation, or automation.

162. In developing countries where there may well be a pool of unemployed labour, moderate payroll taxation is more likely to be useful for ordinary fiscal purposes. Subsidies for new factories and machinery will have the additional justification, as far as pioneering enterprises are concerned, that the cost of setting up a new industry in a non-industrial country will be more expensive than the comparative cost in (a) a more developed country and (b) in the same developing country at a later stage in its development.

163. *Comparison between payroll and turnover taxation*

One of the justifications for the British SET form of payroll taxation on labour employed in service industries is that there is no turnover taxation (purchase tax) on the turnover of these industries, whereas purchase tax *is* applied to commodities. Payroll tax is in a sense a tax on added value, assuming the added value to be equal to the cost of the labour employed. In contrast a turnover tax would be levied (at a lower rate for the same

revenue yield) on the gross sale price including basic costs, labour and profit.

164. There will be a difference in impact of payroll tax such that a luxury industry which employs a high mark-up on costs in its pricing policies will be favoured compared with an industry where the profit factor is only a small part of the gross earnings. This difference in impact could be compensated for by applying different rates of payroll tax to different types of industry corresponding inversely to the labour content in costs but not without undue administrative complication. Accordingly where it is desired to produce revenue, turnover taxation is to be preferred as having a more even impact where it can be effectively administered. Where tax is to be levied on services, however, this presupposes a tax at the retail level which, in a developing country, because of the comparatively large number of traders involved, and the need to set up a new administrative structure, may be more troublesome to administer than a payroll tax operated on the basis of an existing PAYE or State pension scheme.

165. *Administrative problems*

Economy in administering a payroll tax is, of course, most likely to be obtained by imposing a simple flat-rate levy on the total cost of labour including fringe benefits. In practice, other methods of achieving economy have been employed. For example, in Britain, as mentioned above, the new levy was merely added to existing levies and collected with existing machinery, the "poll tax" nature of the levy being modified by applying reduced rates to female, and to part-time, employees, and by refunding with or without premiums the tax paid by selected industries and in selected areas. In Malaysia, the 2 per cent payroll tax was at first collected by using the machinery of the established State provident fund and later transferred to be collected along with PAYE deductions for income tax.

166. Fixed levies per head avoid problems of valuing fringe benefits which are to be taxed although the valuation problem has in any event to be fixed for income tax assessment purposes. On the other hand, fixed levies are likely to be less productive because the level chosen must not be so oppressive as to make it uneconomic to employ part-time workers or those who, for reasons of age or health, are below average in their productivity. On the other hand, a percentage levy produces a yield which increases whenever emoluments increase and does so "automatically" without the need to legislate for additional contributions.

167. Whether the tax is merely a social security levy, designed to keep the revenue and reserves in balance with the liability for benefits, or a straightforward fiscal levy is a factor in determining the details of the impost and its administration. To provide a retirement pension based solely on cash emoluments it is only necessary to "tax" cash emoluments in order to provide the necessary funds. On the other hand, fiscal taxation on emoluments must take account of fringe benefits so as to remove an obvious device for legal avoidance. Where fixed and equal basic benefits are to be provided it may be appropriate to make charges of the same type on the potential beneficiaries.

168. *Examples in practice*

In practice the methods employed by countries which use payroll taxation extensively vary considerably and in general one does not usually find the simplest concept of a flat percentage on total payroll in evidence. This may to some extent be due to the fact that payroll levies have evolved slowly over a lengthy period and represent in many

countries a patchwork of different schemes which have been introduced successively to cover different aspects of social security. France (see paragraph 160) graduates the rate of tax according to the level of the individual salary, the *rate* increasing with the salary level. Peru collects 3½ per cent on employees' salaries up to Sol. 7,000 for Health insurance and 2 per cent for Pensions but nothing on the balance of salary above Sol. 7,000 from the employer. The employee's contributions are respectively 3 per cent and 1 per cent on salaries up to S. 7,000 and 2.1 per cent and NIL on salary between S. 7,000 and S. 14,000 with no charge on the excess over S. 14,000. Puerto Rico has a 2.7 per cent unemployment tax on employers charged only on the first $3,000 of wages and a series of levies for workmen's compensation insurance which are charged on the first $5,200 only of salaries and are charged at different rates according to the degree of danger in the occupation (from 10 cents per $100.00 for office workers to $10.00 per $100.00 of wages for quarry workers). Canada makes equal levies for unemployment insurance on employer and employee, the charge varying from 10 cents to 94 cents per week according to the earnings level, the benefits being also fixed on a scale of $6.60 (minimum) for a single person to a maximum of $36.00 per week for a beneficiary with dependents on a scale which is related to the level of earnings as well as the number of dependents. As with other Beveridge-type schemes this one provides merely basic relief and the same applies to the new Canadian Pension Plan, financed by 1.8 per cent levies on employer and employee up to a maximum salary level of $5,000 per annum which will provide eventually a maximum monthly pension of $104.17 after a ten-year transitional period. Japan also has a salary ceiling (Y 6,760 per month for Health contributions, and Y 3,300 per month (males) for Welfare and Pension) to its contributions of 3.25 per cent and 2.75 per cent respectively by employer and employee but has no ceiling on Unemployment contributions which total 1.4 per cent of standard monthly salary payable in equal shares by employer and employee.

169. *Graduation of Payroll Levies*

The limitation of payroll levies by reference to a ceiling salary level (a refinement of the fixed levy to provide fixed benefits) employed, as noted above, by Peru and Puerto Rico, is adopted fairly widely. Belgium uses a wages ceiling of B.Fr. 9,400 per month for unemployment, industrial diseases, and invalidity compensation and of B.Fr. 12,925 per month for family allowances and health insurance, but has no ceiling on contributions for pensions and holiday pay. Germany limits (by income) the employees falling compulsorily within certain spheres of social security insurance. Only those earning not more than Dm. 900 per month are compelled to be covered for sickness benefits, those with not more than Dm. 1,800 per month for retirement benefit and those with Dm. 1,250 or less for unemployment benefit although contributions for the last of these are only charged on the first Dm. 750 of salary (at 2 per cent, paid in equal shares by employer and employed). Spain levies contributions on payroll for a series of benefits by a percentage charge without ceiling and with the preponderating contribution being made by the employer. Norway has graduated contributions for a "package" covering health insurance, old age pension, disability and unemployment insurance which are in five specific amounts graded according to income level but with an effective ceiling at Kr. 25,000 above which the levies on employer and employee re-

main unchanged. In contrast, Sweden collects social security insurance from employers at a percentage on total payroll without ceilings.

170. It will be noted that graduation is employed in two opposite ways in determining social security contributions—in the French example the *rate* increases with higher incomes[21], in other cases the *rate* of contribution decreases as salary increases either because the contribution is in a fixed amount (e.g. Britain, Malta) or because no levy is made above a certain ceiling figure.

171. Obviously the cause of redistribution (see paragraphs 118-120) is better served by percentage levies on employees than by fixed contributions, whether the benefits themselves are fixed or graduated, because these will accord more precisely with ability to pay. Redistribution is not, however, an issue with regard to the employer's contribution unless there is evidence that the level of remuneration will be affected by the payroll levy.

172. Normally payroll tax will be passed on by the employer to the consumer and it is only where he is unable (perhaps only in the short run) to shift the burden that his remuneration policy may be affected. In general, competition among employers for the higher technical and managerial skills will be enough to maintain high remuneration for key personnel. The employer is likely to look to ways of legal avoidance by fringe benefits, stock options, etc. if he feels the rate of tax on the upper echelons of employees unduly onerous, rather than try to reduce salaries.

173. In principle the graduation upwards of rates of payroll taxation does not appear to be a worthwhile contribution to redistribution of wealth. The employer-employee relationship is being additionally taxed compared with a partnership or a contractor-sub-contractor relationship. Moreover there is a stronger case at least for limited tax neutrality, by way of levying a flat percentage on total payroll which would tax different employers equally on equal payrolls leaving them the freedom to determine how the work-force should be made up and remunerated. If it is desired to tax the higher-paid employee more heavily than the lower-paid it is better to levy income tax directly in the same way as is done in the case of individuals with income other than from employment, leaving payroll taxation to serve as a tax on labour as a factor of production.

174. *State Contributions*

It has already been mentioned that the best policy for a developing country, newly entering the social security field or extending the scope of existing provisions, is to limit as far as possible governmental commitments towards contributions or subsidies to such funds (see paragraph 109). Practice varies from the tripartite principle (preserved by Beveridge but already in existence in the pre-Beveridge schemes in Britain) of contributions from employer, employee and State, to benefits provided solely by the State in certain oil- or mineral-rich countries, and in some instances to wholly employer-provided benefits (e.g. family allowances in Belgium).

175. Comparative figures prepared for the European Common Market countries for 1959 to indicate the *average* State contribution to social security schemes showed that in France, Italy, and the Netherlands the

21. Note that France allows a flat-rate credit to the employee in respect of the employer's payroll tax. When the graduated rates were 5 per cent, 10 per cent, and 16 per cent, the credit to the employee against his personal tax on emoluments was at a flat rate of 5 per cent.

State contributed from 5 per cent to 7 per cent of the total funds, in Belgium the State's share was 30 per cent, and in West Germany and Luxembourg about 20 per cent. Some harmonisation will presumably be necessary so as to equalise the burden on competing industrialists in different countries in the Market (see also paragraph 160).

176. In Mexico, action was taken (effective 1st January, 1966) to increase by 25 per cent the employer's contribution under the Mexican Social Security Law and to reduce the State's contribution by a corresponding amount. The proportions were previously: employer 50 per cent; employee 25 per cent; government 25 per cent, and have now been changed respectively to 62½ per cent; 25 per cent; 12½ per cent. This action was along the lines of limiting the State's commitment (to be paid for out of general taxation) referred to above and in paragraphs 64 and 109.

177. Apart from the practical point that undue burdens may be placed on the Budget, with the possible disincentive effect of increases in general taxation, if the State does not strictly limit its commitments in respect of social security schemes for employees, there is the danger of imbalance between different sectors of the economy. Retirement pensions, for example, are likely to be provided at a much earlier stage for employees than for the self-employed (small business people and those who till small landholdings who will often be at a similar or lower income level than employees) because funds for the former can be more readily generated by payroll levies. If the State becomes involved in contributions to such schemes out of general taxation before the population as a whole is provided with retirement benefits, this is tantamount to having one section of the community subsidise the benefits of another section. The principle of neutrality, therefore, implies that as far as possible sectional schemes should be self-balancing, and financial prudence demands that national schemes should as far as possible be covered by contributions to avoid open-ended State commitments which might put undue pressure on the national Budgets.

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GREECE
THE NEW CODE ON FINANCIAL BOOKS AND DOCUMENTS

(The salient points)

I. INTRODUCTION

Every business in Greece must keep certain books and use certain documents as prescribed in the law. The lists of these are not exclusive and businesses can keep and use such additional books and documents as their internal system requires. What the law does is to set certain minimum standards with which no business can dispense. Moreover, these legal books are the official books of the business from which the financial results and balance sheets are extracted and are the only evidence that the tax authorities will recognize when they come to audit, for taxation purposes, the records of the business.

Another feature of the Greek system is that the prescribed books and documents must be legalized in advance. This means that, before being put into use, every book and every document must be stamped and controlled by the tax authorities. Books are legalized on payment of certain stamp taxes, but documents are legalized free of charge.

Books are legalized in the name of a specific person or company. A company, of course, is non-existent until it has been incorporated. All preliminary expenses, incurred prior to incorporation, cannot be recorded in the company's legal books because there are no such books. They can, however, be recorded in books legalized in the name of an individual involved in the incorporation of the company and later on, when the company has been incorporated, transferred en bloc to the legalized books of the company.

Non-compliance with the law is a very serious matter. Apart from fines and other sanctions, which will be discussed later on in this article, the tax authorities can "reject" the books of the business. This means that the business will be taxed, not according to the results as extracted from the books, but according to factors specified in the Income Tax law and which give a measure of discretion to the tax authorities.

The following notes are meant to introduce the foreign investor or tax specialist to the Greek system. They do not, in any way, pretend to be an analysis of the system, because such a task would need much more time than the time at the writer's disposal and, in any case, it cannot be confined to the limits of one article. Nor does this article attempt to interpret the law. This is the work of the Greek courts and there is a great amount of judicial interpretation. This article is, in fact, a summary of the main points of the new Code on books and documents.

This last sentence has a double meaning: (a) that anyone who wants to implement the Code must have in mind the original text and not this summary, and (b) that this Code is only one part of the taxation system; the taxation laws proper are found in such Codes as the Income Tax law, the Stamp Taxes law etc.

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the Gazette of the Government of the Kingdom of Greece on November 25, 1968, and came into operation on January 1, 1969. It replaces the old code and is termed "Code of Taxation Documents" (Kodix Forologikon Stichion). The selection of the "main" points was not, of course, made at random. It was consciously made, always having in mind the necessity of giving a very general guidance to the foreign investor in Greece. The investment laws of this country offer very attractive terms to foreign capital, but of course full compliance with all laws, including tax laws, is indispensable.

II. GENERAL

Every natural person, whether a Greek citizen or not, and every legal entity, whether incorporated in Greece or abroad, carrying on in Greece a trade, industry or profession with a view to profit, is under the obligation to use and keep the documents and books prescribed by the Code. This obligation extends to joint ventures. Certain classes of persons are exempted, such as persons whose income derives exclusively from rents, stocks and shares and salaries. Small farmers, fishermen etc. are also exempted, as well as small businesses as defined in the law.

Books and documents are kept in Greek. In the case of transactions with foreign countries, it is permissible to use a foreign language in the relevant documents. Foreign businesses operating in Greece can record their transactions in both Greek and a foreign language.

Books and documents must not be destroyed before the lapse of five years from the end of the financial year to which they relate. However, if a case is pending before the Tax Tribunals, the records must be kept until final settlement of the dispute.

Only the Tax Authorities have access to the books and documents. However, the Minister of Finance can give permission to other authorities, public or municipal, or other organisations, to have access thereto.

For the purpose of deciding what books they must keep, businesses are divided into two categories. (Under the previous law there were four such classes). Basically, the deciding factor is the level of the gross income of the business during the previous financial year. If this income is less than 6.5 million drachmas (about U.S. $ 217,000) then the compulsory books are of the first category (vide III below). If this income exceeds this level, then the second category books must be kept. If the previous financial period was shorter than twelve months, then the monthly income of the period, multiplied by twelve, is taken as a basis. A business which normally falls into the first category can, if it so wishes, keep books of the second category. All Greek companies with limited liability and all foreign companies and foreign insurance enterprises must keep books of the second class. Certain groups of taxpayers, whose net earnings are taxed, according to the Income Tax Law, by reference to their gross earnings (such as private schools, hotels etc.) can keep books of the first class even if they fall within the second class income bracket.

Books kept in conformity with the Mercantile Law, so long as they conform also to the requirements of the present Code, are considered as satisfying these requirements. However, spcial books prescribed for certain categories of businesses by special laws must continue to be kept.

As mentioned already, all books prescribed by this law must, before being used, be legalized by the Tax office of the district in which the business has its registered office. Branch books must be legalized by the Tax

Office of the district in which the branch is located. The necessary revenue stamps shall be affixed on the books at the time of legalization. Documents prescribed by this law will be legalized free of charge. Loose-leaf books can be kept provided they are consecutively numbered, each numerical series lasting not less than one financial year. The books are kept at the registered office of the business with the exception of branch books which must be kept at the branch. They must be neatly written in ink or by mechanical means and all entries must be properly supported. Accounts and products can be identified by code numbers, instead of using the full name. In this case a coding manual must be in existence which must be legalized in advance.

III. THE BOOKS AND THE DOCUMENTS

Article 14 describes in detail the books that must be kept by businesses falling into category I. Broadly speaking, a simple book, in which items of revenue and items of expense are distinctly and separately shown, is sufficient.

The books of the second category are, in fact, the conventional books kept on the "double entry" principle. They are:

(a) the journal: different journals can be used for different classes of transactions, such as cash, sales, purchases etc.;
(b) the general ledger, in which the accounts, as detailed in the law, are kept;
(c) a subsidiary ledger for each control account kept in the ledger; (of the subsidiary ledgers only the stock ledger must be legalized);
(d) a book in which inventory-takings and balance-sheets are recorded;
(e) the stock ledger, if this is necessary in accordance with the provisions of article 20;
(f) the production and costs book, if the provisions of article 22 render this necessary.

Certain additional books are also prescribed, if the nature of the business warrants it. One of them is the goods inward book. In this book, businesses must record all goods received and not accompanied by an invoice, as well as goods received on consignment, for storing on somebody else's behalf etc. This book is also used to record movements of goods among branches of the same company. The goods inward book can be substituted by legalized goods inward sheets but one such sheet must be issued for every receipt of goods. Businesses can dispense with this book if:

(a) on receipt of the goods (and before receipt of the invoice), they make a ledger entry recording the receipt of the goods at a nominal price; this entry must be reversed and the full price recorded on receipt of the invoice, or
(b) they record the quantities in the stock ledger, if one is kept.

Bill books must also be kept, if the business handles bills. Separate books are kept for bills receivable and bills payable. The details to be recorded in these books are specified in the law.

Some businesses are compelled to keep special books, detailed in article 19. These businesses are: theatres and cinemas, hotels, commission agents, cotton mills, private schools, clinics, parking lots and garages, tourist car offices and insurance companies. Article 20 details the circumstances under which businesses are compelled to keep a stock ledger. Generally speaking, businesses whose turnover during the preceding financial year exceeded 10 million drachmas must keep this book. The various items must be separately recorded and both quantities and values must be shown. Certain kinds of

businesses, detailed in the law, are exempted. It also appears that businesses whose retail sales exceed one-third of total sales are also exempted. (But they can be compelled to keep this book if their total sales exceed 25 million drachmas).

Businesses falling within the provisions of article 20 and which are engaged in manufacture must keep a book in which to record:

(a) the specifications of all products before production of those products starts, and changes to the specifications must also be recorded before starting production on the new specifications;
b) the consumption of raw materials and important auxiliary supplies used on each product during the financial year, as well as the quantities of goods produced during the same period (this information must be recorded within a month of the close of the financial year); and
(c) the total factory cost of each product, which must be recorded during the year or, at least, once at the end of the financial year.

This "production and cost book" is kept outside the accounting system. It must, of course, be legalized in the same way as any other book. However, if the accounting system is such as to reveal the information required by paragraphs (b) and (c) above, then this book is only necessary for recording the information required by paragraph (a) and can be dispensed with as far as paragraphs (b) and (c) are concerned. (Article 22).

A business can file an application with the Accounting Disputes Committee (vide V below) and ask that it be exempted in whole or in part from the requirements of articles 20 and 22. It can also ask that these requirements be fulfilled in a different way than that prescribed in the law (article 23). The article does not define the grounds on which such an application can be based, but it is thought that the business must prove the impossibility, because of the nature of its business, of complying with the law.

Articles 29 through 37 deal at length with the documents which businesses must use in order to support the entries in their books. These documents include, for example, retail chits, invoices, delivery tickets, debit and credit notes etc. The details in the law are too many to be mentioned here but it is a general principle that these documents must either be legalized or controlled in specified ways so that tax evasion is not possible. Similarly, articles 38 to 46 detail the documents, as well as their contents, that are necessary to accompany goods at transportation. Details are also given of the contents of bills of lading which carriers must issue upon taking delivery of goods to be transported. It is considered that these details are outside the scope of this paper.

Articles 24 through 28 specify the time limit within which each transaction must be recorded in the books. Generally speaking, these deadlines are very tight. For instance, cash transactions must be recorded within the day following the transaction. In the journal, purchases must be recorded within two days of receiving the vendor's invoice, sales within two days of issuing the invoice, and other transactions within five days of receiving or issuing the relevant documents. Entries in the general ledger must be made within the month following the month of the transaction. And subsidiary ledgers must be updated within 10 days of recording the transaction in the journal. The Tax Authorities can give, upon the business's application, small extensions to these deadlines.

IV. FINANCIAL PERIOD – INVENTORIES – BALANCE-SHEET – EVIDENTIAL VALUE OF RECORDS

The financial period extends to twelve months except when the business starts for the first time or terminates its activities in which cases the period can be shorter. It can also, at the start, be longer but in no case can it exceed 24 months.

At the end of each financial year, every business must take inventory of all its assets existing on the last day of the year. These assets must be recorded in the inventories book. The law speaks of all assets, not only goods for sale. In the case of goods for sale, however, the goods in each separate storing area must be separately taken and recorded. Goods belonging to third parties must also be inventoried and separately recorded.

Goods for sale are valued at cost or market value, whichever is the lower, but the basis adopted must be consistently followed. Fixed assets are shown, individually, at original cost plus improvements. Depreciation is recorded and deducted from this total and the net value is also shown. These details are not necessary in the case of furniture and fittings. In the case of assets totally depreciated, but still existing and owned by the business at the year end, they are recorded at the nominal value of one drachma. Doubtful receipts not totally written off as of the end of the previous financial year, are recorded at their original value and any amounts written off are deducted so as to arrive at the net value. There are also provisions for the evaluation of stocks and shares held by banks and for the evaluation of receipts and payments in foreign currency. For every financial year, a balance sheet must be prepared. Transactions affecting the year's results in any manner, but for which the documents came into the business's hands after the date of closing, must be reflected in the balance sheet.

So long as the sufficiency and integrity of the books and documents are established, the Tax Authority must accept the results extracted from them. If the Tax Authority considers the books and documents as insufficient, untrue or inaccurate, then it can reject them and assess the results in an outside-the books manner as described in the Income Tax law.

The books and documents will be considered as insufficient if the business keeps only some and not all those prescribed by the law; if it keeps records which have not been legalized; or if it keeps them in a manner different from that prescribed by the law, thereby rendering their audit impossible. The records will be considered as untrue when, from the evidence in the Tax Authority's hands, it can be proved that they do not reflect the true position.

V. THE COMMITTEE OF ACCOUNTING DISPUTES

Article 58 deals with the formation, duties and powers of the "Committee of Accounting Disputes". The members of the Committee are:

(a) a high official of the Ministry of Finance, as chairman;
(b) a division manager from the Department of Organization and Methods of the Ministry of Finance;
(c) an official from the Tax Commissioner's office;
(d) a sworn-in accountant; and
(e) a joint representative of the Chambers of Commerce and Industry of Athens, Piraeus and Thessaloniki.

The Committee decides, upon application of the interested parties, on the following:

(a) the definition and distinction of the various products, in cases where the Tax Authority and the business concerned have failed to reach agreement;
(b) the exemption of a business from, and the limitation or variation of, the obligation to keep a stock ledger and a production-costs book;
(c) the application of accounting principles, in cases where the Tax Authority and the business disagree; and
(d) on any other subject referred to it by the Minister of Finance.

A business can file a fully reasoned application within the first seven months of the accounting year or, in some cases, within the first nine months and can only refer to the business's obligations during the following accounting year. The Tax Authority can also, within the ninth month, file a fully reasoned application and request:

(a) the change of a previous decision of the Committee; or
(b) the solution of a dispute on accounting principles.

The interested parties can be present at the Committee's meeting and they can also expound their points of view. The Committee shall study both parties' arguments and all the other material at its disposal and shall also, at the business's request and expense, solicit the opinion of experts who can be from among its own members or third parties appointed by it and fully qualified. In deciding the case, the Committee has full discretion and is not limited to the content of the relevant applications. The Committee's decision is final and conclusive and can only be changed by a subsequent decision of the Committee upon application of one of the interested parties—but only if, in the application, it is proved that the circumstances on which the original decision was based have changed.

VI. SUNDRIES

1. *Returns to the Tax Authorities:*

Articles 47 to 53 deal with the returns which businesses must file with the Tax Authorities. It is not possible to discuss them in detail here but we shall just mention them and then we shall briefly discuss two of them in order to show the meaning of these returns. The list is as follows:

(a) return of documents issued by the business and return of stamp taxes and contributions paid;
(b) purchases and sales of agricultural products;
(c) sales on a whole-sale basis;
(d) compensation paid to third parties;
(e) bills of lading;
(f) shares and dividends; and
(g) import and export of goods.

The two returns under (a) above will now be considered. All businesses must, during the months of April, July, October and January of each year submit the following to the Tax Authority—

(a) A duplicate statement showing the calculation of stamp taxes, tax withholdings and contributions payable on the total value of the documents issued during the previous quarter. Documents include, inter alia, invoices, credit notes, bills of lading, contracts for the sale of cars, customs clearance permits etc. The statement must show the total number of each kind of document issued and the total value thereof and also the appertaining stamp taxes, withholdings and contributions.
(b) The receipt proving the payment of the stamp taxes, withholdings and contributions.

In addition to the quarterly statements, businesses must, during the month of February of each year, file with the Tax Authori-

ties the following two returns on documents issued during the previous year:

(a) A return for each person with whom the business had dealings during the year. The return must show the number of each document and the value thereof, as well as the aggregate value of all documents.
(b) A summary of the returns of (a) above.

It is obvious that the stamp taxes etc. paid during the four quarters of the year must be reconcilable with the annual return.

2. *Powers of the Minister of Finance and the Tax Authority:*

The Minister of Finance has the authority and responsibility for the administration of this law and can issue regulations for the detailed implementation of it. He can also, at his full discretion, extend the time or change the mode for the submission of information to the Tax Authority.

The Tax Authority and its officials can, at any time during office hours, inspect and audit all the books and documents which:

(a) are prescribed by this law;
(b) are prescribed by other laws; and
(c) are voluntarily kept by the business.

They can also take notice of all business correspondence.

The Tax Authority has, upon the business's application, certain powers, detailed in the law, of changing the mode or the place of keeping certain books. One of these powers, which is of particular interest to foreign businesses operating in Greece, is that the Tax Authority can permit that some or all the books and documents of a particular foreign business be kept in a foreign language without a parallel recording of the transactions in Greek.

3. *Sanctions:*

Apart from the "rejection" of the books, referred to earlier in this article, the law imposes strict sanctions for non-compliance with it.

(a) Any one who does not keep the books and documents prescribed by this law or who fails to keep some of them, keeps them in an insufficient or untrue manner, or keeps records which are not legalized where they ought to have been legalized and anyone who does not facilitate the tax audit or does not submit on time the required information, or deliberately submits wrong information, and generally anyone who does not comply with the requirements of this law can be fined with a minimum of 200 drachmas and a maximum of 25,000. On second and further offences the maximum can be 75,000. It is of particular interest to note that the law specifically mentions that the non-issuance of even one invoice or retail ticket constitutes a punishable offence. Moreover, the same penalties will be incurred by anyone who helps or in any way takes part in the commission of the offence, be he a director of the business, employee, tax or legal adviser, accountant etc. The fine is imposed by the Tax Authority of the district where the offence was first committed, but the person or business, against whom the fine was imposed, can propose the administrative solution of the dispute, in accordance with the provisions of the Income Tax law.
(b) In cases where a fine exceeding 10,000 drachmas has been imposed, the Tax Authority can apply to the appropriate court for the issuance of an order whereby the shop, office, factory, workshop or storehouse of the business will be closed down, and the business will be disallowed from carrying on its trade, for a period not exceeding three months. The business's obligations towards its employees are not affected by such an order.

JOHN CRYSTAL:

THE CURIOUS NATURE OF "KNOW-HOW"

PART II*

Sale of Technical "Know-how" and Section 106 (1) (d) of the Canadian Income Tax Act and Budget Resolution 18, proposed on October 22, 1968 by the Minister of Finance of the Canadian Government.

I. (a) BACKGROUND TO THE 1968 CANADIAN BUDGET

Canada stands on the threshold of becoming a "Welfare State" and this must be paid for by the people and corporations that generate income, by onerous and increasingly onerous taxation. Hence Canadians can look forward either to formidable taxation and new standards or if capitalism survives an economic recession, and back to older standards. Who will make this decision—the people or the politicians? It would appear that the "Cradle to the Grave" philosophy of a welfare state has every chance of succeeding in Canada.

On October 22, 1968, the Minister of Finance of the Canadian Government presented his 1968 mystifying and questionable budget in the face of Canada's extraordinary and spiralling inflation, raising and terrifying Government deficit status and uncertainty as to employment.

The Canadian Government is now faced, in the writer's opinion, with the philosophical horns of a dilemma for no matter how it turns, it appears that it could have serious fiscal problems in running a country with a population explosion and a welfare attitude. Indubitably taxation in all forms and areas will be seriously increased by new and ingenious ways and means to tax monetary sources. In this budget there were 19 major Tax Amendments and the first ingenious tax increase was to label a $120.00 tax increase as a "social development tax." This category is new and foreign to Canadian taxpayers and what it really means and how and where it is to be used by the Government is also an enigma but somehow it must be related to the Prime Minister's election promise of a "Just Society". Is a "Just Society" another phrase for a "Welfare Society"? The trade unions in Canada in virtually every trade have demonstrated that management can afford or must pay and shall pay wage increases from 30-32% on 2 year contract periods. The power of mass demands, either in wage disputes or in Social Reforms (demanded by political groups) have found inherent strength, in the weakness of our times being a period of compromise, a post war Government long lacking in effective statesmen, and the neutralizing effect of great powers.

The weakness of Canadian Federalism is a result of unusual financial strength and superb leaders in the Provinces. The Provinces have demanded, from this position of strength, a larger portion of the Federal Tax Dollar and if they get it, it will leave the Federal Government with considerable less income to manage a nation, with international commitments and if they don't get it, they threaten to increase taxes on a Provincial level. Anyway one views the

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* The first part has been published in the May 1968 issue.

Federal-Provincial situation, one can only foresee monetary headaches and consequential tax increases for the people and corporations of Canada.

1. (b) BUDGET RESOLUTIONS

What is the legal status of Budget announcements?

The budget is introduced and announced by way of resolutions (and in this case there were 19 resolutions) and with great certainty it reaches Parliament and the Senate to be enacted as law, retroactive to the date of the budget. Consequently the taxpayer consoles himself with the fact that he must pay the tax as presented in the budget resolutions.

The general certainty of budget resolutions being made law suffered a rare setback in 1967 when the minority Liberal Government proposed a 5% surtax on all income in its budget resolutions. The Bill (C-193) was defeated (which almost caused the fall of the Government) and a new Bill (C-207) reducing the 5% to 3% was introduced and passed successfully. A similar situation occurred in the U.S.A. in 1967 when a 10% Surtax Bill failed to pass Congress on its first presentation. It was passed at a much later date.

Hence one would suggest that although enforcement of budget resolutions by the Revenue Department is impossible until the resolution is made law, it is prudent to assume it will become law.

2. SECTION 106 (1) (d)

Resolution 18 refers to this section which is reproduced as follows:

Section 106(1)(d)

Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

(d) rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing any such a payment

(i) for the use in Canada of property,

(ii) in respect of an invention used in Canada, or

(iii) for any property, trade name, design or other thing whatsoever used or sold in Canada,

but not including

(A) a royalty or similar payment on or in respect of a copyright, or

(B) a payment in respect of the use by a railway company of railway rolling stock as defined by paragraph (25) of section 2 of the Railway Act.

This section was enlarged by Resolution 18 as follows:

That the 15% non-resident withholding tax apply in respect of any amount paid or credited after October 22, 1968 by a person resident in Canada to a non-resident person

(a) for the use in Canada of or the right to use in Canada any patent, trade mark, design or model, plan, secret formula or process,

(b) for the use in Canada of or the right to use in Canada industrial, commercial or scientific equipment, or,

(c) for information concerning industrial, commercial or scientific experience.

The Finance Minister stated that the definition of Royalties in this section will be based on the definition of Royalties as suggested by the *Council for the Organization of Economic Cooperation and Development* (O.E.C.D.). The Council was established to recommend to countries that bilateral agreements be made to avoid double taxation in the trades that exist between them.

Canada has adopted recommendations, *inter alia*, on Royalties by this Council as evidenced by some of its treaties:
Canada—United Kingdom
Income Tax Agreement Act 1967
Canada—Trinidad and Tobago
Income Tax Agreement Act 1967.
Two points have emerged from Resolution 18 for purposes of this article.

(1) The sale of "Know-how" by a non-resident to a Canadian resident will be subject to Section 106 (1) (d).
(2) "Royalty" will be redefined so as to include any payment either of a rent or royalty nature or a lump sum payment or simply any payment of any kind made to non-residents for reasons listed in this section as amended by Resolution 18.

Now referring to my previous article dated May 1968, in the Bulletin for International Fiscal Documentation one must simply conclude that the consideration from the sale of "Know-how" by a non-resident to a resident in Canada will be subject to a 15% withholding tax at source, effective October 22, 1968.

Amusing as it may appear the case law referred to in my previous article which was carefully built up on cases in the House of Lords in 1962 to Canadian cases up to 1967 have now been swept under the carpet by budget Resolution 18, in order to help pay the way for an emerging "Welfare State" or "Just Society".

* * * * DOCUMENTS * * * *

INTERNATIONAL FISCAL ASSOCIATION (I.F.A.)

RESOLUTION ON THE FIRST SUBJECT OF THE XXIInd I.F.A. CONGRESS HELD IN MONTEVIDEO FROM 7th TO 11th OCTOBER 1968

Subject: "The relation between the structures of fiscal systems and economic development in underdeveloped countries".

The Congress is of the opinion that the following fundamental principles emerge from the expositions of the General Reporter, the National Reporters and others who have joined the debates:

1) The tax system should be adequate to the revenue requirements which emerge from a policy directed to furthering balanced economic growth. In making effective use of available revenue reserves for this purpose, regard must be given to the risks of imposing excessive tax burdens which could discourage saving and investment. To this end, serious consideration should be given to the reform of the fiscal systems of underdeveloped countries with regard to:

- the clarity and simplicity of the system which should be administrable and comprehensible to taxpayers;
- the emphasis on broad actual bases (and not merely in nominal terms) of taxes on the income of individuals and enterprises, in order to obtain adequate revenue without resort to tax rates so high as to distort and discourage investment;
- a long run objective of introducing—as a supplement to taxes on income—taxes on various forms of wealth in order to throw burdens upon land and other resources not in productive use;
- realisation of substantial revenues from taxes on non-essential consumption and on speculation in order to relieve the burden of those taxes which are more likely to have disincentive effects upon production and investment.

2) The role of fiscal policy in the field of economic development is relatively limited. It is a fact nevertheless, that a tax system which is illogical or irrational, or a tax pressure which is excessive or maldistributed, can retard the economic development of a country.

3) Fiscal incentives, in the form of tax exemptions – above all for income taxation – result in lower revenue and a lower disposability of real resources for productive public outlays. Such incentives do not always produce results of the scale and significance expected unless they are granted only after thoroughgoing examination of the conditions pertaining to their implementation.

4) Consequently a more efficient policy of economic development could consist of adapting the tax burden to the needs of an adequate public expenditure programme together with an increase in the rate of public investment and promotion of infrastructure without which no economic development is possible.

5) In any case, fiscal and budgetary policy must be coordinated with monetary and income policy.

6) Every tax reform should be realistic. Account should be taken of the most complete and reliable information available

as to fiscal objectives. The co-operation of the private sector should be ensured.

7) Progress in the structure of a tax system depends fundamentally upon continual improvement in the efficiency of tax administration. It depends also on the execution of systematic studies of fiscal problems within the responsible public sector organisations. These studies should be undertaken with the co-operation of bodies technically and professionally qualified within the country.

RESOLUTION ON THE SECOND SUBJECT OF THE XXIInd I.F.A. CONGRESS HELD IN MONTEVIDEO FROM 7th TO 11th OCTOBER 1968

Subject: "Territorial limits of fiscal authorities on succession and wealth taxes".

The Congress considers that in international relations the definition of fiscal sovereignty in matters of taxation of wealth should have regard to the taxation of income in the countries concerned.

The Congress notes that a frequent source of international double taxation in matters of periodical wealth taxes and succession taxes is the simultaneous application of the rule of situs by one government and of the concept of domicile by another government.

The Congress points out furthermore that according to experience, double taxation in matters of succession taxes can usually be prevented by international conventions or by unilateral measures. In the field of periodical wealth taxes there exist on the other hand special difficulties in the event that only one of the governments concerned levies such tax. In this case it is practically impossible to provide for a tax credit. Tax conventions should nevertheless, in the opinion of the Congress, aim at providing adequate measures to grant relief in such cases.

The Congress calls attention to the fact that for the same category of assets many governments apply the concept of domicile or residence for taxpayers of the country and the rule of situs for foreign taxpayers. If governments would apply consistently one or the other of the above rules, potential cases of double taxation would be substantially reduced.

The Congress therefore recommends that steps to this effect be considered by way of exemptions or tax credits, at least in the case of double taxation conventions.

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

TRAITEMENT TARIFAIRE ET TRAITEMENT FISCAL APPLICABLES AUX MARCHANDISES CONTENUES DANS LES BAGAGES DES VOYAGEURS ENTRANT DANS UN PAYS DE LA COMMUNAUTE

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

I – Se referant, d'une part, au *projet d'un règlement du Conseil relatif au traitement tarifaire applicable aux marchandises contenues dans les bagages des voyageurs ou faisant l'objet de petits envois adressés à des particuliers,* présenté par la Commission au Conseil le 21 juin 1968 (Doc. COM. (68) 420 final);

Constatant:

– que ce texte tend à appliquer un traitement libéral aux marchandises contenues dans les bagages des voyageurs entrant dans la Communauté;

– que les objets dont la valeur est inférieure à 25 unités de compte correspondent à des droits d'importance négligeable;

– que, toutefois, des précautions spéciales peuvent apparaître utiles aux administrations nationales pour éviter que, dans les rapports frontaliers, l'usage inconditionnel de la franchise ne crée des courants d'importation anormaux;

– que les termes «bagages personnels» et «importations dépourvues de caractère commercial" peuvent donner lieu à des interprétations différentes;

Observant:

– que, dans le rapport qu'il a élaboré sur ce projet, le groupe des questions économiques au comité des représentants a estimé souhaitable que la question du traitement applicable aux petits envois soit disjointe et fasse l'objet d'une proposition particulière de la Commission eu égard aux problèmes particuliers qui se posent dans ce domaine;

SE PRONONCE EN FAVEUR DE L'ADOPTION DE CE PROJET DE REGLEMENT SOUS RESERVE:

1° – que l'article 3 soit supprimé et que la question du traitement tarifaire applicable aux petits envois soit réglée dans un texte spécial en liaison notamment avec la détermination du traitement applicable aux ventes par correspondance;

2° – que les administrations nationales gardent la faculté d'aménager et, si besoin est, l'usage de la franchise dans le trafic frontalier;

3° – qu'il soit précisé que:

a) les dispositions applicables aux bagages accompagnant les voyageurs seront appliquées aux bagages faisant l'objet d'un enregistrement,

b) la franchise sera valable que le contenu des bagages soit homogène (un seul article ou plusieurs articles de même nature) ou hétérogène (plusieurs articles de nature différente).

II – Se referant, d'autre part, à la *proposition de décision du Conseil pour l'harmonisation des réglementations des Etats-membres relatives aux franchises des taxes sur le chiffre d'affaires et des accises perçues à l'importation dans le trafic international de voyageurs,* présentée par la Commission au Conseil le 25 juin 1968 (doc. COM (68) 461 final);

Constatant:

– que, d'une part, cette proposition tend, dans un souci de simplification des formalités

administratives et douanières, à élargir sur une base commune les différentes franchises admises jusqu'à présent dans le trafic des voyageurs entre les pays tiers et la Communauté et qu'à ce titre elle constitue un sensible progrès dans la voie du développement du tourisme international;
– que, d'autre part, et surtout, elle tend à établir, pour le trafic des voyageurs entre les Etats membres, une franchise commune sensiblement plus large, d'un montant de 100 unités de compte par voyageur;
– que cette mesure présenterait l'avantage de pallier dans ce domaine particulier les inconvénients du maintien de la taxation des importations après l'achèvement de l'union douanière et par là même d'anticiper sur la suppression des frontières fiscales;
– qu'elle permettrait notamment à la population des Etats membres de prendre plus rapidement et plus fortement conscience de la réalité du marché commun;
Mais considérant:
– que l'institution, dans le trafic des voyageurs entre les pays membres, d'une franchise relativement importante pour les importations non commerciales de marchandises supposé qu'en tout état de cause ces marchandises ne puissent être achetées dans le pays d'origine (pays de sortie) en franchise de taxe sous peine de susciter des phénomènes de «non imposition» qui ne manqueraient pas de provoquer de notables distorsions de concurrence au détriment du pays de destination (pays d'entrée);
– que, par suite, les réglementations et les pratiques tendant à exonérer les ventes faites aux touristes des pays membres devront être supprimées;
– que cette exigence est d'autant plus impérieuse qu'en l'état actuel de l'harmonisation des taxes sur les affaires et compte tenu de l'élargissement de la franchise reconnue aux voyageurs, les différences des taux d'imposition appliqués dans les pays membres pourront, à elles seules, susciter des distorsions de cette nature;
– qu'à défaut de pouvoir, dans l'immédiat, envisager l'harmonisation de ces taux, il conviendrait, en ce qui concerne les frontaliers, dans un souci d'équité et pour éviter, sous le couvert de la nouvelle réglementation, des détournements de trafic et de clientèle, que des mesures spéciales soient prises par les Etats membres de manière, en particulier, que les intéressés ne puissent pas, au cours d'une période déterminée, bénéficier du fait de l'exercice de leur droit de franchise d'une situation privilégiée;
– qu'il existe des cas ou l'application respective des franchises prévues pour les voyageurs allant d'un pays de la Communauté à un autre pose des problèmes (trafic des voyageurs dans les aéroports internationaux de la CEE; itinéraires circulaires passant par des pays de la CEE et des pays tiers, etc. . . .).

EMET LE VOEU:

– que la rédaction de la décision du Conseil retienne ces suggestions:
– qu'en particulier, l'article 6 pose expressément, comme principe communautaire, la suppression des réglementations et pratiques actuelles permettant aux touristes des Etats membres de réaliser dans un autre Etat membre, directement ou indirectement, des achats en franchise de taxes et que l'article 5 stipule que les frontaliers ne pourront pas bénéficier, pour chaque période déterminée, d'une situation privilégiée en exerçant leur droit de franchise;
– que les dispositions de l'article 3 relativement à l'appréciation du caractère personnel ou familial de l'usage des marchandises susceptibles de bénéficier de la franchise soient interprétées par les administrations douanières avec souplesse et libéralisme de manière à éviter d'éventuels abus et la multiplicité des litiges;

– qu'enfin, en tout état de cause, par souci de simplification, cette décision soit mise en oeuvre à compter du 1er janvier 1970, date prévue pour l'application, dans chaque Etat membre, d'un régime de T.V.A. conforme aux directives du Conseil des ministres du 11 avril 1967;

– que dans les cas revêtant une certaine complexité (tels que ceux qui ont été évoqués plus haut) l'application de la franchise intracommunautaire soit toujours assurée.

le 1er décembre 1968

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Erläuterungen zum deutsch-niederländischen Doppelbesteuerungsabkommen

bearbeitet von: A. Schulze-Brachmann und W. Dirksen

Ein Nachschlagewerk . . .

- das den Text des Abkommens – in den zwei Sprachen – sowie den Wortlaut der diesbezüglichen Durchführungsbestimmungen gibt;
- das nicht nur einen ausführlichen Kommentar zu den Bestimmungen des deutsch-niederländischen Doppelbesteuerungsabkommens enthält, sondern eingehend den Einfluss jeder einzelnen Bestimmung auf das nationale Steuerrecht der beiden Staaten behandelt;
- das ausserdem die für die Auslegung des Abkommens wichtigste Rechtsprechung enthält, auch wenn diese sich auf andere Abkommen bezieht, insbesondere auf das (fast gleichlautende) DBA mit Luxemburg.

Ein auf die Praxis abzielender Kommentar

- weil er erst zu einem Zeitpunkt erscheint, in dem das Abkommen schon 8 Jahre in Kraft ist, sodass eine Reihe von Zweifelsfragen inzwischen gelöst werden konnte;
- weil die Verfasser täglich die immer wechselnden Probleme des internationalen Wirtschaftsverkehrs vor Augen haben und mit deren Lösung beschäftigt sind;
- weil der Kommentar auch der im Wachsen begriffenen europäischen wirtschaftlichen Integration Rechnung trägt und somit dem steuerpflichtigen Unternehmen und seinem Berater einen Blick in die Zukunft einräumt.

- *Internationale Verträge verbinden nationale Rechtssysteme. Die Regelungen in internationalen Vereinbarungen schaffen neues Recht, das jedoch nur im Rahmen nationalen Rechts in Kraft treten kann. Das gilt auch und vor allem für die Rechtsetzung in Verträgen zur Vermeidung der Doppelbesteuerung.*

- Unter Beachtung dieser Rechtslage legt das Internationale Steuerdokumentationsbüro ein Erläuterungsbuch zum deutsch-niederländischen Doppelbesteuerungsabkommen vor, das gemeinsam von je einem Fachspezialisten der beiden beteiligten Nationen erarbeitet wurde. Beide Verfasser sind nicht nur bei den Verhandlungen über den Abschluss des genannten DBA beteiligt gewesen; sie verfügen beide darüber hinaus als langjährige Mitglieder des Steuerausschusses der OECD und der Arbeitsgruppe „Internationale Steuerfragen" innerhalb der EWG über besondere Erfahrungen auf dem schwierigen Gebiet der Doppelbesteuerung.
- Steuern haben die Neigung sich dauernd zu ändern. Wenn es nicht die Steuergesetze selbst sind, so sind es die Verwaltungen oder die Gerichte die, wegen veränderter Auffassungen oder im Hinblick auf das Bedürfnis nach Verfeinerungen, das Steuerrecht in Bewegung halten.
- Um den Entwicklungen Rechnung tragen zu können gibt es in der Steuerliteratur viele Loseblattausgaben, von vielen als die beste Lösung begrüsst, von vielen andern aber abgelehnt, weil sie das gebundene Buch vorziehen.

Den Wünschen beider Gruppen wird Rechnung getragen.

Kurze Inhaltsübersicht

VORWORT – von Dr. h. c. Wolfgang Mersmann, Präsident des Bundesfinanzhofs, München.

EINLEITUNG – I. Notwendigkeit eines deutsch-niederländischen Doppelbesteuerungsabkommens. II. Entstehung und Formalien des DBA. III. Kurzfassung des Inhalts des DBA. IV. Bearbeitungsplan.

Teil A Übersicht des deutschen Steuerrechts
(Einkommen-, Lohn- und Körperschaftsteuer; Ergänzungsabgabe; Gewerbe- und Vermögensteuer; Lastenausgleich; Grundsteuer; Rechtsmittel; Vergleichs- und Konkursverfahren).

Teil B Übersicht des niederländischen Steuerrechts
(Einkommen-, Lohn-, Körperschaft-, Dividenden-, Aufsichtsrat-, Vermögen- und Grundsteuer, sowie Gemeindesteuern; Einseitige Regelung zur Vermeidung der Doppelbesteuerung; Rechtsmittel; Konkursverfahren).

Teil C Der Einfluss des Abkommens auf das Steuerrecht der Bundesrepublik

Teil D Der Einfluss des Abkommens auf das niederländische Steuerrecht
Diese beiden Teile sind wie folgt gegliedert:

I. Sachlicher Geltungsbereich. II. Persönlicher Geltungsbereich. III. Räumlicher Geltungsbereich. IV. Zeitlicher Geltungsbereich.
V. Begriffsbestimmungen (u.a. Betriebstätte; Vertreter; Unternehmen und Betrieb; Ort der Leitung).
VI. Wohnsitz (natürliche und juristische Personen; Diplomaten; Schiffsleute; Personengesellschaften).
VII. Zuteilung des Besteuerungsrechts (Einkünfte; Vermögen).
VIII. Unbewegliches Vermögen.
IX. Gewerbliche Unternehmen (u.a. Gewinnermittlung nach der direkten und indirekten Methode; Übertragung von Wirtschaftsgütern in das Betriebstättenvermögen; Gewinnberichtigung).,
X. Unternehmen der Schiffahrt und Luftfahrt. XI. Veräusserung von Beteiligungen.
XII. Selbständige Arbeit; Aufsichtsratsmitglieder. XIII. Nichtselbständige Arbeit.
XIV. Dividenden. Zinsen. Lizenzgebühren. XV. Hochschullehrer und Studenten.
XVI. Vermeidung der Doppelbesteuerung (Anrechnung; Freilassung; Progressionsvorbehalt; Verluste).
XVII. Diplomaten und Konsuln. XVIII. Die Doppelbesteuerungs-Beschwerde.
XIX. Verständigungsverfahren. XX. Amtshilfe. XXI. Verbot der Diskriminierung.

Teil E
Würdigung des deutsch-niederländischen DBA, insbesondere in internationaler Sicht

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EDITORIAL

TAX DEVELOPMENTS IN AFRICA

In the post-independence period considerable developments have taken place in the field of taxation in the developing countries of Africa, both at the national and at the international level. Many significant tax developments have been associated with the interest which has centred on international economic co-operation as a vehicle for the promotion of more rapid development, and fiscal arrangements are an important component of the co-operation which has materialized.

The International Bureau of Fiscal Documentation is presently engaged in research into the tax systems of developing countries and two of the Bureau's research assistants have prepared a tax report, containing two case studies of the fiscal aspects of sub-regional co-operation in Africa, for publication in this issue of the Bulletin. The report is published as a contribution to the wider circulation of information about African taxation.

The contribution of articles by persons with special knowledge of African tax systems is invited, with a view to their consideration for publication in the Bulletin, as a means of increasing the availability of information about African tax systems.

AMÉNAGEMENTS FISCAUX EN AFRIQUE

Dans la période suivant l'indépendance de considérables aménagements dans le domaine fiscal ont eu lieu dans les pays Africains en voie de développement, ceci aussi bien sur le plan national que sur le plan international. Beaucoup d'aménagements significatifs dans le domaine fiscal ont eu rapport à l'intérêt accordé à la coopération économique internationale. Coopération qui en se matérialisant doit engendrer la promotion d'un développement plus rapide et dont les arrangements fiscaux, à ce moment réalisés, sont une partie intégrante.

Le Bureau International de Documentation Fiscale est à présent engagé dans l'étude des systèmes fiscaux des pays en voie de développement et deux membres du Bureau ont preparé un rapport fiscal contenant deux études pratiques des aspects fiscaux de coopération régionale en Afrique. Ce rapport est publié dans ce Bulletin, en tant que contribution à une circulation plus large de l'information au sujet des impôts en Afrique.

Par la même occasion nous invitons toutes les personnes avec une connaissance particulière des systèmes Africains de nous envoyer des articles en vue de la prise en considération de leur publication dans le Bulletin. Ceci étant un moyen d'étendre l'information au sujet des systèmes fiscaux Africains.

* * * * ARTICLES * * * *

MARC J. VAN DEN ABEELEN AND ROBERT C. HAMMOND*:

THE FISCAL ASPECTS OF INTERNATIONAL CO-OPERATION IN AFRICA—THE EXPERIENCE OF THE UDEAC AND THE EAC

Inter-territorial co-operation in some form was a characteristic common to many regions of Africa during the period of colonial rule. The origins of such co-operation can be associated with the desire for administrative economy on the part of the colonial powers; however interest came to be centred on the potential of these arrangements as a means of promoting the more rapid economic development of the participants. This interest in economic integration has been intensified as a result of the achievement of independence by the majority of African countries and the ambitions of their new leaders, against the background of the failure to establish political federations.

The pattern of co-operation established during the colonial period consisted of the creation of geographically linked sub-regions based on the common denominator of rule by the same colonial power. With independence many of the established groupings have been dissolved or structurally altered but the hallmarks of linguistically based co-operation remain, superimposed on the units arising out of the political and economic aims of the new states.

The desire for economic integration is widely expressed by African leaders and is incorporated in the official policy of their governments. Despite this apparent faith in the economic benefits of this policy, the economic arguments as to the existence, form and extent of such benefits are not settled, particularly when reference is made to the advisability of co-operation between specific countries.

Whatever the economic gains and losses for countries entering into arrangements for economic integration it is clear that fiscal factors are important, particularly as regards the removal of artificial influences on economic decisions. This article is concerned with the fiscal aspects of two examples of economic co-operation in Africa—those between the members of the Union Douanière et Economique de l'Afrique Centrale (UDEAC) and between the Partner States of the East African Community (EAC).

A. FISCAL ASPECTS OF INTEGRATION IN THE UDEAC

The Union Douanière et Economique de l'Afrique Centrale (UDEAC) was established by the signing of a Treaty on 8 December 1964[1] (in this section referred to as "the

* M.J. van den Abeelen, doctor iuris of the Free University of Brussels, wrote section A.
R.C. Hammond B.A., University of York, wrote section B.
Both authors are presently research assistants in the International Bureau of Fiscal Documentation and are studying the tax systems of developing African countries.

1. Journal officiel de l'UDEAC, no. 1, 1 Jan. 1966 (in this section cited as "Treaty"). The text of this Treaty is published in Supplement B, 1969; supplement to this issue of the Bulletin for International Fiscal Documentation.

Treaty") by the heads of state of the following countries: the Federal Republic of Cameroon, the Central African Republic (CAR), the Republic of Chad, the Republic of the Congo (Brazzaville), and the Republic of Gabon.

I. THE HISTORICAL BACKGROUND TO ECONOMIC INTEGRATION

Prior to the signing of the Treaty in 1966 some form of economic co-operation between some of the states which now comprise the UDEAC had existed for more than fifty years.

The origins of this co-operation can be traced to the creation of French Equatorial Africa in 1910, composed of the colonial territories of Moyen Congo, Gabon, Oubangui-Chari and Chad. This inter-territorial unit was headed by a Governor General and a High Commission situated in Brazzaville. Its aim was to unify a number of common activities within the framework of substantial economic and administrative independence for each territory. In principle this co-operation applied to defence, postal services and communications and the centralized collection of customs duties, the revenue from which was subsequently allocated to the constituent territories.

In the early 1950's this long-established co-operation was subject to acute stresses and in 1959, following closely upon the achievement of independence by all four territories, the formal ties were dissolved. Dissatisfaction with the pre-independence arrangements stemmed from three main sources: the feeling among some member territories that the central institutions were interfering with their internal affairs; Gabon's fears that its comparative wealth was being used to subsidize the other members; and the shortage of funds to finance projects outside of the centralized common activities.

However, economic co-operation between these territories did not lapse completely. Two protocols were signed in 1959[2] providing for co-operation in connection with technical services; annual meetings were to be held between the heads of state of the signatories whilst a standing committee of their representatives was created to supervise the common activities. Special attention was given to the problems arising in the land-locked territories, leading to provision for a Solidarity Fund.

Thus, in the post-independence period, the former members of French Equatorial Africa maintained an interest in international economic co-operation within the sub-region, linking the integration of the colonial period with that provided for in the Treaty.

An extension of co-operation was marked by the rapprochement between the four signatory states of the UDE and the Federal Republic of Cameroon which began in 1960. After many meetings and negotiations, the five heads of state signed a Convention on 23 June[3] covering exchange control and the establishment of a commission to fix the rate for a "taxe unique" and a common external customs tariff.

These movements towards sub-regional co-operation culminated in the signing of the Treaty creating the UDEAC, which became effective on 1 January 1966.

II. THE AIMS AND INSTITUTIONS OF THE UDEAC

The aim of the signatories to the Treaty is expressed as being: "The reinforcement of

2. Protocoles instituant l'Union Douanière Equatorial (UDE). June 1959.

3. Convention réglant les relations économiques et douanières entre les Etats de l'Union Douanière Equatoriale et le République du Cameroun (June 23, 1961).

the unity of their economies and a harmonious development by means of the adoption of regulations taking into account the interests of each member-country".[4]

Under the provisions of the Treaty, supreme authority over common activities is vested in the Council of Heads of State.[5] A Direction Committee was established to administer the day-to-day affairs of the union, composed of the respective Ministers of Finance or Economic Development, or their representatives.[6] This Committee is charged with deciding upon the rates of the common external tariff and the rate of the tax on internal turnover, and also with the administration of the Solidarity Fund and of movements towards the harmonization of industrial development and of national fiscal systems.[7]

The General Secretary of the UDEAC performs the function of secretary to both the Council of Heads of State and the Direction Committee.[8]

The Treaty also provides that the transfer of goods imported from outside UDEAC from one member state to another be subject to a levy which is to be paid into the Solidarity Fund.[9] Provision is made to safeguard the operation of this system against avoidance by member states.

As a defensive measure, a member state experiencing a significant deterioration in its economic situation may, in accordance with the Treaty, be granted the suspension of the Treaty's provisions for a limited period of time.[10]

The Treaty expresses the aim of the harmonization of national fiscal systems and development plans, within an overall programme for the industrial development of the sub-region.[11]

In addition to co-operation within the scope of the Treaty a Central Bank has been established issuing a common currency[12] and safeguarding exchange operations.

III. HARMONISED TAXES AND REVENUE ALLOCATION

1. *Customs duties*

The Treaty provides for the free movement of labor, capital and services within the member countries.[13] As measures necessary to assure this free movement provision is made for: a) a common external tariff on goods imported from non-member countries[14]; and b) the abolition of internal tariffs on goods transferred within the sub-region.[15] Legislative control over customs matters rests with the Direction Committee, which is responsible to the Council of Heads of State, and not with the respective national legislatures.[16]

a. The common external tariff

There are four elements to the common external tariff. The Treaty provides that three of these, namely the "droit de douane", the "droit d'entrée" and the "taxe commune sur le chiffre d'affaires à l'importation", are to be elaborated by the Direction Committee and approved by the Council of Heads of State, and that the fourth, the "taxe complémentaire", is to rest under the control of the national legislatures.[17]

"*Droit de douane*" has, since 1962, formed the basis of the common external tariff. The

4. Preamble to the Treaty.
5. Treaty art. 3.
6. Treaty art. 11.
7. Treaty art. 17.
8. Treaty art. 19.
9. Treaty art. 38.
10. Treaty art. 41.
11. Treaty art. 42.
12. CFA. Franc de la Communauté Financière Africaine.
13. Treaty art. 27.
14. Treaty art. 28.
15. *ibid.*
16. Treaty art. 29.
17. Treaty art. 30.

Treaty expresses the intention of the imposition of a two-tier tariff structure comprising a general duty and a minimum rate.[18] In practice the members have failed to reach agreement as regards the goods to which the general duty will apply, and only the minimum rate has been implemented.

In the past, reductions in the minimum rate had been implemented with respect to certain goods, but agreement has been reached to apply the schedule laid down in the customs tariff which entered into force on 1 January 1966.[19]

After considerable negotiations, agreements have been concluded between UDEAC and both the EEC[20] and OAMCE[21] with the effect that certain goods originating in EEC and OAMCE are exempt from the tax.[22]

Exemptions from the tax afforded to qualifying enterprises under national investment incentive regimes have been harmonized.[23]

"*Droit d'entrée*"[24] is assessed on the c.i.f. value (or the market value) of goods imported from outside the UDEAC. The "droit de douane" is not included in the tax base and the tax is levied on all goods of foreign origin, i.e. goods from EEC and OAMCE are not exempt.

"*Taxe commune sur le chiffre d'affaires à l'importation*"[25] is levied on the actual value of imported goods plus the "droit de douane" and the "droit d'entrée" to which they are liable. It is levied at a flat rate of 10 per cent. Certain exemptions are provided when imported goods are destined for use in the public services of the member states and the common services.

"*Taxe complémentaire*"[26] may be imposed at the discretion of the respective member states. In principle, the member states can levy this surcharge on any good and at whatever rate they choose, however, such levies must be notified to the Direction Committee along with details of variations in rates.

b. Internal transfers and the "taxe unique"[27]

Goods originating in one member state and transferred to another member state are exempt from all import and export duties. However goods produced in a member state which are sold in another member state are subject to the "taxe unique".[28]

This tax is levied in the state of origin of the goods and the revenue from it is allocated to the state in which the goods are consumed. This allocation is based upon the declarations made for customs purposes in connection with goods passing through customs controls, which include a statement of the destination of the goods.

Until 1972 the rate of the tax may be varied according to the country of origin of goods liable to the tax, as a means of creating investment incentives. However after that date a common fixed rate will apply.

In order to assist member countries experiencing temporary economic difficulties, the Treaty provides the Direction Committee with the power to authorize one or more states to relax the imposition of the tax, i.e. to suspend the tax or to reduce the rate at which it is levied.[29]

The payment of customs duties on raw materials imported from outside of the

---

18. Treaty art. 29.
19. Acte no. 7-65 UDEAC- 36 portant fixation du tarif des douanes.
20. Under the provisions of the so-called Yaoundé Convention.
21. Organisation Africaine et Malgache de Cooperation Economique.
22. Fiscalité Africaine 15 June 1968, at 2.
23. Acte no. 18 – 65 UDEAC – 15.
24. Treaty art. 30 (a).
25. See note 24 *supra*.
26. Treaty art. 30 (b).
27. Treaty art. 32.
28. Acte no. 12-65, UDEAC – 34 of Dec. 14, 1965.
29. Treaty arts. 40 and 41.

UDEAC and used in the production of goods which are sold in other member states, or the payment of internal taxes, does not relieve goods from liability to the "taxe unique".[30]

c. Export Duties

Under the provisions of the Treaty, member states retain legislative control over the imposition of duties on goods exported to non-members, and these duties are not harmonized.[31] For example, Gabon levies a stamp duty on exports at a rate of 5 per cent[32] which has no counterpart in the other member states.

Although the Treaty makes no provision for the harmonization of these taxes, consultations have taken place both bilaterally and multilaterally between the member states with a view to such harmonization. Two examples of this are as follows: (a) multilateral discussions with respect to export duties assessed on the f.o.b. value or market value of goods, in which partial agreement was reached to fix the rates within the range of 0–13 per cent (exceptionally 25 per cent) for all the member states[33]; and (b) bilateral discussions between Congo (Brazzaville) and Gabon with respect to the "taxe sur le chiffre d'affaires à l'exportation" which led to the harmonization of this tax at a rate of 2 per cent on the assessed customs value of goods.[34]

2. *The allocation of tax revenue*

The provisions of the Treaty as regards the allocation to members of the tax revenue from import duties collected by the institutions of the UDEAC are based on the criterion of consumption, i.e. the revenue collected in member countries by the customs authorities of the UDEAC is allocated to the state in which the declared[35] consumption of the good occurs.[36]

Tax revenue from export duties, which is also collected by a common organization is allocated to the budget of the state of origin of the exported goods.[37]

The administration of these taxes is achieved through a common customs organization. Its main tasks consist of tax collection, including the administration of the declaration form system, and the allocation of tax receipts. For this latter purpose separate accounts are maintained for each of the member states.[38]

Solidarity Fund. In the spirit of co-operation, in order to take account of possible inaccuracies in the information concerning declared consumption, the Treaty provides that a certain part of the revenue collected from harmonized taxes will be allocated to the Solidarity Fund.[39] Payments into this Fund are determined on the basis of certain percentages of revenue receipts which are fixed by the Council of Heads of State on the recommendation of the Direction Committee.

The purpose of the Fund is to maintain an equilibrium in the revenue received by member states from customs duties, in particular to compensate for the handicap of the land-locked states which would otherwise sacrifice revenue to a disprop-

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30. See note 27 *supra.*
31. Treaty art. 34.
32. Loi no. 67 – 60 of 7 Nov. 1960 (Gabon).
33. Déliberation no. 33-57 UDEAC; see Fiscalité Africaine, *ibid.* at 4.
34. Déliberation no. 66–49 UDEAC; see Fiscalité Africaine, *ibid* at 4.
35. The State of declared consumption is determined on the basis of a declaration form which must be submitted to the customs authorities at importation.
36. Treaty art. 35.
37. *ibid.*
38. Treaty art. 36.
39. Treaty art. 38.

tionate extent as a result of the common external tariff.
The basis of payments into the Solidarity Fund has been changed as a result of the Treaty in the light of the accession of Cameroon and the importance which this state has assumed as a source of revenue collected from the harmonized taxes.
The table indicates the extent of reallocation of revenue which takes place through the Fund.

SOLIDARITY FUND
(millions of francs CFA)

Year	*Car*			*Chad*			*Gabon*			*Congo*			*Cameroon*		
	(a)	(b)	(c)	(a)	(b)	(c)	(a)	(b)	(c)	(a)	(b)	(c)	(a)	(b)	(c)
1966	300	665	+ 365	300	1175	+ 875	500	3	- 497	500	57	- 443	300	-	- 300
1967	300	630	+ 330	300	1170	+ 870	200	-	- 200	500	-	- 500	500	-	- 500

SOURCE: Acte no. 12/65-UDEAC-34 et Acte no. 66/6-UDEAC-50
(a) contributions
(b) receipts
(c) net receipts

From the figures given in the table it is evident that the principal beneficiaries from the operations of the Fund are Chad and the CAR. It would seem therefore that it is successful in compensating the land-locked states.

3. *The "taxe unique"*[40]
This tax has a similar objective to that of the Solidarity Fund, i.e. to effect a degree of equalisation in the benefits and charges accruing to the individual member states as a result of the UDEAC.
As a result of the establishment of new import-substituting industries within the UDEAC, under the protection of the common external tariff, the consuming states run the risk of sustaining losses from two sources. On the one hand, the free transfer of goods within the UDEAC results in the consuming states sacrificing customs duty revenue which they would have accrued in the absence of the union and, on the other hand, the substitution of goods produced within the sub-region for less expensive imports from non-member states also operates to the disadvantage of the consuming state.
The "taxe unique" is levied on goods produced in one member state which are transferred for sale in another member state.
The following considerations are taken into account in determining the rate of the tax:[41]
(a) the extent to which industry within the UDEAC is protected;
(b) the presence or absence of effective competition for the good in the UDEAC; and
(c) the aim of removing obstacles to competition.
In the light of these considerations, the Direction Committee decides upon the rate of tax applicable to individual types of goods.
As was pointed out earlier, the Treaty provides that variations in the rates applying to particular goods will be permitted accord-

40. See note 28 *supra*.
41. Treaty art. 62, para. 3.

ing to the location of production, until 1972. If, after that date, experience shows that such variations are still necessary, the Direction Committee, at the request of the member state concerned, may authorize the continuation of rate differentials[42].

The tax is collected at the point of production of the good and receipts are immediately transferred to the budget of the state in which the good is to be consumed.

As at 1 December 1966, 95 companies were subject to the tax. The geographical distribution of these companies was as follows: Cameroon – 47; Congo (Brazzaville) – 19; CAR – 18; Chad – 8; and Gabon – 3.[43]

4. *The harmonization of national fiscal systems*

The harmonization of the national fiscal systems of the members is a major aim expressed in the Treaty[44]; it is as yet unfulfilled. Differences between national fiscal systems within the union are potentially an important influence on the location of new enterprises. In order to counteract the internal tensions to which such differences might give rise, the Treaty provides for the harmonization of the following taxes:[45]

(a) the tax on industrial and commercial profits (BIC)[46];
(b) the internal turnover tax (TCAI)[47]; and
(c) the tax on income from movable property (IRVM).[48]

These taxes constitute the major revenue sources outside of customs duties and are therefore seen as the most important source of differences in the effects of national fiscal systems on new investment.

The Direction Committee is charged with realizing this harmonization[49] but, to date, without success.

In the early post-independence period there was little interest in official harmonization since all the member states had inherited substantially similar fiscal systems from the colonial period, with their origins in the Grand Conseil Federale. The tax structures were uniform, the variations relating to rates of tax.

However, after 1960 fiscal reforms were undertaken in the CAR, Chad and Congo (Brazzaville), and new tax codes were introduced. These reforms gave rise to differences in tax assessment and tax rates between the countries of the sub-region. These differences can be illustrated by an analysis of the major, non-customs revenue sources listed above.

BIC. Chad and Congo (Brazzaville) introduced a genuine company tax to replace the BIC; the rates of the new tax being 30 per cent in Chad and 26 per cent in Congo. In Gabon and the CAR the BIC was retained with rates of 36 per cent and 31.5 per cent respectively. Differences also exist in the taxable base for the two types of tax.[50]

TCAI. This tax exists in all five countries, differences relate only to the rate of tax applying to different professions.

IRVM. In Chad income from this source is taxed under the IRPP[51], which is deducted at source, levied at a flat rate of 30 per cent. In the other four states the old system has been maintained although there are variations in rates.

Although these differences are small they should not be underestimated. Under certain conditions they could be an important

---

42. Treaty art. 62, para. 2.
43. J.O. de l'UDEAC 1967 no. 2.
44. Treaty art. 42.
45. Treaty art. 43.
46. Impôt sur les bénéfices industrielles et commerciaux.
47. Impôt intérieur sur le chiffre d'affaires.
48. Impôt sur le revenu des valeurs mobilières.
49. Treaty art. 42.
50. Fiscalité Africaine 15 June 1968 at 13-15.
51. Impôt sur le revenu des personnes physiques.

barrier to further integration in the sub-region, and it is this danger which has prompted the interest in harmonizing these taxes.

IV. INDUSTRIAL CO-OPERATION[52]

As a counterpart to the financing and operation of the Solidarity Fund, the Treaty also provides for measures towards closer industrial harmonization.

The aim is to provide the land-locked member states with a fair share of industrial development through a system for the co-ordination of development plans and the distribution of new industry. To achieve this co-ordination the members communicate information on development plans, and the progress in attaining their objectives, to each other.[53]

The Treaty divides industrial development into five categories:[54]

(a) export industries;
(b) industries supplying one state with no fiscal advantages in another state;
(c) industrial projects based on a market in one state but producing goods similar to those produced in another state;
(d) industrial projects limited to the supply of two states; and
(e) industrial projects interesting more than two states and for which harmonization is sought.

Categories (a) and (b) do not create difficulties and industries of this nature can be established without seeking the consent of the other members, on the condition that their products are not sold in the other states. Industries established in category (d) are subject to notification to other members and common scrutiny. As regards categories (c) and (e), projects established must be notified to other members and, in cases of disagreement, the Direction Committee will decide on the rate of the "taxe unique" to be applied and the investment code regime.[55]

V. THE CONVENTION ON INVESTMENT CODES

A standardised investment code was proposed by the Convention which was signed and adopted at Yaoundé in December 1956.[56] The signatories undertook to bring their national codes into harmony with the agreed standardised version.[57] As a result of the convention the national codes were completely harmonized.

Control over concessions and exemptions is based upon the different categories of industry as identified in Art. 51 of the Treaty.[58] As regards the first three categories the member states are free to grant concessions and exemptions for import duties, exemption from the "taxe unique" and exemption from national taxes. For the remaining two categories, fiscal concessions are in the hands of the Direction Committee.[59]

VI. CONCLUSION

The apparent success of co-operation under the Treaty in the period immediately following its implementation proved to be short-lived. Internal tensions developed, particularly as a result of the feeling in Chad and the CAR that their position as land-locked states was not being adequately recognised in the distribution of costs and benefits from the union.

In consequence, although the formal ties were not broken, in practice these two states

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52. For a discussion of this aspect see Robson, P. Economic Integration in Africa. George Allen and Unwin 1968 at 220–221.
53. Treaty art. 52.
54. Treaty art. 51.
55. Treaty art. 52.
56. Acte no. 18-65 UDEAC 15 adoptant la convention commune sur les investissements dans les Etats de l'Union (J.O. no. 3 March 1966).
57. Treaty art. 45.
58. See section IV.
59. See note 56 *supra*.

ceased to be fully functioning members of the union.

However, the effective withdrawal of Chad and the CAR must be seen in the perspective of the comparatively small importance of these states within the UDEAC. The union continues to function for the other three member states.

The withdrawal of Chad and the CAR has been recognized in practice by the signing of a Charter between them and Congo (Kinshasa) establishing the Union des Etats de l'Afrique Centrale (UEAC) on 2 April 1968. The union provides for the creation of a common market between the three signatories. As yet the union has not been implemented because of political differences between Congo (Kinshasa) and the CAR and Chad.

Despite the political obstacles to this form of integration, inter-territorial co-operation presents the potential for the speeding up of the economic development of co-operating states. The framework of a union presents, through the wider market facilities and opportunities for specialisation, better opportunities for import-substitution than would be the case without such a union.

The existence of a union reduces the difficulties of achieving agreements with foreign companies and governments, and reduces the dangers of tariff competition in an attempt to attract foreign investment.

Inter-territorial co-operation also facilitates the conclusion of tax conventions with non-member states, particularly in respect of double-taxation.

B. FISCAL ASPECTS OF EAST AFRICAN INTEGRATION

The East African Community (EAC) was established by the signing of the Treaty for East African Co-operation on 6 June 1967[60] (in this section referred to as "the Treaty") by the presidents of the Republic of Kenya, the United Republic of Tanzania,[61] and the Sovereign State of Uganda.

I. THE HISTORICAL BACKGROUND TO ECONOMIC INTEGRATION[62]

There is a long history of inter-territorial co-operation in East Africa and during the period of colonial rule this co-operation came to include a common market, fiscal harmonization, the joint operation of certain services and a common currency.

The effective origins of economic co-operation can be traced to the establishment of free trade between Kenya and Uganda in 1917 under a unified customs authority. By 1927 Tanganyika had been phased into this common market in a number of steps, but retained a separate customs department until 1949.

In addition to the harmonization of customs and excise duties, a substantially uniform system of individual and company income taxation has existed since 1939, when Uganda and Tanganyika[63] introduced this form of taxation on the basis of the same structure as that enacted by Kenya in 1937.

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60. The Treaty for East African Co-operation. Government Printer, Nairobi, Kenya, 1967 (in this section cited as "Treaty"). Part of the text of the Treaty has also been published in Supplement A, 1968; supplement to the February 1968 issue of the Bulletin for International Fiscal Documentation.

61. Zanzibar, as part of the United Republic of Tanzania, became a member of the customs union in 1967. In the past it had been a party to the harmonization of income taxes but had its own customs arrangements.

62. The history of the problems which have arisen from co-operation and the solutions to them are reviewed in section V.

63. Zanzibar has been a party to the common income tax administration.

This tax has been under joint administration since 1939.

Monetary co-operation between the three territories dates from 1919 and the establishment of the East African Currency Board. Although each country established a Central Bank in 1966 and issued national currencies, in practice there is still close co-operation in the money and banking sphere.

Co-operation in the field of common services is also long-established in the sub-region, covering such activities as research, transport and communications.

The establishment of formal legislative and administrative bodies to some extent lagged behind the integration undertaken in practice. Three important steps can be singled out in the evolution of these bodies—

(a) the creation of a Central Legislative Assembly and the East African High Commission in 1948;

(b) the reconstitution of the High Commission as the East African Common Services Organization (EACSO) in 1961, accompanied by an expansion of the Central Legislative Assembly; and

(c) the signing of the Treaty, effective as of 1 December 1967, which created the EAC,[64] abrogating the earlier agreements on which the EACSO was based[65], and provided a legal basis for the common market.

II. THE AIMS AND INSTITUTIONS OF THE EAC

The aim of the EAC is expressed as being "to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities the benefits whereof shall be equitably shared".[66] The Treaty specifically enumerates the following goals: a common customs and excise tariff; the abolition of restrictions on trade between Partner States; a common agricultural policy; the establishment of an East African Development Bank; freedom of current and capital account payments between the Partner States; the harmonization of monetary policy; the operation of common services; the co-ordination of economic planning and transport policy; and the approximation of commercial laws.[67]

The Treaty provides for the creation of a wide range of institutions to further the achievement of these aims.

An East African Authority is created consisting of the presidents of the three Partner States, which is the principal executive authority of the EAC[68]. Three posts of East African Minister are created, one nominated by each of the Partner States, to assist the Authority; a person appointed to such a post is required to resign any senior post which he may hold in a national government and each Partner State undertakes to accord him ministerial and cabinet status.[69]

An East African Legislative Assembly is established through which measures taken by the EAC may be enacted[70]. However, the presidents of the Partner States retain the right to withhold their assent to a bill passed by the Assembly.[71]

Five major councils have been established as follows: the Common Market Council; the Communications Council; the Economic Consultative and Planning Council; the Finance Council; and the Research and Social Council.[72]

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64. Treaty art. 1.
65. Treaty art. 97.
66. Treaty art. 2 para. 1.
67. Treaty art. 2 para. 2.
68. Treaty arts. 46 and 47.
69. Treaty arts. 49 and 51.
70. Treaty arts. 56 and 59.
71. Treaty art. 60.
72. Treaty art. 53.

In connection with the common services, the Treaty provides for the formation of corporations for railways, harbours, posts and telecommunications and airways.[73]
Other institutions brought into existence by the Treaty include the following: a Court of Appeal for East Africa, a Common Market Tribunal, an East African Industrial Court, an East African Development Bank and an East African Tax Board.
The institutions are served by a central secretariat, and an East African Community Service Commission which is empowered to make appointments to offices. The Treaty specifically provides for the offices of a Secretary General, a Counsel to the Community and an Auditor-General.[74]

III. HARMONIZED TAXES AND REVENUE ALLOCATION

A high degree of tax harmonization has been achieved between the three states. The major sources of central government tax revenue – customs and excise duties and individual and company income taxes – are harmonized and centrally administered.
In this sub-section the scope of tax harmonization is reviewed along with the arrangements for common institutions and revenue allocation.

1. *Customs and excise duties*

The three Partner States have common laws for the structure and administration of customs and excise duties, the basic legislation is contained in the so-called Management Acts[75]. These basic acts are now the subject of EAC legislation through the East African Legislative Assembly.
The value of the rates of tax and deductions is governed by national laws enacted by the three respective National Assemblies,[76] but substantial uniformity is achieved through prior consultation between the responsible national bodies and the simultaneous announcement of the proposed tariffs.

a. The common external tariff

The Partner States are bound by the Treaty to the maintenance of a common external customs tariff, with certain permitted departures which it is hoped will be abolished at an early date.[77]
The common external tariff is one of the many respects in which the Treaty rationalizes but largely recognizes the practice on which co-operation had been based prior to 1967.
With minor amendments, the standard Brussels Tariff Nomenclature has been introduced with respect to import duties as from the beginning of 1968. The structure of rates is not complicated and it can be viewed under a six-fold classification—

(a) a general rate, in the region of 30 per cent, as a source of revenue and of protection;
(b) a reduced rate for semi-necessities such as building materials;
(c) duty free imports, including most basic foodstuffs, and essential machinery and equipment etc.;
(d) a protective rate varying from 35-50 per cent;
(e) high specific duties on certain luxury goods; and

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73. Treaty art. 71.
74. Treaty Ch. XVII.
75. East African Customs and Transfer Management Act 1952 (as amended), East African High Commission, Act No. 12 of 1952.
76. The basic legislation is: Kenya—Act no. 36 of 1967; Tanzania—Act No. 8 of 1968; and Uganda—Act No. 1 of 1968. Specific references are not given in the text to customs duty legislation governed by the National Assemblies, the interested reader should refer to the legislation cited here, except where otherwise indicated.
77. Treaty art. 5 para. 3.

(f) rates on motor vehicles which vary between 30–70 per cent depending on the type and capacity of the vehicle.

The external tariff is substantially uniform and there have been only a few differences in the rates applied to particular goods in the three countries.

Further divergencies have existed as a result of the system of suspended rates and the drawback of duties paid on imported materials used in certain activities, which are granted by the individual countries.

Each of the three Partner States has legislation providing for the refund of customs revenue to certain 'local industries'[78]; in general these concessions are granted to individual companies in respect of specific imports and for a limited period, with the possibility of extension. Applications submitted by enterprises for such refunds are considered both by the national authorities and by the central customs and excise authorities. Despite the system of notification and consultation between the three states, via the common administrative body, the scope and extent of refunds granted in the individual countries are not uniform.

However, in the light of the over-all structure of the customs tariff, existing divergencies are not serious.

b. Excise duties

(i) The common excise tariff

The Treaty provides for a common excise tariff to be established and maintained for all excisable goods which are manufactured, processed or produced in the Partner States.[79] In a similar manner as for the common external customs tariff, provision is made for departures from the common excise tariff "For revenue purposes . . . in special circumstances and after consultation between the Ministers of the Partner States responsible for public finance . . .". However, the intention of removing existing differences in the tariff[80] is expressed.

Excise duty is levied on a small number of commodities and differences have been minor; the main examples are sugar—taxed more heavily in Uganda and Tanganyika—and matches—less heavily taxed by Kenya.

(ii) Consumption taxes

A more important source of divergence in the national tax structures of the Partner States has resulted from the levying of non-harmonized consumption taxes.

Examples of these taxes are: in Tanzania - soft drinks, electricity and hotel accommodation[81]; in Uganda— certain consumer goods[82] such as paints, shoes and beer; and in Kenya—petroleum and fuel oil.[83]

These taxes have been justified by Uganda and Tanzania as a means of recouping the revenue losses sustained as a result of the common external tariff. They can thus be seen as evidence of the strains within the common market and as a form of unilateral adjustment to them.

2. *Allocation of customs and excise revenue*

According to the provisions of the Treaty, both customs duties[84] and excise duties[85] collected by the East African Customs and Excise Department are to be paid to the State in which the taxed commodities are consumed.

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78. The basic legislation is: Kenya – Cap. 481 R.E. 1962 and Act No. 1 of 1967; Tanzania – Cap. 289 R.L. and Act No. 53 of 1968; Uganda – Cap. 180 R.E. 1964 and Act No. 26 of 1967.
79. Treaty art. 17 para. 1.
80. Treaty art. 17 para. 3.
81. Acts Nos. 41 of 1968, 42 of 1968, and 36 of 1962 respectively.
82. Act No. 25 of 1965.
83. Cap. 477 R.E. 1962.
84. Treaty art. 10.
85. Treaty art. 18.

The collection of information concerning transfer of goods within the three States, on which the allocation of customs and excise revenue is based, has been achieved by a system of transfer declarations which consignors are required by law to make along with customs declarations for imported goods. In the absence of fiscal frontiers there was in general no rationale for enterprises to submit false information about transfers, or to attempt to avoid the regulations altogether, since their tax liability remained unaffected.

a. Customs revenue

The following are the main provisions which apply in the case of goods imported by one Partner State from outside the EAC and subsequently transferred to another Partner State:[86]

– in the case where a specific duty applies to a good, or where the good is transferred to the consuming state in its original packaging, the collecting State is charged with paying the full amount of the duty to the consuming state.

– in the case where an *ad valorem* duty applies to a good which is not transferred in its original packaging the collecting State "...shall pay to the consuming State an amount equal to 70 per cent of the duty which would have been payable if the value of the goods for duty had been taken to be the ordinary retail price".

– in the case where customs duty has been remitted, in whole or in part, by the importing State then the importing State is charged with paying to the consuming State the customs duty which would otherwise have been payable.[87]

Where goods are imported by a Partner State and used by it to manufacture goods which are subsequently transferred to another State, then the collecting State is charged with paying the full amount of the duty collected, in respect of goods so used, to the consuming State.[87a]

The Treaty makes no special provision for the few cases where the customs tariff differs as between the collecting State and the consuming State and it is to be assumed that the rate of the collecting State applies in respect of its payment to the consuming state. This appears to be a reversal of the previous situation, in which the rate applicable in the country of destination applied.[88]

b. Excise revenue

The following provisions apply in the case where goods liable to excise duty in one Partner State are transferred to another Partner State:[89]

– the East African Customs and Excise Department is charged with collecting the excise duty payable either at the rate in force in the collecting State or at the rate in force in the consuming State where the latter is the greater.

– a refund is available to the owner of goods in respect of which excise duty has been paid in the collecting State at a rate which is higher than that applying in the consuming State.

3. *The Transfer Tax*[90]

A fiscal innovation made by the Treaty, the transfer tax is effectively an import duty

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86. Treaty art. 10.
87. Treaty art. 10 para. 2.
87 a. Treaty art. 15 para. 1.
88. See Due, J.F. and Robson, P. "Tax Harmonization in the East African Common Market" in Shoup, C.S. (ed.) Fiscal Harmonization in Common Markets, Vol II, Columbia University Press, 1967, at 564-5.
89. Treaty art. 18 paras. 1 and 2.
90. Treaty art. 20.

which one Partner State may levy on imports from other Partner States.

The object of the tax is the promotion of industrial development in the Partner States which are presently lagging behind, i.e. Uganda and Tanzania. There is some doubt as to whether the tax can achieve this rebalancing of industrial growth rates in the sub-region, or at least whether alternative measures might not have been more effective, but a discussion of this point falls outside of the scope of this article.[91]

Transfer taxes may be levied on the value[92] of manufactured goods[93] imported from Partner States, under certain conditions. The principal of these conditions are described below.

a. Restrictions on goods to which the tax can be applied

The tax can only be imposed on goods whose value does not exceed the amount of the trade deficit[94] in manufactured goods between the State levying the tax and the State of origin of the goods so taxed.[95]

There must be capacity within the State imposing the tax for the production of the goods on which the tax is imposed, or of goods of a similar description or function, within three months of the imposition of the tax.[96] It is further provided that the production of such goods in the State imposing the tax must be either in a quantity equal to not less than 15 per cent of the domestic consumption within that State in the twelve months following the imposition of the tax, or that such production have an ex-factory value of not less than 2,000,000 shillings.[97]

b. The rate of the transfer tax

A maximum limit is placed upon the rate of the tax.[98] In respect of goods subject to an *ad valorem* duty, or an *ad valorem* as an alternative to a specific duty, this limit is 50 per cent of the rate of duty prescribed in the customs tariff of the State imposing the tax. Where goods are subject to a specific duty the limit is 50 per cent of the *ad valorem* equivalent of the duty.[99]

When a reduction occurs in the rate of customs duty relating to a good subject to a transfer tax, the State imposing the tax is compelled to reduce the rate of transfer tax accordingly within twenty-one days.[100]

c. Expiration of the transfer tax

The Treaty provides for a maximum life of eight years for any individual transfer tax imposed.[101] All transfer taxes imposed under the provisions of the Treaty will cease to have effect after fifteen years have passed from the date at which the Treaty became effective.[102]

A transfer tax imposed on goods in respect of which not less than 30 per cent of the total ex-factory value of sales of goods of that kind originating in the State imposing the tax, in any twelve-month period, is sold for transfer out of that state must be revoked.[103]

d. Other provisions

The Treaty provides for the review of the

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91. The interested reader should refer to the articles by Helleiner, G.K. and Hazelwood, A. in The East African Economic Review, vol. 3 (New Series) No. 2, December 1967.
92. As determined by Annex V to the Treaty. Generally the normal sale price in an open market.
93. As defined in Annex IV to the Treaty.
94. Treaty art. 20 para. 5.
95. Treaty art. 20 para. 4.
96. Treaty art. 20 para. 6.
97. Treaty art. 20 para. 7.
98. Treaty art. 20 para. 8.
99. As determined by Treaty art. 20 para. 9.
100. Treaty art. 20 para. 10.
101. Treaty art. 20 para. 14.
102. Treaty art. 20 para. 15.
103. Treaty art. 20 para. 19.

transfer tax system within five years from the imposition of the first transfer tax[104], and for the avoidance of a deviation of trade from Partner States to foreign countries as a result of the tax.[105]

The ability of a Partner State to levy new transfer taxes is limited by a provision that no such new taxes may be imposed by a State manufacturing, in any calendar year, goods of a value not less than 80 per cent of the total value of manufactured goods transferred into that State from the Partner States.[106]

A Partner State may introduce a suspended transfer tax on a good without there being production of the good in that State. This provision will operate as an open opportunity for the establishment of new industries in respect of goods to which the suspended tax has been applied.

Appeal to the Common Market Council may be made by a State against transfer taxes imposed by other Partner States[107].

e. Transfer taxes introduced

Both Tanzania[108] and Uganda[109] have imposed transfer taxes under the provisions of the Treaty. Examples of goods subject to the tax are certain foodstuffs, beverages, tobacco and paint.

f. Implications for the control of transfers within the EAC

The introduction of transfer taxes effectively establishes incentives to enterprises not to comply with the system of transfer declarations described above under III 2. This simple system of recording transfers, resting largely on taxpayer compliance, can no longer be regarded as reliable.

The Treaty does not provide details of how the transfer taxes are to be administered, except that they will be under the control of the East African Customs and Excise Department.[110] Some new system of control will be necessary both as a safeguard against evasion of the transfer taxes imposed and as a means of obtaining reliable information on which to base the allocation of tax revenues collected by the common institutions of the Community.

4. *Individual and company income taxes*

Individual and company income taxes have (as was pointed out above) been governed by common legislation between the three States for some time. The Treaty devotes very little attention to these taxes except in regard to the East African Income Tax Department which is recognised as a service to be administered by the Community[111], and the allocation of income tax revenue.[112]

The principal legislation governing the structure of individual and company income taxes is contained in the East African Income Tax (Management) Act 1958 (as amended).[113]

The value of rates and allowances is, however, governed by national laws enacted by the three respective National Assemblies.[114]

The division of legislative authority between the Community and the National Assemblies has not given rise, in practice, to signi-

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104. Treaty art. 20 para. 16.
105. Treaty art. 20 para. 17.
106. Treaty art. 20 para. 21.
107. Treaty art. 20 para. 22.
108. Act No. 44 of 1967 (as amended).
109. Act No. 29 of 1967 (as amended).
110. Treaty art. 20 para. 13.
111. Treaty Annex IX.
112. Treaty art. 68.
113. East African High Commission, Act No. 10 of 1958. (In this section cited as "Act")
114. The basic legislation is: Kenya – Act No. 8 of 1966; Tanzania – Act No. 15 of 1966; Uganda – Act No. 4 of 1966. Specific references are not given in the text to income tax legislation governed by the National Assemblies, the interested reader should refer to the legislation cited here.

ficant divergencies in the national income tax systems since, from its inception in the three countries, income tax has been closely harmonized and subsequent changes in rates and allowances have been discussed between the countries in advance and agreed upon before their simultaneous introduction.

The administration of the tax is carried out by the East African Income Tax Department in respect of all three countries. Each country appoints a Commissioner of Income Tax, as the head of the Department in that State, who is under the Commissioner-General. The latter has responsibility for co-ordination and overall policy. A degree of decentralization has been achieved by the establishment of district offices dealing with geographical areas, and tax returns are filed with these offices on the basis of the location of the taxpayer's residence.

The tax base[115] for both individual and company income taxes is, for residents, the total income of the taxpayer accruing in East Africa during the calendar year; non-residents are subject to tax on income accruing in or derived from East Africa. There is no liability to tax on income arising abroad, whether or not it is remitted to East Africa.[116]

a. Individual income tax and surtax

Allowances, which are deductible in arriving at income chargeable to tax, are available for single persons, married persons, children and insurance (deductible only against surtax). Non-residents do not usually qualify for allowances. In general, the allowances are uniform in each of the three states. However, minor variations have occurred, for example, in the number of children for which allowances may be claimed (up to four in Kenya and Tanzania, up to six in Uganda) and the value of child allowances, and Kenya has provided an additional personal allowance for men of 65 years of age and women of 60 years and over.

The introduction of the Pay As You Earn (PAYE) system for employees, effective 1 July 1966, led to some simplification of allowances and the rate structure. These changes involved the introduction of a flat rate of Shs.2/50 for each Shs.20/– on all chargeable income, and a progressive surtax on all income in excess of Shs.20,000. As at 1 January 1968, the highest surtax rate was Shs.13/– for each Shs.20/– over Shs.300,000. The establishment of the PAYE system was a means of reducing the time lag between the accrual of income and the payment of tax; however, it relates only to employees and to income tax, any surtax payable is assessed and becomes payable after the end of the fiscal year.

The relatively high allowances restrict the scope of the tax to a small number of individuals and employees. In 1964 the total number of taxpayers in East Africa was 89,256, and their geographical distribution was as follows: Kenya – 52,703; Tanganyika – 21,036; Uganda – 14,508; and Zanzibar – 1,009.[117]

b. Company income tax

In addition to expenditure exclusively incurred in the production of income, allowances are normally made in respect of the following: industrial buildings; plant and machinery; special deductions for mining

115. Act sec. 3.

116. The only exception to this general rule is, briefly, that income accruing from a business in East Africa is deemed to arise in East Africa even though part of such income is earned outside of East Africa. See Act sec. 4.

117. East African Income Tax Department, Report for 1965/66 at 8. (This was the most recent copy available at the time of writing).

activities and farm works; and investment deductions on the capital cost of constructions, land clearance and planting and scientific research. Provision is made for loss carry-overs.

As of 1 January 1968, corporation tax was levied at a rate of Shs.8/– in every Shs.20/–. Companies were also required to deduct income tax at source on debenture interest paid to individuals and at Shs.8/– in every Shs.20/– in respect of such payments to persons other than individuals.

Dividend income in the hands of shareholders is only subject to surtax.

The comparative lack of industrial activity in the sub-region is reflected in the small number of taxpayers. The official figures for income taxpayers other than individuals and employees record a total of 5,914 in 1964, and the geographical distribution was as follows: Kenya – 3,382; Tanzania – 1,173; Uganda – 1,334; and Zanzibar – 25.[118]

c. The allocation of income tax revenue[119]

In accordance with the provisions of the Treaty, the total revenue collected by the Income Tax Department is broken down as follows: (a) the cost of collection, which is paid into a General Fund, along with other sums necessary to meet part of the expenditure from that Fund; (b) sums to be paid into the Distributable Pool (see below section V 3. c.); and (c) 'divisible income', which is allocated to the Partner States.

The divisible income tax is paid to each of the Partner States according to the ascertained location at which it accrued or from which it derived.

As regards company income tax, the origin of income is determined on the basis of reports made by taxpayers, uniformity in the allowances and rates of tax assures that, in general, there is no incentive for inaccurate reporting.

IV. NON-HARMONIZED TAXES

1. *Non-harmonized indirect taxes*

A number of indirect taxes, all of which are of minor importance as sources of revenue, are at present outside of the scope of harmonization.

In addition to the consumption taxes which were discussed earlier (see section III 1. b. (ii)) the most significant of these are export duties. These duties have been used increasingly since independence by all three countries, although Uganda has traditionally made the widest use of them. In general they are applied to primary products such as coffee.

Other taxes falling under this head include the following: stamp duties; produce "cesses"; motor vehicle licences; and purchase taxes on motor vehicles.

2. *Non-harmonized direct taxes*

All three countries impose some form of graduated personal tax.[120] In general they apply to all males over 18 years of age with certain exemptions; for example, destitute persons, persons in full-time education, temporary residents etc. Taxpayers are classified into groups and pay a fixed sum accordingly, normally there are no deductions allowed in determining the taxpayer's income.

Some other non-harmonized direct taxes have been levied; for example, Tanzania and Uganda have both imposed development levies. These taxes are of little importance as regards government revenue receipts.

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118. *Ibid.*

119. Treaty art. 68.

120. The national legislation includes: Kenya – Cap. 470 R.E. 1962 and Act No. 2 of 1968; Tanzania – Act No. 3 of 1955; and Uganda – Act No. 23 of 1962.

3. *Overview of tax harmonization*

Despite the existence of differences between the three countries as regards taxes which are officially harmonized and the levying of the non-harmonized taxes outlined above, the progress towards tax harmonization has been substantial and it is a major feature of economic integration in the sub-region.

The officially harmonized taxes constitute some 75 per cent of total central government tax revenue in the sub-region as a whole and when account is taken of local government revenues this proportion falls by only a few percentage points.[121]

V. PROBLEMS ARISING FROM INTEGRATION, AND FISCAL ADJUSTMENTS

The long history of co-operation in East Africa has not been without its problems and moments of crisis. These have stemmed in large part from the attitudes of the co-operating countries to the distribution of gains and losses from integration.

These considerations are vital to the continuation of co-operation in the sub-region but an adequate analysis of them is beyond the scope of this article. The observations here are limited to some general comments and a description of the fiscal aspects of adjustments which have been made.

The major source of dissatisfaction with the operations of the common market has been the feeling in Tanzania and Uganda that Kenya has reaped a disproportionate share of the gains, and they a disproportionate share of the losses, from integration.

Three important steps in the history of the accommodation of co-operation to these difficulties can be singled out: the Raisman Commission of 1961; the Kampala Agreement of 1964; and the Treaty.

1. *The East African Economic and Fiscal Commission (Raisman Commission)*[122]

Pressure from Tanganyika and Uganda and the acknowledgement that a lack of balance in the growth rates of the three territories was endangering the continuation of the common market led to the appointment of the Raisman Commission in 1960, to examine the arrangements for economic co-ordination between the territories.

In its report the Commission reached the conclusion that the then existing arrangements were beneficial to the sub-region as a whole and to the individual territories.

As a means of bolstering co-operation and ameliorating the problems to which it had given rise, the Commission's main recommendation was for the creation of a Distributable Pool with the aim of effecting a redistribution of revenue[123].

This Distributable Pool was to be financed by payment to it of 6 per cent of the total customs and excise revenue collected and 40 per cent of revenue collected from income tax on profits arising from manufacturing and finance. From these proceeds, 50 per cent was to be allocated to the financing of the common services and the remainder was to be distributed equally between the three territories.[124]

The aim of the Pool was explicitly stated as being "to offset by fiscal means, the inequalities in the distribution of benefits from the Common Market"[125], i.e. to shift more of the benefits to Tanganyika and Uganda and away from Kenya.

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121. See revenue statements of the Partner States.

122. East Africa: Report of the Economic and Fiscal Commission, H.M.S.O. London, Cmnd. 1279. (In this section cited as "Report").

123. Report paras. 202/4.

124. Report para. 209 (e) and (f).

125. Report para. 210.

2. *The Kampala Agreement*

Despite the implementation of the major recommendations of the Raisman Commission, relationships between the three territories continued to be strained, leading in 1964 to serious consideration in Tanganyika of withdrawal from the common market. This crisis was the background to the so-called Kampala Agreement of April 1964. Under this Agreement further measures were to be taken to correct the imbalance within the sub-region, relying mainly on operations to influence the location of new industry and on export quotas for goods transferred within the common market.[126]

However the provisions of the Kampala Agreement were not implemented and economic relationships between the States again worsened and another commission was appointed, the Philip Commission, to review again the structure of co-operation in East Africa.

3. *The Treaty for East African Co-operation*

The negotiation of the Treaty was the outcome of the recommendations of the Philip Commission.

In addition to the provisions of the Treaty which have already been discussed certain other features are of particular interest from the fiscal point of view.

a. The East African Development Bank[127]

The Treaty provides for the creation of a Development Bank with the aim of promoting the industrial development of the Partner States, especially those which are relatively less developed in this respect. This aim is to be achieved by the financing of specific projects designed to promote industrial development and its co-ordination between the States.

The Bank is to have an authorized capital stock and shares subscribed to by the Partner States.[128] These subscriptions are to be paid in instalments according to a timetable set out in the Treaty.[129]

The Bank is charged with conducting its operations on the basis of "sound banking principles", to select projects in accordance with the aims set out in its Charter, and to so manage its activities that the shares of commitments accrue to the Partner States in the proportions of 38¾ per cent each to Tanzania and Uganda and 22½ per cent to Kenya.[130]

b. The General Fund[131]

A general Fund of the Community is established into which all receipts of the Community are to be paid with the exception of income tax and customs and excise revenue disbursed to Partner States, and payments into the Distributable Pool. Expenditure from the Fund is to be made in respect of the cost of services provided by the Community and the recurrent expenditure of the University of East Africa.

c. The Distributable Pool

Under the provisions of the Treaty the Distributable Pool is reconstituted with its finances and operation on a new basis. As regards its finances[132], payments into the Pool are now to comprise 20 per cent of the income tax collected by the East African Income Tax Department in respect of companies engaged in manufacturing or financial activities, and 3 per cent of the total revenue

126. For a discussion of this point see Robson, P. Economic Integration in Africa. George Allen and Unwin 1968 at 149–154.
127. Treaty art. 21 and Annex VI.
128. Treaty Annex VI arts. 3 and 4.
129. Treaty Annex VI art. 5.
130. Treaty Annex VI art. 13.
131. Treaty arts. 65 and 66.
132. Treaty art. 67 para. 2.

collected by the East African Customs and Excise Department.
The receipts of the Pool are to be distributed equally among the Partner States.[133]
However the reconstituted Distributable Pool is to operate for only a limited period and its activities are to be reduced following the imposition of the first transfer tax, and are to cease altogether according to a time limit linked to Kenya's contribution to the Development Bank.[134]

d. The East African Tax Board[135]

An East African Tax Board is to be created as an advisory body. The Board is to be composed of three specially appointed members (one nominated by each Partner State) plus eight officials from the Community's tax departments and corresponding national authorities.
Its advisory role consists mainly of reviewing the activities of the Community's tax departments and the co-operation between them. At the request of a Partner State the Board may render assistance as regards tax planning in that State.

VI. CONCLUSION

The attempts to establish stable international economic integration between developing countries are based on the view that such integration makes possible the achievement of economic benefits, largely through the widening of markets, the exploitation of economies of scale and of differences in comparative advantage, which would not be available to countries endeavouring to develop their economies without such links. Fiscal harmonization cannot in itself ensure the fruition of such potential gains but it has an important role to play in the removal of artificial influences on economic decisions within the international unit and in realizing economies in the cost of tax administration and the use of scarce skilled personnel.
The objective of removing some of the obstacles to the free working of common markets via fiscal harmonization is not without its costs. The harmonization of national tax systems involves the individual participants in a loss of budgetary flexibility, both as regards the raising of tax revenue and possibly in connection with tax reform, and, in the short run at least, may result in a reduction of total tax revenue accruing to individual governments as a result of the establishment of a common external tariff and the free internal movement of commodities. These costs are unlikely to be equally shared and, as has been the case in East Africa, they are a source of dissatisfaction with the operations of integration arrangements.
In the East African context, these and other problems have led to adjustments, many of a fiscal nature, which have constituted to some extent a movement away from the free working of the common market. However these adjustments must be seen in the light of the extent to which tax harmonization has been attained, leading some participants to the opinion that this objective had been followed without adequate recognition of the costs involved, and the necessity of introducing some flexibility in order that co-operation should continue in the sub-region.
Despite the problems which have been thrown up, East African co-operation has to date proved to be stable, and the signing of the Treaty marks a formalisation of the ties between the three countries.
The existing links form a platform on which a wider geographical scope for co-operation can be built. The Treaty contains a general

133. Treaty art. 68.
134. Treaty arts. 67 and 70.
135. Treaty art. 88.

provision by which new members may be admitted but no procedural rules are laid down.[136] Applications for membership have been made by Burundi, Ethiopia, Somalia and Zambia and a series of talks involving all four countries and ministers representing the Partner States were held in November 1968.

Such an expansion of the Community presents many problems and contains the potential for a magnification of the stresses within it. Nevertheless, along with the recent agreement by the Partner States to form an association with the European Economic Community[137], the interest in widening the scope of co-operation is a sign of both overall satisfaction with the results of the existing arrangements and of future aspirations. Providing that the unequal distribution of costs and benefits are admitted and accommodated to both the economic and political needs of the participants, economic integration in East Africa may be expected to endure and may constitute the basis for the rapid economic development to which these countries aspire.

136. Treaty art. 93.

137. The text of the Agreement is published in Legal Notice No. 25, East African Community Gazette Supplement No. 10, 1 October 1968.

DR. JUR. ROBERT HALPERN:

DIE NEUEN BESTIMMUNGEN DES ÖSTERREICHISCHEN EINKOMMENSTEUERGESETZES 1967

EINLEITUNG

Im Bundesgesetzblatt vom 28.7.1967 wurde unter Nr. 268 das Einkommensteuergesetz 1967 vom 1.7.1967 kundgemacht. Dieses Einkommensteuergesetz stellt einerseits eine Neukodifizierung des ab 1. Jän. 1954 in Kraft getretenen Einkommensteuergesetzes 1953 dar, welches durch 22 Novellierungen bereits sehr unübersichtlich geworden ist. Andererseits wurde durch dieses Gesetz die sogenannte große Einkommensteuerreform verwirklicht, welche in der Hauptsache eine wesentliche Tarifänderung brachte. Bereits im Jahre 1966 wurde durch die beiden Einkommensteuernovellen 1966 die geplante Einkommensteuerreform mit der sogenannten kleinen Einkommensteuerreform eingeleitet, worüber im Bulletin, Heft 7-8/67 schon kurz berichtet worden ist.

Die meisten neuen Bestimmungen des Einkommensteuergesetzes 1967 sind mit 1. Jän. 1968 in Kraft getreten und werden – sieht man von jenen Neuerungen ab, welche auch bei der Lohnsteuer Bedeutung haben und daher schon im Laufe des Kalenderjahres 1968 angewendet wurden – bei der nunmehr bevorstehenden Einkommensteuerveranlagung für das Kalenderjahr 1968 angewendet werden. Daher erscheint eine Befassung mit diesem Gesetz gerade jetzt besonders aktuell; dies umsomehr, als durch das Bundesgesetz vom 27.6.1968 (Bundesgesetzblatt vom 2.8.1968 Nr.302) mit Wirkung vom 1. Jän. 1969 für 2 Jahre eine Sonderabgabe vom Einkommen eingeführt wurde, wodurch die Einkommensteuersenkung durch die Tarifreform des Einkommensteuergesetzes 1967 im wesentlichen wieder beseitigt wurde.

In Anbetracht der großen Anzahl der textlichen Änderungen erscheint es zweckmäßig, nur die wichtigen Novellierungen gegenüber der Rechtslage nach dem Einkommensteuergesetz 1953 darzulegen. Weiters erscheint es zum besseren Verständnis vorteilhaft, den Aufbau dieses Berichtes nicht an die Paragraphenfolge des Einkommensteuergesetzes 1967 zu binden, sondern 4 Abschnitte herauszuarbeiten. Der I. Abschnitt befaßt sich mit jenen Änderungen, welche nur die Lohnsteuer (also die Einhebung der Einkommensteuer im Abzugswege an der Quelle) betrifft; der II. Abschnitt betrifft die Neuerungen bei der veranlagten Einkommensteuer, während der III. Abschnitt jene Novellierungen behandelt, welche sowohl die Lohnsteuer als auch die veranlagte Einkommensteuer betreffen. Der IV. Abschnitt wird sich dann mit der Einkommensteuersenkung durch die Tarifreform befassen.

Nach dieser Darstellung der wesentlichen Änderungen der Gesetzesmaterie durch das Einkommensteuergesetz 1967 wird in einem V. Abschnitt die einleitend erwähnte Sonderabgabe vom Einkommen behandelt und ein Tarifvergleich durchgeführt werden. Eine zusammenfassende Würdigung wird diesen Bericht abschließen. Endlich sei noch festgestellt, daß sämtliche Gesetzesbestimmungen des Einkommensteuergesetzes 1967 bis auf drei mit 1. Jän. 1968 in Kraft getreten sind; daher wird der frühere Stichtag für das Inkrafttreten dieser drei Gesetzesbestimmungen besonders erwähnt, ansonsten aber kein Inkrafttreten angegeben werden.

I

Wir beginnen also mit jenen wichtigsten Änderungen, welche nur für Lohnsteuerpflichtige gelten. In § 3 Abs.1, Z.12 wurde der Freibetrag für die sonstigen Bezüge von jährlich S 2.600,– auf jährlich S 3.500,– erhöht; die letzte Erhöhung hatte mit Wirkung vom 1.1.1962 von S 2.100,– auf S 2.600,– stattgefunden. Hier bringt § 107, Abs.3 des Gesetzes eine Übergangsbestimmung, derzufolge bei der Versteuerung sonstiger Bezüge, die nach dem 30. September 1967 und vor dem 1.1.1968 gewährt werden, ein zusätzlicher Freibetrag von insgesamt S 900,– zu gewähren ist. Da die Weihnachtsgelder in der Regel erst nach dem 1.10. eines Jahres ausgezahlt werden, ergab sich die praktische Auswirkung dieser Erhöhung für das ganze Kalenderjahr 1967. Gemäß § 3 Abs.1 Z.15 EStG 1953 waren Jubiläumsgeschenke an Arbeitnehmer steuerfrei, wenn sie bei einem Arbeitgeber nach 25-jähriger oder 30-jähriger Dienstzeit S 5.000,–, bei 35-jähriger oder 40-jähriger Dienstzeit S 7.000,– bzw. bei 45-jähriger oder 50-jähriger Dienstzeit S 9.000,– nicht überstiegen. Bei einem Firmenjubiläum waren Jubiläumsgeschenke an Arbeitnehmer, wenn sie einen Monatsbezug nicht überstiegen, dann steuerfrei, wenn sie deshalb gegeben wurden, weil die Firma seit 25 oder 50 Jahren oder einem sonstigen Mehrfachen von 25 Jahren besteht. Wurden bei Zutreffen der sonstigen Voraussetzungen die genannten Höchstbeträge überschritten, so war nur der übersteigende Betrag mit dem begünstigten Steuersatz für sonstige Bezüge steuerpflichtig. Durch die Neutextierung dieser Gesetzesbestimmung – es heißt jetzt „insgesamt 25 bis 30 Jahre bei einem Arbeitgeber" etc. – ist einerseits eine Verbesserung dahingehend eingetreten, daß die Zeitpunkte für die begünstigte Behandlung der Jubiläumsgeschenke entsprechend der bereits bestehenden Praxis in Zeiträume umgewandelt wurden, andererseits ist eine Verschlechterung für solche Jubiläumsgeschenke eingetreten, welche den gesetzlichen Freibetrag um mehr als das Einfache überschreiten; während bisher Beträge, welche den Freibetrag überschritten, in vollem Umfange als sonstige Bezüge begünstigt zu versteuern waren, werden nunmehr Jubiläumsgeschenke, soweit sie den Freibetrag um mehr als das Einfache überschreiten, als laufender Bezug versteuert.

Die Bestimmungen des § 3, Abs.1, Z.18, betreffend die Sonntags-, Feiertags- und Nachtarbeitszuschläge, wurden neu geregelt. Die für die Steuerfreiheit dieser Zuschläge maßgebliche Bezugsgrenze für die Normalarbeitszeit wurde von täglich S 166,66 auf S 230,–, von wöchentlich S 1.000,– auf S 1.380,– und von monatlich S 4.333,33 auf S 5.980,– erhöht: übersteigen die steuerpflichtigen laufenden Bezüge für die Normalarbeitszeit in einzelnen oder allen Lohnzahlungszeiträumen der genannten Bezugsgrenzen, so bleiben diese Zuschläge trotzdem steuerfrei, soweit sie S 20,– täglich, S 120,– wöchentlich oder S 520,– monatlich nicht übersteigen.

§ 3, Abs.1 Z.31, betreffend die zinsverbilligten Arbeitgeberdarlehen, wurde, wie die erläuternden Bemerkungen ausführen, um Mißbräuche hintanzuhalten, dahingehend eingeschränkt, daß Zinsenersparnisse bei zinsverbilligten oder unverzinslichen Arbeitgeberdarlehen nurmehr insoweit steuerfrei bleiben, als das Darlehen S 100.000,– nicht übersteigt. Bei Berechnung der Zinsenersparnis wird dabei von dem gesetzlichen Zinsfuß nach dem allgemeinen bürgerlichen Gesetzbuch, also von 4% pro anno auszugehen sein, wobei die Neuregelung auch

für Darlehen gilt, welche vor dem 1.1.1968 gewährt worden sind.

Das Kraftfahrzeugpauschale wurde nach der Neufassung des § 9, Abs.1, Z.4 um 25% erhöht, und zwar sowohl bei Krafträdern oder Motorfahrrädern, als auch bei Personen- und Kombinationskraftwagen. Bei letzteren beträgt es nunmehr S 10,— täglich, S 60,— wöchentlich, S 260,— monatlich und S 3.120,— jährlich.

Durch die Neufassung des § 19 Abs.2 Z.2 wurde bezüglich der Tages- und Nächtigungsgelder für Inlandsdienstreisen privater Arbeitnehmer von der Koppelung mit den Bezugsgrenzen und den Reisegebührensätzen der vergleichbaren Bundesbediensteten abgegangen. Die neuen Bezugsgrenzen wurden gegenüber den bisherigen Grenzen auf volle S 10.000,— auf- oder abgerundet, während die Gebührensätze um rund 10% erhöht wurden.

Die seit 1. Jän. 1968 geltenden Gebührensätze sind nachfolgender Tabelle zu entnehmen, wobei der angeführte Tarif I bei Dienstreisen in Orte, die mehr als 5 km vom Dienstort entfernt sind, anzuwenden ist; in allen anderen Fällen gelten die Ansätze des Tarifes II.

		Tagesgelder		Nächtigungsgelder
		Tarif I	Tarif II	
	bis 50.000 S	75 S	60 S	35 S
über 50.000 S	bis 70.000 S	90 S	70 S	35 S
über 70.000 S	bis 100.000 S	100 S	80 S	45 S
über 100.000 S	bis 140.000 S	115 S	90 S	60 S
über 140.000 S		150 S	110 S	60 S

Für die Kilometergelder und Auslandsreisekostenentschädigungen privater Arbeitnehmer wurde die Koppelung mit den Reisegebührensätzen der Bundesbediensteten aufrechterhalten und analog zu der für Bundesbedienstete geltenden Reisegebührenvorschrift endlich die Anordnungen über Umzugskostenvergütungen in das Gesetz aufgenommen. Auch die Regelung hinsichtlich der Haushaltsersparnisse bei höheren Tages- und Nächtigungsgeldern wurde etwas geändert, wobei unangenehm auffällt, daß bisher derartige tatsächliche höhere Reiseaufwendungen dem Finanzamt nur glaubhaft zu machen waren, jetzt aber nachgewiesen werden müssen; außerdem sind diese Haushaltsersparnisse nunmehr zwar einheitlich mit 20%, aber von den nachgewiesenen Aufwendungen zu berechnen, während bisher die Berechnung von den zustehenden Tagessätzen vorgenommen wurde.

Infolge der im III. Abschnitt zu besprechenden Erhöhung des Sonderausgabenpauschales mußte der Hinzurechnungsbetrag für mehrere Lohnsteuerkarten nach § 43 bzw. wegen Nichtvorlegung der Lohnsteuerkarte nach § 63 von S 29,— täglich auf S 33,—, von S 174,— wöchentlich auf S 198,— und von S 754,— monatlich auf S 858,— erhöht werden. Während die neuen Bestimmungen des § 46 hinsichtlich Alleinverdienerfreibetrag, Steuergruppen und Kinderfreibetrag anläßlich der Tarifreform besprochen werden, sei ergänzend darauf verwiesen, daß auch in den §§ 47, 48, 51, 53, 54 und 55 gewisse Änderungen eingetreten sind, welche nicht im Detail erörtert werden können, aber zum Teil problematisch sind.

Neugefaßt wurde auch die Bestimmung des § 60 betreffend die Überwälzung der Lohnsteuer bei sogenannten Nettolohnvereinbarungen. Diese auf den Arbeitgeber überwälzte Lohnsteuer – welche im übrigen

nach § 98 verboten ist und unter der dort angeführten Sanktion steht – stellte nach der älteren Rechtsprechung des Verwaltungsgerichtshofes keinen Vorteil aus einem Dienstverhältnis und daher auch keinen Arbeitslohn dar. Nunmehr wurde ein Halbsatz neu in diesen Paragraphen aufgenommen, demzufolge der übernommene Betrag an Lohnsteuer als Vorteil aus dem Dienstverhältnis zu behandeln ist. Leider wurde aber der folgende Satz "Der Arbeitgeber hat für die Berechnung der Lohnsteuer dem Arbeitslohn (§ 19) die darauf entfallende Lohnsteuer einmal hinzuzurechnen" nicht der neuen gesetzlichen Bestimmung angepaßt, sodaß die Lohnsteuerberechnung jetzt erst recht durch eine involvierende Rechnung problematisch geworden ist.

Abschließend zu diesem Teil seien noch gewisse Änderungen bei der Durchführung eines Jahresausgleiches erwähnt, wobei jene, die den Jahresausgleich auf Antrag des Arbeitnehmers nach § 76 betreffen, nur formeller Natur sind.

Bedeutsam ist die Novellierung des § 77 über den amtlichen Jahresausgleich, gemäß welcher die Freigrenze für die Durchführung eines Jahresausgleiches von S 36.000,– auf S 48.000,– erhöht wurde, wobei auf gewisse formale Änderungen nicht näher eingegangen werden kann.

II

Wenden wir uns nunmehr dem zweiten Teilkapitel, und zwar jenen steuerlichen Bestimmungen zu, welche nur die veranlagten Steuerpflichtigen betreffen, so ist als erste die Neufassung des durch die Einkommensteuernovelle 1964 geschaffenen § 3, Abs.1 Z.34 zu erwähnen, welcher die Zuschüsse aus öffentlichen Mitteln behandelt. Hier wurde der Wortlaut "Zuschüsse aus öffentlichen Mitteln" durch den Ausdruck "Zuwendungen aus öffentlichen Mitteln" ersetzt. Durch diese Textierung ist die Frage, ob der Steuerpflichtige zur Erlangung der Steuerfreiheit dieser Zuwendungen aus öffentlichen Mitteln auch eigene Mittel für die Anschaffung oder Herstellung von Wirtschaftsgütern des Anlagevermögens aufwenden muß, bedeutungslos geworden; außerdem sei ausdrücklich darauf verwiesen, daß unter dem Begriff Zuwendungen auch Sachzuwendungen fallen, sodaß nunmehr z.B. auch Zuwendungen von Grundstücken zur Herstellung von Gebäuden begünstigt sind. Weiterhin wurde der Wortlaut insoferne geändert, als die Steuerfreiheit künftig auch dann gegeben ist, wenn die Zuwendung nicht nur auf Grund gesetzlicher Ermächtigung, sondern auch auf Grund eines Beschlusses der zuständigen Landesregierung, des zuständigen Gemeinderates oder einer Körperschaft des öffentlichen Rechtes erfolgt.

Der Absetzungsbetrag für die mittätige Ehegattin nach § 4, Abs.4, Z.4 wurde nach 2 Richtungen hin geändert; einerseits wurde bei gleichbleibendem Prozentsatz der Mindestbetrag auf S 10.000,– und der Höchstbetrag auf S 15.000,– erhöht; dabei wurde der bisherigen Rechtsprechung folgend, die Vollbeschäftigung mit einer wöchentlichen Mindestarbeitszeit von 40 Stunden definiert. Andererseits wurde ein neuer Absetzungsbetrag von S 3.000,– für jene Fälle geschaffen, in denen das Ausmaß der Mittätigkeit mindestens 20 Wochenstunden erreicht. Dieser Fixbetrag ist deshalb wesentlich niedriger als der Betrag bei Vollbeschäftigung, weil hier der später zu erwähnende Alleinverdienerfreibetrag von S 4.000,– nicht verlorengeht; bei der Gewerbesteuer bleibt es

allerdings beim Absetzungsbetrag von S 3.000,—, sodaß diese Regelung auch infolge der Problematik der Überprüfbarkeit nicht befriedigen kann.

Bereits durch die Einkommensteuernovelle 1966 wurde die Bestimmung des § 4, Abs.4 Z.6 über die Zuwendung an wissenschaftliche Hochschulen und Fakultäten dahingehend geändert, daß die vollen Zuwendungen bis zu 2% des Gewinnes des unmittelbar vorangegangenen Wirtschaftsjahres als abzugsfähig erklärt wurden, während vorher nur die Hälfte dieser Zuwendungen abzugsfähig waren. Durch das Einkommensteuergesetz 1967 wurde dieser Prozentsatz von 2% auf 4% erhöht.

Endlich wurde dem § 4 ein neuer Absatz 6 angefügt, wodurch die Vorschriften über die Reisekosten der selbständig Erwerbstätigen ähnlich jener unter I bereits besprochenen Regelung für die unselbständig Tätigen im Gesetz selbst festgelegt wurden. Es gelten die gleichen Bezugsgrenzen und Sätze wie jene des § 19, Abs.2 Z.2, wobei an die Stelle des Bruttoarbeitslohnes der durchschnittliche Reingewinn der letzten 3 Jahre – erhöht um gewisse Zurechnungsposten wie vorzeitige Abschreibungen, Zuführung zu bestimmten Rücklagen etc. - tritt, ohne daß für diese Beträge eine sachliche Änderung eingetreten wäre. Während sich aber der Begriff einer Dienstreise für Arbeitnehmer in der Regel aus den Kollektivverträgen ergibt, sodaß diesbezügliche Auffassungsdifferenzen mit den steuerlichen Bestimmungen kaum auftreten können, wurde in das Einkommensteuergesetz 1967 eine Definition der Dienstreisen neu aufgenommen, welche für alle selbständig Tätigen leider wesentliche Unklarheiten gebracht hat; bisher war es eindeutig klar, daß für steuerlich anzuerkennende Dienstreisen eine Dienstverrichtung vorliegen muß, welche ausserhalb des Dienstortes (also der Ortsgemeinde) stattfindet; die Neutextierung läßt auch die Auslegung zu, daß unter Dienstort die regelmäßige Arbeitsstätte (Büro, Fabrik, Werkstätte etc.) gemeint ist, sodaß bereits bei Verlassen dieser regelmäßigen Arbeitsstätte ohne Verlassen der Ortsgemeinde eine Dienstreise angenommen werden könnte. Es bleibt abzuwarten, ob sich die Finanzbehörde dieser Auslegung, welche die Steuerpflichtigen stark begünstigen und schwer überprüfbare Voraussetzungen schaffen würde, anschließt.

Von dem seit Jahrzehnten eingelebten, allerdings nicht immer zutreffenden Begriff kurzlebige Wirtschaftsgüter, müssen wir uns verabschieden, da dieser auf die zutreffendere Bezeichnung "geringwertige Wirtschaftsgüter" geändert wurde. Wichtiger erscheint dabei, daß die Grenze für geringwertige Wirtschaftsgüter auf S 2.000,— erhöht wurde; bis 1947 betrug diese Grenze S 200,—, stieg für die Jahre 1948-1957 auf S 800,— und ab 1958 auf S 1.200,—.

§ 6c hinsichtlich der vorzeitigen Abschreibung wurde, abgesehen von unbedeutenden formalen Berichtigungen, durch einen neuen Abs. 4 ergänzt. Demnach beträgt für abnutzbare Wirtschaftsgüter des Anlagevermögens, soweit diese unmittelbar und ausschließlich der Verhinderung, Beseitigung oder Verringerung von Abwässer- und Abgasschäden dienen und deren Anschaffung oder Herstellung gesetzlich vorgeschrieben oder im öffentlichen Interesse erforderlich ist, der Abschreibungssatz abweichend von Abs. 3 einheitlich 60%. Diese Vorschrift soll auch auf Mitbenützungsrechte und Zuschußzahlungen, die für ein Mitbenützungsrecht an solchen Anlagen geleistet werden, Anwendung finden.

Der verbleibende Teil der Anschaffungs- oder Herstellungskosten ist gleichmäßig auf die nächsten 4 Wirtschaftsjahre verteilt, abzuschreiben. Auffallend an dieser grund-

sätzlich sehr begrüßenswerten Bestimmung erscheint lediglich, daß die Höhe der vorzeitigen Abschreibungen nach Abs.4 mit 60% fixiert ist, während sie nach Abs.3 dieses Paragraphen bis zu den Grenzbeträgen von 20, bzw. 45 bzw. 60% dem Ermessen des Steuerpflichtigen anheim gestellt ist. Obwohl aus der Gesetzesstelle nicht klar ersichtlich, wird es dem Steuerpflichtigen wohl nicht verwehrt sein können, an Stelle der höheren vorzeitigen Abschreibung nach Abs.4 die allgemeinen vorzeitigen Abschreibungsbestimmungen nach Abs.3 in Anspruch zu nehmen.

In § 9, Abs.1, Z.6, betreffend die Abschreibung von Gebäuden, die nicht zu einem Betriebsvermögen gehören, wurde die verunglückte Fassung der Einkommensteuernovelle 1965 zum Teil wieder beseitigt. Während weiterhin über Antrag jener Betrag für die Bemessung der Abschreibung zugrunde gelegt werden kann, der für die Anschaffung am 1.1.1963 hätte aufgewendet werden müssen, wurde der Begriff Herstellung aus dieser Gesetzesstelle eliminiert. Wenn auch eine derartige Neuregelung wohl unvermeidlich geworden ist, so muß der Inhalt der dazu gegebenen erläuternden Bemerkungen als unzutreffend abgelehnt werden.

Dagegen kann mit Befriedigung vermerkt werden, daß die Freigrenze für Veräußerungsgewinne nach dem § 14, Abs.2 (Land- u. Forstwirtschaft), § 16, Abs.4 (Gewerbebetrieb), § 16a, Abs.4 (Bodenschätze), § 17, Abs.4 (wesentliche Beteiligungen) und § 18, Abs.4 (selbständige Arbeit), welche seit der Einkommensteuernovelle 1964 S 60.000,— betrug, nunmehr in einen Freibetrag umgewandelt wurde.

Auch die Änderung des § 21, Abs.2, welcher vom Nutzungswert von Eigentumswohnungen und Wohnungen in Eigenheimen handelt, erscheint erwähnenswert; einerseits wurde die Nutzfläche der mit dem begünstigten Satz von 1% anzusetzenden Eigentumswohnungen bzw. Wohnungen in Einfamilienhäusern insoweit erhöht, als sie für jedes Kind, für das dem Steuerpflichtigen ein Kinderfreibetrag wegen Haushaltszugehörigkeit gewährt wird, um 10 m² erweitert wurde. Andererseits wurde der erst durch die Einkommensteuernovelle 1966 neu geschaffene § 103b hinsichtlich der Abzugsfähigkeit von Hochwasser-, Erdrutsch-, Vermurungs- und Lawinenschäden hier übernommen und auf Katastrophenschäden aller Art ausgedehnt. In diesem Zusammenhang darf noch darauf hingewiesen werden, daß gemeinsam mit dem Einkommensteuergesetz 1967 folgende Entschließung verabschiedet wurde: Der Bundesminister für Finanzen wird ersucht, die Frage der Besteuerung der Erträge aus Vermietung und Verpachtung gemäß § 21 Einkommensteuergesetz nach einer gesetzlichen Neuordnung des Wohnungs- und Mietenwesens zu überprüfen und dem Nationalrat eine entsprechende Novelle zuzuleiten.

Hinsichtlich der Haushaltsbesteuerung wurde durch § 26, Abs.3 und § 27, Abs.7 in Hinblick auf das Erkenntnis des Verfassungsgerichtshofes vom 30.6.1966, Zahl G 6/66 mit Wirkung ab 1. Jän. 1967 verfügt, daß zusammen veranlagte Personen Gesamtschuldner sind. Die zwangsweise Einbringung der aushaftenden Einkommensteuerschuld ist jedoch über Antrag eines Gesamtschuldners bei jedem Gesamtschuldner auf jenen Teilbetrag zu beschränken, der sich aus dem Verhältnis seiner Einkünfte zum Gesamtbetrag der Einkünfte ergibt. Bedauerlicherweise wurde der Anregung nicht Rechnung getragen, über begründeten Antrag eines Gesamtschuldners die Einschränkung der Einkommensteuerschuld auch vor zwangsweiser Einbringung der Gesamtschuld durchzuführen. Weiterhin wurde, obwohl der Ver-

fassungsgerichtshof die Bestimmungen des § 27, Abs.6 als verfassungskonform bezeichnet hatte, die Rechtstellung der Kinder hinsichtlich der Zusammenveranlagung verschlechtert; nunmehr sind von der Zusammenveranlagung nur mehr jene Einkünfte der Kinder aus nichtselbständiger Arbeit ausgeschlossen, welche aus einem Betrieb stammen, der weder ganz oder teilweise im Eigentum des Haushaltungsvorstandes, noch, und das ist neu, der mit ihm gemäß § 26 zusammenveranlagten Person steht. Bedauerlicherweise wurde der durch Jahrzehnte gebräuchliche Begriff "ein dem Haushaltungsvorstand fremder Betrieb", wie eben zitiert, gleichfalls geändert, was möglicherweise bei Beteiligungen an Kapitalgesellschaften zu unerfreulichen Diskussionen führen wird. In § 28, Abs.1, Z.4 betreffend die Steuererklärungspflicht, wurde die Grenze für kapitalertragsteuerpflichtige Einkünfte von bisher S 1.500,— auf S 3.600,— erhöht, während es nach der Neufassung des § 28a den Mitgliedern einer Haushaltsgemeinschaft freigestellt bleibt, ihre erklärungspflichtigen Unterlagen entweder dem Haushaltungsvorstand oder dem zuständigen Finanzamt direkt zur Verfügung zu stellen.

In § 32a wurde, wie die erläuternden Bemerkungen ausführen, festgestellt, daß sich der Freibetrag nach § 32a und der Absetzungsbetrag gemäß § 4, Abs.4, Z.4 gegenseitig ausschließen; aus dieser Feststellung folgt allerdings der Umkehrschluß, daß bisher die beiden Absetzungsbeträge in besonderen Fällen nebeneinander zustehen.

§ 34a EStG 1953 sah für Einkünfte aus der Verwertung patentrechtlich geschützter volkswirtschaftlich wertvoller Erfindungen durch andere Personen (also Lizenzeinkünfte) einen begünstigten Einkommensteuersatz vor, welcher einschließlich der Einkommensteuerzuschläge bis einschließlich 1966 zwischen 11,8% und 41,3% festzusetzen war; diese Grenzen erhöhten sich für 1967 auf 12,1% bis 42,35%. Durch das Einkommensteuergesetz 1967 wurde die Höchstgrenze auf 36,3% herabgesetzt.

Endlich wurde bei der Veranlagung von steuerpflichtigen Einkünften nach § 93 die Veranlagungsgrenze für kapitalertragssteuerpflichtige Einkünfte – neben Einkünften aus nichtselbständiger Arbeit - von bisher S 1.500,— auf S 3.600,— jährlich erhöht.

Weiterhin wurde bei der Veranlagung von steuerpflichtigen Einkünften über Antrag des Steuerpflichtigen nach § 93 Abs.3 ein neuer Antragsgrund eingeführt und zwar, wenn zur Vermeidung einer Doppelbesteuerung eine im Ausland entrichtete Einkommensteuer auf die inländische Einkommensteuer anzurechnen ist.

III

Damit kommen wir zu jenen neuen Bestimmungen, welche alle Steuerpflichtigen betreffen, also zu den Sonderausgaben des § 10 und der außergewöhnlichen Belastung des § 33. Schuldzinsen und auf besonderen Verpflichtungsgründen beruhende Renten und dauernde Lasten waren bisher bekanntlich dann voll abzugsfähig, wenn sie weder Betriebsausgaben oder Werbungskosten darstellten, noch mit Einkünften im wirtschaftlichen Zusammenhang stehen, die bei der Veranlagung außer Betracht bleiben; die Nichtabzugsfähigkeit derartiger Aufwendungen wurde jetzt dahingehend erweitert, daß sie auch nicht mit Einkünften im wirtschaftlichen Zusammenhang stehen dürfen, die nicht der Einkommensteuer unterliegen. Die erläuternden Bemerkungen führen aus, daß durch die Einfügung der Worte "oder nicht der Einkommensteuer unter-

liegen" erreicht werden soll, daß Schuldzinsen usw., die im wirtschaftlichen Zusammenhang mit Liebhabereien, (z.B. Luxusgüter) oder mit Spielschulden stehen, nicht als Sonderausgaben zu berücksichtigen sind. Diese Motivierung klingt vorerst durchaus überzeugend, doch steht zu befürchten, daß der neue Gesetzeswortlaut nicht zielführend ist; scheint es doch eine gewagte Konstruktion zu behaupten, daß Spielschulden mit Einkünften im wirtschaftlichen Zusammenhang stehen, die nicht der Einkommensteuer unterliegen. Weiterhin kann doch niemand exakt feststellen, ob ein aufgenommener Kredit etwa dazu dient, Spielschulden abzudecken oder gewisse Anschaffungen oder einen erhöhten Lebensunterhaltaufwand. Somit steht zu befürchten, daß die Finanzbehörde bei der Prüfung der Abzugsfähigkeit von Schuldzinsen nunmehr noch wesentlich weiter in die Intimsphäre des Abgabepflichtigen eindringen wird als bisher, was als absolut unerwünscht bezeichnet werden muß.

Auf gewisse Änderungen hinsichtlich der bestimmungsmäßigen Verwendung von Bausparkassenbeträgen bzw. 5-jährig gebundenen Beiträgen und endlich der Änderung der Nachversteuerung von als Sonderausgaben anerkannten Beträgen für die Schaffung von Wohnraum nach § 10, Abs.1, Z.3 und Z.4 kann hier nicht näher eingegangen werden. Hingegen erscheint erwähnenswert, daß auch hier die maßgebliche Gesamtnutzungsfläche der nach § 10, Abs.2, Z.3 begünstigten Eigenheime bzw. Eigentumswohnungen für jedes Kind, für das dem Steuerpflichtigen ein Kinderfreibetrag wegen Haushaltszugehörigkeit gewährt wird, um 10 m² erhöht wurde.

Endlich wurde das Sonderausgabenpauschale gemäß § 10, Abs.3 bzw.51, Abs.3, welches durch die 2. Einkommensteuernovelle 1966 mit Wirkung ab 1.1.1967 in der jährlichen Höhe von S 2.028,— eingeführt wurde, auf jährlich S 3.276,—, also auf die gleiche Höhe wie das Werbungskostenpauschale erhöht.

In § 33, Abs.5 erfuhren die Einkommensstufen für die außergewöhnliche Belastung eine gewisse Valorisierung, und zwar wurden sie von bisher S 18.000,— auf S 30.000,—, von bisher S 36.000,— auf S 60.000,—, von bisher S 72.000,— auf S 120.000,— und von bisher S 150.000,— auf S 240.000,— erhöht, während die höchste Einkommensstufe von S 300.000,— unverändert geblieben ist. Berücksichtigt man, daß die letzte Erhöhung dieser Einkommensstufen mit Wirkung vom 1.1.1952 stattgefunden hat, so kann man die Valorisierung kaum als angemessen bezeichnen.

Endlich wurde § 103 b, Abs.2 hinsichtlich der Hochwasser-, Erdrutsch-, Vermurungs- und Lawinenschäden in einem neuen Absatz 8 des § 33 übernommen und analog der Regelung des oberwähnten § 21 auf Katastrophenschäden aller Art ausgedehnt.

IV

Wenden wir uns nunmehr dem Herzstück der großen Einkommensteuerreform, der Tarifreform zu, so war, wie die erläuternden Bemerkungen einleitend ausführen, für die Ausarbeitung der Tarifreform bestimmend:

1) Milderung der bisherigen Diskriminierung jener Ehepaare, bei denen nur 1 Partner erwerbstätig ist, durch Einführung eines Alleinverdienerfreibetrages,
2) Steuerliche Entlastung der Familienerhalter,
3) Neugestaltung des Tarifes und Milderung der Progression, und
4) durch die Reform des Einkommensteuertarifes sollen keine steuerlichen Mehrbelastungen eintreten.

Diese Gesichtspunkte dürfen nach den offiziellen Verlautbarungen noch dahingehend ergänzt werden, daß die gesamte Einkommensteuerreform nicht mehr als 3 Milliarden Schilling an Steuerausfall verursachen dürfte. An die Stelle der bisherigen Steuergruppen I-III mit verschieden hohen Kinderermäßigungsabschlägen treten nunmehr zwei Steuergruppen, nämlich die Steuergruppe A für Ledige mit bestimmten Ausnahmen und die Steuergruppe B für alle anderen Steuerpflichtigen. Der Tarif der Steuergruppe A wird nunmehr bis zu einem Einkommen von S 40.000,— nur mehr das 1,45-fache des Tarifes der Steuergruppe B betragen. Bei Einkommen über S 40.000,— sollen die Mehrbeträge mit dem um 7% des Einkommens erhöhten Steuerbetrag der Steuergruppe B besteuert werden.

In die Steuergruppe B fallen jene Personen, die bisher in die Steuergruppe II und III eingereiht waren. Dabei wird der diesbezügliche Tarif in den unteren und mittleren Einkommensbereichen dadurch ermäßigt, daß höhere Einkommensstufen eingeführt werden. Damit wird gleichzeitig ein Schritt zur Beseitigung des sogenannten Mittelstandsbauches des Einkommensteuertarifes getan. Der neue Tarif sieht bis zu einem Einkommen von S 200.000,— eine Ermäßigung gegenüber dem bisherigen Tarif vor, welche in der Steuergruppe B ohne Alleinverdiener- und Kinderfreibetrag im Höchstausmaß bei S 5.000,— jährlich liegt; diese wird bei einem darüberliegenden Einkommen systematisch abgebaut, sodaß bei einem Einkommen von S 434.700,— keine Ermäßigung mehr gegeben wird.

An Stelle der Kinderermäßigung durch verschieden hohe prozentuelle Abschläge soll die durch die Erhaltung von Kindern eintretende Beeinträchtigung der wirtschaftlichen Leistungsfähigkeit durch die Gewährung von Kinderfreibeträgen in Höhe von je S 7.000,— für das erste und zweite Kind und von je S 8.000,— für das dritte und jedes weitere Kind steuerlich berücksichtigt werden. Da die Kinderfreibeträge von der Höhe des Einkommens unabhängig sind, richtet sich die eintretende Steuerermäßigung nach der für den einzelnen Steuerpflichtigen jeweils in Betracht kommenden Progressionsspitze, worauf noch zurückzukommen sein wird. Endlich wurde in § 32, Abs.3, Z.2 bei gemäß § 26 zusammen zu veranlagenden Personen der sogenannte Alleinverdienerfreibetrag in Höhe von jährlich S 4.000,— eingeführt, wenn nur eine dieser Personen Einkünfte im Sinne des § 2, Abs.3, Z.1-4, das sind die sogenannten Erwerbseinkünfte, bezieht bzw. wenn derartige Einkünfte der zusammenveranlagten Person unter einem Nettobetrag von S 3.000,— jährlich liegen. Dieser Alleinverdienerfreibetrag wird nicht gewährt, wenn der volle Absetzungsbetrag für den mitarbeitenden Ehegatten gemäß § 4, Abs.4 Z.4 in Anspruch genommen wird. Diese Tarifreform ist bereits mit Wirkung vom 1.10.1967 in Kraft getreten, woraus folgt, daß bei der Einkommensteuerveranlagung bzw. bei Durchführung des Jahresausgleiches für 1967 die Einkommensteuer bzw. Lohnsteuer mit 3/4 nach den bisherigen Tabellen und mit 1/4 nach den neuen Tabellen zu bemessen war.

V

Im Bundesgesetzblatt vom 2.8.1968 wurde unter Nr.302 das Bundesgesetz über Maßnahmen auf dem Gebiete des Abgabenrechtes und des Familienlastenausgleiches vom 27. Juni 1968 kundgemacht, welches Gesetz nach den erläuternden Bemerkungen zur

teilweisen Deckung des Budgetdefizites 1969 und 1970 bestimmt ist. Artikel I dieses Gesetzes befaßt sich mit der Sonderabgabe vom Einkommen, welche für die Kalenderjahre 1969 und 1970 erhoben wird; diese Sonderabgabe vom Einkommen haben alle natürlichen und juristischen Personen zu entrichten, die der Einkommensteuer bzw. der Körperschaftsteuer unterliegen. Sie beträgt für natürliche Personen 10% der veranlagten oder im Abzugswege eingehobenen Einkommensteuer, für juristische Personen 10% der veranlagten oder im Abzugswege eingehobenen Körperschaftsteuer, wobei in letzterem Fall für gewisse Steuerstufen eine Übergangsregelung getroffen wurde.[1] Diese Sonderabgabe soll neben dem Beitrag vom Einkommen zur Förderung des Wohnbaues und für Zwecke des Familienlastenausgleiches in der Höhe von 18% und neben dem Beitrag nach dem Katastrophenfondsgesetz in Höhe von 3% der Einkommensteuer (Lohnsteuer) bzw. Körperschaftsteuer erhoben werden. Die Erhöhung der Beiträge vom Einkommen von bisher 18% und 3%, also 21% durch die Sonderabgabe auf insgesamt 31% der Einkommensteuer (Lohnsteuer) bzw. Körperschaftsteuer bewirkt eine Steigerung der tatsächlich zu entrichtenden Einkommensteuer (Lohnsteuer) bzw. Körperschaftsteuer samt Beiträgen gegenüber 1968 um ca. 8,26%. Beim Steuerabzug vom Kapitalertrag (§ 85 ff EStG 1967) und beim Steuerabzug in besonderen Fällen (§ 90 ff EStG 1967) ist die Sonderabgabe vom Einkommen von den in den Kalenderjahren 1969 und 1970 zufließenden Einkünften zusammen mit der Einkommensteuer oder der Körperschaftsteuer einzuheben und abzuführen. Im übrigen sind auf die Sonderabgabe die gesetzlichen Vorschriften über die Einkommensteuer und die Körperschaftsteuer sinngemäß anzuwenden, woraus insbesondere folgt, daß auch auf die Sonderabgabe vom Einkommen die von Österreich abgeschlossenen Abkommen zur Vermeidung der Doppelbesteuerung des Einkommens ausnahmslos anzuwenden sind, worauf ein Erlaß des Bundesministeriums für Finanzen vom 21.10.1968 (AÖFV vom 26.Nov.1968 Nr.300) ausdrücklich hinweist. Durch die Sonderabgabe vom Einkommen sind die festen Steuersätze des Einkommensteuergesetzes 1967 mit Wirkung ab 1. Jän. 1969 neuerlich geändert worden, wobei tieferstehend aus einem Erlaß des Bundesministeriums für Finanzen vom 19.Sept.1968 (AÖFV vom 29.10.1968 Nr.277) jene Sätze angeführt werden, welche von besonderem Interesse sind.

1. Beschränkt steuerpflichtige Arbeitnehmer (§66 Abs.2, Z.2 EStG 1967),

a) Soweit der steuerpflichtige Bezug die Betragsgrenze von 100 S täglich, 600 S wöchentlich, 2.600 S monatlich nicht übersteigt oder wenn es sich um in der Land- u. Forstwirtschaft ausschließlich körperlich tätige Arbeitnehmer handelt ..... 10,5 v.H. des vollen Betrages der steuerpflichtigen Bezüge;

b) für Beträge, soweit sie die Betragsgrenzen in lit. a übersteigen ..... 22,3 v.H. des vollen Betrages der steuerpflichtigen Bezüge.

2. Sonstige Bezüge neben laufendem Arbeitslohn (§ 67 Abs.1 bis 3 EStG 1967).

In der Steuergruppe	nach Spalte I[2]	II
A	7,9 v.H.	19,6 v.H.
B	5,9 v.H.	14,4 v.H.
B mit Kinderfreibeträgen für 1 Person	2,6 v.H.	11,8 v.H.

1. Durch dasselbe Gesetz wurde die Vermögensteuer für die Jahre 1969 und 1970 um 50% erhöht.

2. Die Steuersätze der Spalte I gelten für sonstige Bezüge bis S 8.000,— jährlich.

2 Personen ..... 1,3 v.H. 7,9 v.H.
3 Personen ..... 0 v.H. 4,6 v.H.
mehr als 3 Personen 0 v.H. 2,6 v.H.

3. Kapitalerträge (§ 87 Abs.1 EStG 1967):

a) Wenn der Empfänger (Gläubiger) die Abgaben trägt..... 19,6 v.H. der Kapitalerträge;

b) wenn der Schuldner die Abgaben trägt 24,4 v.H. der Kapitalerträge.

4. Beschränkte Einkommensteuerpflichtige (§ 90 Abs.1 Z.1 bis 3 und Abs.2 EStG 1967):

a) Wenn der Empfänger (Gläubiger) die Abgaben trägt ..... 22,3 v.H. des vollen Betrages der Einnahmen;

b) wenn der Schuldner die Abgaben trägt 28,7 v.H. des vollen Betrages der Einnahmen.

5. Unbeschränkt einkommensteuerpflichtige Aufsichtsratsmitglieder:

Die Aufsichtsratsabgabe beträgt

a) wenn der Gläubiger (Empfänger) die Aufsichtsratsabgabe trägt.. 30 v.H. der Aufsichtsratsvergütungen;

b) wenn der Schuldner die Aufsichtsratsabgabe trägt ..... 42,857 v.H. der Aufsichtsratsvergütungen.

6. Beschränkt einkommensteuerpflichtige Aufsichtsratsmitglieder (§ 90 Abs.1, Z.4 und Abs.2 EStG 1967):

Die Aufsichtsratsabgabe und die Einkommensteuer samt Beiträgen und der Sonderabgabe vom Einkommen betragen,

a) wenn der Empfänger (Gläubiger) die Aufsichtsratsabgabe und die Einkommensteuer trägt..... 45,6 v.H. der Aufsichtsratsvergütungen;

b) wenn der Empfänger (Gläubiger) nur die Abgabe von den Aufsichtsratsvergütungen trägt ..... 54,05 v.H. der Aufsichtsratsvergütungen;

c) wenn der Empfänger (Gläubiger) nur die Einkommensteuer trägt .. 65,157 v.H.

d) wenn der Schuldner die Aufsichtsratsabgabe und die Einkommensteuer trägt 83,857 v.H. der Aufsichtsratsvergütungen.

Die wiederholte Änderung des Einkommensteuertarifes und die Tarifreform selbst läßt es interessant erscheinen, einen Vergleich der Einkommensteuerbelastung in den Jahren 1966 bis 1969 durchzuführen; der Aufbau des Einkommensteuertarifes und seine Gliederung in Steuergruppen machen es dabei erforderlich, statt einer instruktiveren prozentmäßigen Belastung die Einkommensteuer in absoluten Beträgen anzugeben. In der tieferstehenden Tabelle werden in 4 Kolonnen die Einkommensteuern für die Jahre 1966 bis 1969 für gewisse Einkommenshöhen ausgeworfen. Im Kalenderjahr 1966 handelt es sich um die normale Einkommensteuerhöhe einschließlich der seit Jahren gültigen 18%igen Zuschläge. Im Jahre 1967 erhöhen sich einerseits diese 18%igen Zuschläge auf 21%, andererseits gilt die unter IV dargelegte Tarifreform bereits ab 1.10. 1967, sodaß sich für dieses Jahr ein Mischtarif ergeben hat. Im Kalenderjahr 1968 erscheint die Einkommensteuer nach der Tarifreform, also mit der vollen Ermäßigung einschließlich der 21%igen Zuschläge ausgewiesen, während für 1969 (und 1970) diese Zuschläge 31% betragen. Dabei wurde das im Jahre 1967 neu geschaffene, jedem Steuerpflichtigen zustehende Sonderausgabenpauschale von jährlich S 2.028,– – welches ab 1. Jän. 1968, wie unter III erwähnt, auf S 3.276,– erhöht wurde – zur besseren Vergleichbarkeit nicht abgezogen; dies auch deshalb nicht, da – insbesondere bei höheren Einkommen – die tatsächlichen Sonderausgaben in der Regel höher als das Sonderausgabenpauschale sind. Verglichen werden 5 verschiedene Steuergruppen und zwar:

1) Die Steuergruppe I bzw. A, d.s. ledige

Personen bis zum Alter von 42 Jahren (dieses für das Kalenderjahr 1966 geltende Alter steigt jedes 2. Jahr um 1 Jahr an, bis im Jahre 1981 das 50.Lebensjahr endgültig maßgeblich ist.)

2) Die Steuergruppe II bzw. B ohne dem erstmalig im 4.Quartal des Kalenderjahres 1967 geltenden Alleinverdienerfreibetrag.

3) Die Steuergruppe II bzw. B mit Alleinverdienerfreibetrag; die Steuergruppe II bzw. B betrifft im wesentlichen verheiratete Personen sowie ledige Personen, die das bei der Steuergruppe I angeführte Lebensalter überschritten haben.

4) Steuergruppe III 1/B1, d.s. Personen, denen Kinderermäßigung bzw. nach der Tarifreform ein Kinderfreibetrag für ein Kind zusteht.

5) Steuergruppe III 4/B4, d.s. Personen, denen Kinderermäßigung für 4 Kinder bzw. 4 Kinderfreibeträge zustehen; bei 4 und 5 wurde kein Alleinverdienerfreibetrag berücksichtigt.

	1966	1967	1968	1969
S 15.000,–				
1. Steuergruppe I (A)	455	413	253	274
2. Steuergruppe II (B) ohne AV	253	238	174	189
3. Steuergruppe II (B) mit AV	253	–	–	–
4. Steuergruppe III/1 (B1) (1. Kind)	–	–	–	–
5. Steuergruppe III/4 (B4) (4 Kinder)	–	–	–	–
S 50.000,–				
1	11.937	11.899	10.874	11.772
2	7.814	7.953	7.773	8.415
3	7.814	7.665	6.660	7.210
4	6.502	6.457	5.825	6.306
5	1.866	1.628	770	833
S 100.000,–				
1	31.402	31.768	30.348	32.986
2	23.126	23.568	23.133	25.045
3	23.126	23.254	21.874	23.682
4	21.814	22.009	20.931	22.660
5	17.178	16.635	13.695	14.827
S 150.000,–				
1	54.625	55.221	52.844	57.211
2	42.218	42.787	41.273	44.684
3	42.218	42.369	39.821	43.112
4	40.951	41.177	38.732	41.933
5	36.449	35.628	30.383	32.894

	1966	1967	1968	1969
S 200.000,—				
1	81.687	82.232	77.689	84.055
2	65.150	65.563	61.875	66.944
3	65.150	65.107	60.188	65.162
4	64.673	64.322	58.954	63.826
5	61.742	59.856	49.491	53.582
S 250.000,—				
1	108.827	110.210	106.060	114.825
2	88.160	89.306	86.019	93.128
3	88.160	88.831	84.131	91.032
4	88.073	88.392	82.631	89.460
5	87.112	84.869	71.499	77.408
S 300.000,—				
1	125.967	138.191	134.495	145.610
2	111.170	113.052	110.219	119.328
3	111.170	112.577	108.283	115.136
4	111.170	112.221	106.831	115.660
5	111.170	109.490	95.699	103.608
S 400.000,—				
1	190.247	194.456	192.572	208.487
2	157.190	160.847	159.827	173.035
3	157.190	160.368	157.842	170.887
4	157.190	160.101	156.354	169.275
5	157.190	157.262	144.944	156.922
S 500.000,—				
1	244.527	251.102	251.860	271.370
2	203.210	208.943	210.644	228.053
3	203.210	208.462	208.611	225.852
4	203.210	208.102	207.087	224.201
5	203.210	205.336	195.398	211.547

VI

Versucht man eine kurze zusammenfassende Würdigung der dargestellten Reform, so darf einleitend vom Standpunkt der Rechtssicherheit die Neukodifikation des Einkommensteuergesetzes 1953 nach bisher 22 Novellen eindeutig begrüßt werden. Auch das Herzstück der großen Einkommensteuerreform, die Tarifreform wäre, isoliert betrachtet, grundsätzlich positiv zu würdigen, da sie sich einerseits bemühte, bisherige Tarifverzerrungen zu beseitigen und andererseits durch Milderung der Progression in den unteren Tarifbereichen den Leistungswillen einen Anreiz zu geben. Berücksichtigt man allerdings den Zeitpunkt des Inkrafttretens der Tarifreform (1.10.1967) und die Tatsache, daß einerseits bereits ab 1.2.1968 durch Erhöhung der Umsatzsteuer und der Ausgleichsteuer rund 1,9 Milliarden S mehr aufgebracht werden mußten und

andererseits die Budgetlage mit 1.Jän.1969 mit der Sonderabgabe vom Einkommen eine neuerliche 8,26%ige lineare Erhöhung der Einkommensteuer erzwang, so wird man den Zeitpunkt der Tarifreform als schwer verständlich bezeichnen müssen.

Im einzelnen wäre zu der Tarifreform festzustellen, daß sie anscheinend zu sehr mit dem Blickpunkt auf jene Ehepaare, bei welchen beide erwerbstätige Arbeitnehmer sind, ausgearbeitet wurde, ohne zu versuchen, die systemwidrige und zum Teil unberechtigte Bevorzugung der Besteuerung derartiger Ehepaare bis zu einem Haushaltseinkommen von S 150.000,– jährlich abzubauen. Durch die Einführung des Alleinverdienerfreibetrages wird die Bevorzugung der gemeinsam verdienenden, nicht veranlagten Ehegatten offensichtlich verewigt, ohne daß durch diese neue, komplizierte und gleichfalls systemwidrige Maßnahme eine wirklich gerechte Lösung erzielt werden kann. Und wie will man endlich – wenn man nicht den vorerwähnten falschen Blickwinkel für diesen Reformpunkt anerkennt – objektiv die Anomalie erklären, daß der Alleinverdienerfreibetrag bei Netto-Erwerbseinkünften des zusammenzuveranlagenden Partners über S 3.000,– jährlich wegfällt, durch dessen Einkünfte nach § 2, Z.5-7[3] in unbegrenzter Höhe aber nicht beeinflußt wird? Hier hätte nur ein Splittingverfahren eine wirklich gerechte und endgültige Abhilfe bringen können, wobei nicht verkannt wird, daß eine dahinzielende Reform auch problematisch gewesen wäre.

Die Ersetzung der bisherigen Kinderermäßigung, welche bei einem Einkommen von etwas S 280.000,– bereits abgebaut war und schon längst hätte valorisiert werden sollen, durch die Kinderfreibeträge, welche ohne Rücksicht auf die Höhe des Einkommens gewährt werden, erscheint gleichfalls bedenklich. Über die Frage, ob und in welcher Höhe eine Einkommensteuerprogression grundsätzlich richtig bzw. angemessen ist, läßt sich endlos diskutieren, wobei aber festgestellt werden muß, daß die meisten europäischen Steuerrechte, aber auch das amerikanische Steuerrecht diese Progression z.Teil wesentlich stärker als der österreichische Einkommensteuertarif bejahen. Da auch der österreichische Einkommensteuertarif progressiv ist, scheint es in gewisser Beziehung widersinnig, wenn Kinderfreibeträge in gleichbleibender Höhe ohne Rücksicht auf die Höhe des Einkommens gewährt werden und damit die Steuerermäßigung für Kinder bei wachsendem Einkommen stets höher wird, womit geradezu das Gegenteil der Progressionswirkung des Einkommensteuertarifes erreicht wird.

Weiterhin erscheint es nicht überzeugend, daß diese Kinderfreibeträge bei der Lohnbesteuerung beiden Ehegatten gewährt werden, während sie bei der Einkommensbesteuerung nur einem Ehegatten zustehen. Gewiß stand nach dem bisherigen Tarif die Steuergruppe III mit Kinderermäßigung bei der Lohnbesteuerung auch beiden Ehegatten zu, doch waren hier die Auswirkungen schwächer und nicht so deutlich sichtbar. Nun aber müssen wir uns vor Augen halten, daß einem Ehepaar mit beispielsweise 5 Kindern bei der Lohnbesteuerung sowohl für den Ehemann als auch für die Ehegattin Freibeträge von je S 38.000,– zustehen; kommt es in derartigen Fällen zu keiner Zusammenveranlagung, so bleiben Freibeträge in der Höhe von S 76.000,– abzugsfähig; kommt es hingegen zu einer Veranlagung, so werden Freibeträge von S 38.000,– gestrichen, was sich noch dadurch ver-

3. Hier handelt es sich um Einkünfte aus Kapitalvermögen, Einkünfte aus Vermietung und Verpachtung und gewisse sonstige im Gesetz taxativ bezeichnete Einkünfte.

schärft, daß der Pauschalabzugsbetrag von S 1.248,– nach § 51, Abs.5 und das Sonderausgabenpauschale gleichfalls bei der Lohnbesteuerung beiden Ehegatten zusteht, bei der Veranlagung aber nur einmal gerechnet wird.

Es ist richtig, daß diese steuerliche Diskriminierung, welche sich im Falle der Veranlagung derartiger Ehepaare ergibt, durch die Härteklauseln des § 93 gemildert werden, welche nunmehr stärkere Bedeutung als bisher erlangen. Trotzdem scheint diese Regelung keineswegs befriedigend und es bleibt abzuwarten, ob dagegen bereits geäußerte verfassungsrechtliche Bedenken nicht tatsächlich begründet sind.

Vergleicht man endlich die Entwicklung der Einkommensteuerbelastung nach dem unter V gebrachten Tarifvergleich, so muß festgestellt werden, daß die Ermäßigung, welche die Einkommensteuertarifreform ab 1. Oktober 1967 brachte, durch die Einkommensteuererhöhung ab 1.Jän.1969 in der Regel nicht nur rückgängig gemacht, sondern auch durch Erhöhung ersetzt wurde. Dabei kann man der Tarifentwicklung hinsichtlich der Milderung der Progression in den Steuergruppen A und B noch folgen. Nicht mehr verständlich erscheint aber die schon generell in Frage gestellte Auswirkung der neuen Kinderfreibeträge, die es mit sich bringt, daß bei einem Kinderfreibetrag die Einkommensteuer 1969 – trotz der Erhöhung der Einkommensteuer seit 1966 um 13% – erst bei einem Einkommen von etwa S 250.000,– die Einkommensteuer 1966 übersteigt, während dies z.B. bei 4 Kindern erst bei einem Einkommen von rund S 400.000,– der Fall ist. Die noch verbliebenen Nutznießer der Einkommensteuerreform unter Berücksichtigung der Tariferhöhung ab 1. Jän. 1969 sind daher die Bezieher höherer Einkommen mit Kinderermäßigungen – insbesondere für mehrere Kinder – wobei die Frage unbeantwortet bleibt, ob bei dem offensichtlich hohen Finanzbedarf des Staates gerade dort eine Steuerermäßigung gegenüber allgemeinen Steuererhöhungen hätte eintreten dürfen. Daß endlich die Sorge besteht, die auf 2 Jahre befristete Sonderabgabe vom Einkommen könnte verlängert werden, darf nicht Wunder nehmen, da derzeit noch nicht abgesehen werden kann, ob sich die Budgetlage ab 1971 bessern wird.

Endlich darf abschließend noch als unbefriedigend bezeichnet werden, daß die gegenständliche Einkommensteuerreform nicht dazu verwendet wurde, die Diskriminierungen von beschränkt einkommensteuerpflichtigen Personen zu beseitigen. Bekanntlich besteht in Österreich noch immer der aus dem deutschen Einkommensteuerrecht übernommene derzeitige § 97 EStG, gemäß welchem insbesondere die Bestimmungen über die Sonderausgaben nach § 10 und damit auch über den Verlustvortrag, aber auch die Bestimmungen über die außergewöhnliche Belastung nach § 33 und die begünstigten Steuersätze bei außerordentlichen Einkünften nach den §§ 34 und 34a nicht angewendet werden dürfen. Diese Diskriminierungen der beschränkten Steuerpflichtigen in Österreich sollten endlich durch eine angemessene Novellierung des § 97 – wie es z.B. in der Bundesrepublik Deutschland schon lange der Fall ist – behoben werden.

PATRICK DURAND & JACQUES LATSCHA*:

THE NEW TAX TREATY BETWEEN THE UNITED KINGDOM AND FRANCE

A new tax treaty has been recently signed between U.K. and France on May 22, 1968. It is meant to replace the previous treaty of December 14, 1950.

Such revamping was made necessary owing to the considerable changes which have occurred in both countries since the last few years.

This new treaty shows considerable improvement over the older one, especially in the field of dividends and interest. It generally follows the pattern of the OECD draft with some deviations due to the special character of the tax systems which prevail in both countries.

We will not analyse the practical impact of the new treaty, which is not yet ratified by both countries and therefore will only enter into application after such ratification.

However, according to article 30, the Convention has effect in the United Kingdom for income tax, including surtax (other than income tax in respect of dividends paid before April 6, 1966) and capital gains tax from April 6, 1966, and for corporation tax from April 1, 1964. In France, it has effect for withholding tax and précompte on amounts payable on or after January I, 1966, and as regards other taxes for the assessment year 1966 and subsequent years.

References to articles appearing in the titles hereunder all refer to the new treaty.

I – TERRITORY

Article 2 of the new treaty gives a broader definition of the territory to which the new treaty is applicable by including the overseas départements such as Guadeloupe, Guyane, Martinique and Réunion, which were specifically excluded from the scope of the old treaty, according to article 2-1-b.

II – DIVIDENDS (ARTICLE 9)

A) paid from U.K. to France

According to the 1950 treaty, dividends paid from UK to France were subject to income tax at the standard rate (41.25%).

Now, according to article 9 of the new treaty, the rate of withholding tax applicable is reduced to 15%.

Moreover, when a British corporation is a subsidiary of a French corporation which holds at least 10% of the voting power, the withholding tax is applicable at a lower rate of only 5%.

The dividends which can benefit of the 5% reduced rate must have been paid out of income accrued 12 months or more before the parent company became owner of the shares. Such limitation does not apply however if such acquisition has been made bona fide and not primarily for the purpose of securing the benefit of the reduced rate.

It must be noted here that, in the 1950 treaty, the reduction of withholding tax was provided for, in the case of subsidiaries, by article 7 but only in the case of French subsidiaries of U.K. companies (and not the reverse case) and provided that the rate of participation of the parent company in the subsidiary amounted to at least 50% of the capital.

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B) paid from France to U.K.
The reduced rates of 15% (and respectively 5%) apply as indicated above.
The French subsidiary of a U.K. company will therefore, if the UK holds at least 10% of the voting stock and if the dividends are paid out of income accrued 12 months before the acquisition, be liable to a reduced rate of tax amounting to 5% of the gross dividend.
One other point of great importance must be outlined here. Since July 12, 1965, French tax law has been completely revamped. A new system of tax credit on dividends (known in French as "avoir fiscal") was adopted. A practical example will show the actual mechanism of such tax credit.

a) Assuming that a French corporation shows a gross profit of	200
it will be liable to corporation tax (50%)	100
b) The net profit is assumed distributed as a dividend to the shareholders.	100
c) When receiving a dividend of the shareholder is given a tax credit of 50%	50
thus making a total taxable income of	150
d) If the shareholder pays income tax at the rate of 50%, he will be liable to a tax of	75
He will however use the tax credit (c) above to offset part of his tax liability	50
His net tax will amount to	25

In the same situation, the same dividend of 100 paid to a British resident is subject to a withholding tax of 15%. Both situations compare as follows:

French shareholder		*British shareholder*	
Dividend	100	Dividend	100
Tax credit	50	Withholding tax	15
Gross income	150	Gross income	85

Apparently, there is here a discrimination[1]. Already the Swiss and German Governments have made some demonstrations to the French authorities in this respect. It is expected that the benefit of the tax credit will be extended to German residents and Swiss "bona fide" residents who will give evidence of their liability to Swiss income tax at the standard rate. It seems, however, that the granting of such advantages to German and Swiss residents could be construed as a discrimination.

III – INTERESTS (ARTICLE 11)
A) paid from U.K. to France
The rate of withholding tax is limited to 10%, as opposed to the standard rate of income tax (41.25%) applicable in the old treaty.
B) paid from France to U.K.
The rate is also limited to 10% with the exception of negotiable bonds (obligations) issued in France prior to 1st January, 1965, which are subject to a 12% withholding tax.
C) Inter-companies interest
In order to clear a possible misunderstanding which might result from the differences in the national tax systems of both contracting states, paragraph 5 (a) of article 11 indicates that interest paid to a non-resident company shall not be treated as a distribution of dividend made by the company resident in either state which is paying such interest. Such limitation, however, as indicated in paragraph 5 (b) of same article 11, shall not

1. See PATRICK DURAND: Taxation of Dividends in France – a discrimination: Bulletin for international fiscal documentation, Amsterdam – vol. XX January 1966, No. 1.

apply if 50% or more of the voting power in the company receiving the interest is controlled directly or indirectly by a person or persons resident in the contracting state other than the one where is located such company.

Paragraph 7 of same article 11 provides that, if a special relationship exists between the payer and the recipient of interest, the amount of interest which may exceed the actual amount which would have been paid in an arm's length transaction will be treated as a dividend, and therefore subject to a 15% withholding tax as provided for in article 9. This will not preclude the tax authorities of the contracting state where the payer is resident to refuse such interest as a deductible expense, and to have it taxed as reintegrated in the profits of the payer, as generally provided for in article 8 of the new treaty.

IV – ROYALTIES (ARTICLE 12)

The general principle of the old treaty remains the same, i.e. no withholding tax is applicable to royalties paid to a resident of one state by a resident of the other state.

The definition of "royalties" in the new treaty (paragraph 2 of article 12) is quite broader than the one used in the old convention. It now specifically includes copyrights of literary and artistic works which were not listed in article 10 of the old treaty.

V – PERMANENT ESTABLISHMENTS

A) definition (article 4)

It is interesting to compare the definition which appeared in the old treaty with the new one.

Treaty of 14th December 1950 (article 2 (1) k –

k) The term "permanent establishment", when used with respect to an enterprise of one of the territories, means a branch, management factory, or other fixed place of business in which is exercised, in whole or in part, the activity of the enterprise, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. In this connection:

i) An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a *bona fide* broker or general commission agent acting in the ordinary course of his business as such;

ii) The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise;

iii) The fact that a company which is a resident of one of the territories has a subsidiary company which is a resident of the other territory or which carries on a trade or business in that other territory (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary company a permanent establishment of its parent company.

Treaty of 22nd May 1968 (article 4(2) to (5) –

(2) The term "permanent establishment" shall include especially:

a) a place of management
b) a branch
c) an office
d) a factory
e) a workshop
f) a mine, quarry or other place of extraction of natural resources
g) a building site or construction or assembly project which exists for more than twelve months.

(3) The term "permanent establishment" shall not be deemed to include:
a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.
(4) A person acting in a contracting state on behalf of an enterprise of the other contracting state—other than an agent of an independent status to whom paragraph (5) applies—shall be deemed to be a permanent establishment in the first-mentioned state if he has, and habitually exercises in that state, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.
(5) An enterprise of a contracting state shall not be deemed to have a permanent establishment in the other contracting state merely because it carries on business in that other state through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

Although not as sophisticated as the definitions adopted in the new U.S./French Tax treaty of 28th July 1967, the new U.K./French treaty is a considerable improvement over the previous one, and it follows the pattern recommended by the OECD Draft.

B) Taxation
The old treaty provided for the taxation of the profits of the permanent establishment of a British company in France at the Taxe proportionnelle on the whole profits of such establishment.
The French law of 12th July 1965 has completely revamped the existing system and, as a matter of principle, all profits of permanent establishments of foreign corporations in France are first of all liable to corporation tax at the standard rate of 50%, the balance being subject to a withholding tax at a standard rate of 25%.
However, article 10 of the new treaty specifically provides that the withholding tax applicable to the net profits of such permanent establishment of a British corporation in France shall not exceed 15% of two-thirds of the profits of such establishment, after corporation tax. The following example will give the practical meaning of such disposition:

Gross profit	2,400
Corporation tax (impôt sur les sociétés)	1,200
Net profit	1,200
Withholding tax $15/100 \times {}^{2}/_{3} \times 1{,}200 =$	120

Accordingly, the rate of withholding tax on net profits of permanent establishments amounts to 10% of such net profits, which is an intermediate figure between the two rates of 15% and 5% applicable to dividends as we have seen above.

VI – INCOME FROM REAL ESTATE

Article 5 deals with the standard treatment of income from real estate and immovable property. Article 13 is quite new and is connected with profits deriving from the alienation of shares in a real property co-operative company.

Two French laws of March 15, 1963, and December 19, 1963, have drastically changed the approach to taxation of real estate profits. The essence of this new legislation can be summarized as follows[2]: profits made on constructible land and/or shares of corporations which are known as "sociétés immobilières transparentes" are treated as ordinary income; prior to the new laws, they were considered in France as capital gains and free from any tax of any kind.

The "sociétés immobilières transparentes" are a special type of corporation which are meant to create a special kind of real estate joint ownership for house buildings. Their shareholders are entitled upon liquidation to receive the full ownership of the portions of the building referred to in the articles of the corporation. If for instance any shareholder, when purchasing shares, is specifically attributed these shares corresponding to a certain flat in the building, he is considered as having ownership of said flat. This is why such corporations are said to be "transparent", since their purpose is to act as a legal shell embodying the interests of their members, and are not, in the sense of French law, owners of the building (or parts thereof) in their personal capacity.

Real estate profits made by non-residents under the two above-mentioned French laws of 1963 are taxable in France, even if their origin is only attributable to shares of the "transparent" corporation.

A complex legislation makes a distinction between "speculative" and "non-speculative" profits. It is not our intention to give here complete details of the mechanism involved, since the length of such matters is not compatible with this general survey.

VII – TAXATION OF BRITISH INDIVIDUALS LIVING IN FRANCE[3]

A certain number of articles of the new treaty are dealing with specific problems such as teachers, students, diplomatic and consular officers, etc.

It should be however noted that a great improvement has been made by article 24 c) dealing with the avoidance of double taxation.

Prior to the new treaty, a British citizen having his permanent residence outside France, but nevertheless owning in France a villa, building or other real estate asset, was taxable in France upon all his income derived from French source, according to article 164-2 of the French Tax Code.

If he had an ancillary residence at his disposal (in French: résidence secondaire), he was taxable on all his French income, unless the estimated rental value of his ancillary residence multiplied by five showed a greater figure, as in such case the latter amount would have been retained as taxable income. If for instance a non-resident, having nevertheless a "résidence secondaire" in France, had income of French origin as follows:

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

and if, on the other hand, the estimated rent

2. It is not possible to give here all technical details of the new system, which has led to numerous books and papers in France.

3. Cf. PATRICK DURAND & JACQUES LATSCHA: Taxation of British individuals living in France – BIFD 1968 – page 111.

value of his "résidence secondaire" was 3,000 Frs per annum, his taxable income was amounting to 30,000 Frs, as 3,000 Frs × 5 = 15,000 Frs is not in excess of 30,000 Frs.
But if all the estimated rent value was 10,000 Frs p.a., his taxable income was: 10,000 × 5 = 50,000 Frs.
Now thanks to the new treaty which reads as follows:
"A resident of a contracting state who maintains one or more places of abode in the other contracting state shall not be subject in that other state to an income tax according to an imputed income based on the rental value of the place or places of abode."

Any British resident having a villa for instance on the French Riviera, will no more be subject to a theoretical assessment based upon the rental value of his residence.

These short comments will hopefully show the advantages of the new treaty as compared to the old one which will certainly constitute an incentive for investments in either country by each contracting state. It is a happy step towards the elimination of heavy double taxations which are always a stumbling block for the development of international trade.

	OLD TREATY withholding tax applicable in		NEW TREATY withholding tax applicable in	
	FRANCE	U.K.	FRANCE	U.K.
Dividends				
general case	25%	41.25%	15%	15%
Subsidiaries				
participation at least 10%	25%	41.25%	5%	5%
participation between 10% and 50%	25%	41.25%	5%	5%
participation at least 50%	10%	10 %	5%	5%
Royalties	0	0	0	0
Interest				
general case	25%	41.25%	10%	10%
Negotiable bonds issued before Jan. 1, 1965	12%	41.25%	12%	10%
Negotiable bonds issued after Jan. 1, 1965	10%	41.25%	10%	10%

CANADA
BANKER'S 'INTEREST'

Foreign banks and lenders dealing on an international basis must be capable of assessing their interest yield on a competitive basis and in many cases this can only be achieved if the loan can be made free of withholding tax.

In Canada the matter of debt and equity financing is of major importance, especially when one is appraised of the fact that a majority of the Canadian Natural Resources and Manufacturing facilities are foreign owned.

Canada is looked upon as somewhat of a lenders and investors paradise because it has an obvious and predicted growth potential of phenomenal proportions and the astounding debt consciousness of its people.

Part III of the Canadian Income Tax Act imposes a withholding tax on certain classes of income including dividends, interest and royalties earned in Canada by non-residents. The class of income that shall be discussed herein is INTEREST. Section 106(1)(b) is the relevant section under Part III covering the question of INTEREST which is important to bankers and lenders who are faced with the problem of withholding tax and its exemptions on a current basis in their dealings with Canada. This section is reproduced from the Canadian Income Tax Act as follows:

PART III — TAX ON INCOME FROM CANADA OF NON-RESIDENT PERSONS

SEC. 106. Non-Residents Tax

(1) *Tax.* Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

(b) *Interest.*—interest except

(i) interest payable by a non-resident-owned investment corporation,

(ii) interest payable on

(A) bonds of or guaranteed by the Government of Canada issued on or before December 20, 1960, or

(B) bonds of or guaranteed by the Government of Canada issued after December 20, 1960, and before April 16, 1966, the interest on which is payable to the government or central bank of a country other than Canada or to any international organization or agency prescribed by regulation, or

(C) bonds, debentures, notes, mortgages, hypothecs or similar obligations

1. of or guaranteed by the Government of Canada,

2. of the government of a province or an agent thereof,

3. of a municipality in Canada or a municipal or public body performing a function of government in Canada,

4. of a corporation, commission or association not less than 90% of the shares or capital of which is owned by Her Majesty in right of a province or by a Canadian municipality, or of a subsidiary wholly-owned corporation that is subsidiary to such a corporation, commission or association,

5. of an educational institution or a hospital where repayment of the principal amount thereof and payment of the interest thereon is to be made, or is

guaranteed, assured or otherwise specifically provided for or secured by the government of a province,
issued after April 15, 1966,
(iii) interest payable in a currency other than Canadian currency to a person with whom the payer is dealing at arm's length, on
(A) any obligation where the evidence of indebtedness was issued on or before December 20, 1960,
(B) any obligation where the evidence of indebtedness was issued after December 20, 1960, if the obligation was entered into under an agreement in writing made on or before that day, under which the obligee undertook to advance, on or before a specified day, a specified amount at a specified rate of interest or a rate of interest to be determined as provided in the agreement, to the extent that the interest payable on the obligation is payable
1. in respect of a period ending not later than the earliest day on which, under the terms of the obligation determined as of the time it was entered into, the obligee would be entitled to demand payment of the principal amount of the obligation or the amount outstanding as or on account of the principal amount thereof, as the case may be, if the terms of the obligation determined as of that time provided for such payment on or after a specified day, or
2. in respect of a period ending not later than one year after the time the obligation was entered into, in any other case,
(C) any bond, debenture or similar obligation issued after December 20, 1960, for the issue of which arrangements were made on or before that day with a dealer in securities, if the existence of the arrangements for the issue of the bond, debenture or similar obligation can be established by evidence in writing given or made on or before that day,
(D) any debt owing by a bank to which the *Bank Act* applies, as or on account of an amount deposited with that bank that is not repayable in Canadian currency,
(E) any obligation entered into in the course of carrying on a business in a country other than Canada, or
(F) any obligation entered into by the payer after December 20, 1960, upon assuming an obligation referred to in clause (A) in consideration or partial consideration for the purchase by the payer of property of the vendor that constituted security for that obligation, if the payer upon entering into the obligation undertook to pay the same amount of money on or before the same date and at the same rate of interest as the vendor of such property had undertaken in respect of the obligation under which he was the obligor,
(for the purpose of this subparagraph, interest expressed to be computed by reference to Canadian currency shall be deemed to be payable in Canadian currency); and
(iv) interest payable on any bond, debenture or similar obligation issued after June 13, 1963 to a person to whom a certificate of exemption that is in force on the day the amount is paid or credited has been issued under subsection (9);

We will now examine two sub-sections of this section because the remainder can be read clearly and requires no explanation or interpretation.

106 (1) (b) (iii)

The interpretation of this sub-section is that a loan must be made in a foreign currency, repayable in a foreign currency and the interest must be calculated on the foreign currency principle sum and the interest must

must be paid in a foreign currency.
When reading this sub-section "on or before that day" means on or before December 20, 1960.
Hence (iii) (A) appears clear and states that interest on an obligation (promissary note, debt agreements, bonds etc.) where the agreement in writing was made and the evidence or document of indebtedness or obligation was issued on or before December 20, 1960 is not subject to Canadian withholding tax.
However (iii) (B) states that where an agreement in writing referring to an obligation was entered into on or before December 20, 1960 for the issuance of a document evidencing the obligation such as a promissary note or bond etc. after December 20, 1960 say February 1, 1961 for any period thereafter, say fifteen years, then during the whole outstanding period of the loan, the interest payable by the Canadian resident to the non-resident is not subject to Canadian withholding tax.
The loan must be a term loan, otherwise interest on a demand loan is only exempted from Canadian withholding tax for one year from the date of entering into the obligation.
Now obviously this sub-section deserves an explanation for two reasons:

(1) Foreign currency is involved both as to principle and interest.
(2) Foreign banking institutions and lenders may be involved with promissary notes, debt agreements, bonds or obligations that commenced on or before December 20, 1960 and that by its term or nature have yet to mature and naturally the withholding tax shall become an issue when these obligations are examined for purchase or security on current loans.
(3) Obligations made and issued after December 20, 1960 when the loan is in foreign currency and the interest is payable in a foreign currency is not pursuant to this sub-section exempt from Canadian withholding tax.

Hence, other then as explained hereinabove, this sub-section has no application to current 1969 lending situations in order to assist one in obtaining a withholding tax exemption involving interest payable as a result of a foreign currency loan by a non-resident to a Canadian resident.

106 (1) (b) (iii) (D)

This sub-section refers to a foreign currency deposit account with a Canadian bank where the principle sum is deposited in a foreign currency, the interest is calculated by reference to the foreign currency principle sum and the interest is payable in a foreign currency and the interest is not subject to a Canadian withholding tax.
This sub-section is of immense importance to foreign banks and lenders dealing with Canadian banks and Canadian residents because of the obvious correlation between the aforesaid. I assume that during periods of short money supply and rising interest rates in Canada that foreign banks and lenders will examine this sub-section very closely.

CONCLUSION

In conclusion, one might say that foreign banks and lenders on an international basis have extremely good cause to look at Canada as a suitable lending area.
In fact as an investment area, Canada has shown a genuine desire to invite Equity Capital and Financing by allowing a special type of Non-Resident Investment Corporation known as the Non-Resident Owned Investment Corporation to exist in Canada at a reduced tax rate of 15% of its taxable income, provided this type of corporation complies strictly with the definition set out in the Canadian Income Tax Act. Hence without too much departure one might

comment summarily on this type of corporation which by definition, at least 95% of the "aggregate value of its issued shares and all of its bonds, debentures and other funded indebtedness must be beneficially owned by Non-Resident persons".

In addition to the reduced tax rate, interest and dividends payable by this type of corporation to Non-Residents is exempt from the Canadian Withholding Tax of 15% pursuant to section 106(1) (b) (i) and 106(1a) respectively of Part III of the Canadian Income Tax Act.

The usual corporate rate by way of comparison is 18% of the amount taxable if the amount does not exceed $35,000.00 and $6,300.00 plus 47% of the amount by which the amount taxable exceeds $35,000.00, if the amount taxable exceeds $35,000.00. The ordinary corporation is subject to an additional increase in rate of 3% pursuant to the Old Age Security Act and a temporary surtax of 3% during the year 1968 and 1969 whereas the privileged Non-Resident Owned Investment Corporation is not subject to this additional tax rates or surtax.

So generally speaking if Non-Residents have an eye for lending or investing in Canada one can usually find attractive tax provisions on a straight forward basis that would suit the lenders business purposes without having to resort to numerous concocted plans and schemes.

INTERNATIONAL TAX LAW – A HALF CENTURY OF PROGRESS

The development of international tax law over five decades has been synthesized by Dr. Mitchell B. Carroll, President of the International Fiscal Association, in the July and October 1968 issues of "The International Lawyer," an authoritative quarterly published by the American Bar Association's Section of International and Comparative Law. (Mr. Carroll is of counsel, Coudert Brothers, Attorneys, New York).

Part I describes the American contribution to this branch of treaty law which officially began at the time of the author's participation in a meeting in Somerset House, London, of the League of Nations Committee of Technical Experts on Double Taxation, and was continued in succeeding League Committees and Conferences. It outlines the formulation of a series of model conventions at meetings in Geneva, Mexico City, and again in London in 1946. The Geneva drafts of 1933 and 1935 reflected the results of an "on the spot" survey by the writer of the methods employed by tax administrations in some 30 countries in Europe, the Western Hemisphere and Asia, in dividing the profits of international enterprises attributable to establishments in different countries. As Chairman of the League's Fiscal Committee, Dr. Carroll arranged and presided over the two Regional Tax Conferences in 1940 and 1943 that formulated the Mexico model conventions.

In 1947 the United Nations Fiscal Commission superseded the League of Nations Fiscal Committee. Dr. Carroll, who had been elected President of IFA, attended as its representative a series of meetings that were held in New York.

The OEEC, presently the OECD (Organization for Economic Cooperation and Development) created a Tax Committee which undertook to replace the Mexico and London drafts by a new model which was published in 1963. Its provisions are already reflected in numerous tax treaties adopted by the United States and other countries. The foregoing is epitomized in a useful comparison of the provisions in the Mexico and London model conventions and the OECD draft.

All these models were of course intended to encourage the framing of tax conventions along uniform lines. The writer's practical experience in negotiating the first treaty between the United States and France and the subsequent evolution of U.S. tax treaties are described in Part II. The United States now has in force general income tax conventions with 21 countries, as follows:

> Members of the EEC, i.e. Belgium, the Netherlands and Luxembourg, as well as France, Germany, Italy and the associated country, Greece;
>
> Members of the EFTA, i.e. the United Kingdom, Denmark, Norway, Sweden and the associated country Finland, also Austria, Switzerland and Portugal—(but the last mentioned treaty has not been completed); Ireland, Canada, Australia, New Zealand, South Africa, Japan and Pakistan.

These treaties are included in the United Nations list of international agreements which contains 526 on income and fortune taxes. To try to read them all would be a formidable task but Dr. Carroll's synthesis of the background and U.S. treaties in only 72 pages offers a readable "vade mecum" for those who want to learn quickly the essentials on income tax conventions.

N.B. Reprints of both Parts I and II are obtainable for $ 1.00 to cover printing, packing and mailing from Coudert Brothers, 200 Park Avenue, New York, N.Y. 10017, U.S.A.

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EEC COMMISSION MEMORANDUM ON CAPITAL

The EEC Commission has laid before the Council a memorandum entitled "*Need for action in the field of capital: appropriate procedures*". This document has not been translated into English. The document begins by summarizing the case for deeper interpenetration between the capital markets of the member countries. Free movement of capital is necessary for a steady and balanced expansion throughout the community, freedom of establishment, equality of conditions of competition among firms, development of an industrial policy and of the process of industrial combination, being all objectives included, or implied by the EEC Treaty. At present a number of problems hampers the promotion of capital mobility, e.g. fear that a general and real mobility of capital may engender movements contrary to the monetary and budgetary equilibrium policy, compromise the financing of certain priority projects for industry or for the regions. The Commission understands the reasons supporting the maintenance of restrictions on capital movements and proposes therefore that the process of dismantling the barriers between the markets should be gradual and spread out over a sufficiently long transition period. The Commission is suggesting to the Council certain measures to make up a first stage. Among these measures to be taken are provisions which provide for the harmonization of tax regulations affecting capital movements. The Commission has already laid down before the Council a memorandum dealing with measures for adjusting direct taxes with a view to facilitating the development and interpenetration of the capital markets in the EEC. This memorandum has been referred to. The measures contemplated mainly concern the withholding tax imposed by most of the Member States on the income both from variable yield securities and from bonds and debentures[1].

The effect of the bilateral conventions is definitely not adequate to avoid all double taxation. Therefore there is, according to the Commission, an urgent need for revision of the implementing rules concerning withholding tax so that this can always be claimed for (and/or refunded) under income tax rules both within each country and in relations between the Member States.With regard to bond interest the solution would consist quite simply in the abolition of the withholding tax. The growing importance of the Euro-bond market is evidence that this form of investment is a magnet for international capital.

The problem in respect of dividends is less urgent, according to the views of the Commission; however, work on preparing a comparative examination of the economic, social and fiscal implications of the various possible ways of lightening the double economic taxation of dividends is now in hand.When this work is complete, the Commission will state which situation it believes to be in the best interest of the development of a common market for capital.

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1. As to these taxes we may refer our readers to the "Guides to European Taxation"; Vol. I and III, publication of the Bureau.

ARTICLES

DRS. MUHD HUSNI:

THE NEW SYSTEM OF COLLECTING INCOME TAX, PROPERTY TAX AND COMPANY TAX IN INDONESIA

INTRODUCTION

In 1968 a new system of collecting income tax, property tax and company tax was applied in Indonesia, called Menghitung Padjak Sendiri (M.P.S.) —"self-collecting tax system"—and Menghitung Padjak Orang Lain (M.P.O.)—"collecting somebody else's tax". M.P.S. and M.P.O. matters are settled by Act. No. 8, 1967 and the Government Regulations No. 11, 1967.

The introduction of the above mentioned system is intended to speed up the administration of the Inland Revenue and to increase tax revenue in accordance with the Governmental measures to rehabilitate and stabilize the Indonesian economy.

Under the old system, at the beginning of the fiscal year the tax was levied by provisional assessment based on the tax official's valuation for the current year. At the end of the year the tax payer had to file his tax return in respect of the tax concerned.

After the return had been investigated the final assessment was determined by the tax authority.

With the M.P.S. system all taxation activity passes over to the taxpayer who has the duty to:

a. calculate himself his income/property/ profit; and
b. calculate himself his income/property/ company taxes due and is required to pay the tax assessed periodically to the State Treasury.

In addition to the system of self-assessment, the fiscal authority has also introduced a system to "collect somebody else's tax" (M.P.O.) which is meant to complete the system of self-assessment (M.P.S.)

Selected persons or bodies are appointed by the Head of the Tax Inspectorate to calculate, withhold and pay to the Treasury the income and company taxes of other taxpayers who in one way or another have any business connection with the afore-mentioned people or bodies.

Those appointed people or bodies function merely as tax collectors.

I. SELF-ASSESSMENT TAX SYSTEM (M.P.S.)

M.P.S. TAXPAYERS

MPS taxpayers are all persons or bodies who are assessable in accordance with the Income Tax Ordinance 1944, Property Tax Ordinance 1932 and Company Tax Ordinance 1925.

The MPS income taxpayer is every person who has his domicile in Indonesia, or is a non-resident whose income accrues from sources in Indonesia.

The property tax is a supplement to the income tax so that all income taxpayers are also MPS property taxpayers.

The MPS property taxpayer is every person who has his domicile in Indonesia and those who are non-resident but have their wealth sources in Indonesia.

The MPS company taxpayer is every body/ company that has its domicile in Indonesia

or is incorporated in Indonesia.

DUTY OF THE M.P.S. TAXPAYER

They are obliged to calculate their own tax liability during the period, pay taxes due to the treasury and report it to the Head of the Tax Inspectorate concerned.

FISCAL PERIOD

The fiscal period for the income and company taxes is the calendar month and the fiscal period for the property tax is one calendar quarter.

BASIS OF CALCULATION AND AMOUNT OF TAX

A. Income Tax/Company Tax

1. Basis of calculation

The basis of calculation of income tax and company tax due are the gross sale, the transaction value, the substitution value or other values.

Gross sale value is the entire selling price, excluding sales tax, all goods sold for cash or credit during the tax period.

Transaction value is the entire purchase price, excluding sales tax, or of all purchased goods bought on credit or cash during the tax period.

Substitution value is the whole sum paid for services rendered in credit or cash during the tax period.

Values other than sales, transaction or substitution values are used; e.g. the gross income or value of increases in property of MPS—income taxpayers, such as government or state corporation officials (either civil or military).

Of the four bases of calculation only three are used for monthly MPS, i.e. gross sale, substitution value and other values.

2. Tariff

The amount of tax due in one calendar year for income tax and company tax is a percentage of the abovementioned bases of calculation. There are two kinds of tariffs, i.e. general tariff and special tariff.

The general tariff is:

— 1% for gross sale

—10% for substitution value

—10% for other values.

The special tariff is an exception to the general tariff and is specially applied to certain kinds of enterprises, it varies from ½ to 5%. Enterprises which fall under the special tariff are as follows:

%	Number	Description
A. ½%	1	biscuit factory or other cookies factories
	2	confectionary factory chocolate and cocoa mills
	3	coffee roasting factory
	4	macaroni, chinese vermicelli (and the like) factory
	5	soyabean cakes factory
	6	soya (and other soyabean product) factory
	6 a	cooking oil factory
	7	spinning mill (except for ropes or string)
	8	textile factory
	9	knitting factory
	10	soap factory

%	Number	Description
	11	batik factory
	12	paint factory, wax factory
	13	ink and glue factories
	13 a	match factory
	14	glass works
	15	cement factory
	16	iron works and blast furnace
	17	metal works except for iron and steel
	18	tinworks
	19	balance and scales factory
	20	printing letters and block factory
	21	factory of other kinds except for machines and vehicles
	22	machine factory except for electrical ones
	23	electrical devices, instruments and components
	24	steel shipbuilding yard
	25	wooden shipbuilding yard
	26	train and railway material manufacturer
	27	motorcars and spareparts
	28	bicycles and tricycles
	29	aeroplanes
	30	all kinds of vehicles
	31	instruments and implements for measuring and surveying
	32	cameras and other optical instruments
	33	watches and clocks
	34	jewelry and trinkets of silver and others metals
	35	insurance company
B. 1%	1	passenger transport by road, except for buses
	2	road transport not falling under other groups
	3	sea transport
	4	water transport, except for sea transport
	5	air transport, including organizing airports and all other flying facilities
	6	forwarder and transport firm
	7	transport not falling under groups
	8	movies
	9	theaters and the kind
	10	hotels and lodgings for permanent guests like governmental officials and offices of the armed Forces.
C. 2%	1	cigarettes, cigars, clove cigarettes (kretek) and tobacco factories
	2	gold and jewelry shops

%	Number	Description
D. 4%	1	workshops for motor cars
	2	hotels and lodgings
E. 5%	1	people or bodies who render services on building and construction based on the substitution value which is applicable for the basis of sale tax
	2	persons or firms engaged in building construction on their own account
	3	person/body who sells immovable goods, including renting houses, flats, grounds, real estate agents and collecting agents
	4	banks, basis of calculation gross income
	5	immovable goods business
	6	entertainment except for theatre and movies
	7	restaurants and cafés
	8	laundries and similar activities
	9	photographer's studio

B. Property tax

1. Basis of calculation

The basis of calculation of the property tax due for the MPS taxpayer is the net wealth he owns at the beginning of the calendar year concerned.

Net wealth is all property value less the cash value of debts.

A net wealth on January 1st of 2 million rupiah (Rp.2,000,000.—) or more is liable to property tax.

For the assessment of the property tax, the value of wealth is fixed as follows:

I.a. immovable goods: valued according to the selling price.
b. mortgage : estimated according to the amount of the capital.
c. stocks : securities are valued at their cash value according to the latest information available.
d. other properties : estimated according to the value of capital, except if the selling price is higher.
e. foreign currency : valued on D.P.A. rate on January 1st of the current year.
f. capital, invested in enterprises : estimated according to latest balance-sheet except if the value according to above regulations is higher.

II. When valuation according to the above mentioned regulations cannot be estimated, the value of acquisition/purchase multiplicated with the multiplier set out below can be used for each quarterly payment.

Multipliers to estimate
property
per January 1st, 1968.

a. Year	Acquisition/ Purchase	Dutch currency	Indonesian currency
Before	1946	26	8
	1947	24	7.5
	1948	22	7
	1949	20	6.5
Continued			
	1950		6.5
	1951		6.5
	1952		6.5
	1953		6.5
	1954		6.5
	1955		4
	1956		4
	1957		4
	1958		2.5
	1959		2.5
	1960		1.5
	1961		1.2
	1962		0.4
	1963		0.2
	1964		0.08
	1965		0.02
New currency			
	1966		2.4
	1967		1.0

b. in case of houses rented according to official rate the valuation is 20× yearly rent.
c. When valuation of property is exercised on the value of acquisition times the multiplier, the result can be deduced for depreciation for the use during the past period.

The depreciation rate is in accordance with the Depreciation order for company tax 1953. The result after subtraction of the depreciation is not to be lower than the estimated selling value by the beginning of the current fiscal year.

III. Not falling under property and therefore exempt from the property tax 1968 are:
a. Jewelry such as precious metals and stones, pearls whose total value does not exceed Rp. 500,000.— and
b. Life annuity, if the right to it is acquired by paying a premium up to Rp. 36,000.— a year.

2. Tariff
The property tax is 5‰ of the net property mentioned above. For a property of net Rp.2,000,000.— or more the tariff is Rp.5.— for each Rp.1,000.— that exceeds Rp. 1,900,000.—
Example: Net property Rp. 2,500,000.— property tax 5‰ × (Rp.2,500,000.— — Rp.1,900,000.—) = 5‰ x Rp.600,000.— = Rp.3,000.—.

TAXPAYER'S DUTY AND METHOD OF TAX PAYMENT
The MPS taxpayer has to pay his income/property and company taxes due to the Treasury or other offices appointed by the Director General of Inland Revenue.
The MPS taxpayer calculates his tax for a tax period (calendar month) according to the basis of calculation, tax period and tariff concerned as mentioned above. Tax must be paid within 15 days after the tax period concerned has ended.
So, e.g., for the tax of January 1968 payment must be by February 15th.
The MPS property tax payer has to calculate himself the property tax due according to the above mentioned regulations. The instalment is 1/4 of the property tax due. For example the first instalment of the property tax 1968 must be paid by April 15, 1968, 15 days after the tax period at the latest, the second instalment by July 15, 1968 and so on.
When the MPS taxpayer fails to pay in due time, he has to pay interest monthly 12% at the most of the amount of tax payment that has been delayed.
Part of a month is counted as a full month.

NOTIFICATION AND FINAL CALCULATION
A. *Notification*
Within 20 days after the end of the tax period the MPS taxpayer has to notify his tax payments. This duty is also to be fulfilled for taxes not due mentioning reasons.
Income tax and company tax payers for the fiscal period January 1968, have to give notification on February 20, 1968 at the latest, and MPS property taxpayers for the first quarterly 1968 have to give notification on April 20, 1968 at the latest.
These notifications are sent to the Head of the Tax Inspectorate using certain forms. Within ten days after the notification has been entered, the taxpayer has the opportunity to correct mistakes in writing or calculation in the above mentioned notification, and inform the Head of the Tax Inspectorate.

B. *Final calculation*
Within 3 months time after the expiration of the fiscal year the MPS taxpayer has to make a final calculation and file a return.
This final calculation is the tax amount due in the fiscal year according to the tax Ordinance concerned. The amounts of MPS payments in the current year are instalments of the amount of tax due according to the Tax Ordinance.
In the same way the tax instalments of MPO are instalments to be settled with the tax due according to the Tax Ordinance.

TAX ASSESSMENT
In case the MPS taxpayer does not pay and report an official provisional assessment will be made, after a written warning or dun.
This tax assessment can cover a month or more. On this assessment interest is due of 12% a month at most. The interest is calculated for the period between the date of the issuance of the assessment and the date due for tax payment. Part of a month is counted as a full month.
The Head of the Tax Inspectorate checks the return and final calculation filed by the taxpayer. When the amount of tax paid is equal or more than that due according to the Ordi-

nance the tax authority notifies the taxpayer that he is not indebted any more or has paid too much. The surplus will be returned or taken into account with other taxes owing. If the paid tax amount is less than the tax amount due according to the ordinance, the taxpayer will be assessed for the balance.
If the taxpayer does not file a return and final calculation, the tax authority will make an official provisional assessment with an additional 25%, after having sent a warning and a dun.

CLAIMS AND APPEAL

The MPS taxpayer can enter a claim against the official provisional assessment mentioned above within one month after receiving the assessment.
Within three months after receiving the claim, the tax authority will give a decision. If within three months there is no decision of the tax authority, the claim is regarded refused. On this partly or total refusal the taxpayer can lodge an appeal to the Director General of Inland Revenue within one month after above mentioned refusal. The Director General will give a decision on this appeal, if necessary after hearing advice and intentions of a representative of the group of MPS taxpayers concerned.
The MPS taxpayer who has objections to the decision/assessment about the return or final calculation filed can lodge an appeal in accordance with the regulations of the Tax Ordinance concerned.

TAX COLLECTING

The official provisional tax assessment must be paid within one month after receiving the assessment. Delay of payment is punished with a maximum interest of 12% a month. Part of a month is counted as a full month.
In case of a claim the period of payment is prolonged with three months, except where, before the expiration of the prolonged period, the tax authority has made a decision, in which case the assessment must be paid within 10 days after the decision notice has been sent.
The tax assessment in accordance with the return and final calculation filed must be paid within one month after the assessment has been forwarded.
Where payment is delayed an interest of 12% a month at most is due. Part of a month is counted as a full month.

TAX PENALTIES

In cases where the MPS taxpayer does not fulfil his duty of reporting his tax payments for a tax period, he can be fined Rp.1,000.– (thousand rupiah) as a penalty.

II. IMPOSING SOMEBODY ELSE'S TAX (M.P.O.)

COLLECTING DUTY

The MPO tax collector is any person or body appointed by the tax authority, where he has his domicile, to calculate and deduct Income and Company taxes of MPO taxpayers due in a certain tax period and to pay it to the Treasury.
To the person/body from whom it is collected, the above mentioned MPO tax is an instalment compensating for taxes due in accordance with the Income and Company Tax Ordinance.

M.P.O. TAXPAYERS

All MPO taxpayers falling into the group of Income and Company taxpayers who have an active connection, such as purchasing goods/rendering services with the tax collector, is an MPO taxpayer.

BASIS OF CALCULATION, TARIFF AND TAX PERIOD

1. Basis of calculation

The basis of calculating income/company tax which has to be collected by the MPO tax collector is the gross sale or transaction value or other values fixed by the Director General of Inland Revenue.

2. Tariff

The general MPO tariff is 1% (as from 15 September increased to 2%) except for the sale of products of cigarette factories to agents or wholesale dealers which is ½%, and film hire which is paid by the movies manager to the filmdistributor/importer which is 3%.

DUTY OF THE TAX COLLECTOR

The MPO tax collector has the duty to calculate the tax due for taxpayers (...% × basis of calculation), collect the above mentioned tax by the time the taxpayer has to pay for a transaction with the tax collector, and pay those taxes to the treasury within 7 days after the expiration of the MPO tax period.

A delay of payment incurs an interest of at most 1% a day of the amount of tax that is due.

NOTIFICATION

Within 20 days at the latest after the expiration of the tax period, the MPO tax collector notifies the tax authority about the tax collected and paid. For example, the report for the tax period January 1968 must be sent to the tax authority on February 20, 1968 at the latest.

Within 10 days after the report has been entered, the MPO tax collector has the opportunity to correct mistakes in writing or calculating in that report and notify the Tax Autority.

TAX ASSESSMENT

If the MPO tax collector fails to calculate (wholly or partly), pay and report the amount of taxes (income/company) due, after he gets a warning and a dun the Tax Authority will make an official provisional tax assessment with an additional 100%.

CLAIM AND APPEAL

The MPO tax collector who has objections to the above mentioned tax assessment can lodge an appeal to the Board of Appeal, according to the regulations for appeal in tax matters, within 3 months after receiving the tax assessment.

The MPO taxpayer who has objections to the collecting of the income/company taxes exercised by the MPO tax collector can enter an appeal to the Director General as soon as possible.

On this appeal the Director General of Tax (Inland Revenue) will give a decision as soon as possible.

SOME NOTES ABOUT THE REALIZATION OF MPS-MPO

In the explanation to the Act No. 8 1967 about the MPS-MPO it is stated that the collecting system is based on national confidence and mutual aid.

This fact is reflected in the way of settling the value as the basis of collecting the MPS, the percentage of income tax, company tax and the fiscal period as the most important principles of the execution of the MPS, decided upon by the Directorate General of Inland Revenue after having heard the advice and opinions of the representative of the group of MPS taxpayers concerned.

To make this MPO/MPS system succeed at

the beginning of the year the fiscal authority gives extensive information about this MPO-MPS system, at the same time distributing return forms to high officials and officers of the armed forces, from whom it is expected that they should cooperate to make this system successful.

During the execution of this system in 1968, it appeared that the collection of the MPO was more successful than the MPS.

As is explained above, the MPO is sent a dun by the tax collector from the taxpayer on a transaction, e.g. import which is collected by the Bank from the importer, formerly 1% now 2% of the foreign currency amount (C and F) on an effective rate.

So, in the MPO there is no voluntary element of the taxpayer where calculation and payment of the tax depends entirely on the activity of the taxpayer.

There are also difficulties caused by the fact that the income which is the object of the tax, in accordance with the ordinance, is the difference between revenue and expenditure over one year whereas the MPS instalment is calculated from the tax base e.g. X% × sales over a month's period.

In this connection the fiscal authority, in executing the MPS, can allow a deferred payment for special cases when the taxpayer can prove that the paid instalments are more than the tax due under the Ordinance.

In my opinion there is much more time needed to adjust this system to the conditions of the taxpayer in general, moreover, attention ought to be paid to the element of apparent profit in the books during inflation.

HAYTHAM MALLUHI:

TAX SYSTEM IN KUWAIT

The Tax System in Kuwait is typical of a strikingly affluent country whose economy is still mainly dependent on a single product; namely oil, currently exploited by just three foreign companies.

Royalties and Income Tax payments accruing to the Government from the oil companies have been substantial enough to account for more than 92% of the State's total budget revenues, and henceforth to provide a per capita income of about $3,500 — the highest per capita income in the world. That is why Kuwaiti legislator has not cared, so far, to impose any kind of taxes other than the Corporate Income Tax—which we shall elaborate on—although a Personal Income Tax might be imposed in the future.

On the other hand, because there has been, so far, no real multitude of exportable products—other than oil and fertilizers; and due to the liberal commercial policy adopted by Kuwait State, the customs duties, wherever applicable, are only nominal as we shall explain later on.

1. INCOME TAX

The only Income Tax levied in Kuwait State at the present time is the Corporate Income Tax specified in Decrees No. (3) of 1955 and No. (23) of 1961 as follows:

A — *Decree No. (3) of 1955 (with its amendments)*

Amount of Tax

On income exceeding Kuwaiti Dinars	But not exceeding K.D.	The percentage shall be
5,250	18,750	5 per cent
18,750	37,500	10 „ „
37,500	56,250	15 „ „
56,250	75,000	20 „ „
75,000	112,500	25 „ „
112,500	150,000	30 „ „
150,000	225,000	35 „ „
225,000	300,000	40 „ „
300,000	375,000	45 „ „
375,000	and above	50 „ „

The subject tax is imposed, in accordance with said Decree, on "every body corporate, wheresoever incorporated, carrying on trade or business in Kuwait during the taxable period".

The "body corporate" includes any body corporate carrying on trade or business in Kuwait either directly or through an agent or as an agent for others.

Among the items allowed as deductions in the process of computing the taxable income are:

1 — The cost of goods sold to or services rendered by the taxpayer.

2 — Expenses which accrue against, or are paid by, the taxpayer (exclusive of amounts accruing to, or are received by, the Government of Kuwait and of capital expenditures amounts).

3—"A reasonable amount" for the exhaustion, depreciation and obsolescence of the properties used by the taxpayer. In respect of the properties specified hereunder the said "reasonable amount" is equivalent to the following percentage of their value:

Buildings; such as offices, dwellings, hospitals, clubs.	4 %
Road and bridges	4 %
Tanks, pipelines, jetties and wharves.	5 %
Office furniture and equipment	15 %
Plant, machinery and equipment	10 %
Motor cars, and motor cycles	33⅓%
Lorries and trailers	25 %
Marine craft	7½%
Aeroplanes	25 %
Drilling and clean-out tools	33⅓%
Service replacement plant	25 %
Service station buildings and driveways	10 %
Servicing, greasing	15 %
Carts	20 %
Refining plants	10 %

4—Losses sustained and not compensated for by insurance or otherwise.

5—"An amount" for the amortization of direct expenses incurred in exploration surveys and in drilling and completing new wells which are brought into use for production, observation or injection purposes and in extending existing wells into other productive zones and completing the same for such purposes.

B—*Decree No. (23) of 1961*

Amount of Tax

On income	The percentage shall be
Not exceeding K.D. 500,000	20 per cent.
Exceeding K.D. 500,000	57 per cent.

The subject tax is imposed, in accordance with the above Decree, on every body corporate, wheresoever incorporated, carrying on trade or business in the "Specified Territory".

The term "Specified Territory" means the Neutral Zone between Saudi Arabia and Kuwait together with the Islands of Kubr, Qaru, Umm Al Maradim and their territorial waters.

However, it can safely be stated that the "bodies corporate" to which the above two Decrees notably apply are actually the oil companies operating in Kuwait State and the Neutral Zone.

II. CUSTOMS DUTIES

The only other two forms of taxes prevailing in Kuwait, other than the aforesaid corporate Income Tax, are the import and export Customs Duties.

A—*Import Duty*

This is fixed at 4% ad-valorem on almost all commodities imported with the exclusion of a group of items which are exempted from this duty, such as some foodstuffs, fresh vegetables, and fruits, live animals, some precious metals including gold and silver, and publications. Furthermore, certain Arab goods are liable for only 50% or 75% of the 4% duty imposed on similar foreign products.

B—*Export Duty*

This is set at 2% ad-valorem on goods transhipped in Kuwait for reexport.

The following schedule shows the estimated State revenues of taxes in accordance with the General Budgets of the financial years 1967/68 and 1968/69.

	1968/1969		1967/1968	
	K.D.	% age of Total	K.D.	% age of Total
Taxes on Business Incomes	165,565,000	64.0%	172,032,000	60.3%
Income Taxes from Oil Companies	165,385,000	63.9%	171;832,000	60.2%
Other Income Taxes	180,000	0.1%	200,000	0.1%
Customs Taxes and Duties	5,639,000	2.1%	4,768,000	1.6%
Remaining Revenues	87,472,141	33.8%	108,411,703	38.0%
Total Estimated Revenues	258,676,141	100.0%	285,212,103	100.0%

MITCHELL B. CARROLL*:

THE U.N. REENACTS A TAX DRAMA

In the huge edifice of the United Nations on a hill overlooking Geneva, Switzerland, an Ad Hoc group of Experts on Tax Treaties between "Developed" and "Developing" countries reenacted from December 3 to 15, 1968, a drama previously staged in October 1928 by the League of Nations in the Palais des Nations at a World Conference of Governmental Experts. In the recent scene, the champions of 9 "have-not" nations challenged the defenders of 9 "have"nations to yield their right to tax the investor at his residence in their territory to the "prior right" of the "have-not" country where the capital produces income. This is known as taxation at source or in accordance with the principle of territoriality.

Since the opening scene in 1928, great progress has been made by resolving the conflicts on jurisdiction through concluding over 526 general conventions for the avoidance of double taxation of income and property, more or less according to model conventions drafted at that meeting. They were replaced by the revised texts of Mexico of 1943 and London of 1946. These in turn provided the launching pad for the model convention of the Tax Committee of the Organization for Economic Cooperation and Development published in 1963.

The Mexico draft responded almost completely to the demand of the developing countries that, in order to obviate full taxation in both countries, those which were less developed should have the exclusive right to tax income produced in their territory or in any event to a prior right subject to concessions to prevent double taxation granted by the country of the investor's residence.

Developing countries were invited to attend the meeting in 1928, but Asia was represented only by the Chinese Republic and Japan, and the Western Hemisphere only by the United States.** Africa, Asia and the Near East had no delegates at all. On the contrary, practically all the governments of Europe sent their top tax officials. They included inter alia not only the USSR but also the six then independent countries of Eastern Europe which the USSR subsequently absorbed.

The primary objective of the 1968 meeting was to have a "confrontation" of carefully selected officials from the tax administrations of 9 developed countries with those of 9 developing nations in a balanced and compatible "working party". The UN was especially anxious to get the best talent available in both categories and to see if a way could be found to bring about tax conventions between such diverse nations that would be as satisfactory as the hundreds concluded between developed countries.

From the Western Hemisphere came high officials from Argentina, Chile and the USA. Asian governments included Japan, India, Pakistan and the Philippines. Africa had spokesmen from Ghana, Sudan and Tunisia; and the Near East from Israel and Turkey. The European selectees were France, Germany, Netherlands, Sweden, Switzerland and the United Kingdom. For the most part, the respective administrations were repre-

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* Of Counsel, Coudert Brothers, New York. President, International Fiscal Association, Amsterdam.

** One of its delegates was the writer, then Chief of the Section of European Law and Taxes of the Department of Commerce, and soon thereafter Special Attorney for International Tax Matters, Treasury Department.

sented by the principal officials handling international tax problems or applying tax treaties—in cases where they existed.

In order to assure freedom of ideas and of speech, the UN followed the League of Nations' practice of inviting the officials to attend the meetings in their private capacity as experts and not bound by governmental instructions. The United States experts were Mr. Stanley S. Surrey, then Assistant Secretary of the Treasury in charge of Tax Policy (he has since returned to the Harvard Law School) and his adviser, Mr. Nathan N. Gordon, Director for International Tax Affairs, Treasury Department.

The Organization of American States sent as an observer Mr. M. Rappaport, Executive Director of the Joint Tax Program of the OAS and the Latin American Development Bank. The observer for the Organization for Economic Cooperation and Development (OECD) was Mr. Gilmer, Secretary of its Tax Committee (in which the U.S.A. has been represented by the above-named Americans).

The observer for the International Fiscal Association was its Deputy Secretary General, Prof. J.H. Christiaanse, and for the International Chamber of Commerce, Mr. A.G. Davies, Executive Director of the Rio Tinto Group, and also President of the U.K. Branch of International Fiscal Association. An American, Mr. Henry J. Gumpel, of Price Waterhouse & Co. and a member of IFA, attended as a Special Adviser.

BASIS AND GIST OF DISCUSSIONS

Some of the experts from the developing countries objected to the model published in 1963 by the Tax Committee of the OECD on the ground that it was too weighted in favor of developed countries. Nevertheless, the Group decided to use it as a basis for discussion.[1]

The experts of the developing countries reiterated in 1968 essentially the same arguments that their Spanish predecessors had made in 1928 in favor of recognizing that these governments had the exclusive right to income produced in their respective territory, or in any event the prior right to do so. In Mexico in 1940 and 1943 Latin American officials attending Regional Tax Congresses under the aegis of the League of Nations Fiscal Committee[2] had adamantly sustained the right of their governments to tax income from domestic sources.

Again, in 1968 they opposed limitations on their jurisdictions in the definition of the term "permanent establishment". Some insisted, instead, on the right to tax income from an economic activity in their territory. Moreover, they insisted that they should tax not only the profits of a local subsidiary but also the dividends paid to the nonresident investor.

The developed-nation champions of the prinple of taxing at the shareholder's residence demurred on the ground that they should have the right to tax the income from the capital which the resident had supplied.

As regards loans, developing-nation officials nevertheless admitted that the application of a high withholding rate on interest paid to the nonresident might obstruct the inflow of foreign capital. The crucial question was how high a rate would the nonresident lender

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1. For the background, contents and significance of this model in recent and impending tax conventions, see Carroll, M.B. International Tax Law, ABA, The International Lawyer, July 1968, Vol. 2, No. 4, pp. 692-728, and for a summary of the U.S. treaties framed on the basis of the League models, see Carroll, *ibid.*, October 1968, Vol. 3, No. 1, pp. 129-172. Reprints are obtainable on a request addressed to Coudert Brothers, 200 Park Avenue, New York, N.Y. 10017, U.S.A.

2. of which the writer was Chairman.

agree to bear before he required the borrower to assume the tax—thus augmenting the cost of borrowing.

The experts also discussed the impact of taxes on license agreements. They acknowledged that in order to induce nonresident industrial enterprises to license their patents and knowhow, the government of the licensee should—if it would not grant exemption of outgoing royalties—at least reduce the rate deducted from royalties in order to take into account the cost incurred in developing and maintaining the patent or technical knowledge.

They did agree on two points: (1) the application of the principle of reciprocal exemption at source of income from air navigation enterprises, i.e., in all countries other than that of the real center of management; and (2) the limited exemption of the earnings of temporary business visitors.

Prior to the publication of the official record of the 1968 meeting, more specific comments cannot be made. However, it can be stated that the representatives of the "have-not" nations and of the "haves" all enjoyed so much having this opportunity in historic surroundings to exchange views that they voted unanimously to meet again at the beginning of autumn, in order to endeavor to reach agreement on additional items.

The meetings under the auspices of the League of Nations which resulted in the original model conventions of 1928 led to concluding hundreds of conventions along their lines. Logically, prospective meetings of the UN Hoc Group should foment bridging gaps in the world-wide network of treaties between developed countries by new treaties assuring equally important benefits as between them and the developing countries.

C.E.E.

PROPOSITION D'UNE DIRECTIVE DU CONSEIL CONCERNANT LE RÉGIME FISCAL COMMUN APPLICABLE AUX FUSIONS, SCISSIONS ET APPORTS D'ACTIF INTERVENANT ENTRE SOCIÉTÉS D'ÉTATS MEMBRES DIFFÉRENTS*

PROPOSITION D'UNE DIRECTIVE DU CONSEIL CONCERNANT LE RÉGIME FISCAL COMMUN APPLICABLE AUX SOCIÉTÉS MÈRES ET FILIALES D'ÉTATS MEMBRES DIFFÉRENTS**

The EEC Commission has submitted to the council two directives concerning a uniform system of taxation in the six member countries with respect to company consolidations and participations in companies. The text of these draft-directives has been published below in the original French language.

TEXTE

de la directive concernant le régime fiscal commun applicable aux fusions, scissions et apports d'actif intervenant entre sociétés d'Etats membres différents

(Présentée par la Commission au Conseil)

LE CONSEIL DES COMMUNAUTES EUROPEENNES,

Vu les dispositions du Traité instituant la Communauté Economique Européenne, et notamment l'article 100,
Vu la proposition de la Commission,
Vu l'avis du Comité Economique et Social,
Vu l'avis du Parlement Européen,
considérant que les fusions, scissions et apports d'actif intéressant des sociétés d'Etats membres différents doivent être rendus possibles pour créer dans la Communauté des conditions analogues à celles d'un marché intérieur et pour assurer ainsi l'établissement et le bon fonctionnement du Marché commun et que ces opérations ne doivent pas être entravées par des restrictions, désavantages ou distorsions particuliers découlant des dispositions fiscales des Etats membres; que de tels regroupements ne présentent pas d'inconvénients dans la mesure où une concurrence efficace et dès lors une liberté d'activités et de choix pour les fournisseurs, les clients et les consommateurs demeurent assurées; que ce domaine est régi par les règles de concurrence des Traités de Rome et de Paris; que dans ce cadre, il importe d'instaurer pour ces regroupements de sociétés

* Doc. COM (69)5 final, 15 janvier 1969.
** Doc. COM (69)6 final, 15 janvier 1969.

d'Etats membres différents des règles fiscales neutres au regard de la concurrence afin de permettre aux entreprises de s'adapter aux exigences du Marché commun, d'accroître leur productivité et de renforcer leur position concurrentielle sur le plan international;
considérant que des obstacles importants d'ordre fiscal empêchent actuellement de telles opérations, et qu'il importe dès lors de les éliminer;
considérant qu'il n'est pas possible, notamment pour des raisons de concurrence, d'atteindre cet objectif par une extension au plan communautaire des systèmes en vigueur dans les Etats membres pour les fusions, scissions et apports d'actif intervenant entre sociétés d'un même Etat, les différences entre ces systèmes étant susceptibles de provoquer des distorsions; que seul un régime fiscal commun peut donc constituer une solution satisfaisante;
considérant que le régime fiscal commun à adopter doit, pour éliminer les obstacles actuels, éviter dans toute la mesure du possible une imposition à l'occasion d'une fusion, d'une scission ou d'un apport d'actif, tout en sauvegardant les intérêts financiers de l'Etat de la société apporteuse;
considérant que ces opérations auront normalement pour résultat la transformation de la société apporteuse en établissement stable de la société bénéficiaire de l'apport;
considérant que le régime du report de l'imposition des plus-values afférentes aux biens apportés, jusqu'à leur réalisation effective, appliqué à ceux de ces biens affectés à cet établissement stable, permet d'éviter l'imposition des plus-values correspondantes, à l'occasion d'une fusion, d'une scission ou d'un apport d'actif, tout en assurant leur imposition ultérieure par l'Etat de la société apporteuse, au moment de leur réalisation;
considérant que, pour éliminer les autres obstacles fiscaux, il convient de prévoir le régime fiscal à appliquer à certaines provisions, réserves ou pertes de la société apporteuse, de régler les problèmes fiscaux qui se posent lorsqu'une des deux sociétés détient une participation dans le capital de l'autre ou lorsque les associés de la société apporteuse échangent leurs titres de cette société contre ceux de la société bénéficiaire de l'apport, et d'interdire la perception de tout droit de mutation;
considérant que les problèmes concernant le droit d'apport et la taxe sur le chiffre d'affaires ont trouvé leur solution dans le cadre de directives déjà adoptées par le Conseil;
considérant que le régime d'imposition d'une société ayant des établissements stables à l'étranger présente de sérieux inconvénients; que, notamment, il peut être à l'origine de doubles impositions et qu'il comporte des discriminations à l'encontre de ces établissements stables; qu'il importe dès lors d'améliorer ce régime pour que l'élimination des obstacles fiscaux aux fusions, scissions et apports d'actif conserve toute sa portée;
considérant qu'en cette matière l'objectif final à atteindre doit être l'imposition exclusive des bénéfices qu'une société d'un Etat membre réalise dans la Communauté, par l'Etat membre dont relève cette société, mais qu'il n'est pas possible de prévoir actuellement dans quelles conditions et dans quel délai une telle solution pourra être réalisée; qu'il est donc souhaitable que les mesures à prendre pour atteindre cet objectif soient déterminées ultérieurement sur la base de propositions faites par la Commission au Conseil;
considérant qu'en attendant la réalisation de cet objectif final, il importe, pour remédier aux inconvénients actuels, d'éviter qu'un établissement stable d'une société d'un Etat membre situé sur le territoire d'un autre Etat membre soit taxé plus lourdement qu' une société de cet autre Etat exerçant la même activité;

considérant que, pour les mêmes raisons, les bénéfices d'un tel établissement stable ne doivent être taxés que par l'Etat membre sur le territoire duquel il est situé; qu'il faut cependant donner aux sociétés des Etats membres la possibilité d'opter, pour leurs activités exercées dans la Communauté, en faveur du régime du bénéfice mondial qui constitue un premier pas vers l'objectif final et offre aux sociétés la possibilité notamment de tenir compte, pour le calcul de leurs bénéfices imposables, des pertes subies par leurs établissements stables;
considérant que, dans le but d'encourager les investissements au dehors de la Communauté, le régime du bénéfice mondial doit pouvoir s'appliquer aussi, sur demande des sociétés, aux établissements stables situés dans les pays tiers ou dans certains d'entre eux seulement;
considérant qu'il n'est pas possible de fixer dès à présent les modalités communes d'application du régime du bénéfice mondial et le mode de détermination des bénéfices imposables d'un établissement stable et qu'il convient donc de les préciser ultérieurement sur la base de propositions faites par la Commission au Conseil;

A ARRETE LA PRESENTE DIRECTIVE:

TITRE I

DISPOSITIONS GENERALES

Article 1

Chaque Etat membre applique aux opérations de fusions, scissions et apports d'actif intervenant entre, d'une part, des sociétés relevant de sa législation nationale et, d'autre part, des sociétés relevant de la législation d'autres Etats membres, les dispositions des articles suivants.

Article 2

1. Au sens de la présente directive, il faut entendre par:
— fusion, l'opération par laquelle:
a) une société transfère à la suite d'une dissolution, sans liquidation, l'ensemble de son patrimoine à une autre société préexistante, moyennant l'attribution à ses associés de titres représentatifs du capital social de l'autre société, et éventuellement d'une soulte en espèces ne dépassant pas 10% de la valeur nominale ou, à défaut de valeur nominale, du pair comptable de ces titres;
b) deux ou plusieurs sociétés transfèrent, à la suite d'une dissolution sans liquidation, l'ensemble de leur patrimoine à une société qu'elles constituent, moyennant l'attribution à leurs associés de titres représentatifs du capital social de la société nouvelle, et éventuellement d'une soulte en espèces ne dépassant pas 10% de la valeur nominale ou, à défaut de valeur nominale, du pair comptable de ces titres;
— scission, l'opération par laquelle une société transfère, à la suite d'une dissolution sans liquidation, l'ensemble de son patrimoine, à deux ou plusieurs sociétés préexistantes ou nouvelles, moyennant l'attribution à ses associés de titres représentatifs du capital social des sociétés bénéficiaires de l'apport et éventuellement d'une soulte en espèces ne dépassant pas 10% de la valeur nominale ou, à défaut de la valeur nominale, du pair comptable de ces titres;
— apport de actif, l'opération par laquelle une société apporte sans être dissoute, l'ensemble de ses éléments d'actif ou une ou plusieurs branches de son activité, à une ou plusieurs sociétés préexistantes ou nouvelles, moyennant remise de titres représentatifs du capital social de la ou des sociétés bénéficiaires de l'apport;
— société apporteuse, la société qui transfère son patrimoine, ou apporte l'ensemble de ses

éléments d'actif, ou une ou plusieurs branches de son activité;
— société bénéficiaire, la société qui reçoit le patrimoine, l'ensemble des éléments d'actif ou une ou plusieurs branches d'activité de la société apporteuse;
— branche d'activité, l'ensemble des éléments investis dans une division d'une société qui constituent au point de vue technique une exploitation autonome, c'est-à-dire un ensemble capable de fonctionner par ses propres moyens.
2. La définition de l'établissement stable est donnée dans une annexe qui fait partie intégrante de la présente directive.

Article 3

Les dispositions de la présente directive s'appliquent aux sociétés de droit belge, allemand, français, italien, luxembourgeois et néerlandais passibles de l'un des impôts suivants:
— Impôt des sociétés en Belgique,
— Körperschaftsteuer en Allemagne,
— Impôt sur les sociétés en France,
— Imposta sulle società en Italie,
— Impôt sur le revenu des collectivités au Luxembourg,
— Vennootschapsbelasting aux Pays-Bas,
ou de tout autre impôt qui viendrait se substituer à l'un de ces impôts.

TITRE II

REGLES APPLICABLES AUX FUSIONS ET SCISSIONS

Article 4

En cas de fusion ou de scission, les Etats membres s'abstiennent de prélever tout impôt sur les plus-values afférentes aux biens apportés, c'est-à-dire sur les sommes correspondant à la différence entre la valeur réelle de ces biens et la valeur pour laquelle ceux-ci figuraient dans le bilan fiscal de la société apporteuse, dans la mesure où:
a) les biens immeubles par nature, les titres et participations, les fonds de commerce (goodwill), et les droits de propriété industrielle et intellectuelle faisant partie de l'apport, sont du point de vue comptable rattachés aux établissements stables de la société bénéficiaire dans l'Etat dont relève la société apporteuse;
b) les autres biens sont du point de vue comptable rattachés à ces établissements stables et ne sont pas transférés dans l'Etat dont relève la société bénéficiaire ou rattachés à un établissement stable de cette société situé dans un autre Etat que celui dont relève la société apporteuse;
c) dans le cadre de ces établissements stables, la société bénéficiaire calcule les nouveaux amortissements et les plus-values ou moins-values ultérieures afférents aux biens reçus en apport, d'après la valeur pour laquelle ces biens figuraient dans le bilan fiscal de la société apporteuse.

Article 5

Les provisions ou réserves constituées en franchise partielle ou totale d'impôt par la société apporteuse peuvent être reprises en franchise d'impôt dans la comptabilité des établissements stables de la société bénéficiaire situés dans l'Etat dont relève la société apporteuse, la société bénéficaire se substituant alors aux droits et obligations de la société apporteuse.

Article 6

Les pertes de la société apporteuse non encore amorties au point de vue fiscal, sauf celles provenant d'établissements stables à l'étranger peuvent être reprises dans la comptabilité des établissements stables de la société bénéficiaire situés dans l'Etat dont relève la société apporteuse et amorties selon les règles du droit fiscal applicable à ces établissements stables.

Article 7

1. Les biens apportés donnent lieu à la perception d'un droit d'apport conformément aux dispositions de la directive concernant les impôts indirects frappant les rassemblements de capitaux adoptée par le Conseil le...
2. Aucun droit de mutation ou impôt similaire ne peut être perçu sur les apports de biens ni sur les dettes dont ils sont grevés.

Article 8

1. Lorsque la société bénéficiaire détient une participation dans le capital de la société apporteuse, ou dans le cas inverse, ne donnent lieu à aucune imposition les plus-values éventuellement dégagées par la société bénéficiaire:
a) lors de l'annulation, soit de sa participation dans le capital de la société apporteuse, soit de ses propres titres représentatifs de son capital social reçus en apport;
b) lors de l'échange des titres représentatifs du capital social de la société apporteuse contre des titres représentatifs de son propre capital social.
2. Lorsque, dans le cas où la société bénéficiaire détient une participation dans le capital de la société apporteuse, les opérations visées au paragraphe 1 du présent article font apparaître une moins-value, cette moins-value est déductible du bénéfice imposable de cette société à condition qu'elle soit calculée par référence à la valeur réelle des biens reçus en apport.

Article 9

L'attribution aux associés de la société apporteuse de titres représentatifs du capital social de la société bénéficiaire ne doit entraîner acune imposition.
Lorsque les titres représentatifs du capital social de la société apporteuse font partie de l'actif d'une entreprise, les Etats membres peuvent déroger à cette règle si cette entreprise ne reprend pas à son bilan fiscal les titres représentatifs du capital social de la société bénéficiaire, pour la même valeur que celle pour laquelle figuraient les titres de la société apporteuse.

TITRE III

REGLES APPLICABLES AUX APPORTS D'ACTIF

Article 10

1. Les dispositions des articles précédents concernant les fusions et scissions, sauf celles des articles 8 et 9, s'appliquent aux apports d'actif.
2. Toutefois, dans le cas d'un apport de branche d'activité tel que défini à l'article 2, la reprise des provisions, réserves ou pertes de la société apporteuse prévue aux articles 5 et 6 ne peut être effectuée par la société bénéficiaire, que s'il est établi que ces provisions, réserves ou pertes se rapportent à la ou aux branches d'activité apportées.
3. Les titres représentatifs du capital social de la société bénéficiaire reçus en contrepartie de l'apport peuvent être évalués par la société apporteuse dans son bilan fiscal à la valeur réelle des biens apportés sans que cette évaluation donne lieu à imposition.

TITRE IV

CAS PARTICULIER DE L'APPORT D'UN ETABLISSEMENT STABLE

Article 11

Lorsque dans les biens apportés à l'occasion d'une fusion, d'une scission, ou d'un apport d'actif, figure un établissement stable de la société apporteuse situé dans un autre Etat membre que celui dont relève cette société, ce dernier renonce à partir de la date de la fusion, de la scission ou de l'apport d'actif, à tout droit à imposition de cet établissement sta-

ble; l'Etat où se trouve l'établissement stable et l'Etat dont relève la société bénéficiaire appliquent à cet apport les dispositions de la présente directive comme si le premier Etat était celui dont relève la société apporteuse. Si l'établissement stable est situé dans un Etat tiers, l'Etat dont relève la société apporteuse renonce à tout droit éventuel à imposition de cet établissement, à partir de la même date.

TITRE V

REGLES RELATIVES A L'IMPOSITION DES SOCIETES AYANT DES ETABLISSEMENTS STABLES

Article 12

1. Chaque Etat membre a le droit d'imposer les bénéfices d'un établissement stable d'une société relevant de la législation d'un autre Etat membre situé sur son territoire.

2. Chaque Etat membre renonce à imposer les bénéfices d'un établissement stable qu'une société relevant de sa législation possède dans un autre Etat membre, sauf si la société en cause opte pour le régime du bénéfice mondial.

3. Le régime du bénéfice mondial visé au paragraphe 2 précédent consiste de la part de l'Etat membre dont relève la société qui opte pour ce régime:

a) à englober dans l'assiette de l'impôt frappant les bénéfices de la société:

—les résultats, calculés selon les règles du droit national, de l'ensemble des établissements stables de la société, situés dans les Etats membres;

—sur demande de la société, et dans la mesure où les dispositions des conventions destinées à éviter la double imposition ne s'y opposent pas, les résultats, calculés selon les mêmes règles du droit national, de l'ensemble des établissements stables de la société, situés dans d'autres Etats, pays ou territoires, ou dans certains d'entre eux seulement;

b) à réduire le montant de l'impôt national frappant les bénéfices de la société, pour éviter la double imposition des bénéfices des établissements stables englobés dans l'assiette de cet impôt.

4. Une société qui a opté pour le régime du bénéfice mondial ne peut y renoncer totalement ou partiellement pendant un délai de cinq ans commençant le premier jour de l'exercice fiscal à partir duquel ce régime lui est appliqué.

5. Le Conseil statuant à l'unanimité, sur proposition de la Commission, fixe dans un délai de deux ans à compter de la date indiquée à l'article 15 de la présente directive, les modalités communes d'application des dispositions du présent article.

Article 13

Les modalités d'imposition d'un établissement stable, qu'une société relevant de la législation d'un Etat membre a dans un autre Etat membre, ne doivent pas entraîner pour cet établissement stable une charge fiscale plus lourde que celle qu'aurait supportée une société relevant de la législation de cet autre Etat exerçant la même activité.

Article 14

La Commission soumet au Conseil, le moment venu, des propositions indiquant de quelle façon et dans quel délai toute société relevant de la législation d'un Etat membre sera imposée exclusivement par cet Etat pour l'ensemble des bénéfices qu'elle réalise dans la Communauté.

TITRE VI

DISPOSITIONS FINALES

Article 15

Les Etats membres mettent en vigueur les dispositions législatives, réglementaires et

administratives nécessaires pour se conformer aux dispositions de la présente directive au plus tard le 1er Janvier 1971 et en informent immédiatement la Commission.

Article 16

Dès la notification de la présente directive, les Etats membres veillent a informer la Commission en temps utile pour présenter ses observations de tout projet ultérieur de dispositions essentielles d'ordre législatif, réglementaire ou administratif qu'ils envisagent d'adopter dans le domaine régi par la présente directive.

Article 17

Les Etats membres sont destinataires de la présente directive.

ANNEXE

DEFINITION DE L'ETABLISSEMENT STABLE

1. Au sens de la présente Directive, l'expression «établissement stable» désigne une installation fixe d'affaires où une société 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 ressource naturelle;
g) un chantier de construction ou de montage dont la durée dépasse douze mois.
3. Ne sont pas considérés comme établissements stables les installations et entrepôts répondant aux critères indiqués ci-après aux points a) à e), que ces critères soient remplis individuellement ou conjointement:
a) installations utilisées aux seules fins de stockage, d'exposition ou de livraison de marchandises appartenent à une société;
b) dépôts de marchandises appartenant à une société tenus aux seules fins de stockage, d'exposition ou de livraisons;
c) dépôts de marchandises appartenant à une société tenus aux seules fins de transformation par une autre entreprise;
d) installation fixe d'affaires utilisée aux seules fins d'acheter des marchandises ou de réunir des informations pour une société;
e) installation fixe d'affaires utilisée, pour une société, aux seules fins de publicité, de fourniture d'informations, de recherches scientifiques ou d'activités analogues qui ont un caractère préparatoire ou auxiliaire.

TEXTE

de la directive concernant le régime fiscal commun applicable aux sociétés mères et filiales d'Etats membres différents

(Présentée par la Commission au Conseil)

LE CONSEIL DES COMMUNAUTES EUROPEENNES,

Vu les dispositions du Traité instituant la Communauté Economique Européenne, et notamment l'article 100,

Vu la proposition de la Commission,

Vu l'avis du Comité Economique et Social,
Vu l'avis du Parlement Européen,
considérant que les regroupements de sociétés d'Etats membres différents doivent être rendus possibles pour créer dans la Communauté des conditions analogues à celles d'un marché intérieur et pour assurer ainsi l'établissement et le bon fonctionnement du Marché commun et que ces opérations ne doivent pas être entravées par des restrictions, désavantages ou distorsions particuliers découlant des dispositions fiscales des Etats membres; que de tels regroupements ne présentent pas d'inconvénients dans la mesure où une concurrence efficace et dès lors une liberté d'activités et de choix pour les fournisseurs, les clients et les consommateurs demeurent assurées; que ce domaine est régi par les règles de concurrence des Traités de Rome et de Paris; qua dans ce cadre, il importe d'instaurer pour ces regroupements des sociétés d'Etats membres différents des règles fiscales neutres au regard de la concurrence afin de permettre aux entreprises de s'adapter aux exigences du Marché commun, d'accroître leur productivité et de renforcer leur position concurrentielle sur le plan international;
considérant que de tels regroupements peuvent se pratiquer par des prises de participations aboutissant à la création de groupes de sociétés mères et filiales;
considérant que les dispositions fiscales actuelles réglant les relations entre sociétés mères et sociétés filiales d'Etats membres différents varient sensiblement d'un Etat à l'autre et présentent de sérieux inconvénients qu'il convient d'éliminer par l'instauration d'un régime commun, pour éviter de contrarier ces regroupements de sociétés;
considérant que le régime fiscal commun doit, en premier lieu, éviter qu'un bénéfice réalisé par une filiale, déjà taxé au niveau de cette société, soit à nouveau soumis à l'impôt sur les sociétés dans le chef de la société mère;
considérant qu'il convient par ailleurs pour assurer la neutralité fiscale d'exempter de retenue à la source, sauf dans certains cas particuliers, les bénéfices qu'une société filiale distribue à sa société mère;
considérant que le régime du bénéfice consolidé offre aux sociétés notamment la possibilité de tenir compte, pour le calcul de leurs bénéfices imposables, des pertes subies par leurs filiales; qu'il faut donc donner aux sociétés la possibilité d'opter pour ce régime, pour toutes leurs filiales situées dans la Communauté;
considérant que, dans le but d'encourager les investissements au dehors de la Communauté, notamment dans les pays associés et dans les pays en voie de développement, le régime du bénéfice consolidé doit pouvoir s'appliquer aussi, sur demande des sociétés, à leurs filiales situées dans les pays tiers ou dans certains d'entre eux seulement;
considérant qu'il n'est pas possible de fixer dès à présent les modalités d'application et la date d'entrée en viguer de ce régime, et qu'il convient donc de les préciser ultérieurement sur la base de propositions faites par la Commission,

A ARRETE LA PRESENTE DIRECTIVE:

Article 1

Chaque Etat membre applique les dispositions de la présente directive:
—aux bénéfices recueillis, par des sociétés-mères relevant de sa législation nationale, de filiales relevant de la législation d'autres pays;
—aux bénéfices distribués, par des sociétés relevant de sa législation à des sociétés relevant de la législation d'autres Etats membres dont elles sont les filiales.

Article 2

Les dispositions de la présente directive con-

cernent les sociétés de droit belge, allemand, français, italien, luxembourgeois et néerlandais passibles de l'un des impôts suivants:
— Impôt des sociétés en Belgique,
— Körperschaftsteuer en Allemagne,
— Impôt sur les sociétés en France,
— Imposta sulle società en Italie,
— Impôt sur le revenu des collectivités au Luxembourg
— Vennootschapsbelasting aux Pays-Bas,
ou de tout autre impôt qui viendrait se substituer à l'un de ces impôts.

Article 3

1. Pour l'application de la présente directive,
a) la qualité de société mère est reconnue au moins:
— à toute société relevant de la législation d'un Etat membre qui détient dans le capital d'une société relevant de la législation d'un autre Etat membre une participation minimum de 20%;
— à toute société relevant de la législation d'un Etat membre qui détient dans le capital d'une société relevant de la législation d'un autre Etat membre une participation résultant d'un apport d'actif quelle que soit l'importance de celle-ci.
b) il faut entendre par
— société filiale, la société dans le capital de laquelle la participation visée à l'alinéa a) est détenue;
— apport d'actif, l'opération par laquelle une société apporte sans être dissoute, l'ensemble de ses éléments d'actif ou une ou plusieurs branches de son activité, à une ou plusieurs sociétés préexistantes ou nouvelles, moyennant remise de titres représentatifs du capital social de la ou des sociétés bénéficiaires de l'apport;
— branche d'activité, l'ensemble des éléments investis dans une division d'une société qui constituent, au point de vue technique, une exploitation autonome, c'est-à-dire un ensemble capable de fonctionner par ses propres moyens.
2. Tout Etat membre a cependant la faculté de ne pas appliquer les dispositions de la présente directive aux sociétés relevant de sa législation qui ne conservent pas pendant au moins deux ans une participation donnant droit à la qualité de société mère.

Article 4

Les bénéfices distribués que toute société mère reçoit à titre d'associé de sa société filiale, même à l'occasion de la liquidation de celle-ci, ne font pas partie de son bénéfice imposable.
Tout Etat membre a cependant la faculté d'exiger qu'une société mère relevant de sa législation réintègre dans son bénéfice imposable une somme n'excédant pas 5% de ces bénéfices.

Article 5

1. Les bénéfices distribués par une société filiale à sa société mère sont, au moins lorsque celle-ci détient une participation minimum de 20% dans le capital de la filiale ou lorsque la participation résulte d'un apport d'actif, exemptés de retenue à la source, en particulier:
— de précompte mobilier en Belgique,
— de Kapitalertragsteur en Allemagne,
— de retenue à la source en France,
— de ritenuta alla fonte en Italie,
— de retenue d'impôt au Luxembourg,
— de dividendbelasting aux Pays-Bas.
2. Par dérogation aux dispositions du paragraphe 1, tout Etat membre dont le taux de l'impôt sur les bénéfices distribués est inférieur à celui sur les bénéfices non distribués peut prélever une retenue à la source sur les bénéfices qu'une société filiale relevant de sa législation distribue à sa société mère pour autant que:
a) le taux applicable aux bénéfices distribués

soit inférieur d'au moins 10 points à celui fixé pour les bénéfices non distribués;
b) le taux de la retenue ne dépasse pas la différence en points entre les taux pratiqués pour les bénéfices distribués et non distribués et n'excède pas en tout état de cause 25% des bénéfices distribués.
3. L'Etat membre, qui a prélevé dans les conditions prévues au paragraphe 2 une rerenue à la source sur les bénéfices d'une société filiale, est tenu de rembourser cette retenue à la société mère lorsque cette dernière procède au titre du même exercice à une redistribution de ces bénéfices.
Ce remboursement est effectué en proportion des bénéfices ainsi redistribués par la société mere qui a cependant la faculté d'imputer par priorité sur le bénéfice qu'elle distribue les bénéfices de ses filiales ayant subi une telle retenue.

Article 6

L'Etat membre dont relève la société mère ne peut percevoir de retenue à la source sur les bénéfices que cette société reçoit de sa filiale.

Article 7

1. Toute société mère relevant de la législation d'un Etat membre détenant une participation d'au moins 50% dans le capital d'une société relevant de la législation d'un autre Etat membre peut opter pour une période minimum de cinq ans pour le régime du bénéfice consolidé.
2. Le régime du bénéfice consolidé visé au paragraphe 1 consiste de la part de l'Etat membre dont relève la société mère qui opte pour ce régime:
a) à englober dans l'assiette de l'impôt frappant les bénéfices de la société mère, en proportion du capital détenu par celle-ci,
—les résultats, calculés selon les règles du droit national, de l'ensemble des sociétés relevant de la législation des Etats membres, dans le capital desquelles la société mère détient une participation d'au moins 50%;
—sur demande de la société mère, les résultats, calculés selon les mêmes règles, de l'ensemble des sociétés relevant de la législation d'autres Etats, pays ou territoires ou de certains d'entre eux seulement, dans le capital desquelles la société mère détient une telle participation;
b) à réduire le montant de l'impôt national frappant les bénéfices de la société mère, pour tenir compte du fait que les sociétés, dont les bénéfices sont englobés dans l'assiette de cet impôt, sont assujetties à un impôt sur ces bénéfices;
3. Le Conseil statuant à l'unanimité sur proposition de la Commission, fixe ultérieurement les modalités d'application du régime du bénéfice consolidé, ainsi que la date à laquelle les Etats membres devront obligatoirement introduire ce régime dans leur législation.

Article 8

Les Etats membres mettent en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer aux dispositions de la présente directive au plus tard le 1er janvier 1971 et en informent immédiatement la Commission.

Article 9

Dès la notification de la présente directive, les Etats membres veillent à informer la Commission en temps utile pour présenter ses observations de tout projet ultérieur de dispositions essentielles d'ordre législatif, réglementaire ou administratif qu'ils envisagent d'adopter dans le domaine régi par la présente directive.

Article 10

Les Etats membres sont destinataires de la présente directive.

ELABORATION OF COMMUNITY CUSTOMS LEGISLATION

Although 1 July 1968 was an important date in the history of the Common Market, it brought no appreciable change in the conditions under which Member States trade with each other, because for most products it was only the remaining 15% of the base duties in force in 1957 that was abolished (duties equivalent to 25% of those in force in 1957 will be charged on intra-Community trade in certain products listed in Annex II to the Treaty for which there is not yet a common market organization until 1 January 1970).

Although the Common Customs Tariff had been introduced and two important regulations (on origin of goods and value for customs purposes) had been adopted by the Council, a really harmonized Community-wide customs legislation was still not in place. To remedy this, the Commission submitted to the Council in 1967 and at the beginning of 1968 a first set of measures which have now been formally approved by the Council.

Of the five texts concerned, four are directives actually harmonizing rules applying in the six Member States. The fifth is a regulation setting up a Community customs procedure designed to facilitate trade between the Member States by means of close co-operation between customs officials of the Six.

A. THE FOUR DIRECTIVES

I. *Inward processing traffic*

Inward processing consists of using products from non-member countries duty-free or levy-free for incorporation in goods subsequently sold by Community exporters on world markets. This is an economic tariff arrangement, the importance of which in international trade is constantly increasing and which affects not only traditional industries such as food, textiles, etc., but more particularly the latest and most modern industries (computers, motor vehicles, aircraft, chemicals, etc.). It is currently estimated that of the $31 000 million worth of exports from the EEC, $6 000 to $7 000 million is accounted for by operations carried out under customs supervision and inward processing traffic arrangements.

Difficult problems had to be settled at Community level, principally because the Benelux countries had imposed no economic limitation on such operations, which may in certain cases be detrimental to Community producers.

The directive lays down quite liberal criteria to be observed by the administrations of the Member States: operations providing the optimum combination of export conditions without being detrimental to the basic interests of Community producers are to be authorized.

Since these arrangements will raise numerous administrative problems (particularly with regard to the exchange of information between the Member States concerning the nature of the operations which they authorize, rates of yield, taxation of goods not re-exported, etc.), a procedure conferring certain powers on the Commission through a specialized Committee has been laid down.

As this Committee's programme is particularly full, a large number of meetings will have to be held before Community administration of the main rules of the directive is achieved.

II. *Bonded warehouses and free zones*

The economic importance of bonded ware-

houses and free zones no longer needs to be demonstrated; here again, the total annual value of goods other than oil products stored in bonded warehouses without payment of customs duties or agricultural levies before ultimate assignment to a specific economic use (in general either they are cleared through customs and consumed in the Community or they are re-exported) can be put at $ 5 000 to $6 000 million at least.

(a) Free zones

In theory a free zone is a territory where complete freedom is allowed in customs matters. In fact no such situation existed in any of the Community's free zones (including free ports). However, common rules had to be laid down for all the Member States having free zones or wishing to create them. The Community arrangements specified by the directive prevent the Member States from establishing free zones in cases where products from non-member countries might be consumed without payment of customs duties. On the other hand, subject to customs supervision at the boundaries of these zones and the observation of certain principles within them, any of the EEC Member States may create territorial enclaves called "free zones" where goods from non-member countries can be stored for an unlimited period without being taken over by the customs authorities. Bonding activities in the zones will be greatly facilitated. And firms will be able to set up plants in the zones to process products from non-member countries for subsequent export without paying customs duties or levies, as long as they observe the same economic principles as those applicable to inward processing traffic (but they will benefit from inspection procedures which may be very much simpler than those outside the zones). By the combined application of these arrangements and the exemptions made for shipbuilding in June 1968, there may be some alleviation of customs formalities for Community shipyards.

(b) Bonded warehouses

Unlike a free zone, which consists of a territorial enclave surrounded by a customs barrier, the bonded warehouse is merely a building where goods can be stored. These may be handled in the warehouse and are not subject to customs duties or levies unless they are taken out of the warehouse to be consumed in the Community.

Frequent use is made of such warehouses, and they are of special importance for commodities for direct consumption such as tropical products, furs, carpets, etc.

Here too, differing regulations in the Member States would cause diversion of trade and more particularly of distribution (inside or outside the Community).

The directive ensures that the main rules governing bonded warehouses are neutral in their impact principally by eliminating the differences which used to exist in the taxation of products coming out of bond, depending on the Member State.

III. *Deferred payment of customs duties, taxes with equivalent effect and agricultural levies*

For various reasons, the authorities in the Member States allowed importers certain periods of grace for payment (ranging from five days in the Benelux countries to sixty days in Germany). Facilities such as these, granted free of interest, could not continue to vary so much from one member country to another. At the end of a transition period expiring on 31 December 1970, importers will be given equal treatment in the matter throughout the Community: thirty days' grace will be allowed them for payment subject to the furnishing of a guarantee, but without interest. The directive makes provision

for adapting the period of grace to modern administrative systems used in certain Member States (totalling of operations over a period with one final account covering all of them).
The directive also stipulates that additional payment facilities, if interest is payable, must conform to the conditions of the capital market in the Member State concerned so as not to constitute an advantage in favour of importers.

B. COMMUNITY TRANSIT

The regulation introducing Community transit arrangements has some sixty articles and a number of specially important annexes and is therefore very difficult to summarize. The effects it is expected to have after implementation on 1 January 1970 are worth noting; in practice it should make possible a considerable simplification of formalities. The new arrangements for customs supervision of goods circulating in the Community will then be as follows.
(1) A single document will replace the export declaration, the movement certificate, the export certificate and the transit declaration or declarations.
(2) The inspection of goods on departure from and arrival in the vicinity of or at the actual premises of the exporter or the consignee will enable all complicated formalities on crossing frontiers to be dispensed with, and one customs-office stop in two will be eliminated. The system should prevent breaking of bulk and allow better relations to develop between the customs authorities on the one hand and exporters and importers on the other.
(3) The reduction in guarantees usually required by customs should cut the cost of transport operations.
With the transit declaration serving as a source of statistics, the data collected will very soon be processed by a single Member State on behalf of the others.
Because of its very simplifications, the regulation will raise certain problems of application. For instance, the procedure will have to be adapted to new modes of transport (e.g. containers). The Commission, acting through a Committee whose work load here too is still very heavy, will take the necessary steps.
In conclusion, the Community transit scheme will apply from 1 January 1970 to all goods circulating in the Community and should represent a major step forward in simplifying controls and speeding up the movement of goods in the Common Market. It will also be the first procedure systematically requiring close co-operation between all the customs authorities in the Community and will thus be an effective means of combating frauds without imposing additional controls on users - far from it, in fact.

The above-mentioned texts are only a part of what needs to be done at Community level concerning customs legislation. Although they constitute an advance on the previous situation, progress is only partial in the matter of customs clearance procedure. Nothing has yet been done in respect of the obligations of the declarer. The content of import declarations has not been harmonized. The conditions for settling customs disputes, especially those concerning sanctions, are still determined unilaterally by the Member States. Economic customs arrangements apart from inward processing (e.g. temporary use of capital goods from non-member countries) are not covered by Community regulations. A number of other problems (continental shelf, various exemptions, uniform application of the many customs conventions, etc.) remain to be studied.
So while there is cause for congratulation on

the work accomplished, it is nevertheless essential, as the Council recommended on 30 July 1968, that work on customs harmonization should continue in order to ensure that the customs authorities of the Member States, which employ some 65 000 officers (8 000 or 9 000 of them Inspectors), perform their duties under similar conditions. During 1968 these officers checked some 600 or 700 million travellers and, more important, $ 110 000 million worth of goods on which 35 million declarations were made, thus ensuring enforcement of the most varied and complex regulations.

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1879 - JUNE 3 - 1969

On June 3, 1969 Professor Dr. P.J.A. Adriani will celebrate his 90th birthday. As one of the founders of the International Fiscal Association and as the founder and first director of the International Bureau of Fiscal Documentation. Adriani has had a significant influence on the development of international and comparative tax law as a discipline of study and research. Adriani's name is linked with the names of many others with whom he had numerous contacts. Becker, Bühler and Spitaler in Germany, Blumenstein in Switzerland, Griziotti and Vanoni in Italy, Trotabas in France, Bruins in the Netherlands, Van Houtte in Belgium: they all felt that taxation ought to be considered as a social and economic phenomenon also worthy of theoretical study from a legal point of view, and they all realized that the international aspects of taxation would become increasingly important.

On the occasion of Adriani's retirement as professor of tax law at the University of Amsterdam, in 1949, a *liber amicorum* under the title "Tractatus Tributarii" was presented to him containing, *inter alia*, an impressive bibliography of his books and articles. In many of his writings reference is made to situations in other countries where similar problems were solved in the same or in a different way, with the reasons why this was so. Few had Adriani's gifts to explain difficult problems so clearly that they seemed not to be problems at all. Those within the Netherlands and outside who had the privilege of meeting Adriani and discussing taxation with him could not help but have the feeling that they had talked to an artist. This Adriani has always been, not only in his paintings but in his attitude towards mankind and the world. It is rare to meet a man of so much wisdom in all respects.

Long since retired, Adriani's daily influence on taxation has disappeared, but those whose teacher he was, in his courses and writings, will with gratitude extend to him their best wishes for a happy birthday.

v.H.

* * * * ARTICLES * * * *

PROF. V. UCKMAR & P. DURAND:

THE TAX TREATY BETWEEN ITALY AND FRANCE*

1. The Convention of 16th June 1930 between Italy and France against double taxation with respect to direct taxes, together with the related additional acts of 16th November 1931, proved itself inadequate after the war, both because of the amendments made to the fiscal systems of the two states and the evolution of international fiscal law.

On the 29th October 1958, a new Convention was agreed in Paris which replaced the previous one and whose entry into force, notwithstanding Italy's ratification by means of the law N° 469 of 9th February 1963, was delayed because of failure in exchanging the instruments of ratification. In the meantime the fiscal systems of the two states underwent new changes; the main changes were: the introduction of the withholding tax on dividends over the distributed profits in Italy; and the amendment of the taxation system with respect to companies and distributed profits in France.

An additional agreement with the related protocol was therefore agreed on 6th December 1965 which will come into force, together with the 1958 agreement, "on the date of the exchange of the instruments of ratification which will take place in Rome in the shortest possible time" (art. 12). The additional agreement was ratified by Italy with law N° 766 dated 6th August 1967[1].

The instruments of ratification were exchanged on December 15, 1967, and the whole treaty, including the protocol, was published in the Journal officiel de la République Française on March 14, 1968, further to the French decree N° 68-228 of March 12, 1968[2].

2. The convention (hereinafter referred to as "convention" or "treaty", unless otherwise stated and to be understood as the one made in 1958 and amended by the 1967 additional agreement) complies in its greater part with the OECD draft. Concerning Italy the convention deals with all the income taxes (local and State), except for the tax on companies in the parts concerning assets, and for the tax on bonds "for reasons of reciprocity" (as is stated in the governmental report) "there being no tax on assets in France".

The convention then, covers, concerning Italy, the taxes on land income, on agrarian income, on buildings, on income, progressive complementary income tax (on the physical person), tax on companies (dealing with the part concerning income) and the withholding tax on the profits distributed by companies.

As far as France is concerned, the French taxes covered are listed in article 2 A, as amended by article 1 of the 1965 protocol, owing to the drastic changes which happened in France further to the law of 12th July 1965. They are therefore:

– Impôt sur le revenu des personnes physiques

---

* The text of the treaty in the original French language is published in a supplement to this issue.

1. By France with law no. 66-966 dated 26th December 1966.

2. An administrative instruction on February 27, 1969 precising the application of this convention was published in B.O.E.D. no. 14 of March 31, 1969. This article being written before this important instruction, footnotes will give details concerning this instruction.

– Taxe complémentaire
– Impôt sur les sociétés

The convention will be applied to "every other tax of similar nature which will be instituted after the signing of the convention . . . on income, estates, and on capital gains". It has been taken into account though, that "if amendments are made to the fiscal laws of either of the two states, such as to modify noticeably the nature or the character of the taxes to be, the two countries will consult each other". It is likely that a consultation will be necessary if the reform of the Italian fiscal system, which is at the moment still in the planning stage, were to take place.

3. Article 3 of the convention contains the definition of some expressions recurring in the convention.

It must be noted here that the territory to which the treaty is applicable does not include such overseas French territories as New Caledonia and Tahiti. The precise reason for this is that in these territories a special tax system is in force. In New Caledonia for instance, there is no income tax and no corporate tax. Since the treaty is meant to avoid double taxation, it is understandable therefore that it cannot be applicable to those French territories where no taxation exists.

First of all it specifies exactly the meaning of "fiscal domicile" not coinciding with that given by the article 8 t.u.i.d.[3] For physical persons, it is the place where they have the house they live in, as "centre of vital interests, that is the place where the personal relations are strongest": the domicile then coincides with the residence ascertained for the communal family tax. In the cases where a subject lives for a part of the year in one State and in the other State for the remaining part of the year, he will be considered as domiciled in the State "in which he lives prevalently". If he lives in the two States for the same length of time he is considered as domiciled in the State of his nationality. Finally, if he has the nationality of both States, or if he has not either of them, the superior administration authorities of the two States "will consult each other". For the juridical person, the domicile is "in the place where the effective management is located". This definition of the treaty must be analysed in connection with the definition of the tax domicile given by article 164-1 of the French Code Général des Impôts. This article indicates that aliens are considered as domiciled in France if they have on French soil the center of their interests, or if they have had a permanent residence in France for more than five years. This definition is the source of numerous problems. An Italian citizen may, when he retires, elect to live in France. If he receives a pension originating from Italy (as such pension according to article 15 of the treaty is taxable only in Italy), he may not be considered as having the center of his interests in France unless he has actually lived in France for at least five years. And, accordingly, he may be taxed in France, until the said period of five years has elapsed, as per article 164-2 of the French Code Général des Impôts, i.e. on whichever is the higher figure of:

– his actual French income
– five times the assessed rental value of his villa or apartment in France.

This irritating problem for many aliens has already been solved in the two tax treaties concluded by France with Switzerland and the U.S.A. (Swiss treaty of September 9, 1966 and additional protocol—U.S. treaty of July 28, 1967, article 23-3). It is regrettable

3. Testo Unico delle leggi sulle imposte dirette – Direct Tax Code (Decree of January 29, 1958, no. 645, as subsequently modified).

that no similar solution has been adopted in the treaty with Italy.

Paragraph 4 of article 3 contains a detailed definition of "permanent establishment". The following are considered to be permanent establishments: the location of effective management; workshops; laboratories; mineral deposits; storehouses; branch offices; yards carrying out works the duration of which exceeds three months in the course of the following consecutive twelve months; agencies, when the agent habitually exercises, in actual fact, a general power which enables him to carry on business and to seal contracts on behalf of an enterprise; etc. Successively, it is pointed out that a "permanent establishment" is not constituted in one of the two States by the fact that an enterprise of the other State:

a) owns, under any form, a storehouse with the only purpose of facilitating the delivery in this State of products and merchandise which have been objects of sale in the other State; b) owns, under any form, a shareholding in a company or moral person paying tax in the first State; c) has business relations in the first State through an agent truly autonomous (commission agent, broker) acting inside his normal activity or through a company juridically independent (such as a "filiale"); d) owns in the first State, also under the form of permanent establishments, offices whose activity is limited to the purchase of raw materials for its supply.

The wording of this clause is, in broad lines, similar to the clause of the OECD Draft Treaty. However, it is regrettable that the treaty did not use a more elaborate language, as the one which was adopted in the new French-U.S. treaty of July 28, 1967. Two significant examples will illustrate our position:

A) It is said in the new U.S./French tax treaty that a building site or construction or assembly project which exists for more than 12 months (article 4(2)(h)) will constitute a permanent establishment. In the new Italian treaty, article 3(4)(2)(a) assimilates to a permanent establishment a building site (or similar activity) where the works made in such site exceed a total length of three months during 12 consecutive months.

Article 5(2)(g) of the new Swiss/French treaty of September 9, 1966, shows a wording similar to the one used by the U.S./French treaty (12 months period), although the old Swiss treaty of October 13, 1937, used a wording similar to the one used in the new Italian treaty.

B) Concerning insurance and reinsurance companies, paragraph 5 of article 4 states that they are considered as having a permanent establishment when, through one of their agents, they collect premiums on insurance risks. In the governmental report to the Bill of Ratification of 29th October 1958 Convention, it was pointed out that this clause was introduced at the request of the Italian delegation to avoid double taxation of reinsurance enterprises acting in France, because they, as all foreign insurance companies acting there, for the sole fact that they have to maintain, under the French law, a "représentant responsable agréé" in that country, would be subjected, if there was not the clause mentioned above, to taxation in France even when the aforesaid agent does not exercise powers such as to bind the enterprise which he represents or he does not enter into contracts on behalf of the enterprise itself.

However, an Italian (or French) insurance company (article 3(5) of the new Italian treaty) is deemed to have a permanent establishment in France when it collects premiums in France (or Italy) through a representative.

The situation is quite different in the new U.S./French treaty (articles 4-7) since an insurance company is *not* considered as having a permanent establishment if it collects premiums through an *independent* representative as defined in article 4(5) of the U.S. treaty.
The fact that an Italian insurance company collects premiums in France through an *independent* representative could make it liable to tax in France, since the definition of representative in article 3(5) of the new Italian treaty is not connected with a notion of independence.

4. Articles 4-22 set out the rules for the attribution of the power of imposition in the two States regarding the nature of the various incomes.
Article 4 states that "incomes deriving from real estate, including profits deriving from the alienation of such goods" are taxable only by the State where these goods are located. The same rule is effective for the "duties paid for the use of real estate, for the use of the right of hunting, of fishing or similar rights, or for the utilisation of mines, quarries or other natural resources".
It must be pointed out that it is up to the State where these properties are situated to apply the taxation on the profits "deriving from sale of such goods" and consequently of the eventual increases deriving from their sale. Thus in the case of an undertaker selling a property of his in France and realizing an overvalue, this overvalue would not be liable for taxation in Italy (income tax cat. B) and this derogating from the provisions made by the articles 82, last paragraph, and 100 t.u.i.d.
This clause is a standard one in old tax treaties, and it provides that profits derived from real estate are taxable only in the country where such real estate is located. However, this article must be read in conjunction with the protocol of December 6, 1965, since, in the field of real estate taxation, special attention must be devoted to the French tax system.
Two French laws of March 15, 1963, and December 19, 1963, have drastically changed the approach to taxation of real estate profits.
These changes are reflected in the protocol of December 6, 1965. The essence of this new legislation can be summarized as follows[4]: profits made on constructible land and/or shares of corporations which are known as „sociétés immobilières transparentes" are treated as ordinary income; prior to the new laws, they were considered in France as capital gains and free from tax of any kind.
The „sociétés immobilières transparentes" are a special type of corporation which are meant to create a special kind of real estate joint ownership for house buildings. Their shareholders are entitled upon liquidation to receive the full ownership of the portions of the building referred to in the articles of the corporation. If for instance any shareholder, when purchasing shares, is specifically attributed those shares corresponding to a certain flat in the buiiing, he is considered as having ownership of that flat. This is why such corporations are said to be "transparent", since their purpose is to act as a legal shell embodying the interests of their members, and are not, in the sense of French law, owners of the building (or parts thereof) in their personal capacity.
Real estate profits made by non-residents under the two above-mentioned French laws of 1963 are taxable in France, even if their origin is only attributable to shares of the "transparent" corporation.

4. It is not possible to give here all technical details of the new system, which has led to numerous books and papers in France.

A complex legislation makes a distinction between "speculative" and "non-speculative" profits. It is not our intention to give here complete details of the mechanism involved, since the length of such matters is not compatible with this general survey.

5. Article 5, also in accordance with that stated by the internal Italian regulations, provides that, when an enterprise has a "permanent establishment", the income deriving from all the operations made by this organisation and the profits resulting from the partial or total alienation of goods belonging to this organisation, the imposition is within the competence of the State where the permanent establishment is situated. This rule is derogated for shipping companies, taxable only by the State in whose territory is situated the main office of the effective management, "on condition that the ship or aeroplane fly the flag or own the nationality of the State in whose territory the above-mentioned management is located." The same article 5 provides some indications of the determination of the taxable income.

As a general rule, we must refer to the accounts; in the case where the accounts or other elements are not sufficient to determine exactly and distinctly the effective amount of the incomes produced by the permanent establishment, the fiscal authorities of the two States will consult each other, if necessary, to establish the criteria of distribution suitable to determine the part of the whole income of the company which can be equitably attributed to this establishment. Paragraph 3 adds that permanent establishments must be attributed with all the profits and advantages that, under the normal, commercial customs would not have been allowed to third parties and which are attributed or granted in any way by the permanent establishment, directly or indirectly, both by the company itself or by other organisations of this company both to its managers, shareholders, partners or to other participants or to persons sharing common interests with them.

It must also be pointed out that, for the determination of the taxable income account must be taken of: "on one side the burdens and real expenses met by the company of the State where the permanent establishment is situated, expenses which weigh directly and specifically on the production and conservation of such incomes; on the other, the part of expenses normally related to the permanent establishment thus including the normal expenditure for management and general administration of the company as a whole in the location of the main office of its effective management". Article 6 adds that, when a company of one of the two States which is either under or owns the control of an enterprise of the other State, or which is under an enterprise or group of enterprises holding control of an enterprise of the other State, grants or imposes to this enterprise of the other State, in its financial or commercial relations, conditions different from those which would have normally been made to enterprises effectively independent, all the profits which normally would have had to be shown in the accounts of one of these enterprises, but which have thus been transferred directly or indirectly to the other enterprise, can be included in the taxable profits of the first enterprise. Failing the existence of precise elements allowing exact determination of the amount of profit transferred, the competent authorities of the two contracting States will reach an agreement, if necessary, to determine the value to be given to these products to avoid double taxation, according to the meaning of the convention.

6. Articles 8 and 9 provide the rules for the distribution of the taxation of interests and dividends.
They provide, generally speaking, that such taxation is within the competence of the State where the payee is domiciled, nevertheless granting the State to which the payer belongs the authority of the taxation, but with the rate of taxation not exceeding 15% of the gross amount.
In the case where such authority was being enforced, the taxes paid by the State of the payer must be related to the taxes due to the State where the payee is domiciled.
Nevertheless, in Italy, the "tax credit" for the taxes paid in France is granted only if the interest or dividends are taxable under the rules covering income taxes; if such taxation is not applicable (as in the case of dividends), the "tax credit" is granted only if the Italian taxation on incomes deriving from French sources is superior to 20% and limited to the part exceeding such percentage.
The above-mentioned rules cannot be applied if the payee of the dividends or of the interest has a permanent establishment in the State of the company paying.
Summing up, concerning dividends, those of Italian companies, due to subjects domiciled in France, will be liable to undergo a maximum withholding of 15%, to be deducted from the taxes due in France dividends coming from French sources, will be subjected in Italy to the normal rules concerning the withholding tax on dividends (law of 29th December 1962, N° 1745, last modified by law N° 209 of 21st April 1967); the deduction of the taxes paid in France, though, (which for the subjects domiciled abroad amounts to a withholding of 25%: article 4 of law N° 566 of 12th July) will be granted to the conditions mentioned above, that is only in the measure of 5%, always providing that the Italian taxation on dividends exceeds 20%.
These rules laid down when in Italy the system of withholding tax on dividends of 30%, without any reimbursement, was in force —in fact the conditions mentioned above for the tax credit in Italy actually tend to bring back to such tax rate the definitive charge on dividends—do not agree well with the new rules, dictated by the law decree N° 22 of the 21st February 1967; it will therefore be necessary for a co-ordination to be made between the latter and the regulations of the agreement, as permitted by the regulations of the agreement (see paragraph 2 of articles 2 and 3 of the agreement and article II of the protocol).
Originally, the wording of the new treaty, as adopted in 1958, provided that dividends and interest were only taxed in the country of the debtor. A new wording of article 8 was adopted by the addendum of December 6, 1965, and is more in line with the OECD Draft Convention. Accordingly, the withholding tax on dividends, which amounts in France to 25% in the absence of any treaty, is reduced to 15%.
It is however regrettable that the new treaty did not include a special treatment for the dividends paid to a parent company by its subsidiary. Two recent tax treaties concluded by France (U.S.A. and U.K., the latter not yet ratified) have included provisions to the effect that the rate of withholding tax is substantially reduced in the case of dividends paid by subsidiaries. In this respect, the new tax treaty between Italy and France is not very up-to-date as far as international trade requirements are concerned.
One other point of great importance must be outlined here. Since July 12, 1965, French tax law has been completely revamped. A new system of tax credit on dividends (known in French as "avoir fiscal") was adopted. A practical example will show the actual mechanism of such tax credit.

a) assuming that a French corporation shows a gross profit of	200
it will be liable to corporation tax (50%)	100
b) the net profit	100
is assumed distributed as a dividend to the shareholders.	
c) when receiving a dividend of	100
the shareholder is given a tax credit of 50%	50
thus making a total taxable income of	150
d) if the shareholder pays income tax at the rate of 50%, he will be liable	
to a tax of	75
He will however use the tax credit (c) above to offset part of his tax liability	50
His net tax will amount to	25

In the same situation, the same dividend of 100 paid to an Italian resident is subject to a withholding tax of 15%. Both situations compare as follows:

French shareholder		*Italian shareholder*	
Dividend	100	Dividend	100
Tax credit	50	Withholding tax	15
Gross income	150	Gross income	85

Apparently, there is here a discrimination[5]. Already the Swiss and German Governments have made some representations to the French authorities in this respect. It is expected that the benefit of the tax credit will be extended to German residents and Swiss "bona fide" residents who will give evidence of their liability to Swiss income tax at the standard rate. It seems, however, that the granting of such advantages to German and Swiss residents could be construed as a discrimination.

The article 9 dealing with interest has been introduced by the addendum of December 1965. Accordingly, the withholding tax on interest cannot exceed 15%. We must admit that a discrepancy exists here as regards domestic French law:

The French law N° 64-1279 of December 23, 1964 (article 7-1) provides that withholding tax applicable to negotiable bonds (obligations et titres d'emprunt négociables) is calculated as follows:

- 12% on all bonds issued prior to January 1, 1965
- 10% on all bonds issued after January 1, 1965
- 12% on all premiums (lots et primes de remboursement) irrespective of the date of issuance of corresponding bonds.

Special provisions to this effect have been embodied in the new U.S. and Swiss tax treaties concluded by France in 1966 and 1967. Since the new Italian treaty does not cover these specific points, it is therefore inevitable that the new treaty apparently inflicts a penalty on Italian holders of French bonds, as opposed to U.S. or Swiss holders. Such a situation will not occur, however, since article 23 is meant to grant to Italian residents all advantages which are due to French

5. See PATRICK DURAND: Taxation of Dividends in France – a discrimination: Bulletin for international fiscal documentation, – vol. XX january 1966, N° 1.

residents. Consequently, the withholding tax on interest paid from France to Italy will, as far as bonds are concerned, be reduced from 15% to 12 or 10% as above indicated.

Also concerning the incomes of partnerships, it is stated that incomes of partnerships of persons are taxable regarding their nature, and conforming to the conventional regulations and to the internal ones of each State. Thus, concerning Italy, by means of these rules the differences between the fiscal regulations of such types of partnerships and those of the corporations, are left unchanged. Some uncertainties are met in finding out the conventional rules exactly applicable to the profits of the partnerships of persons.

In this respect, article 9 bis, specially devoted to partnerships, was introduced by the protocol of December 1965.

Some comments are necessary here in the light of the basic taxation of partnerships in domestic French tax law. The common characteristic of practically all forms of partnerships is that taxation is directly assessed under the name of each partner as in Italy, and not on the partnership entity itself. This is true provided that the liability of the partners is not limited and that furthermore such partnership has not elected to be personally liable to corporate tax.

Should an Italian corporation be a member of a partnership which, as stated above, is not directly liable to corporation tax, the profits which it may derive from its share in the business will be taxed at the standard rate of corporation tax: 50% (see Francis Lefebvre—Documentation pratique Impôts directs—Série I.S. Division IV § 121 to 123 bis). However, since the tax reform introduced by the French decree N° 48-1968 of December 9, 1948, the mere ownership of shares of a partnership is not considered in French tax law as a permanent establishment in France.

According to such tax reform (see Francis Lefebvre—Documentation Pratique Impôts directs—Série Conventions internationales—Italy) which is still valid, when the assessment of an Italian corporation to the corporation tax is based on another ground than the disposal of a permanent establishment, the Italian corporation is only liable to corporate tax on its share of the profits of the partnership, and not to the withholding tax, since the appropriation by the Italian corporation of its share of profits in the partnership is neither a dividend nor a profit derived from a permanent establishment (see Circular of the French Ministry of Finance dated 10th August 1949 page 2256 §38).

Article 10 is specifically devoted to the taxation of permanent establishments of Italian corporations in France.

Although the official wording refers to article 109-2 of the French Tax Code, it must be noted that such reference is now irrelevant since the French law of 12th July 1965 has, inter alia, abrogated article 109-2[6].

An Italian corporation having a permanent establishment in France will be subject to corporation tax and withholding tax according to the following practical example.

Assuming that such establishment makes a gross profit of	200,000 Frs
corporate tax (impôt sur les sociétés) will be payable at the rate of 50% i.e.	100,000 Frs
thus leaving a net profit after tax of	100,000 Frs

6. The article 115 quinquies of the French tax code provides new taxation with respect to foreign companies.

The withholding tax on such net profit, at a rate of 15% (article 8-2) will be assessed on 25% of the above net profit (article 10-1), as follows:

$$100{,}000 \times \frac{25}{100} \times \frac{15}{100} = 3{,}750 \text{ Frs}^{7}$$

If no treaty existed between Italy and France, the withholding tax (at the standard rate of 25%) would be applicable to the whole profit after corporate tax and would therefore amount to 25,000 Frs.

It must be noted that the withholding tax, calculated as above, can also be reduced if the share capital of the Italian corporation having such establishment in France is owned by French residents for more than 75% of its whole issued amount.

Furthermore, as in the OECD Draft, the convention indicates that a mere participation of an Italian company in a French corporation does not as such constitute a permanent establishment.

7. Article 11 provides the rules for the taxation of the *redevances* deriving from the granting, either temporary or permanent, of incorporeal private properties as invention patents, drawings or models, secret processes and formulae, trade-marks and other such rights, copyrights and rights of reproduction, rights to use industrial machinery, commercial and scientific and the rights of leasing films. In derogation to what is stated by article 127 t.u.i.d. (which purposes a withholding as partial payment) no direct taxation is due on such *redevances* owned by a subject domiciled in France (it is debated whether the general income taxes are due, with rate of taxation of 4% due by the payee but with the right of redraft on the payer).

This rule is derogated in the case where the beneficiary has "a permanent establishment of his enterprise" in Italy and this is also true when "a shareholding in a company substitutes the permanent establishment". Such extension of the derogation is not clearly understandable: the derogation to the general rule should be applicable only if for the permanent establishment of the French enterprise, addressee of the *redevances*, typically through conferment, a company entirely controlled by the head French company was substituted. This derogation should not be applicable when, for example, conferred the permanent establishment in an Italian company, perhaps with the participation extended to other companies, the *redevances* continued to be paid to the French beneficiary[8].

The old treaty of June 16, 1930, was absolutely silent in the matter of royalties. Article 11 of the new treaty has now covered the matter to a large extent. The new treaty provides one new service of considerable worth in defining "royalties", and making clear that payments for "know-how" are considered royalties as well as payments that are contingent in whole or in part on the productivity, use or disposition of an asset. The State in which the use, or right to use, gives rise to the payment is specifically

7. The withholding tax must be calculated at the rate of 25% on the following basis. Either on the quarter of the retained profits of a permanent establishment of an Italian company for the taxable base of corporate tax of the year of assessment (as has been calculated above). Or on the profits realized by the permanent establishment in the course of the year of assessment after deduction of the amount of corporate tax and of the income which, though taxed in the tax year in question, is linked nevertheless with previous tax years with regard to its date of realization.

8. The administrative authorities of the countries agreed to limit the application of this extension only in the case where the permanent establishment under consideration would be transformed into "société de personnes ou à caractère familial" in which a person holds either directly or through an interposed person the majority of the rights.

fixed as the source of the royalty. If a royalty is increased beyond a normal figure owing to a special relationship between payee and payor, or between either and some third person, the restriction to this article applies only to the normal figure.
Under Sections 57 and 209 of the French Tax Code, the French authorities have the power to refuse as deductible expenses any amounts of any kind paid by a resident to a non-resident and which are meant to transfer to a non-resident any fraction of the taxable income of a resident.
Although there is no actual ruling in this field, the French authorities are always investigating with great care the amount of royalties paid to its foreign parent company by a French subsidiary.
In broad terms, the actual rate of permissible royalty is determined by the percentage of capital held by the parent company. As the rate of ownership increases, the percentage of royalty is deemed to decrease, since royalty is a deductible expense for corporate tax purposes.

The negotiators of the agreement were obviously aware that the meaning of the regulation was not clear and so they have purposed that "in case of difficulties, the administrative authorities of the two countries will consult each other". In order to avoid the hidden transmission of profits, paragraph two of article 11 provides that the *redevances* are taxable "in the State in whose territory is situated the enterprise which bears the burden, when and for the amount in which these rents, proceeds and rights exceed the intrinsic and normal value of the properties for which they are paid."
It is to be taken into account that in case such hypothesis came true, the administration cannot proceed directly to the evaluation of the "exceeding amount": the second part of paragraph two of article 11 states that "the fiscal authorities of the two countries will consult each other to determine that part of the amount of rents, proceeds and rights which can be conceded as normal".

8. Articles 12-18 provide the rules for the taxation of working income.
Article 12 provides that the salaries, wages or other such forms of remuneration as well as the pensions paid by one of the contracting States or by one of its local branches to persons living in the other State as "compensation" for administrative or military services rendered to them, are taxable only in the State where the debtor is.
An exception to this rule is made when salaries, pensions and such remunerations are paid to citizens of the other contracting State. In such case the State of which the payee is a citizen, and in which the payee exercises his activity for the other State keeps the right of taxation, so that the citizen, just because he exercises his activity in favour of the other contracting State or of one of its local branches, is not to undergo a fiscal treatment different from that undergone by the other citizens.
In article 13, for salaries, wages and other such remunerations, different from those dealt with in the previous article 12 and in the following article 14, a general principle has been adopted which confers the right of taxation upon the State where the activity takes place. The provision of this article is applied therefore to the employees and labourers working for private firms or establishments, normally residing in a State and exercising their activities in the other State. The place where the salary or the retribution is paid is of no importance for taxation, because, as is mentioned above, only the place where the activity is exercised matters. Nevertheless, in deroga-

tion to such principle, it has been agreed that the physical persons having their fiscal domicile in one of the two States, are exempted, in the other State, from taxation for the aforesaid remuneration collected for the activity exercised in this other State, if the following conditions occur: 1. that the stay in this "last State" has not altogether exceeded 183 days in twelve consecutive months. 2. That the activities are exercised during this stay on behalf of a physical person or a moral one having the domicile of the first State or of a person, physical or moral having the domicile in the first State or of a permanent establishment situated in this State. 3. That such remuneration has not, as such, weighed upon the income of an activity taxable in the other State.

Finally, the article states that the remuneration for services rendered aboard ships or aeroplanes is taxable in the State where the main office of the effective management of the shipping or air company is located.

Article 14 states that the remuneration, attendance checks, etc. attributed to the members of the boards of administration, or boards of inspection in the "Sociétés Anonymes" or "Societa per Azione", of co-operative companies, etc., are taxable in the State where the company making the payments is domiciled. The same article points out as well that the normal remuneration that the above-mentioned persons receive for different reasons, are taxable, depending on their nature, by the provisions of articles 13 and 16 of the convention under examination.

Article 15 provides that the pensions different from those paid by the contracting States or by their local branches and life annuities are taxable in the State where the debtor of such pensions or life annuities is domiciled.

Article 16 provides the rule for the taxation of incomes deriving from free professions and, generally, of any other working income different from those whose particular regulation is purposed by the other regulations of the convention under examination. It states that such incomes are taxable only in the State in which the professional activity is exercised. In order to prevent a State from taxing the product of a professional activity which has been exercised only occasionally or irregularly in its territory, the article provides that in order to proceed to taxation it is necessary that the tax payer utilises, in such State, a permanent installation of which he makes regular use. Referring to the regulations examined above, the following are considered, in detail, to be free professions: scientific activity, artistic, literary, teaching and pedagogic activity, as well as the activity of doctors, lawyers, architects and consultants.

It has been deemed advisable to point out that when the artists of show business, radio, television, cinema or sportsmen are engaged by an enterprise or by any other organisation by means of a determined remuneration, the rules set out in the preceding article 13, paragraph 1 are applicable. Article 13 paragraph 2 relates to the taxation of salaries, wages and other remuneration paid out by organisations or by private firms on behalf of the State in whose territory the activity takes place, without the maintenance of the requisite of the permanent installation, required by this article, being necessary.

Article 17 aims to favour the development of cultural relations between the two countries, facilitating, from the fiscal point of view, the stay of professors and members of the teaching bodies of one of the contracting States in the territory of the other State to teach in universities and other institutes of higher teaching. The income which such professors receive as remuneration for their

teaching is not taxable in the State in which they stay, if their stay in such State does not exceed a period of two years. By the provisions of article 18 the students and apprentices of one of the two contracting States, staying in the other State to study or to acquire knowledge in their professional field, are exempt from taxation in such other State for the sums which they receive, as allowances, by the first State. This regulation aims to further the staying of citizens of one of the two States in the territory of the other State, in order to study or to improve themselves professionally. This exemption can be granted only to the above-mentioned persons and for the amounts of money sent to the self same persons from their country of origin for their maintenance and their studies.

9. Article 19 contains a rule of general character stating that the taxes due for any other income different from those considered in the preceding articles are applicable in the State where the beneficiary has his domicile. Article 20 states that in the case in which, by the regulations of the convention, income was to be exempted by one of the two States, the exemption will be granted if, and in the measure in which, this income is taxable in the other State. This regulation aims to avoid the situation where, in consequence to the effects of the convention, which only aims to avoid double taxation, some incomes, or part of them, can escape taxation in both the contracting States: similar regulations are already in force in the internal Italian law for income tax (lett. F. art. 82 t.u.i.d.) and for complementary taxation (lett. C. art. 133 t.u.). Article 22, whose text has been completely substituted by article 7 of the additional agreement, provides that every State, for the application of progressive taxation, can apply the rates relative to the mass of incomes, in accordance with its legislation, to that part of the income which is reserved for its taxation by the convention. The aim of this regulation is to avoid that the situation where, in consequence of the renunciation by a State of the taxation of some elements of income, the amount of the taxation, which would otherwise be drawn from the incomes on which the taxation is reserved to the State itself, can be reduced.
Article 23 contains a regulation of a general character stating that the rules of the convention do not confine the rights and the facilities which the legislation of the contracting States grant to the tax payers for the taxes considered in article 2 of the convention.
Finally, some regulations have been dictated in the additional agreement which are meant to guarantee: the parity of fiscal treatment for the citizens of the two States still maintaining the application to French companies operating in Italy of the particular regulations which govern the Italian taxation on companies, weighing on foreign subjects (art. 8 para. 7); the regulations on incomes deriving from participation in some types of real estate companies (art. I of the protocol); and the adaptation of the regulations of the convention to the eventual modification of the internal legislation of the contracting States (art. II of the protocol).

10. Article 24 sets out the rules for the administrative assistance which the two contracting States are due to give each other for a better application of the convention and for the realization of the aims purposed by the convention itself. It has been decided that the fiscal authorities of the two countries can ask each other for information and any other necessary element to ensure the application of the regulations of the convention, to avoid fiscal fraud and to apply the

rules meant to prevent the evasion from the taxation purposed by the convention itself. Such information must be kept secret and shall not be communicated—apart from to the taxpayer or his mandatory—to any other persons apart from those who intervene in the different stages of the procedure of ascertaining and collecting the tax or in disputes. In any case, the information which the two States can exchange is that which, regarding the internal regulations of such States, is available at each fiscal administration, provided that it is not information which would lead to the uncovering of a manufacturing procedure or to endanger an industrial secret, commercial or professional, or public order.

Article 25 deals with the administrative assistance which the two States are due to give each other for the collection of tax purposed by the convention and of its relative accessories (interest, expenses, etc.) due to one of the two contracting States by taxpayers domiciled in the territory of the other State. The article states that the fiscal authorities will proceed with the collection of such taxes in accordance with their own laws with the exclusion of the regulations which deal with privileges. The procedure and execution acts will take place after a copy of executive titles and eventually a copy of decisions has been produced.

The same article states finally that, in regard to that which concerns the fiscal credits still liable to raise claims, the creditor State, in order to guard its rights, can ask the other State to present to the tax-debtor a summons or a title of collection. The solution of the disputes regarding the validity of the claims, which have given ground to the notification mentioned above, is up to the competent jurisdiction of the claiming State.

Article 26 relates to the possibility of understanding between the fiscal authorities of the two States whenever in the enforcement of the regulations of the convention, any difficulties or doubts should arise. It also states the procedure to be followed in order to avoid any double taxation which might take place in contrast with the regulations and aims of the convention itself.

It is stated finally that when it is deemed advisable to start dealings in order to reach an agreement on the afore-mentioned points, these will be referred to a mixed Commission formed by representatives of the two States appointed by their respective superior administrative authorities.

Articles 29 and 30 (modified by the additional agreement) state the modalities for the ratification and the date of coming into force of the Convention which will take place at the moment of the exchange of the instruments of ratification, as well as the date of commencement for the application of the regulations stated in the convention. The commencement of enforcement of the convention's regulations has been established referring to direct taxation on incomes with respect to the calendar year in which the exchange of the instruments of ratification takes place, as well as fiscal years opened during the said year; nevertheless, concerning withholdings at the source on interest and dividends, the new regulation will be applied for the first time to the "sources of income" which will be put up in payment (for dividends it must be understood the distribution of which will be deliberated) after the running out of the limit of three months from the date of exchange of the instruments of ratification.

The duration of the convention is at will; nevertheless each of the two contracting States can repudiate it for the end of each year, giving six months notice, but not before five years have elapsed from its ratification.

G. CROZES:

LEGISLATION FISCALE DU CAMEROUN

HISTORIQUE

Par le traité de Versailles du 7 mai 1919, la société des Nations confiait, à la France et à l'Angleterre, le soin d'administrer le Cameroun, ancienne colonie allemande, qui fut ainsi partagé en deux Territoires.

Le 1er janvier 1960, le Territoire Camerounais sous Tutelle Française accédait à l'indépendance pour devenir «la République du Cameroun».

Le 1er octobre 1961, à la suite du Référendum organisé par l'ONU dans le Cameroun sous Tutelle Britannique, la partie méridionale de ce Territoire, obtenait son rattachement à la «République du Cameroun» tandis que la partie septentrionale votait sa réunification avec la NIGERIA.

Depuis lors le Cameroun est une République Fédérale qui comprend l'Etat Fédéré du Cameroun Oriental (ancien Territoire sous mandat français) et l'Etat fédéré du Cameroun Occidental (autrefois sous mandat britannique).

Les différences fondamentales ayant existé entre les deux systèmes juridiques appliqués par la France et l'Angleterre pendant la période de tutelle, subsistent encore largement à l'heure actuelle.

En matière fiscale, notamment chacun des Etats Fédérés a encore son propre régime et l'uniformisation des systèmes fiscaux n'a pu, à ce jour, être réalisée qu'en matière de douane.

Le système fiscal actuel du Cameroun Oriental est donc largement inspiré des principes français qui ont présidé à l'élaboration des textes fiscaux en vigueur avant son indépendance; tandis que le système fiscal du Cameroun Occidental est, pour sa part, d'inspiration purement britannique.

Afin de donner un aperçu, le plus vaste possible, de la législation Camerounaise en matière d'impôts, droits et taxes, nous examinerons successivement, le régime douanier commun aux deux Etats Fédérés, le régime fiscal du Cameroun Occidental, le régime fiscal du Cameroun Oriental.

Enfin nous préciserons brièvement quels sont les régimes fiscaux privilégiés découlant du Code des Investissements de la République Fédérale du Cameroun.

I. DROITS ET TAXES PERÇUS PAR LA DOUANE

La législation douanière applicable à la République Fédérale du Cameroun (y compris au Cameroun Occidental depuis le 1er juillet 1966) est celle qui a été élaborée par l'UNION DOUANIERE ET ECONOMIQUE DE L'AFRIQUE CENTRALE «UDEAC» qui groupe actuellement, le CAMEROUN, le CONGO-BRAZZAVILLE, le GABON et la REPUBLIQUE CENTRAFRICAINE.[1]

Cette législation découle notamment des textes suivants, publiés au Journal Officiel de l'UDEAC No 1 du 1er janvier 1966:

- traité en date du 8 décembre 1964, instituant une UNION DOUANIERE ET ECONOMIQUE DE L'AFRIQUE CENTRALE

1. Compare Bulletin 1969, no. 3.

- Acte No 7-65 UDEAC-36 portant fixation du tarif des Douanes, et des actes subséquents ayant apporté des modifications à ce tarif
- Acte No 8-65 UDEAC-36 portant Code des Douanes.

I. OPERATIONS D'IMPORTATION

Le tarif douanier et fiscal d'entrée commun comprend:

- les droits de douane du tarif extérieur commun
- le droit fiscal d'entrée commun
- la taxe commune sur le chiffre d'affaires à l'importation
- la taxe complémentaire à l'importation dont le taux peut varier suivant les Etats membres.

D'une manière générale la circulation des marchandises, biens et capitaux est libre entre les Etats de l'UDEAC et, aucun droit n'est perçu sur les produits originaires d'un des Etats de l'UNION destinés à être consommés dans un autre Etat, mais les produits et marchandises fabriqués dans un des Etats et transférés dans un autre, pour y être utilisés, sont soumis au régime de la «TAXE UNIQUE» dont il sera question plus loin.

A. *Droit de douane*

Ce droit dont le taux prévu au tarif varie selon la nature du bien importé est applicable aux marchandises importées des Etats non membres de l'UDEAC à l'exception des produits originaires des Etats membres de la COMMUNAUTE ECONOMIQUE EUROPEENNE «C.E.E.» (France, Allemagne Fédérale, Italie, Luxembourg et Pays-Bas et Belgique) et des Etats membres de l'OAMCE (Côte d'Ivoire, Dahomey, Haute Volta, Madagascar, Mauritanie, Niger, Sénégal).

Sont également exonérés de droit de douane les produits importés par des entreprises bénéficiant de régimes fiscaux privilégiés dans le cadre des Codes d'Investissements.

B. *Droit d'entrée*

C'est un droit fiscal applicable en principe à toutes les importations et dont le taux fixé par le tarif varie selon les produits.

La valeur taxable est comme pour le droit de douane constituée soit par la valeur mercuriale, soit par le prix d'achat majoré des frais nécessaires pour l'importation jusqu'au lieu d'introduction.

Le droit de douane n'est pas compris dans la valeur imposable au droit d'entrée.

C. *Taxe commune sur le chiffre d'affaires à l'importation*

Cette taxe frappe en principe tous les produits importés quelle que soit leur origine ou leur provenance.

Son taux est de 10% applicable sur la valeur en douane des marchandises majorée des droits de douane et du droit d'entrée.

Sont admis en franchise de cette taxe, les produits destinés aux organismes et services Inter-Etats et en général ceux destinés aux services publics des différents Etats membres.

D. *Taxe complémentaire*

Perçue sur certains produits au profit des Etats membres de l'UDEAC et selon des taux variant suivant ces Etats, cette taxe est appliquée sur la valeur CAF des produits importés.

2. OPERATIONS D'EXPORTATION

Les exportations donnent lieu à la perception de droits de sortie dont le taux varie entre 0% et 17% et qui sont appliqués sur la valeur FOB ou la valeur mercuriale des produits exportés.

3. AUTRES TAXES LIQUIDEES PAR LA DOUANE

A. *Taxe Unique*

Les productions industrielles nationales dont

le marché s'étend, ou est susceptible de s'étendre au Territoire de plusieurs Etats membres de l'UDEAC sont obligatoirement soumis au régime de la Taxe Unique (institué par l'Acte N° 12/65 UDEAC-34 du 14 décembre 1965).
Ce régime particulier est attribué individuellement à chaque entreprise par acte du Comité de Direction de l'UDEAC.
La perception de la Taxe Unique est exclusive:

- de la perception des droits et taxes applicables à l'importation aux matières premières et produits essentiels (y compris les emballages) utilisés en usine pour obtenir les produits fabriqués dans leur forme de livraison au commerce.
- de la perception de toute taxe intérieure tant sur les matières premières et produits essentiels (y compris les emballages) importés ou d'origine locale, utilisés en usine pour l'obtention des produits fabriqués dans leur forme de livraison au commerce, que sur les produits fabriqués eux-mêmes.

B. *Taxes diverses*
Les services des douanes liquident et perçoivent en outre, tant à l'importation qu'à l'exportation diverses taxes annexes telles que

- droit de magasinage et de garde
- taxe sur l'exportation des animaux vivants
- taxe de contrôle et de conditionnement
- taxe de sortie sur la banane
- taxe sur les viandes, les bois, le cacao, le café, les oléagineux, les carburants.
- etc. . .

II. REGIME FISCAL DU CAMEROUN OCCIDENTAL

Le régime fiscal du Cameroun Occidental, découlant de la législation britannique en vigueur à l'époque du mandat, est relativement simple; il comporte pratiquement un seul impôt: l'«INCOME TAX» ou impôt sur le revenu applicable soit aux revenus dont bénéficient les personnes physiques, soit aux bénéfices réalisés par les sociétés.

I. IMPOT SUR LES BENEFICES DES SOCIETES

Les revenus, de quelle que nature qu'ils soient, acquis au Cameroun Occidental par une société qui y est établie, sont imposables à l'impôt sur le revenu, sous déduction des dépenses et charges d'exploitation, de telle sorte que le bénéfice imposable n'est que le bénéfice net.
Une réduction du bénéfice imposable est en outre accordée au titre de l'amortissement des biens immobilisés (matériel, agencements, constructions etc. . .).
Cette réduction consiste à déduire un certain pourcentage de la valeur du bien investi (20% pour les constructions et 40% pour le gros matériel par exemple) du bénéfice réalisé au titre de l'exercice au cours duquel l'investissement a été réalisé (dégrèvement initial).
Puis, au cours des exercices suivants il est pratiqué une déduction annuelle correspondant à un amortissement égal à un certain pourcentage, variable selon la nature du bien (10% à 5% pour les constructions par exemple) du solde de la valeur du bien investi après déduction du «dégrèvement initial».
L'exercice fiscal d'une durée de 12 mois doit en principe être clos au 31 mars de chaque année au Cameroun Occidental.
Le taux de l'impôt sur le revenu des sociétés est de 40%.
Les pertes subies au cours d'un exercice sont imputables sur les résultats des exercices suivants.

2. IMPOT SUR LE REVENU DES PERSONNES PHYSIQUES

Les personnes physiques résidant au Cameroun Occidental doivent faire, chaque année, la déclaration de l'ensemble des revenus qu'ils ont perçus au cours de la période écoulée comprise entre le 1er avril et le 31 mars.
Le revenu global imposable est obtenu après diverses déductions telles que notamment les abattements pour charges de famille dont les montants sont forfaitaires (environ 120.000 francs CFA pour l'épouse, 25.000 francs CFA par enfant et 60.000 francs CFA[2] pour les parents à charge, par an) les primes d'assurance sur la vie dans certaines limites . . . etc. . . .
Le taux de l'impôt est progressif et s'échelonne entre 2,5% sur la première tranche (de 1 à 120.000 francs CFA) et 50% sur la partie du revenu imposable excédant 6.000.000 de francs CFA.
L'impôt sur le revenu dû par les salariés est habituellement retenu mensuellement par l'employeur sur le salaire selon un barême fourni par l'administration fiscale.
Le régime fiscal en vigueur au Cameroun Occidental est fort imprécis en l'absence de toute diffusion des textes qui le régissent.

III. REGIME FISCAL DU CAMEROUN ORIENTAL

Le régime fiscal du Cameroun Oriental est codifié depuis l'indépendance, par le décret N° 60-135 du 11 juillet 1960 portant refonte du Code Général des Impôts Directs. (Décret publié au Journal Officiel de la République du Cameroun du 13 juillet 1960) et par les textes subséquents qui y ont apporté diverses modifications.
Ce Code qui a pris effet au 1er juillet 1960 reprenait l'essentiel des dispositions régissant la fiscalité sous le mandat français.
Il détermine les conditions d'assiette et de liquidation des impôts et taxes émis par les services des Contributions Directes et recouvrés par les services du Trésor, lesquels services dépendent du Secrétariat d'Etat aux Finances du Cameroun Oriental.
Les droits et taxes liquidés et perçus par les services de l'Enregistrement dépendant également du Secrétariat d'Etat aux Finances, sont régis par l'ensemble des délibérations et textes adoptés avant et après l'indépendance, et constituant le Code de l'Enregistrement.

1. IMPOTS LIQUIDES PAR LES SERVICES DES CONTRIBUTIONS DIRECTES

Les principaux impôts liquidés par les services des Contributions Directes sont:
- l'impôt sur les sociétés
- l'impôt général sur le revenu des personnes physiques
- la patente et la licence
- la taxe d'apprentissage
- l'impôt sur le chiffre d'affaires.

Nous examinerons successivement ces divers impôts.

A. *Impôt sur les sociétés*

Les personnes morales sont passibles d'un impôt annuel sur leurs bénéfices, dit «impôt sur les sociétés».

a. Personnes imposables

L'impôt sur les sociétés frappe, quel que soit leur objet toutes les personnes morales qui se livrent au Cameroun Oriental à une exploitation de caractère lucratif. (A l'exception toutefois des Caisses de Crédit Agricole Mutuel et des sociétés coopératives agricoles).
Par ailleurs les bénéfices réalisés par les

2. 1 franc français = 50 francs CFA
   1 US $ 250 francs CFA
   1 £ 600 francs CFA

personnes morales suivantes demeurent en dehors du champ d'application de l'impôt sur les sociétés:

- sociétés en nom collectif
- sociétés en commandite simple pour la part des bénéfices revenant aux associés commandités
- associations en participation et sociétés de fait comptant moins de cinq membres
- sociétés civiles immobilières limitant leur activité à la gestion de leur patrimoine immobilier, ne revêtant pas la forme de société de capitaux ou de sociétés à responsabilité limitée et n'accomplissant pas d'opérations à caractère industriel et commercial (n'exerçant aucune activité entraînant l'exigibilité d'une patente).

Les bénéfices réalisés par de telles sociétés sont, en vertu du principe de la transparence fiscale, imposables directement entre les mains des associés au prorata de leur participation.

b. Bénéfice imposable

Le bénéfice imposable est le bénéfice net tiré de l'ensemble des opérations de toute nature réalisées au Cameroun Oriental au cours de l'exercice fiscal obligatoirement clos au 30 juin de chaque année.

Ce bénéfice net, qui tient compte des plus ou moins values réalisées à l'occasion de cessions d'éléments d'actif, est établi sous déduction de toutes charges et amortissements, hormis l'impôt lui-même, toutefois certaines charges sont réintégrées partiellement ou totalement au bénéfice imposable. Il s'agit:

- des rémunérations allouées à un salarié et qui ne correspondraient pas à un travail effectif ou dont le montant serait exagéré
- des rétributions de toute nature versées à l'ensemble des associés, ou à leurs conjoints, à raison d'un emploi effectif exercé dans la société, pour la part de ces rétributions qui excéderait le quart du bénéfice fiscal réalisé.
  (Pour l'application de cette disposition, les participations détenues par les conjoints ascendants ou descendants des associés salariés sont reputées appartenir à ces derniers).
- les tantièmes et jetons de présence accordés aux Administrateurs, s'ils ne présentent pas le caractère d'un salaire ou ne rétribuent pas un travail effectif
- les frais généraux, débités par le siège situé à l'étranger, dans la mesure où ils ne se rattachent pas aux opérations faites au Cameroun (le montant déductible de ces frais, ne peut excéder la quote part des frais de siège totaux déterminée au prorata du chiffre d'affaires réalisé au Cameroun par rapport au chiffre d'affaires total).
- le montant des amortissements qui dépasserait les pourcentages suivants appliqués aux valeurs d'acquisition des biens amortissables:

constructions définitives	5%
constructions provisoires	20%
aménagements et matériel lourd	10%
petit matériel et mobilier	20%
matériel naval ou aérien	20%
véhicules	33%

etc. . . .

- les provisions constituées en fin d'exercice en vue d'éventualités qui ne présentent pas un caractère de probabilité suffisant ou qui correspondent à des charges qui doivent être payées lors des exercices suivants.
- les amendes ou pénalités appliquées par suite de contraventions aux dispositions légales économiques et fiscales
- les intérêts servis par la société à des associés, à raison de prêts, pour la partie de ces intérêts excédant le taux de réescompte de la Banque Centrale majoré

de deux points et dans la limite de la moitié du capital social, pour les sommes prêtées par les associés dirigeants.
- les frais de voyage occasionnés par les congés des employés et de leurs familles qui excéderaient la déduction autorisée à raison d'un voyage de congé tous les deux ans seulement
- les loyers versés par la société à un associé qui détient plus de 10% du capital social (pour l'application de cette disposition les participations appartenant au conjoint, aux ascendants ou descendants du propriétaire du bien loué, sont reputées appartenir à ce dernier).

c. Imposition des plus-values de cession

Les plus-values de cession d'élements d'actif doivent être comprises dans le bénéfice fiscal de l'exercice au cours duquel elles ont été réalisées, toutefois ces plus-values peuvent n'être que partiellement imposées ou même échapper à toute imposition.

C'est ainsi que les plus-values, autres que celles réalisées sur les marchandises résultant de l'attribution gratuite d'actions ou de parts sociales à la suite de fusion, de scission, ou d'apport partiel d'actif effectué entre sociétés anonymes, en commandite par action ou à responsabilité limitée, sont exonérées de l'impôt sur les sociétés à condition que la société absorbante ou nouvelle ait son siège social au Cameroun, et qu'elle prenne l'engagement dans le traité de fusion, ou d'apport, de calculer les amortissements annuels des biens apportés ainsi que les plus-values ultérieures résultant de la réalisation de ces biens, d'après leur valeur nette comptable dans le bilan de la société absorbée, scindée ou apporteuse au moment de la réalisation de l'opération.

C'est ainsi également que les plus-values réalisées en cours d'exploitation par cession d'éléments d'actif immobilisé peuvent être exonérées d'impôt sur les sociétés si la société les porte dans un compte spécial intitulé «Plus-values à réemployer» et si elle prend l'engagement de réinvestir en immobilisations nouvelles dans un délai de trois ans à partir de la clôture de l'exercice au cours duquel ces plus-values ont été réalisées, une somme au moins égale à leur montant majoré du prix de revient des éléments cédés.

Si le réemploi intervient dans le délai, les plus-values sont affectées à l'amortissement des immobilisations nouvelles, dans le cas contraire, elles sont rapportées au bénéfice de l'exercice au cours duquel le délai imparti est expiré.

C'est ainsi, enfin, que les plus-values, autres que celles sur les marchandises, dégagées en fin d'exploitation ou en cas de cession partielle d'entreprise, ne sont retenues dans la base de l'impôt sur les sociétés, que pour la moitié, ou le tiers, de leur montant si l'achat ou la création de l'entreprise date de moins ou de plus de cinq ans.

d. Taux de l'impôt

Le taux de l'impôt sur les sociétés est de 25% (majoré de 10 centimes additionnels au profit du budget communal soit un taux global de 27,5%).

Le montant de l'impôt annuel ne peut toutefois être inférieur à 220.000 francs CFA (200.000 francs CFA + 10%) quel que soit le résultat.

Cet impôt minimum est dit «Impôt Minimum Forfaitaire sur les Sociétés» (I.M.F.).

Il n'est cependant pas exigible
- des sociétés qui bénéficient d'un exemption d'impôt sur les sociétés en vertu du Code des Investissements, ou qui bénéficient de la réduction d'impôt pour réinvestissement dont il sera question plus loin
- des sociétés nouvelles, au titre de leurs deux premiers exercices

- des sociétés dissoutes et ayant cessé toute activité antérieurement au 1er juillet de l'année au titre de laquelle l'I.M.F. doit être réglé
- des entreprises de travaux publics qui n'ont au Cameroun qu'un chantier de construction, sans y avoir d'établissement stable
- des compagnies d'assurances qui exercent en pool leurs activités avec d'autres compagnies ou qui limitent leurs activités aux opérations de co-assurance dans les branches «transport» et «incendie» et qui ne réalisent qu'un chiffre d'affaires annuel inférieur à 3.000.000 de francs CFA.

e. Paiement de l'impôt sur les sociétés
Les services des Contributions Directes, grâce aux documents déposés par le contribuable (notamment bilan, compte d'exploitation et compte de pertes et profits) avant le 30 septembre de chaque année liquident l'impôt et le mettent en recouvrement par voie de rôle.
Le paiement s'effectue de la façon suivante:
- l'impôt minimum forfaitaire (220.000 francs CFA) quand il est exigible doit être payé spontanément avant le 15 septembre.
  Cette somme s'impute sur le montant de l'impôt dû si celui-ci est supérieur à l'I.M.F.
- le solde de l'impôt dû est payable en trois fractions d'égal montant.
- premier tiers = dans les quinze premiers jours du mois d'octobre.
- deuxième tiers = dans les quinze premiers jours du mois de janvier.
- solde = soit à la date d'exigibilité figurant sur l'avertissement d'impôt délivré au contribuable, soit avant le 15 avril quand ladite date d'exigibilité est postérieure.

Le défaut de paiement dans les délais entraîne l'application d'une majoration de 100% en ce qui concerne le règlement de l'IMF et de 10% par mois de retard en ce qui concerne le solde de l'impôt sur les sociétés.

f. Report des pertes
Les déficits réalisés au cours d'un exercice déterminé, sont jusqu'à amortissement, déductibles des bénéfices réalisés un cours des exercices suivants sans être toutefois reportables au-delà du cinquième exercice.

B. *Impôt sur le revenu des personnes physiques*
Il est établi au Cameroun Oriental un impôt annuel sur le revenu des personnes physiques.
Cet impôt comprend:
- une taxe proportionnelle, impôt cédulaire frappant chaque catégorie de revenu suivant un taux différent
- et une surtaxe progressive frappant le revenu net global du contribuable.

a. personnes imposables
Sous réserve des dispositions des conventions internationales, l'impôt sur le revenu des personnes physiques est dû par toute personne quelle que soit sa nationalité qui réside habituellement au Cameroun Oriental, ou qui y a son centre principal d'intérêt ou d'affaires ou pour laquelle le Cameroun est son lieu de séjour principal.
De même sont imposables les personnes résidant habituellement hors du Cameroun, à raison de leurs revenus d'origine Camerounaise, ainsi que les fonctionnaires ou agents de l'Etat Camerounais exerçant leurs fonctions à l'étranger.
Toutefois les revenus atteints, à l'étranger par un impôt général sur le revenu peuvent échapper au Cameroun à la seule surtaxe progressive.
Par ailleurs, sont également passibles de l'impôt général sur le revenu des personnes physiques les sociétés ou autres personnes morales, à raison des revenus qu'elles ont distribués à des personnes dont elles ne

revèlent pas l'identité.
Chaque chef de famille est imposable tant à raison de ses propres revenus que de ceux de sa femme et de ses enfants à charge (enfants légitimes, adoptifs, légalement reconnus, inscrits à l'Etat-Civil, âgés de moins de 18 ans, infirmes ou étudiants).
Les enfants d'un contribuable peuvent sur sa demande être imposés séparément lorsqu'ils disposent de revenus propres, les femmes mariées peuvent également faire l'objet d'une imposition distincte dans les cas suivants:

- lorsqu'étant en instance de divorce ou de séparation de corps ou séparée de biens, elle ne vit pas avec son mari
- lorsqu'ayant été abandonnée par son mari ou ayant elle-même abandonné le domicile conjugal, elle dispose de revenus distincts de ceux de son mari
- Pour les revenus dont elle a disposé pendant l'année de son mariage et qui ont été acquis avant la date de celui-ci
- Pour les revenus provenant de son activité exercée au Cameroun, lorsque son mari n'est pas imposable au Cameroun.

Sont affranchis de l'impôt, les agents diplomatiques, les Consuls et agents consulaires de nationalité étrangère, mais seulement dans la mesure où le pays qu'ils représentent accordent les mêmes avantages aux agents diplomatiques et consulaires Camerounais.

b. Déclaration des revenus

Chaque contribuable assujetti à l'IRPP doit faire, auprès des services des Contributions Directes de son domicile, la déclaration des revenus dont il a disposé au cours de l'année fiscale écoulée (1er juillet-30 juin).
Cette déclaration doit être déposée avant le 31 août de chaque année. Toutefois le contribuable qui a disposé de revenus découlant d'une activité commerciale, industrielle, agricole ou non commerciale, doit déposer sa déclaration avant le 30 septembre.

c. Evaluation du revenu imposable

Les différentes catégories de revenus sont évaluées de façon identique pour l'assiette de la taxe proportionnelle et de la surtaxe progressive:

- *Profits commerciaux, industriels, agricoles et non commerciaux*

Il s'agit des bénéfices nets tirés des activités commerciales, industrielles, agricoles ou non commerciales, ils sont évalués comme en matière d'impôt sur les sociétés, après déduction de toutes charges, et amortissements.
Toutefois en ce qui concerne les rémunérations versées au conjoint de l'exploitant, leur déduction n'est admise que dans la limite de 50.000 francs CFA par mois.
Les contribuables dont le chiffre d'affaires annuel n'excède pas 5.000.000 de francs CFA, s'il s'agit d'opérations exclusivement non commerciales, et 10.000.000 de francs CFA dans les autres cas, peuvent demander à l'administration fiscale de procéder à l'estimation forfaitaire de leur bénéfice et ne sont tenus alors de ne communiquer à l'administration chaque année avant le 31 août que le montant de leur chiffre d'affaires, de leurs achats et de leurs stocks au 30 juin précédent.

- *Bénéfices des professions artisanales*

Les bénéfices des professions artisanales sont évalués comme ceux des professions industrielles, commerciales, agricoles et non commerciales.

Peuvent être considérés comme artisans

- les fabricants et ouvriers travaillant chez eux avec ou sans force motrice à façon ou non utilisant le concours de 5 employés, compagnons ou apprentis au maximum et ne vendant que le produit de leur propre travail
- les mariniers, chauffeurs ou cochers n'ayant

qu'un bâteau ou véhicule qu'ils conduisent eux-mêmes
- les pêcheurs se livrant personnellement à la pêche sans autre concours que celui de deux aides, au plus.

- *Revenus locatifs*

Les revenus locatifs sont ceux qui sont retirés des immeubles donnés à bail verbalement ou par écrit.

Toutefois les locations meublées constituent un acte commercial dont le revenu est taxé comme tel au taux BIC.

Le revenu imposable est égal au produit brut encaissé, augmenté des impenses réalisées par le locataire, et diminué de 25% pour tenir compte des frais et charges financiers ou nécessités par la gestion, l'amortissement et l'entretien.

Cependant le contribuable peut opter pour la prise en considération des frais réels justifiés par factures, mais cette option est irrévocablement valable pour trois années consécutives.

Les revenus tirés de la location des immeubles dont l'édification datant de moins de dix ans, a été régulièrement déclarée aux services des Contributions dès l'ouverture du chantier, sont exonérés de taxe proportionnelle, ils demeurent néanmoins passibles de la surtaxe progressive.

Par contre sont exonérés à la fois de taxe proportionnelle et de surtaxe progressive les immeubles dont le propriétaire se réserve la jouissance, tout au moins proportionnellement à la partie occupée par lui ou par ses ascendants ou descendants en ligne directe.

- *Traitements et salaires*

Les traitements, salaires, pensions et rentes viagères sont imposables pour leur montant brut mais sont exclus du revenu imposable:
- l'indemnité d'éloignement servie aux fonctionnaires et salariés de l'Etat non originaires du Cameroun
- un abattement de 25% pratiqué sur la rémunération brute de présence, pour les salariés non Camerounais du secteur privé, recrutés hors du Cameroun et bénéficiant d'une indemnité spéciale de sujétions particulières

ne peuvent toutefois bénéficier de cet abattement, les associés et leurs conjoints rémunérés par une société dans laquelle ces associés détiennent plus de 25% du capital, ni les salariés rémunérés par l'entreprise appartenant à leur conjoint
- les allocations ou avantages familiaux dans la limite de ceuxconsentis aux fonctionnaires
- les indemnités représentatives de frais dans la mesure où elles sont utilisées conformément à leur objet et ne dépassent pas les normes habituelles
- les allocations, indemnités et prestations sous quelque forme que ce soit versées par l'Etat, les collectivités et établissements publics en vertu de lois et décrets d'assistance et d'assurances
- les allocations et rentes viagères n'ayant pas le caractère de pensions de retraite, servies aux victimes de guerre ou d'accidents du travail
- l'indemnité de résidence servie aux fonctionnaires.

Par contre, les avantages en nature servis gratuitement sont imposables et sont évalués selon le barême forfaitaire suivant:

logement	5%	du salaire en espèce
par domestique	5%	-d°-
éclairage	3%	-d°-
nourriture	20%	du salaire en espèce

par personne avec maximum de 20.000 francs CFA par mois, les enfants de moins de 14 ans comptant pour moitié

La taxe proportionnelle frappant les traitements et salaires est précomptée par l'employeur et payée par lui au trésor.

Les salaires mensuels inférieurs à 5.000 francs CFA ne subissent pas le précompte.

– *Revenus des capitaux mobiliers*

Sont considérés comme revenus de capitaux mobiliers

- les produits des actions et des parts sociales ou revenus assimilés
- les revenus des obligations
- les revenus de créances, dépôts, cautionnements et comptes courants
- les intérêts des bons dc caisse.

Par produits des actions et parts sociales ou revenus assimilés il faut entendre tous bénéfices réalisés par les sociétés ou personnes morales imposables à l'impôt sur les sociétés et qui ne demeurent pas investis dans l'entreprise et notamment

- tous les bénéfices ou produits qui ne sont pas mis en réserve ou incorporés au capital (les bénéfices et réserves capitalisés étant eux-mêmes imposables lorsqu'ils sont remboursés aux associés, par voie de réduction et de remboursement de capital)
- toutes les sommes ou valeurs mises à la disposition des associés et non prélevées sur les bénéfices, telles que prêts, avances, rémunérations non déductibles du bénéfice imposable à l'impôt sur les sociétés (les prêts ou avances remboursés viennent en déduction des revenus imposables de l'exercice au cours duquel le remboursement est effectué).

Par contre ne sont pas considérés comme des revenus distribués:

- les remboursements d'apports ou de primes d'émission lorsque ces remboursements sont effectués après répartition de toutes les réserves autres que la réserve légale
- les incorporations de réserves au capital
- les sommes incorporées au capital ou aux réserves à l'occasion de fusion de sociétés et les attributions gratuites d'actions ou de parts sociales de la société absorbante ou nouvelle, aux membres de la société absorbée à condition que ladite société absorbante ou nouvelle ait son siège social au Cameroun
- les sommes mises à la disposition des associés dès lors qu'elles sont comprises dans les charges déductibles pour l'assiette de l'impôt sur les sociétés.

Par revenu des obligations il faut entendre les intérêts, arrérages de tous autres produits des obligations ainsi que les primes de remboursement payées aux porteurs des titres.

Les revenus de créances, dépôts, cautionnements et comptes courants ne sont imposables à la taxe proportionnelle sur le revenu des capitaux mobiliers que dans la mesure où ils ne figurent pas dans les recettes provenant de l'exercice d'une profession industrielle, commerciale, minière non commerciale ou agricole (dans ce cas ils sont imposés comme les revenus provenant de ces activités).

En ce qui concerne les intérêts de bons de caisse, ceux-ci sont passibles de la taxe proportionnelle sur le revenu des capitaux mobiliers au taux normal lorsque la société émettrice fait connaître à l'administration les noms et adresses des bénéficiaires; dans le cas contraire la société émettrice doit verser sur leur montant la taxe au taux de l'impôt sur les sociétés et les bénéficiaires de ces intérêts sont dispensés de les faire figurer dans leur déclaration de revenus.

Les sociétés ou collectivités qui procèdent à des distributions taxables sont tenues de remettre à l'administration fiscale soit dans le mois qui suit la mise en paiement, soit avant le 31 juillet de chaque année pour les banques et établissements financiers, l'état nominatif des distributions effectuées.

Ces sociétés et collectivités doivent précompter la taxe proportionelle duc sur les paiements effectués et cette taxe est directement enrôlée à leur nom.

Toutefois les intérêts de créances, dépôts, cautionnements ou comptes courants ainsi que les revenus de capitaux mobiliers en-

caissés à l'étranger par des personnes imposables au Cameroun sont imposés au nom du bénéficiaire.

Les revenus distribués par les sociétés étrangères exerçant une activité au Cameroun sans y avoir leur siège sont également passibles entre les mains desdites sociétés, de la taxe proportionnelle sur le revenu des capitaux mobiliers, sur une quote part de ces revenus déterminée au prorata du chiffre d'affaires réalisé au Cameroun Oriental par rapport au chiffre d'affaires global.

En ce qui concerne les sociétés ayant leur siège en France ou dans un autre Etat membre de l'UDEAC, cette quote part est établie non pas au prorata du chiffre d'affaires mais au prorata des bénéfices.

– *Evaluation du revenu global imposable à la surtaxe progressive*

Le revenu global imposable à la surtaxe progressive est égal au total des revenus des diverses sources, évalués comme vu ci-dessus, diminué des charges et frais suivants:

- intérêts des emprunts de dettes à la charge du contribuable
- arrérages de rente payée à titre obligatoire ou gratuit
- tous impôts et taxes se rapportant aux déclarations souscrites au cours de l'année précédente ou acquittée, à l'exclusion de la surtaxe progressive elle-même, et des pénalités
- cotisations versées au titre des assurances sociales
- versements effectués pour constitution de retraite à capital aliéné
- déficits subis en cas de cession ou cessation d'entreprise et déficits antérieurs non amortis
- frais professionnels supportés par les salariés évalués forfaitairement à 10% du revenu brut de cette nature (l'intéressé pouvant demander la déduction de ses frais réels mais il doit alors comprendre dans son revenu imposable des allocations qu'il perçoit éventuellement pour frais d'emploi et justifier de la réalité des frais déduits)

Les plus-values réalisées à l'occasion de cessions d'actions, parts sociales ou autres droits sociaux, sont passibles de la surtaxe progressive au cas ou l'intéressé, son conjoint, ses ascendants ou descendants exercent ou ont exercé au cours des cinq dernières années des fonctions d'Administrateur ou de Gérant dans la société et que l'ensemble des droits des mêmes personnes aient dépassé 25% des bénéfices réalisés au cours de la même période. Toutefois les plus-values inférieures à 100.000 francs CFA ne sont jamais imposables.

d. Calcul et recouvrement de l'impôt sur le revenu des personnes physiques

Exception faite de la taxe proportionnelle sur les traitements et salaires et sur les revenus des capitaux mobiliers qui sont retenus à la source et payés directement par l'employeur ou la société distributrice, comme il a été précisé plus haut, la taxe proportionnelle frappant les autres revenus et la surtaxe progressive sont liquidées au vu des déclarations faites par le contribuable et enrôlées à son nom.

Le contribuable reçoit chaque année un avertissement d'impôt indiquant la somme à régler ainsi que la date d'exigibilité et la date d'application des pénalités de retard.

Toutefois la taxe proportionnelle sur les revenus commerciaux, industriels, artisanaux, agricoles et non commerciaux doit être acquittée en trois fractions dans les 15 premiers jours des mois d'octobre et de janvier pour les deux premiers acomptes et le solde soit à la date d'exigibilité figurant sur l'avertissement d'impôt soit avant le 15 avril lorsque cette date est postérieure.

La taxe proportionnelle est calculée aux taux suivants:

– Bénéfices industriels, commerciaux et non commerciaux	20%
– Bénéfices artisanaux	10%
– Bénéfices agricoles	15%
– Traitement, salaires, pensions et rentes viagères	3%
– Revenus locatifs	20%
– Revenus des capitaux mobiliers	10%

En ce qui concerne les revenus commerciaux, industriels, artisanaux, agricoles et non commerciaux, l'impôt est réduit de moitié pour la tranche de revenu ne dépassant pas 200.000 francs CFA.

Il y a lieu de majorer les taux ci-dessus de taxe proportionnelle de 10% (centimes additionnels allant au budget des communes).

La surtaxe progressive est calculée de la façon suivante:

Le revenu imposable arrondi au millier de franc CFA inférieur est divisé en un certain nombre de parts fixées comme suit d'après la situation de famille du contribuable.

– Célibataire majeur, divorcé ou veuf, femme dont le mari n'est pas imposable au Cameroun	0,75 part
– Célibataire mineur	1 part
– Marié sans enfant après trois ans de mariage	1,25 parts
– Marié sans enfant avant trois ans de mariage, célibataire ou divorcé avec un enfant à charge	1,50 parts
– Marié ou veuf avec un enfant à charge, célibataire ou divorcé avec 2 enfants à charge	1,75 parts
– Marié ou veuf avec 2 enfants à charge, célibataire ou divorcé avec 3 enfants à charge	2 parts
– et ainsi de suite en augmentant d'un quart de part par enfant à charge, sans, toutefois, que le nombre des parts puisse excéder 4.	

Cependant le nombre de parts à prendre en considération en ce qui concerne les contribuables n'ayant pas d'enfant à charge est fixé à 1 s'il s'agit de contribuables célibataires divorcés ou veufs et à 1,50 lorsqu'il s'agit de contribuables mariés, lorsque ces contribuables ont un ou plusieurs enfants légitimes, adoptifs ou légalement reconnus faisant l'objet d'une imposition distincte, ou ont eu un ou plusieurs enfants, à la condition que l'un d'eux au moins ait atteint l'âge de 16 ans ou soit décédé par suite de fait de guerre.

La surtaxe progressive est calculée en appliquant pour chaque part de revenu le barême suivant:

de	0	à	200.000 francs CFA	néant
de	200.001	à	320.000 francs CFA	5 %
de	320.001	à	480.000 francs CFA	7,5%
de	480.001	à	600.000 francs CFA	10 %
de	600.001	à	1.000.000 francs CFA	15 %
de	1.000.000	à	1.400.000 francs CFA	20 %
de	1.400.000	à	2.000.000 francs CFA	25 %
au-dessus de	2.000.000			30 %

L'impôt dû par le contribuable est égal au produit de l'impôt par part ainsi obtenu, multiplié par le nombre de parts.

Le montant de cette surtaxe progressive doit être majoré de 10% (centimes communaux).

Toutefois la surtaxe progressive due par les salariés ne peut être inférieure chaque année à 2.400 francs CFA (soit 2.640 francs CFA y compris les centimes additionnels).

Ce minimum fiscal est obligatoirement retenu et versé au Trésor par l'employeur en six mensualités de 440 francs CFA, il constitue un acompte à valoir sur le montant de la surtaxe progressive du contribuable lorsque celui-ci est imposable pour un montant supérieur.

La surtaxe progressive due par les sociétés qui versent des rémunérations occultes est calculée au taux maximum sans abattement.

Les contribuables exerçant une activité commerciale ou industrielle dont le chiffre d'affaires annuel est inférieur à 2.000.000 de francs CFA et celui exerçant une activité non commerciale dont le chiffre d'affaires annuel n'excède pas 500.000 francs CFA peut être assujetti à une surtaxe progressive dont le montant est fixé forfaitairement à 50% du montant de sa patente et qui est perçue en même temps que celle-ci.

Les personnes physiques, non salariées, qui faute de revenus suffisants ne peuvent être astreintes au paiement de la surtaxe progressive sont soumises à un impôt dit «Impôt Minimum Forfaitaire» dont le taux est fixé par l'assemblée nationale.

Les assujettis à cet impôt sont classés en différentes catégories par des commissions locales composées de personnalités et fonctionnaires.

L'impôt estémis par voie de rôles soit nominatifs, soit récapitulatifs à raison d'un article par village, il est recouvré par l'intermédiaire des chefs de village ou de quartier qui bénéficient de remises sur le montant de l'impôt collecté.

C. *Dispositions communes à l'impôt sur les sociétés et à l'impôt général sur le revenu des personnes physiques*

a. Exonération par suite de réinvestissement

Les personnes physiques ou morales qui réinvestissent au Cameroun peuvent bénéficier d'une réduction d'impôt sur les sociétés ou de la taxe proportionnelle sur le revenu des personnes physiques. Seuls les investissements suivants peuvent ouvrir droit à cette réduction d'impôt.

- construction ou extension d'immeubles bâtis en matériaux définitifs à usage industriel, agricole, forestier ou minier, bureaux techniques compris, ainsi que celles destinées au logement gratuit du personnel salarié (lorsque ces dépenses ne revêtent pas un caractère de luxe)
- acquisition de matériel industriel, agricole ou minier scellé au fonds à perpétuelle demeure, de tracteurs et matériel mécanique lourd spécialisé à usage agricole, forestier ou minier, de remorqueurs et chalands creux pour le transport fluvial
- dépenses de préparation du sol, l'ensemencement et de plantation en vue de la création sur des terrains précédemment en friche, de cultures ou de plantations industrielles, à l'exclusion des dépenses d'entretien
- tout réinvestissement à caractère social.

L'acquisition d'un matériel usagé ou destiné au renouvellement d'un matériel de même nature ainsi que l'acquisition d'une construction existante ne donnent pas lieu à réduction d'impôt.

La réduction d'impôt doit être demandée par le contribuable avant le 30 septembre de chaque année au titre des investissements réalisés au cours de l'année fiscale écoulée, toutes justifications utiles doivent être fournies.

Le dossier est examiné par différentes autorités successives qui communiquent leur avis à Monsieur le Secrétaire d'Etat aux Finances qui accorde ou refuse la réduction d'impôt par acte réglementaire.

Si la réduction d'impôt est accordée, celle-ci intervient sur la base de 50% des réinvestissements admis, c'est-à-dire que la moitié du montant de l'investissement peut être déduit du montant du bénéfice imposable. Toutefois cette déduction ne peut excéder 50% dudit bénéfice. Au cas où le bénéfice est insuffisant pour amortir la moitié de l'investissement, le report du solde déductible est autorisé sur le ou les exercices suivants, sans que le report puisse intervenir au-delà du troisième exercice suivant.

b. Cessation – cession – décès – départ

La cessation ou la cession d'entreprise ainsi que le décès du contribuable ou son départ du Cameroun entraînent l'exigibilité immédiate de l'impôt dû au jour où intervient l'évènement.

Nul ne peut quitter le Cameroun sans avoir au préalable, obtenu son quitus fiscal.

c. Contrôle des déclarations, vérifications, taxation d'office-pénalités

Les déclarations souscrites par les contribuables sont vérifiées par l'Inspecteur des Contributions Directes qui peut demander toutes justifications et tous renseignements dont il a besoin.

Les employeurs doivent chaque année, avant le 31 juillet déposer auprès des services divers états (états des appointements, commissions, courtages, honoraires, ristournes vacations et droits), payés par eux au cours de l'exercice écoulé ces états permettent la vérification des déclarations déposées par les bénéficiaires de ces paiements.

Le défaut de dépôt dans les délais de déclarations ou d'éclaircissements et justifications, peut entraîner la taxation d'office du contribuable sur des bases évaluées par l'administration. Le non respect des obligations incombant au contribuable du fait des textes en vigueur, entraîne l'application de pénalités fixes ou proportionnelles dont l'importance varie selon la gravité de l'infraction.

Des peines correctionnelles de prison sont également prévues en cas de fraude caractérisée et de non versement au Trésor des impôts retenus à la source.

d. Prescription

Les omissions totales ou partielles constatées dans l'assiette de tous les impôts liquidés par les services des Contributions Directes à l'exception des patentes et licences, peuvent être réparées jusqu'à l'expiration de la 5ème année fiscale suivant celle au titre de laquelle l'impôt est dû.

D. *Patentes et licences*

a. Patentes

Toute personne physique ou morale qui exerce au Cameroun Oriental, un commerce, une industrie ou une profession non exemptée expressément par le Code des Impôts (notamment les agriculteurs, planteurs, éleveurs, artistes, les pêcheurs, les chasseurs etc. . . .) est assujettie à la contribution des patentes qui est un impôt annuel émis par voie de rôle.

Il est dû autant de patentes que le contribuable a d'établissements ou de chantiers et exerce d'activités distinctes.

Le tarif de la patente varie selon la profession exercée et le lieu où elle est exercée.

Les professions sont classées dans deux tableaux

- le tableau A qui ne comporte qu'un droit fixe (allant de 2.000 francs CFA à 400.000 francs CFA et plus selon les professions)
- le tableau B qui comporte une taxe déterminée et une ou plusieurs taxes variables par profession.

Le montant de la patente est majoré de 13% (10 centimes additionnels pour la Commune et 3 pour les Chambres de Commerce ou d'Agriculture).

La contribution est réduite de moitié pour les exploitants travaillant uniquement à façon avec le concours de moins de dix ouvriers et manoeuvres, et pour les exploitants dont les machines sont uniquement actionnées par l'homme.

Les omissions ou insuffisances constatées dans l'établissement des patentes peuvent valablement être réparées par le service des Contributions jusqu'à l'expiration de l'année fiscale suivant celle de l'établissement du rôle.

b. Licences

Toute personne physique ou morale autorisée à se livrer à la vente à un titre quelconque ou à la fabrication de boissons alcooliques, de vins, bières, cidres et autres boissons fermentées est soumise à la contribution des licences.

Cette contribution est annuelle, elle est exigible à raison de chaque établissement selon les mêmes règles que la contribution des patentes et mise en recouvrement en même temps que celle-ci.

Son tarif est divisé en 3 catégories

- 1ère catégorie: vente à consommer sur place
- 2ème catégorie: vente à emporter
- 3ème catégorie: licence spéciale pour restaurateurs et gargotiers.

Chaque catégorie est divisée en un certain nombre de classes selon le standing de l'établissement.

De plus le tarif varie selon les localités. (3 zônes distinctes)

Le montant de la licence va de 5.000 francs CFA à 50.000 francs CFA par tranche de 500.000 francs CFA de chiffre d'affaires suivant les classes et les zônes.

Il est majoré de 28% (25 centimes communaux plus 3 centimes pour les Chambres de Commerce).

E. *Taxe d'apprentissage*

Tout employeur qui verse des salaires annuels supérieurs à 100.000 francs CFA, à l'exception des artisans fiscaux et des sociétés dont l'objet exclusif consiste à dispenser un enseignement, est assujetti au paiement d'une taxe d'apprentissage au taux de 0,25% sur le montant total des rémunérations payées au personnel de l'entreprise au cours de l'exercice fiscal.

La taxe est liquidée sur déclaration souscrite par l'employeur en même temps que sa déclaration de bénefices, elle est émise par voie de rôle.

Certaines dépenses engagées par l'entreprise (frais de cours techniques et professionnels, salaires des techniciens exclusivement affectés à la formation du personnel, rétributions versées aux apprentis pendant les heures de présence aux cours professionnels, versements effectués au profit d'écoles de formation générale ou technique) peuvent être imputés sur le montant de la taxe due.

F. *Taxes diverses*

Les services des Contributions Directes contrôlent également la perception de diverses taxes telles que.

- taxe sur le bétail
- taxe sur les armes à feu.

Toutefois les pouvoirs nécessaires pour établir l'assiette de ces taxes sont, comme en matière d'impôt forfaitaire sur le revenu des personnes physiques, délégués aux chefs d'unité administrative.

G. *Impôt sur le chiffre d'affaires*

Le chiffre d'affaires est frappé au Cameroun Oriental par deux taxes distinctes

- la taxe sur le chiffre d'affaires
- la taxe sur les transactions

leur champ d'application n'est pas identique.

a. Taxe sur le chiffre d'affaires intérieur

Cette taxe est instituée en complément à la taxe sur le chiffre d'affaires perçue à l'importation par le service des douanes; elle frappe les opérations suivantes réalisées sur le Territoire du Cameroun Oriental

- les prestations de services et les activités résultant de l'exercice des professions libérales
- les opérations de vente, pour la mise en consommation sur le marché local, de marchandises de fabrication locale ou de produits du cru, y compris les ventes d'articles et matières d'occasion
- toutes activités autres que celles concernant

la revente en l'état de marchandises ou produits importés.

Une affaire est reputée faite au Cameroun Oriental, s'il s'agit d'une vente lorsque celle-ci est réalisée aux conditions de livraison au Cameroun Oriental, s'il s'agit de toute autre affaire lorsque le service rendu, le droit cédé ou l'objet loué sont utilisés ou exploités au Cameroun Oriental.

Sont exonérés de la taxe sur le chiffre d'affaires, notamment

- les affaires relatives à l'impression et à la vente des journaux et périodiques imprimés au Cameroun (à l'exception des recettes de publicité)
- les transactions effectuées par les exploitants forestiers portant sur les bois en grumes et la revente des planches en l'état
- les transactions effectuées par les cultivateurs, les planteurs, les éleveurs, les pêcheurs et les chasseurs pour les produits de leur exploitation
- les produits destinés à l'exportation ou la fabrication d'un produit soumis au régime de la taxe unique ou de la taxe intérieure à la production
- les produits soumis au régime de la taxe unique UDEAC ou à celui de la taxe intérieure à la production
- les services rendus par les établissements d'enseignement.

La base d'imposition est constituée par le prix total dû par l'acquéreur pour prendre possession de la marchandise ou pour obtenir le service (y compris la taxe elle-même), sous déduction, pour les industriels, de la valeur des matières premières importées, directement incorporées dans le produit, ayant déjà supporté la taxe sur le chiffre d'affaires et pour les autres assujettis de la valeur des achats effectués chez un importateur ou un intermédiaire ayant déjà supporté la taxe, ainsi que pour les entrepreneurs, des mémoires des sous-traitants ayant déjà supporté la taxe.

Les entreprises qui effectuent leurs propres opérations de transports, transit, manutention sont taxables à ce titre, elles doivent acquitter la taxe sur la valeur des services qu'elles se rendent à elles-mêmes, sans que cette valeur puisse être inférieure aux prix pratiqués par les professionnels.

La taxe sur le chiffre d'affaires est calculée au taux de 6% (6,38% sur le prix hors taxe) toutefois le taux est réduit de moitié 3% (3,09 sur base hors taxe) pour les opérations de production artisanale, les transports et les activités industrielles.

Les recettes provenant des exploitations cinématographiques supportent en outre une taxe complémentaire au taux de 1,50%.

La taxe doit être payée spontanément au Trésor par le redevable dans le courant du premier mois de chaque trimestre civil sur le chiffre d'affaires du trimestre précédent.

La taxe acquittée est régularisée par l'émission de rôles récapitulatifs préparés par l'Inspecteur chargé de l'assiette grâce aux déclarations déposées par le contribuable auprès de ses services dans le même délai que celui imparti pour le paiement.

b. Taxe sur les transactions

Tous les producteurs, à l'exception des artisans utilisant le concours de 5 employés au maximum et des producteurs bénéficiaires de régimes fiscaux privilégiés (régimes de la taxe unique ou de la taxe intérieure à la production) sont passibles de la taxe sur les transactions à raison de leur chiffre d'affaires.

Par producteur il faut entendre toute personne qui extrait, produit et travaille les matières premières pour les façonner, et leur donner une utilisation pratique ou qui assure la présentation commerciale d'un produit.

Les affaires faites à l'exportation sont exonérées de taxe sur les transactions.

La base taxable est constituée par le chiffre

d'affaires déduction faite de la valeur des matières premières et des achats effectués, ayant supporté la taxe sur les transactions ou une taxe de remplacement au stade antérieur. Le taux de la taxe est fixé à 5%.
La liquidation et le paiement de cette taxe sont effectués spontanément par le redevable avant le 20 de chaque mois à raison du chiffre d'affaires taxable réalisé le mois précédent.
Les textes régissant la taxe sur les transactions sont des textes fédéraux, en conséquence cette taxe est, en principe, également applicable au Cameroun Occidental.

2. DROITS ET TAXES PERÇUS PAR LES SERVICES DE L'ENREGISTREMENT

Bien que les droits et taxes perçus par l'Enregistrement sortent à proprement parler du cadre de la fiscalité, nous en traiterons brièvement et évoquerons principalement les taxes qui par leur caractère de périodicité les font considérer par les entreprises pratiquement comme des charges fiscales.

A. *Principaux droits usuels*
Les principaux droits d'enregistrement appliqués aux actes courants des entreprises sont les suivants:

– Droit sur les apports faits aux sociétés, apports purs et simples jusqu'à 750.000.000 de francs CFA	2 %
apports compris entre 750.000.000 et 1.500.000.000 . . . etc.	1,5%
– ventes d'immeubles	15 %
– vente de fonds de commerce (exception faite des marchandises neuves garnissant le fonds supportant un droit de 2%)	10 %
– baux (écrits ou verbaux)	5 %
– marchés administratifs (sauf marchés pour l'exécution du plan passibles d'un droit fixe de 1.000 francs CFA)	2 %

B. *Taxe annuelle sur les contrats d'assurances*
Toute convention d'assurance couvrant des risques situés ou reputés situés au Cameroun Oriental est passible d'une taxe spéciale au paiement de laquelle l'assureur ou des représentants et l'assuré sont tenus solidairement.
Cette taxe est de 3% du montant des primes pour les contrats d'assurance vie et assimilés et pour les contrats couvrant les risques de navigation maritime, fluviale ou aérienne. Elle est de 10% pour les autres contrats à l'exclusion de ceux relatifs aux accidents du travail qui en sont exonérés.

C. *Taxe spéciale sur les sociétés*
Une taxe annuelle est due sur le capital des sociétés (cette taxe remplace le droit de timbre sur les titres et le droit de mutation sur les cessions de parts ou d'actions).
Elle doit être réglée spontanément avant le 30 septembre de chaque année.
Son taux est de 0,75% du capital social si celui-ci est inférieur à 500 millions de francs CFA.
Il est de 0,60% quand le capital est compris entre 500 et 2.000 millions, de 0,40% entre 2.000 et 5.000 millions et de 0,20% au-dessus.
Le minimum de perception est de 1,000 francs CFA.
Le taux peut être réduit d'un tiers sous certaines conditions, notamment celles que la société redevable n'ait pas été imposable à l'impôt sur les sociétés au titre des deux derniers exercices précédents et qu'elle n'ait procédé pendant la même période à aucune augmentation de ses réserves ou distribution de bénéfices.
Cette taxe est applicable également aux sociétés qui sans avoir leur siège social au Cameroun Oriental y possèdent des biens ou y exercent une activité.
Ces sociétés doivent acquitter la taxe sur une partie de leur capital social déterminée au prorata du chiffre d'affaires réalisé au Cameroun Oriental par rapport au chiffre d'affaires global.

IV. LES REGIMES FISCAUX PARTICULIERS

Différents avantages fiscaux peuvent être accordés aux contribuables dans le cadre de régimes particuliers.

1. LE REGIME DE LA TAXE INTERIEURE A LA PRODUCTION

Instituée par le décret N° 62-DF-293 du 7 août 1962 modifié par le décret N° 66-DF-220 du 12 mai 1966, la taxe intérieure à la production peut être appliquée par arrêté après agrément, à certaines entreprises industrielles installées sur le Territoire de la République Fédérale du Cameroun.

Ce régime particulier comporte

- l'octroi d'exonération de tous droits et taxes frappant à l'importation les matières premières ou consommables et produits entrant dans la composition du produit fabriqué ainsi que les emballages non réutilisables.
- l'exonération de la taxe intérieure sur le chiffre d'affaires et de la taxe sur les transactions sur les matières premières, emballages et produits finis.

En remplacement de ces droits et taxes; l'entreprise assujettie est passible d'une taxe unique dite taxe intérieure à la production frappant le produit fini au stade de la sortie de l'usine.

Le taux de cette taxe est fixé pour chaque entreprise, par l'arrêté attribuant ce régime fiscal particulier qui comporte l'assujettissement de l'entreprise à la surveillance du service des Douanes, lequel perçoit la taxe.

2. REGIMES PRIVILEGIES DECOULANT DU CODE DES INVESTISSEMENTS

Voici brièvement présentés, les divers régimes fiscaux privilégiés susceptibles d'être accordés dans le cadre des dispositions du Code Fédéral des Investissements institué par la loi 64-LF-6 du 6 avril 1964, (et décrets d'application) . . .

au Cameroun Oriental, à toute entreprise ou établissement nouveau à caractère industriel ou agricole

au Cameroun Occidental, à toute société nouvelle de caractère industriel ou agricole, inscrite au Registre des sociétés conformément à la législation en vigueur ainsi qu'à toute nouvelle société d'Etat.

A. *Régime A.*

Ce régime particulier comporte:

l'exonération des droits et taxes perçus à l'importation, sur le matériel et les matériaux, machines et outillages directement nécessaires à la production et à la transformation des produits ainsi que sur les matières premières ou produits incorporés aux fabrications et sur les emballages non réutilisables.

la possibilité d'exonération totale ou partielle des droits d'exportation sur les produits finis.

l'application du régime de la taxe unique UDEAC ou de la taxe intérieure à la production et assujettissement au régime de l'usine exercée du point de vue douanier.

B. *Régime B.*

Le régime B comporte les mêmes avantages fiscaux et douaniers que le régime A avec, en plus, une exonération de l'impôt sur les bénéfices industriels et commerciaux et de la patente ainsi que de la redevance foncière, minière ou forestière pendant les cinq premiers exercices d'exploitation.

C. *Régime C.*

Certaines entreprises d'une importance particulière concourant à l'exécution du plan de développement économique et social et participant à une activité productive considérée comme prioritaire peuvent passer avec le Gouvernement du Cameroun une convention

d'établissement définissant notamment:
- les conditions générales d'exploitation, les programmes d'équipement et de production minima, les engagements de l'entreprise quant à la formation professionnelle et aux réalisations de caractère social
- diverses garanties accordées par le Gouvernement à propos de la stabilité des conditions juridiques, économiques et financières des transferts financiers et de la commercialisation des produits; à propos de la liberté du choix de la main d'oeuvre et des fournisseurs ainsi qu'à propos des modalités d'utilisation des ressources énergétiques et des moyens d'évacuation et de transport
- l'application éventuelle de tout ou partie des avantages fiscaux consentis dans le cadre du régime B.

D. *Régime D.*
Les conventions établies dans le cadre du régime C peuvent en outre comporter des dispositions relatives à la stabilisation du régime fiscal sur la base de ce qui existe lors de la signature de la convention, au profit d'entreprises d'une importance capitale pour le développement économique de la Nation et mettant en jeu des investissements très importants.

E. *Régime particulier en faveur des petites et moyennes entreprises*
Toute entreprise de caractère industriel, agricole ou artisanal, quelle que soit sa forme juridique, qui n'est pas d'une importance suffisante pour être agréée à l'un des régimes ci-dessus peut néanmoins en raison de l'intérêt qu'elle présente être admise au régime particulier défini par le décret 68-DF-10 du 16 janvier 1968.
Ce régime consiste dans l'application d'un taux global réduit à 5% des droits et taxes perçus à l'importation sur le matériel et les matériaux, machines et outillages directement nécessaires à l'exploitation.
Ce régime particulier peut être accordé soit séparément, soit cumulativement avec celui de la taxe intérieure à la production.

F. *Régime particulier en faveur des entreprises forestières*
Le décret 67-DF-14 du 11 janvier 1967 institue au profit des entreprises forestières, un régime de faveur en matière de droits et taxes perçus à l'importation sur un certain nombre de matériels nécessaires à l'exploitation forestière et aux scieries.
Ce régime consiste, comme en matière d'avantages accordés aux petites et moyennes entreprises en l'application du taux réduit à 5% des droits et taxes applicables à l'importation desdits matériels.

G. *Octroi des régimes fiscaux privilégiés*
Tout les avantages découlant des différents régimes fiscaux particuliers sont accordés nominativement par arrêté du Ministre des Finances et après examen, par un Comité Interministériel chargé de l'étude coordonnée des projets d'investissement, d'un dossier présenté par l'investisseur.
Les avantages découlant des régimes A et B ne peuvent être accordés pour une durée excédant 10 ans, et les conventions d'établissements prévues aux régimes C et D ne peuvent être conclues pour une durée supérieure à 25 ans.

CONCLUSION

Voici donc résumées les principales caractéristiques de la législation fiscale de la République Fédérale du Cameroun.
On pourra constater qu'elle dénote un désir d'encourager l'investissement, mais qu'elle établit une assez grande disparité entre les systèmes en vigueur dans les deux Etats Fédérés.

K.S. JAP*:

THE CONCEPT OF DELIVERY OF GOODS BY A MANUFACTURER UNDER THE INDONESIAN SALES TAX ACT (1951-1968)

INTRODUCTION

By Law No. 2 of 1968 Indonesia introduces a sales tax at importation by extension of the concept of delivery of goods to the entry of goods from abroad into customs territory by a manufacturer or those regarded as such.
This discourse is a treatise on the meaning of the concept of delivery of goods under the present day's Indonesian Sales Tax Act 1951 and in comparison with its recent extension to goods imported by a manufacturer or those regarded as such and in comparison to prior provisions in respect of import tax governed in the Sales Tax Act 1951.

IMPORTATION OF GOODS

The single-point sales tax introduced in October 1951—by virtue of Emergency Law No. 19 of 1951 (Official Gazette No. 94 of 1951) ratified by Law No. 35 of 1953 (Official Gazette No. 85 of 1953)—is a consumption tax collected at source on tangible movable property either by the manufacturer at the time of delivery, within customs territory, to his customers under the name of sales tax (padjak pendjualan)[1] or by the importer on the entry of the goods into customs territory under the name of import tax (padjak masuk)[2].
Article 3 Sales Tax Act 1951 stipulated: a tax to be known as sales tax shall be charged in respect of delivery of goods performed by a manufacturer within customs territory within the scope of his business or profession.
Article 27 Sales Tax Act 1951 stipulated: a tax to be known as import tax shall be charged at the rate of 5 per cent (as of 1.1.60 : 10 per cent) on the value of the good at importation for purposes of consumption from one territory of the country, which is not within customs territory or from abroad.
The Sales Tax Act 1951 governed thus two taxes that is the sales tax and the import tax (as of 1.1.60: three, by taxing services rendered). The import tax is the counterpart of the sales tax or in other words it is levied on importation of goods, whereas the sales tax is levied on delivery of goods by a manufacturer resident within customs territory[3].
The import tax is collected at the same time together with the import duty (bea masuk). The Indonesian Tariff Act of 1872 (Indische Tariefwet; Undang Tarip Indonesia) (Dutch Official Gazette No. 150 of 1872; Official Gazette of the Dutch East Indies No. 35 of 1875) and the Duty Ordinance of 1882 (Rechtenordonnantie; Ordonansi Bea) (Official Gazette No. 240 of 1882) as amended, are the principle enactments governing the

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1. Article 3 Sales Tax Act 1951.
2. Article 27 Sales Tax Act 1951.
3. A.M. Astrawinata and R.R. Soemitro. Padjak pendjualan (Sales tax). N.V. Eresco, Bandung. 3rd edition, 1962. P.44.
This book contains the text of the Sales Tax Act 1951, implementing regulations, official explanation and comments by the authors thereto. Hereinafter the following references thereto shall be made behind the page number (official) for official explanation and (comm.) for comments.

assessment and collection of the import duty and customs duty.[4] The customs territory includes before the introduction of the Sales Tax Act of 1951 the territory of the Republic of Indonesia with the exception of the Riau Archipelago.

This clarifies the wording of Article 27 Sales Tax Act 1951 which stipulates that import tax is levied on goods imported for purposes of consumption into customs territory from one territory of Indonesia which is not inclusive customs territory or from abroad.

The principle of assessing sales tax is governed by the single-point tax, that is to say that goods suffering sales tax transported from island A to island B both within the territory of Indonesia, are not chargeable to the sales tax at island B, though customs territory only extends 3 kilometres into open sea. Thus although the goods were actually brought out and into customs territory the act is not considered as importation for purposes of imposing the sales tax. In case the goods within island B are processed by a transformation of the goods into another state as bought, then the delivery by the manufacturer to his customer either resident in island B or in island C, is subject to sales tax. Delivery of goods by a manufacturer, within the Indonesian islands of Riau not included in Indonesian customs territory was not chargeable to sales tax. The goods were subject to sales tax only if they were imported into Indonesian customs territory.

The islands of Riau were included within customs territory as of November 1, 1963 by virtue of Law No. 8 of 1963.

The drafting of the import tax and the sales tax governed in the Sales Tax Act 1951 was so construed that the act of importation of goods itself gave rise to the import tax. The import tax was imposed at importation to place an amount of sales tax on imported goods equal to that burdening similar goods produced domestically.[5]

There was no requirement that the importer be a manufacturer, or that the importation be connected with the delivery of a good. In principle, a private consumer importing goods for his own use was as equally burdened by the amount of tax as a business enterprise who imported merchandise into the customs territory of Indonesia.

The rate of both sales tax and import tax was the same, ordinarily 5% but 10% (as of 1.1.1960: 20 per cent) for various luxury goods or goods regarded as such.

By Law No. 33 of 1960 the import tax was abolished as of August 25, 1960.[6] Although the import tax was abolished, importers were still burdened by the amount of the tax as it was incorporated in the price of the goods imported as a part of the import duty (bea masuk; invoerrecht) to be paid by importers and collected by the customs.[7]

DELIVERY OF GOODS

The scope of the sales tax (padjak pendjualan) is limited to deliveries of goods, within customs territory, by a manufacturer within the scope of his business or profession.[8] The term manufacturer was defined as the person, who, within the scope of his business or profession, within customs territory, independently, produces, manufactures, processes, undertakes, breeds or cultivates, cooks goods or makes other persons perform these occurrences for him.[9]

The term manufacturer, for purposes of

4. Padj. pendj. ibid. P.43-49 (comm.).
5. Padjak pendjualan ibid. P.5 (comm.).
6. Padjak pendjualan ibid. P. 44 (comm.).
7. Padjak pendjualan ibid. P. 6, 44 (comm.).
8. Article 3a Sales Tax Act 1951.
9. Article 2(1) no. 1 Sales Tax Act 1951.

imposing the sales tax has a broader meaning than the term generally used. It follows the principle governed by Article 7(1) Dutch turnover tax act 1954 which considers the principal who makes other persons produce or manufacture goods within the scope of their business, the manufacturer of that good (for example the publisher who makes a bookprinter print a book, is the manufacturer of that book).[10]

Goods mean all "tangible movable property" according to Article 1(1)2° Sales Tax Act 1951 in conformity with the meaning of the concept of goods under the civil law, thus including ships. The transfer of immovable property is not assessed by the sales tax as these transfers are already subjected to the transfer duties on immovables of 1924 (recht van overschrijving; bea balik nama).[11]

The term delivery of goods is to be understood as meaning the transfer of the power to use a tangible asset as owner, as understood under the civil law of Indonesia.[12] This normally occurs through the transfer of ownership of a good by virtue of an agreement.[13] In principle all transfers of ownership of goods are subject to the sales tax either by agreement under consideration or as a gift.[14] However, gifts are exempt from sales tax if the Minister of Finance, after request by the taxpayer, has determined such specific gifts be exempted from sales tax.[15]

The transfer of ownership of a good resulting from inheritance or will is not considered a delivery for purpose of sales tax as it is not considered a delivery by agreement.[16]

The transfer of asset into a limited liability company (perseroan terbates) or other legal entity under the civil law is considered a transfer of ownership of goods and thus not subject to the sales tax.[17]

Further the law provides a delivery of goods for purposes of the sales tax, the transfer of possession of goods acquired under hire-purchase contract.[18] This provision provides that sales tax is due at the moment of handing over of the good to the user rather than the transfer of ownership of the good which in accordance with the civil law takes place under a hire-purchase contract after payment of the last instalment.

The transfer of ownership of goods resulting from expropriation by or in the name of the Government is considered a delivery.[19]

The supply of a movable work by the manufacturer is a delivery for purposes of the sales tax unless the movable work is considered made by order, in which case the principal is considered as the manufacturer of that movable work,[20] that is to say, if a tailor makes a cloth from material and objects which he owns or is entrusted to him by a private person he is considered the manufacturer of that cloth and at the time of delivery to his customer, sales tax is charged.[21] The supply of a movable work made by order, that is to say, the handing over by an entrepreneur to his principal of a movable work is not considered a delivery. The legislator considers in this case the principal as the manufacturer of that movable work.[22]

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10. Padjak pendjualan ibid. P.11 (official).
11. Padjak pendjualan ibid. P.8 (off.).
12. Padjak pendjualan ibid. P.8 (off.).
13. Article 1(1) 3°a Sales Tax Act 1951.
14. Padjak pendjualan ibid. P.8 (off.).
15. Article 29 no. 10 Sales Tax Act 1951.
16. Padjak pendjualan ibid. P.9 (comm.).
17. ibid.
18. Article 1(1) 3°b Sales Tax Act 1951.
19. Article 1(1) 3°c Sales Tax Act 1951.
20. Article 3(1) 3°d Sales Tax Act 1951.
21. Padjak pendjualan ibid. P.11 (off.).
22. ibid.

Sales tax is imposed at the time the manufacturer (principal) delivers the movable work to his customer.

Under the civil law a delivery occurs by which the title of ownership of a movable object is transferred by way of so-called "natrekking" (ikutan), that is to say, a movable object is attached by agreement to a movable property owned by another person. In such case the transfer of ownership of the movable object is not considered a delivery for purposes of the sales tax. In other words if an entrepreneur covers the chairs of the motor car owned by another person the transfer of ownership of the lining materials is not a delivery for purposes of the sales tax. However, if the same entrepreneur attached a coach work to the frame owned by the other person, the transfer of the title of ownership is a delivery for purposes of the sales tax, as the entrepreneur is considered the manufacturer of that produce. In other words the rendering of a service is not chargeable to the sales tax, but the delivery of a movable produce by the manufacturer of that work is chargeable to the sales tax.

A private person who as a home-worker produces a good from materials and objects entrusted to him by one or two manufacturers for this purpose is not considered as the manufacturer of that good.[23]

A profit motive is not essential to the concept of a manufacturer; a non-profit foundation and a public corporation manufacturing goods that by their nature could also be performed by private manufacturers, are subject to the assessment of the sales tax at the time the goods are delivered in the open market. Public corporations manufacturing goods which only can be considered as a performance of the primary functions of the government are not considered as a manufacturer for purposes of the sales tax.[24]

It was the legislator's view not to consider a delivery for purposes of the sales tax to occur if the title of ownership to goods is transferred under an agreement by which the goods are attached to an immovable property, that is to say, the handing over by a contractor to his principal of movable goods which he attached to an immovable property owned by the principal is not considered a delivery of a good for purposes of the sales tax.[25]

Neither does the use of self-manufactured goods in the entrepreneur's own business and the use of self-manufactured goods by an entrepreneur for his private purposes constitute a delivery for purposes of the sales tax,[26] nor does a delivery under the Sales Tax Act 1951 occur if the title to goods is transferred resulting in the removal of the goods from the entrepreneur's business assets, such as upon the transfer of assets from one business entity to another, both owned by the same members or associates. Where a group of separate entities under the civil law judged from an economic point of view must be considered as one unit as a so-called economic unit (kesatuan ekonomi), the group of companies is deemed to be one unit. However, for purposes of the sales tax to be considered as one unit the economic unit is not crucial. Two companies, both separate entities under the civil law shall be considered as one unit for purposes of the sales tax, if one of the two companies is controlled by the other company and not able therefore to exercise an independent business activity of its own.[27]

The Minister of Finance is empowered under Article 38 Sales Tax Act 1951 to act arbitrarily to provide regulations which

23. Article 2(2) Sales Tax Act 1951.
24. Padjak pendjualan ibid. P.17 (off.).
25. Padjak pendjualan ibid. P.11 (off.).
26. ibid.
27. Padjak pendjualan P.22 (comm.).

deviate from what is provided in the law. By virtue of Finance Minister Decree No. PPn 2-1-3 of January 4, 1952, the tax administration was authorized to consider, at request by the manufacturer, the delivery from the manufacturing department to the sales department, which he excercises within the scope of his business, as a delivery for purposes of assessing the sales tax.[28] This division of an enterprise may be justified where the manufacturer delivers directly to the consumer, whereas retailers gain big profits or where the goods of the manufacturer involved suffer severe competition from goods abroad.[29]

As of January 1, 1960, services have been considered as a taxable event for imposing the sales tax.[30] Since then the term entrepreneur was defined in the Sales Tax Act 1951 as those persons who independently conduct a business or exercise a profession within Indonesia.[31]

Further the term manufacturer was modified and defined as entrepreneur, who, within the scope of his business or profession, within customs territory, independently, produces, manufactures, processes, undertakes, breeds or cultivates and cooks goods or makes other persons perform those occurrences for him.

In addition the text of Article 3 Sales Tax Act 1951 has been modified and reads now as follows:

A tax to be known as sales tax shall be charged:

a. in respect of the delivery of a good performed by a manufacturer within customs territory, within the scope of his business or profession.
b. in respect of a service rendered by an entrepreneur within customs territory, within the scope of his business or profession.

It should be noted that only those services rendered for a consideration by entrepreneurs within the scope of business or profession as stated in Article 1(1) no. 5 of the Sales Tax Act 1951 are subjected to the sales tax. The following businesses or professions are listed:

1. notary
2. lawyers, solicitors
3. advisers
4. administration offices
5. accountants
6. brokers
7. commission-agents
8. auctioneers
9. suppliers other than foodstuffs or articles of food
10. contractors and architects
11. reparation and maintenance workshops
12. institutions for physical care
13. assurance business with the exception of transport assurance
14. enterprises renting movable properties
15. enterprises renting rooms other than for dwelling
16. advertising bureaus
17. laundries
18. travel agencies.

LAW NO. 2 OF 1968: AMENDMENTS

By Law No. 2 of 1968 of March 22, 1968 (Official Gazette 1968 No. 14) the Sales Tax Act 1951 was modified and supplemented by the introduction of a sales tax imposed on goods imported by manufacturers effective April 1, 1968.[32]

By virtue of this amendment law, now a

28. Padjak pendjualan ibid. P.103 (official).
29. Padjak pendjualan ibid. P. 25 (official).
30. K.S. Jap. Sales Taxation in Indonesia – A Fifteen Years Experience, in Bulletin for International Fiscal Documentation. Amsterdam 1966. P. 189.
31. Article 2(1) no. 1 a Sales Tax Act 1951.
32. Law No. 2 of 1968 is published in Berita Padjak. Vol. I no. 31 of April 5, 1968. P. 6. A weekly bulletin published by the General Directorate of Taxation, Djakarta.

delivery of a good for purposes of the sales tax is the entry of goods from abroad into customs territory.[33] In addition thereto the concept of manufacturer was modified and defined as entrepreneur, who, within the scope of his business or profession, within customs territory, independently, produces, manufactures, processes, undertakes, breeds or cultivates and cooks goods or makes other persons perform those occurrencs for him.[34] Further the term manufacturer means the entrepreneur, who, independently conducts a business or exercises a profession, within customs territory, imports goods from abroad into customs territory.[35]

The present sales tax at importation deviates substantially from the former import tax in so far that importation of goods by a private person for purposes of consumption now is not subjected to sales tax whereas previously in principle all goods imported were chargeable to the import tax.

In addition, the sales tax at importation is not collected together with the import duty but later after the goods are permitted to be carried into the open market. In other words sales tax is due at the moment when the goods no longer need to be under Custom's control, rather than when the goods pass the customs territory.[36]

In accordance with the implemented system of self-assessment under the Sales Tax Act 1951 the manufacturer (importer) has to pay the sales tax due to the Treasury within 10 days after the end of the calendar month in which the goods are permitted to be carried into the open market.

For instance, if on April 17, 1968 the goods are permitted to be carried into the open market, sales tax at importation must be paid to the Treasury at the latest on May 10, 1958 by the manufacturer (importer). In this respect it also deviates from the principle which governs domestic sales in which the sales tax becomes legally due after the sales price was paid by the buyer.[37]

The taxable base for imposing this sales tax is the total amount of cif value of the goods at importation calculated for purposes of import duty, plus the import duty inclusive surcharges, import passport expenses and stevedoring costs, but exclusive the sales tax itself, increased by a 5% profit margin amount.[38]

The rates of sales tax at importation of goods consist of 5 categories as determined by the Minister of Finance in Decree No. KEP 080/MK/II/3/1968 of March 25, 1968.[39]

Table I shows foreign essential goods which shall be subject to the zero rate of sales tax at importation, that is to say exempt from sales tax. Semi-essential goods covered by Table II are subject to a 5% rate of tax. The rate of tax is 10% for goods necessary for reconstruction covered in Table III and 50% for luxury goods covered in Table IV. Goods not covered in the Tables I to IV are considered ordinary goods and thus subject to a 20% rate of tax, if not exempted from sales tax.[40]

The estimated revenue in 1968 derived from sales tax at importation is Rp. 5.7 billion. The revenue from sales tax on domestic deliveries is estimated at Rp 6.5 billion for 1968 against the revenue of Rp 5 billion in 1967 from domestic sales tax.[41]

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33. Article 1(1) 3°e Sales Tax Act 1951.
34. Article 2(1) no. 1 a Sales Tax Act 1951.
35. Article 2(1) no. 1 b Sales Tax Act 1951.
36. Article 2 Finance Minister Decree No. KEP 083/MK/II/3/1968 of March 27, 1968 in Berita Padjak. ibid. P.12.
37. Article 5(1) Sales Tax Act 1951.
38. Article 5 Finance Minister Decree. ibid.
39. Berita Padjak, ibid. April 5, 1968 P.9.
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Butterworth & Co., Wellington.

NORWAY

SKATTE-NYTT B: releases 8 and 9.
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Prentice Hall, Inc., Englewood Cliffs.

TAXATION IN BRAZIL

In the October 1968 issue we published an article by Mr. Rubens Gomes de Sousa, entitled *Taxation in Brazil*.
There may be some misunderstanding concerning the title of the article, being identical to the title of the book of Mr. Rubens Gomes de Sousa and Mr. Gumpel in the World Tax Series volume, publication of Harvard Law School, Cambridge, Massachusetts (USA), 1957.
This article can be seen as an updated summary of the Brazilian tax system beyond that available in the above mentioned volume.

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SUPPLEMENT TO NO. 3 (B 1969)

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TEACHING TAXATION IN THE ELEMENTARY SCHOOLS

The Philippine Tax Commission is of the opinion that a systematic tax education program should be formulated. Thus, a few years ago, it established as one of its major projects the preparation of a guide for teaching taxation in elementary schools. With this project of teaching taxation in the elementary schools, the Tax Commission expects to inculcate tax consciousness in future taxpayers including those who will not go beyond elementary education.

The "Guide for Teaching Taxation in the Elementary Schools" (1967)* was tried in a number of schools in representative areas of the economy, and as may be learned from the 10th Annual Report (1968) of the Tax Commission**, it elicited enthusiastic response.

The trial run in the pilot areas will lead to further improvement of the Guide before it is finalized for nation-wide implementation.

As formulated, the teaching guide carries the following objectives:

1. To develop in the minds of the pupils an improved attitude and behavior toward taxation.
2. To impart an adequate knowledge of the different kinds of taxes and their purposes.
3. To teach the work of the different offices which collect taxes.
4. To teach the benefits that the community derives from the wise expenditure of tax money.
5. To promote an awareness that taxes help to improve the living conditions of the community.
6. To inform the pupils that evasion or non-payment of taxes lessens the opportunity of the people to receive and enjoy essential government services.
7. To develop an awareness of the need for paying taxes willingly and promptly..
8. To inform pupils that almost all revenues of the government are derived from taxes.
9. To inculcate the need for cooperation in tax collection campaigns.

We think this Philippine example would suit more countries in the world, as modern society needs more tax consciousness. The Philippine program is worth studying.

DR. J.C.L. HUISKAMP

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* Available in the library of the International Bureau of Fiscal Documentation, Brochures, no. 3403.

** Manila, 1969, p. 53.

* * * * ARTICLES * * * *

DR. ERWIN SPIRO:

THE SOUTH AFRICAN BUDGET 1969-70

Shift of emphasis from direct to indirect taxation

In his Budget Speech the Minister of Finance, Dr.Diedrich, proposed a basic change in the tax structure recommended in the First Report of the Franszen Commission of Enquiry into Fiscal and Monetary Policy in South Africa[1] which he tabled in the House of Parliament immediately after his speech. This basic change consists, first, of a reduction in the rate and the progression of the direct tax on individuals — meaning income tax — and, secondly, of a broadening of the base of indirect tax by the introduction of a selective sales tax at the importer/manufacturer stage. In the past by far the major part of the income tax on individuals was collected from a minimal portion of the population, viz. those in the higher income groups[2]. On the other hand, one of the most important advantages of the new system, it is hoped, will be the absence of a restraining effect on effort and on the willingness to risk and save, the sales tax in this respect being superior to most direct taxes.[3]

The Republic is here, as may be mentioned, only in the wake of a general development[4]. In Canada, the Carter Commission although still preferring income tax because of its being based on the taxpayer's ability to pay, recognized the importance of a sales tax[5]. In Norway, the Sandberg Committee found the existing Norwegian income tax too strongly progressive and recommended a shift of emphasis toward indirect taxation and specifically in the form of a value added tax[6]. So, too, the Ross Committee recommended, in 1967, a shift of emphasis in the New Zealand tax system from direct to indirect taxes[7]. Also the British Chancellor of the Exchequer, Mr. R. Jenkins, mentioned in his Budget Speech of 18th March, 1968, various reasons for his regarding indirect taxation as the most appropriate source for additional Government revenue and made the point further that indirect taxation, to some extent, left the public the choice to spend or save[8].

I. INCOME TAX

(a) *Persons other than companies*

RATES. The Proposals attached to the Budget contain new tables of normal tax rates for married and unmarried persons. The progression is more gradual, and the maximum marginal rate on incomes above R28 000 for married persons and R24 000 for unmarried persons is 60 per cent (which may be slightly higher in certain provinces). There shall be

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1. R.P.24/1969. Failing an indication to the contrary, sections quoted hereinafter refer to this Report.
2. Sec. 149.
3. Sec. 153.
4. See e.g. Leif Mutén, *On the Development of income Taxation Since World War I*, I.B.F.D., Amsterdam, 1967, p.76 and Prof. Dr. G. Schmölders, *Turnover Taxes*, I.B.F.D., Amsterdam, 1966, p.9.
5. Sec. 158.
6. Sec. 156.
7. Sec. 156.
8. Sec. 157.

added to the amount of tax 5 per cent thereof as surcharge and another 5 per cent thereof as loan levy. As regards husband and wife, the present rating formula for taxing spouses who both have incomes is to fall away whereas the taxation of husband and wife as a family unit is to be retained. But where the wife works, a sum not exceeding R500 of her remuneration will not be taken into account in determining the combined taxable income. The amount will, however, be reduced after a combined income total of R8000, namely by R1 for every R10 by which the combined income exceeds R8000. Certain additional remuneration for emergency services in the mining industry is to be taxed at the average rate of tax applicable before the inclusion of the additional remuneration.

EXEMPTIONS. A person, whose taxable income does not exceed if married R750 and if unmarried R500, will be exempt from normal tax. As the primary rebate will be changed to R50 in the case of married persons and to R40 in the case of unmarried persons, it follows that persons will not be subject to normal tax if their taxable income does not exceed R1000 and R643 respectively.

In the case of persons above the age of sixty years the relevant amounts are R1200 and R750 respectively.

For the better understanding it may be mentioned that when the various limits are exceeded, the full taxable income is subject to normal tax.

There will be a special exemption in respect of free uniforms. The saving as a result of the wearing of such uniform (or a reasonable uniform allowance) will be exempted from tax provided that the wearing of the uniform is a condition of the taxpayer's employment.

DEDUCTIONS. Medical expenses actually incurred could be deducted up to a maximum of R250. Now a fixed deduction from taxable income (irrespective of the actual expenditure) of R150 per year (in the case of unmarried persons of R75 per year) will be allowed. Where a person is wholly dependent on an unmarried taxpayer, the latter may deduct as much as a married person. An additional deduction of R100 will be allowed in a year during which a child is born.

The concession granted in the past to doctors and dentists to deduct, subject to certain conditions, the cost of post-graduate study courses will now be extended to engineers and natural scientists.

An employer may at present deduct an annuity payable to a dependant of a former employee to a maximum of R600. The maximum limit will be increased to R1000.

(b) *Companies*

WIDER RANGE OF THE ACT. The range of the Act is to be widened by extending it to every company in respect of taxable income derived by such company from sources within or deemed to be within the territory of South-West Africa.

RATES. The rate of company tax will be increased to 40 per cent in respect of all companies, except gold and diamond companies, which latter remain subject to the existing rates and loan levies.

As regards the tax payable by companies in respect of South-West African income, the rate is still 30 per cent if the company's year of assessment ends on or before 31st March, 1969, except such income from mining in which case the rates are those which applied in South-West Africa.

II. UNDISTRIBUTED PROFITS TAX

The undistributed profits tax to which private companies are subject is extended to private companies registered or carrying on business in the territory of South-West Africa (including the port and settlement of Walvis Bay.)

The Proposals also provide for the extension of the undistributed profits tax to public companies registered or carrying on business both in the Republic or the territory of South-West Africa (including the port and settlement of Walvis Bay). But as follows from the First Report[9] there will be the proviso that

(a) distributable income for this purpose will be only that part of a public company's net profit for a tax year which consists of net branch profits from abroad and net dividends from all sources, after such portions of the net profit for a tax year have been reduced by not more than 25 per cent;

(b) assessed losses and/or accumulated deficits are taken into consideration in such a way that there will be no distributable income for this purpose until the assessed losses and/or accumulated deficits of the company have been eliminated by net profits; and

(c) for this purpose net branch profits from abroad and net dividends do not include taxation which might have been levied.

III. NON-RESIDENT SHAREHOLDERS TAX

The non-resident shareholders tax will be payable also in respect of the amount of dividends and interim dividends declared or approved of respectively on or after the 1st April, 1969, accruing to or in favour of any person (other than a company) who is ordinarily resident or carrying on business in the port or settlement of Walvis Bay or accruing to or in favour of any company which is managed or controlled in the territory of South-West Africa (including the port and settlement of Walvis Bay).

IV. NON-RESIDENTS TAX ON INTEREST

The non-residents tax on interest will be payable also in respect of any amount of interest accruing on or after the 1st April, 1969, to or in favour of any company registered outside the Republic and the territory of South-West Africa, if the debtor in respect of such amount is a company ordinarily resident or carrying on business in the said territory (including the port and settlement of Walvis Bay).

V. MARKETABLE SECURITIES TAX

With effect from 27th March, 1969, the tax on marketable securities has been raised from 0,5 per cent to 1 per cent and, with effect from 1st October, 1969, has been extended to sales of marketable securities in the territory of South-West Africa (including the port and settlement of Walvis Bay).

VI. TRANSFER DUTY

The transfer duty has been extended to the acquisition of property situated in the territory of South-West Africa (including the port and settlement of Walvis Bay) with effect from 1st October, 1969.

VII. STAMP DUTIES

Certain changes are proposed in respect of stamp duties in connection with the registration of the transfer of marketable securities, with certain policies of life insurance and marine insurance and with certain transfer deeds relating to immovable property. Furthermore, the stamp duties payable under the Stamp Duties Act, 1968 (Act No. 77 of 1968) shall be paid also in respect of instruments executed on or after the 1st October, 1969, in the territory of South-West Africa (including the port and settlement of Walvis Bay).

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9. Sec. 335.

VIII. GENERAL TAX PAYABLE BY BANTU

It was felt that the reduced scales of income tax on individuals required an adjustment in the general tax payable by Bantu. The gradual general tax assessed on the taxable income above R360 per annum of Bantu men and women will be changed from 1st March, 1970, by reducing the basic tax payable by Bantu men from R3.50 per year to R2.50 and adjusting the tax on taxable income in accordance with new scales. As regards the tax on income, Bantu will be liable from 1st March, 1970, only for the payment of general tax, and employers will have to deduct the tax from wages on the same basis as that presently applying with regard to income tax.

IX. CUSTOMS AND EXCISE DUTIES

(a) *Excise duty on beer*

In order to remove a certain anomaly and simultaneously to give greater encouragement to the small brewery a minor change in the excise duty on beer has been proposed.

(b) *Sales duty*

COMMENCEMENT. The sales duty came into force when it was announced by the Minister of Finance in his Budget Speech (on the 26th March, 1969 at 3.49 p.m.).

NATURE. The sales duty proposed shows two distinguishing features.

First, it is a selective tax in that the items which attract the tax are "selected". Domestic consumption was intended to be the basis of the duty, but items of particular importance to the lower income groups, such as food, clothing, footwear, medicine, rent, fuel and water had to be excluded. It is not possible here to enumerate all the items subject to the duty, but the following examples may give some idea of the scope of the duty: jewellery, leather goods, furs, perfumery, furniture, refrigerators, sewing machines, electrical stoves, stationery, typewriters, motor cars, but also linen goods, sunglasses, soap and razor blades.

Secondly, sales taxes may be distinguished according to the stage in the production-distribution process at which they are levied[10]. They may be single-stage taxes levied at the source (factory, farmer or importer), the wholesale stage or the retail stage or they may also be multi-stage taxes levied at two or more stages. The proposed sales duty is to be collected at an early sales stage, the importer/manufacturer stage. It was considered that such a sales duty was advantageous from the administrative point of view as only a small number of collection points was required. The Minister of Finance was well aware of the possibility that a profit percentage might be added to the tax by commerce so that the retail price would eventually rise by more than the amount of the tax. But not only would competition in the trade combat such a tendency, the Minister also promised that a close watch would be kept on unfair price increases.

GRADUATION OF RATES. In view of the requirements of equity the rates of the duty have been graduated from five to twenty per cent.

VALUE OF IMPORTED GOODS. The value of imported goods will for the purposes of the sales duty be the free on board price or the domestic value thereof as defined in the Customs and Excise Act, 1964 (Act No.91 of 1964), whichever yields the higher amount of sales duty, plus fifteen per cent of such price or value, plus carriage from the port or place of landing to the place of entry for home consumption plus any non-rebated customs duty, but not including sales duty on such goods.

10.Sec.180.

VALUE OF GOODS MANUFACTURED IN THE REPUBLIC. The value of goods manufactured in the Republic will for the purposes of the sales duty be the full and final market price (before deduction of any discount other than cash discounts and normal trade discounts to regular classes of purchasers) at which, at the time of sale, such or similar goods are freely offered for sale for consumption in the Republic, for purposes of trade in the principal markets of the Republic in the ordinary course of trade, in the usual wholesale quantities and in the condition and the usual packing ready for sale in the retail trade or to the consumer, to any independent merchant wholesaler in the Republic under fully competitive conditions. There is to be added the cost of packing and packages and all other expenses incidental to placing the goods on rail for delivery to the purchaser plus carriage to the place of entry for home consumption plus any non-rebated excise duty on such goods. "Manufacture" may be defined to include, in the discretion of the Secretary for Inland Revenue, the packing or measuring off of sales duty goods.

EXEMPTIONS. Sales duty goods manufactured in the Republic by a natural person for his own use and not for sale or disposal will be exempted from payment of sales duty in circumstances which the Secretary considers do not constitute a business and subject to such conditions as he may impose in each case. Further sales duty goods manufactured by any other person in the Republic will be exempted from payment of sales duty where the value for sales duty purposes of goods so manufactured by such person has on the average not exceeded such amount per annum as the Minister may prescribe in each case or is not likely to exceed such amount during a full calendar year and subject to the conditions prescribed by the Minister in each case.

CONCLUSION

Most of the changes introduced in the Budget Speech were based on recommendations of the Commission of Enquiry into Fiscal and Monetary Policy in South Africa referred to earlier. It is, therefore, fitting to advert to two instances where recommendations of the Commission were not accepted.

Firstly, the Commission strongly emphasized the desirability of a consolidated income tax comprising all taxes on the income of individuals, namely normal income tax, provincial income tax and provincial personal tax. It argued that if the provinces retained the right themselves to levy income and personal tax, it not only involved administrative problems, but also made it difficult to maintain an integrated fiscal and taxation policy. The Government did not disagree. Since, however, it was not feasible to discuss the matter in advance with the provincial Administrations it was not now possible to alter the powers of taxation of the provinces. It can, therefore, be expected that the recommendation of the Commission will be accepted next year or in the near future.

The second recommendation of the Commission which the Government did not accept relates to the introduction of a capital gains tax. The Commission was of the opinion that in the interest of tax equity, among other things, and to combat tax avoidance, the time had arrived for the Republic to broaden its fiscal income concept through the introduction of a separate capital gains tax which, subject to certain conditions, would affect those taxpayers who were not at present taxed when they realised their negotiable securities or fixed property.[11] The Commission, therefore, recommended a light and simple form of a capital gains tax

11. Sec. 243.

without retrospective effect, but its recommendation was not unanimous. Although the Government realized that good arguments could be adduced in favour of a capital gains tax, it was also aware of administrative and other reasons against it and, after careful consideration, decided not to accept the recommendation. The taxation of capital gains is, however, a worldwide tendency, and just as the Republic followed the example of other taxation systems by introducing the Pay-As-You-Earn method of collecting income tax and now by introducing a sales duty, so, it is considered, it is not unlikely that the Republic may still introduce a capital gains tax at some future time.

S.T. GARCÍA-GRANADOS*:

CENTRAL AMERICAN TAX LAW

INTERNATIONAL TAXATION OF INCOME IN CENTRAL AMERICA

INTRODUCTION

The Central American Common Market[1] has been without any doubt one of the most successful of the recently formed economic associations of States. Since the beginning of the integration process in 1951, the total interregional trade has developed from 8 million dollars a year in the early 1950's to almost one hundred times that amount in recent years. According to Common Market experts this ratio of growth is likely to continue in the near future.

This impressive result has been attained by a co-ordination of the five countries' efforts in a program to develop local and regional industry through the liberalization of regional trade. Under this program a large number of treaties for the unification of taxation of the transfer of goods have been signed. Nonetheless, little attention has been given to the harmonization of income and capital taxes. To date, the only serious attempt made to achieve some tax harmonization in this respect is the treaty signed at San Jose in 1962 for the unification of tax incentives for industrial development[2]. However, this treaty did not contain any provisions concerning the avoidance of double taxation or the co-ordination of fiscal policies. For these reasons any survey trying to attain a comprehensive scope on this subject should proceed through the study of each state's tax rules, especially those governing the transfer of profits in general. The superimposition of the five countries tax systems will provide a view of the regional taxation of income.

I. TAXATION OF FOREIGN SOURCE INCOME

No regional treaty or common principle exists for the taxation of income originated in one Central American State and received in another Central American State. Each country applies its own general foreign sources rules, whether the income is produced in the Common Market or abroad.

Three countries — Guatemala, Nicaragua and Costa Rica — tax only domestic source income both for individuals and for corporations. Honduras taxes all foreign source in-

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1. Composed of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. Under Spanish Colonial rule these countries were an administrative unit (the "Reyno de Gohatemala"). After independence from Spain they formed the Federal Republic of Central America, which disappeared in the 1840's. At present these countries are linked through a large number of treaties and organizations usually referred to as a whole as the "Central American Common Market".

2. "Convenio Centroamericano de Incentivos Fiscales al Desarrollo Industrial" San Jose, Costa Rica, July 1962. The treaty did not enter into force due to non-ratification on the part of Honduras. This country claimed for preferential treatment as a relatively less developed area in Central America. A protocol to the treaty was signed in San Jose in June 1968 granting special preferences to Honduras, and the missing ratification was recently deposited (Reprinted by BOLSA of April 1969). No information is available yet concerning the application of the treaty.

come (world-wide income of individuals and corporations). El Salvador is the only country to draw a distinction between individuals and corporations for the determination of the international reach of income tax law. Individuals are taxed on world-wide income but exception is made for income produced in other Central American States if the state concerned does not tax its residents — or domiciles — on income from Salvadorean sources. Corporations are taxed only on domestic source income.

We can summarize the application in Central America of the source rules stated above as follows:

El Salvador does not tax corporate or individual income originated in Guatemala, Nicaragua or Costa-Rica, neither does it tax income of corporations if it is produced in Honduras. Guatemala, Costa Rica and Nicaragua tax only domestic source income. In consequence, the problem of double taxation arises only with respect to income received in Honduras from the rest of Central America and income received from Honduras by a Salvadorean individual taxpayer[3].

Table I. Taxation of foreign source income within Central America

Income received in ► / ▼ Income produced in	*Guatemala*	*El Salvador*	*Honduras*	*Nicaragua*	*Costa Rica*
Guatemala	—	taxed at source	double taxation	taxed at source	taxed at source
El Salvador	taxed at source	—	double taxation	taxed at source	taxed at source
Honduras	taxed at source	taxed at source (++) double taxation (+)	—	taxed at source	taxed at source
Nicaragua	taxed at source	taxed at source	double taxation	—	taxed at source
Costa Rica	taxed at source	taxed at source	double taxation	taxed at source	

(+) For individuals only. Foreign tax credit is available.
(++) For corporations only.

3. In this case El Salvador grants a tax credit for the Hondurean tax paid. The tax credit is limited to a percentage of the total tax due in El Salvador not exceeding the ratio existing between the taxpayer's total net income and his net income from Hondurean sources.

II. TAXATION OF PAYMENTS REMITTED TO NON-RESIDENTS[4]

None of the five Common Market countries draws a distinction between payments made in or outside Central America, so the general rules for non-residents are applied in all cases[5].

a. *Taxation of Dividends Paid Abroad*

Guatemala: Levies a 10% tax withheld at source on dividends paid abroad. This 10% is considered as the definitive tax.

Honduras: Levies a 5% withholding tax on dividends paid abroad. The amount withheld is also considered as the definitive tax.

El Salvador: Draws a distinction between individuals and corporations. The withholding rate is 38% if the dividends are paid to individuals, and 28% if they are paid to corporations. The assessed tax may be different if the payee files a tax return for his income originating in El Salvador; in the latter case the rates on net income of non-residents are a flat 38% on profits of corporations, and the ordinary progressive income tax rates (beginning at 25%) for individuals[6].

Nicaragua and Costa Rica: Do not tax dividends paid to non-residents.

b. *Taxation of Interest Paid Abroad*

All five Central American countries tax interest paid abroad.

Guatemala: The withholding tax (assessed tax) is levied at a rate of 10% of the gross amount on a payment not exceeding Q21,500. (Q1.00 = $1.00). If the payment exceeds that amount, the recipient is liable to income tax for all his Guatemalan income[7], but the withholding would still be 10%. The interest paid on foreign loans contracted for a period of more than 18 months is not subject to any tax.

El Salvador: Different amounts are withheld on interest paid to individuals and corporations; for individuals the rate is 28% and for corporations the rate is 38%. The assessed tax is calculated on the total income of the non-resident taxpayer according to the same rates as those for dividends (see section II (a) *supra*). Interest paid to foreign banks or other foreign financial institutions is tax exempt.

Honduras: An assessed tax is levied at the rate of 5% withheld at source. The Ministry of Economics and Financial Affairs may waive the payment of this tax as a tax incentive if the loan is considered to be in the "national interest".

Nicaragua: Does not levy a specific withholding tax on interest, but interest is added to a non-resident payee's income for tax purposes[8]. Tax authorities determine in each case the amount to be withheld. Interest paid to foreign or international banks is tax exempt.

Costa Rica: A withholding tax at source at the rate of 15% is levied. It is considered as the definitive tax.

c. *Royalties*

All five Central American States tax royalties paid to non-residents.

Guatemala: The assessed tax is 10% of the gross payment; the tax is withheld at source.

El Salvador: Different amounts are withheld depending on whether the payment is made to individuals or to corporations. For individuals the rate is 28% and for corporations the rate is 38% of the gross payment. The assessed tax is the same as that for dividends (see section II (a)).

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4. As at January 1968.
5. Unless specifically stated, all rates are applied for individuals and for corporations.
6. See tables in Appendix III.
7. See Appendix I.
8. See Appendix V.

Honduras: 10% of the amount remitted abroad is withheld. It is considered as the definitive income tax.

Nicaragua: As is the case for interest, (see Section II (a)) royalties are added to a non-resident's total income for the purposes of income tax. Tax authorities must be given notice before a remittance is made and they determine in each case the amount to be withheld to assure the payment of income tax by the non-resident.

Costa Rica: 20% is withheld when the royalty is remitted abroad. The amount withheld is considered as the definitive tax.

Table II. Withholding taxes on payments to non-residents

Remission of: ▶ / ▼ From:	Dividends	Interest	Royalties
Guatemala	10%	10% (+) (++)	10%
El Salvador			
to Individuals	38%	28%	28%
to Corporations	28%	38%	38%
Honduras	5%	5%	10%
Nicaragua	not taxed	income tax	income tax
Costa Rica	not taxed	15%	20%

(+) On amounts exceeding Q21,500 the recipient is liable to income tax on all his domestic source income.

(++) Exempt if the loan is granted for more than 18 months.

CONCLUSIONS

1. In spite of the existence of a large number of treaties for the harmonization of taxes in Central America, no treaty has been signed for the avoidance of double taxation of income on a regional scale.
2. Nevertheless, the actual working of source rules and special preferences for Central America creates a regional system of the taxation of foreign income which is more or less harmonized but to have a perfectly harmonized system it would be necessary for Honduras to accept the domestic source rule, or adopt a special preference for Central American income, such as the one existing in El Salvador.
3. None of the Central American States grants a preference to other Central American States concerning the taxation of dividends, interest and royalties. Only the signing of a multilateral tax treaty could harmonize taxation in this respect. This measure would perfect the free circulation of capital within the Central American Common Market.

APPENDIX I

Guatemalan Income Tax Rates for Resident Individuals and Corporations

	Taxable Income (Quetzales)			Tax on Lower Amount (Quetzales)	Additional Rate on Excess Over Lower Amount
Between	0	and	1,000	0	5.00%
	1,000.01		1,500	50.00	5.25
	1,500.01		2,000	76.25	5.50
	2,000.01		2,500	103.75	5.75
	2,500.01		3,000	132.50	6.00
	3,000.01		3,500	162.50	6.25
	3,500.01		4,000	193.75	6.50
	4,000.01		4,500	226.25	6.75
	4,500.01		5,000	260.00	7.00
	5,000.01		5,500	295.00	7.25
	5,500.01		6,000	331.25	7.50
	6,000.01		6,500	368.75	7.75
	6,500.01		7,000	407.50	8.00
	7,000.01		7,500	447.50	8.25
	7,500.01		8,000	488.75	8.50
	8,000.01		8,500	531.25	8.75
	8,500.01		9,000	575.00	9.00
	9,000.01		9,500	620.00	9.25
	9,500.01		10,000	666.25	9.50
	10,000.01		10,500	713.75	9.75
	10,500.01		11,000	762.50	10.00
	11,000.01		11,500	812.50	10.25
	11,500.01		12,000	863.75	10.50
	12,000.01		12,500	916.25	10.75
	12,500.01		13,000	970.00	11.00
	13,000.01		13,500	1,025.00	11.25
	13,500.01		14,000	1,081.25	11.50
	14,000.01		14,500	1,138.75	11.75
	14,500.01		15,000	1,197.50	12.00
	15,000.01		16,000	1,257.50	12.50
	16,000.01		17,000	1,382.50	13.00
	17,000.01		18,000	1,512.50	13.50
	18,000.01		19,000	1,647.50	14.00
	19,000.01		20,000	1,787.50	14.50

	Taxable Income (Quetzales)			Tax on Lower Amount (Quetzales)	Additional Rate on Excess Over Lower Amount
Between	20,000.01	and	21,000	1,932.50	15.00%
	21,000.01		22,000	2,082.50	15.50
	22,000.01		23,000	2,237.50	16.00
	23,000.01		24,000	2,397.50	16.50
	24,000.01		25,000	2,562.50	17.00
	25,000.01		26,000	2,732.50	17.50
	26,000.01		27,000	2,907.50	18.00
	27,000.01		28,000	3,087.50	18.50
	28,000.01		29,000	3,272.50	19.00
	29,000.01		30,000	3,462.50	19.50
	30,000.01		32,000	3,657.50	20.00
	32,000.01		34,000	4,057.50	20.50
	34,000.01		36,000	4,467.50	21.00
	36,000.01		38,000	4,887.50	21.50
	38,000.01		40,000	5,317.50	22.00
	40,000.01		42,000	5,757.50	22.50
	42,000.01		44,000	6,207.50	23.00
	44,000.01		46,000	6,667.50	23.50
	46,000.01		48,000	7,137.50	24.00
	48,000.01		50,000	7,617.50	24.50
	50,000.01		60,000	8,107.50	25.75
	60,000.01		70,000	10,682.50	27.00
	70,000.01		80,000	13,382.50	28.25
	80,000.01		90,000	16,207.50	29.50
	90,000.01		100,000	19,157.50	30.75
	100,000.01		125,000	22,232.50	32.25
	125,000.01		150,000	30,295.00	33.75
	150,000.01		175,000	38,732.50	35.25
	175,000.01		200,000	47,545.00	36.75
	200,000.01		250,000	56,732.50	38.75
	250,000.01		300,000	76,107.50	40.75
	300,000.01		400,000	96,482.50	43.00
	400,000.01		500,000	139,482.50	45.50
	500,000.01		—	184,982.50	48.00

Article 66(a) of Law No. 229 of June 23, 1964.

Note: Non-resident individuals and corporations pay the same rates starting at an effective 10%.

APPENDIX II

A. *Salvadorean Income Tax for Resident Corporations*

Taxable income (Colones) From	To	Tax on lower amount (Colones)	Additional rate on excess over Lower amount
0.01	10,000.00	—	2.5
10,000.01	25,000.00	250.00	5.0
25,000.01	100,000.00	1,000.00	10.0
100,000.01	and over	8,500.00	15.0

Note: Non-resident corporations pay a flat 38% of Net Income.

B. *Salvadorean Surtax on Non-distributed Profits of Corporations*

Taxable income (+) (Colones)		If capitalized	If allocated to reserve
Not in excess of	20,000	—	4%
From 20,000 to	40,000	5%	8%
From 40,000 to	80.000	9%	11%
In excess of	80,000	12%	13%

(+) After income tax.

APPENDIX III

Salvadorean Income Tax Rates for Resident Individuals

	Taxable Income (Colones)			Tax on Lower Amount (Colones)	Additional Rate on Excess Over Lower Amount
Between	0.01	and	7,000	0	2.85%
	7,000.01		8,000	199.50	2.95
	8,000.01		9,000	229.00	3.80
	9,000.01		10,000	267.00	4.70
	10,000.01		11,000	314.00	5.60
	11,000.01		12,000	370.00	6.50
	12,000.01		13,000	435.00	7.40
	13,000.01		14,000	509.00	8.30
	14,000.01		15,000	592.00	9.20
	15,000.01		16,000	684.00	10.10
	16,000.01		17,000	785.00	11.00
	17,000.01		18,000	895.00	11.10
	18,000.01		20,000	1,006.00	12.00
	20,000.01		22,000	1,246.00	14.00
	22,000.01		26,000	1,526.00	15.00
	26,000.01		30,000	2,126.00	16.00
	30,000.01		36,000	2,766.00	17.00
	36,000.01		42,000	3,786.00	19.00
	42,000.01		48,000	4,926.00	21.00
	48,000.01		54,000	6,186.00	23.00
	54,000.01		62,000	7,566.00	25.00
	62,000.01		70,000	9,566.00	27.00
	70,000.01		80,000	11,726.00	30.00
	80,000.01		95,000	14,726.00	33.00
	95,000.01		110,000	19,676.00	36.00
	110,000.01		125,000	25,076.00	39.00
	125,000.01		150,000	30,926.00	43.00
	150,000.01		200,000	41,676.00	48.00
	200,000.01		250,000	65,676.00	53.00
	250,000.01		—	92,176.00	60.00

Article 37 of Law No. 472 of December 12, 1963.

Note: Non-resident individuals pay the same rates starting at an effective 25%.

APPENDIX IV

A. *Hondurean Income Tax Rates for Resident Individuals and Corporations*

Taxable Income (Lempiras)				Additional Rate on Excess Over Lower Amount
Between	0.01	and	5,000	3%
	5,000.01		10,000	5
	10,000.01		20,000	9
	20,000.01		50,000	12
	50,000.01		100,000	14
	100,000.01		200,000	21
	200,000.01		500,000	27
	500,000.01		1,000,000	34
	1,000,000.01		—	40

Article 22 of Law No. 25 of December 20, 1963.

B. *Hondurean Income Tax Rates for Non-Resident Individuals and Corporations*

(a) *5 percent rate:*
- (i) Income from real estate.
- (ii) Dividends and shares of industrial, commercial, agricultural and livestock profits.
- (iii) Interest on commercial operations, bonds, certificates, securities or other kind of obligations.
- (iv) Profits from the operation of aircraft, water craft and land motor vehicles, and from communication enterprises.

(b) *10 percent rate:*
- (i) Royalties from the operation of mines, quarries or other natural resources, and royalties and other amounts paid for the use or the privilege of using copyrights, patents, designs, procedures and secret formulas, trademarks and like goods, including motion picture films.
- (ii) Premiums on insurance and bonding contracted after 1 January 1964.
- (iii) Income from public shows.
- (iv) Salaries, wages and any other compensation for services performed in the country for a period of more than 60 days, provided the annual income is L.5 000 or more.

APPENDIX V

Nicaraguan Income Tax Rates for Resident and Non-Resident Individuals and Corporations

	Taxable Income (Cordobas)			Additional Rate on Excess Over Lower Amount
Between	0.01	and	40,000	4%
40,000.01			60,000	5
60,000.01			70,000	6
70,000.01			80,000	7
80,000.01			90,000	8
90,000.01			100,000	9
100,000.01			125,000	10
125,000.01			150,000	11
150,000.01			175,000	12
175,000.01			200,000	13
200,000.01			250,000	14
250,000.01			300,000	15
300,000.01			350,000	16
350,000.01			400,000	17
400,000.01			450,000	18
450,000.01			500,000	19
500,000.01			600,000	20
600,000.01			700,000	21
700,000.01			800,000	22
800,000.01			900,000	23
900,000.01			1,000,000	24
1,000,000.01			1,500,000	25
1,500,000.01			2,000,000	26
2,000,000.01			—	30

Article 21 of Law No. 55 of December 16, 1952, as amended by Law No. 409 of March 11, 1959.

APPENDIX VI

Costa Rican Income Tax Rates for Resident and Non-Resident Individuals and Corporations (+):

Taxable income (Colones) From	To	Tax on lower amount (Colones)	Additional Rate on excess over lower amount
0.01	3,000.00	—	1
3,000.01	5,000.00	30.00	2
5,000.01	7,000.00	70.00	3
7,000.01	9,000.00	130.00	4
9,000.01	11,000.00	210.00	5
11,000.01	14,000.00	310.00	6
14,000.01	17,000.00	490.00	7
17,000.01	20,000.00	700.00	8
20,000.01	23,000.00	940.00	9
23,000.01	26,000.00	1,210.00	10
26,000.01	30,000.01	1,510.00	11
30,000.01	35.000.00	1,950.00	12
35,000.01	40,000.00	2,550.00	13
40,000.01	45,000.00	3,200.00	14
45,000.01	50,000.00	3,900.00	15
50,000.01	57,000.00	4,650.00	16
57,000.01	65,000.00	5,770.00	17
65,000.01	75,000.00	7,130.00	18
75,000.01	85,000.00	8,930.00	19
85,000.01	95,000.00	10,830.00	20
95,000.01	105,000.00	12,830.00	21
105,000.01	120,000.00	14,930.00	22
120,000.01	135,000.00	18,230.00	23
135,000.01	155,000.00	21,680.00	24
155,000.01	175,000.00	26,480.00	25
175,000.01	200,000.00	31,480.00	26
200,000.01	250,000.00	37,980.00	27
250,000.01	350,000.00	51,480.00	28
350,000.01	500,000.00	79,480.00	29
500,000.01	and over	122,980.00	30

(+) Branches and Agencies of Foreign Companies pay a 0.5% surtax on net profits before Income Taxes.

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GERMANY:

Double Taxation Conventions and Container Transportation

A ruling of February 26, 1969, approved by all German "Länder", issued by the Minister of Finance of the "Freie und Hansestadt Hamburg" provides that the clauses contained in double taxation conventions with respect to international shipping will also apply to container transportation, including all connected services, providing that the other treaty state adopts a similar interpretation. We reproduce the text of this ruling in the German language.

TEXT

Nach den in den Doppelbesteuerungsabkommen enthaltenen Schiffahrtsklauseln können Gewinne aus dem Betrieb von Seeschiffen im internationalen Verkehr nur in dem Vertragsstaat besteuert werden, in dem sich der Ort der tatsächlichen Geschäftsleitung des Unternehmens befindet. Mit der Aufnahme des Containerverkehrs ist die Frage aufgeworfen worden, wie der Begriff "Betrieb von Seeschiffen im internationalen Verkehr" auszulegen ist, weil im Containerverkehr die Reedereien über die Beförderung von Gütern hinaus weitere Leistungen erbringen. ZumContainerverkehrgehöreninsbesondere:

1. Gestellung von Containern und Spezialfahrgestellen zur Beförderung in den Abgangsseehafenplatz und während des Überseetransports,
2. Umladen der Container vom Spezialfahrgestell oder vom Eisenbahnwaggon in das Seeschiff,
3. Transport auf dem Seeschiff,
4. Entladen der Container im Bestimmungshafen auf Spezialfahrgestelle oder Eisenbahnwaggons,
5. Gestellung von Containern und Spezialfahrgestellen vom Eingangsseehafenplatz zum Inlandsempfänger.

Die Schiffahrtsklauseln der Doppelbesteuerungsabkommen dienen der Abgrenzung der Steuerhoheiten der betroffenen Staaten und sollen mit ihrer Abkehr vom Betriebstättenprinzip die ausschließliche Besteuerung der Schiffahrtsunternehmen im Wohnsitzstaat sicherstellen. Unter die Schiffahrtsklauseln fallen auch alle mit dem Containerverkehr zusammenhängenden Leistungen, wenn für sie vom Reeder kein besonderes Entgelt erhoben wird.

Voraussetzung für eine entsprechende steuerliche Behandlung des Containerverkehrs in der Bundesrepublik ist, daß auch die ausländischen Staaten die Schiffahrtsklausel der Doppelbesteuerungsabkommen entsprechend auslegen, die Gegenseitigkeit also gewährleistet ist. Sollte ein ausländischer Staat anders verfahren, so bittet die Finanzbehörde um Bericht.

Dieser Erlaß ergeht im Einvernehmen mit dem Bundesminister der Finanzen und den Finanzministern(Finanzsenatoren)der Länder.

Erlaß der Freien und Hansestadt Hamburg vom 26. Februar 1969 — 52 — S 1300 — 22/67.

Doppelbefreiung nach Doppelbesteuerungsabkommen auf Grund abweichender Erklärungen des Steuerpflichtigen

(Fin.Min. NRW, Erl. v.24.1.1969 — S 1301 — 39 — VB1)

This ruling concerns the special case in which a taxpayer gives the foreign tax administration and the German tax administration different versions of the facts. Where this has resulted in an exemption of tax in the other State, the German tax administration considers that they are justified into taxing the taxpayer on the basis of his version of the facts, as presented to the foreign tax administration. The following is the complete text of this ruling.

TEXT

Abkommen zur Vermeidung der Doppelbesteuerung legen für die Vertragstaaten fest, in welcher Weise die doppelte Besteuerung desselben Steuerguts (Einkünfte oder Vermögen) zu vermeiden ist. Die Besteuerungsverzichte des einen Staates tragen dem Steueranspruch des anderen Staates Rechnung, indem je nach Lage der eine Steueranspruch zugunsten des anderen zurücktritt. Wenn daher ein Steuerpflichtiger für einen bestimmten Sachverhalt unter Berufung auf das maßgebliche Doppelbesteuerungsabkommen Befreiung von der deutschen Besteuerung begehrt, so setzt das voraus, daß er der im Abkommen zugelassenen Besteuerung in dem anderen Vertragstaat (Quellenstaat) nicht mit einer anderen Sachverhaltsdarstellung begegnet. Es kann nicht hingenommen werden, daß ein Steuerpflichtiger sich durch widersprechende Sachverhaltsdarstellungen gegenüber den beiden Vertragstaaten Steuerbefreiung verschafft, die das betreffende Doppelbesteuerungsabkommen nicht vorsieht. Wenn die Darstellung eines Steuerpflichtigen gegenüber dem anderen Vertragstaat dazu geführt hat, daß die Einkünfte dort steuerfrei geblieben sind, und die Besteuerung nicht mehr nachgeholt werden kann, dann ist die Bundesrepublik Deutschland nach Treu und Glauben berechtigt, den Steuerpflichtigen auf der Grundlage seiner Darstellung gegenüber dem anderen Vertragstaat zu besteuern. Der Erlaß ist mit Zustimmung des BdF und im Einvernehmen mit den Länder-Finanzministern ergangen.

DIE GRENZEN DER STEUERHOHEIT IM BEREICH DER ERBSCHAFTSTEUERN UND VERMÖGENSTEUERN

(Erläuterung zur Resolution 2 des Montevideo-Kongresses von Dr. h.c. W. Mersmann*

Bei dem zweiten Thema handelte es sich nicht allgemein um einen Vergleich der Ausgestaltung von Vermögensteuern und Erbschaftsteuern, etwa um die Frage der anzuwendenden Steuersätze, Freibeträge, usw., sondern ausschließlich um die Frage der territorialen Zuständigkeit der verschiedenen Staaten in den Fällen, in denen eine Doppelbesteuerung möglich ist. Dies ist bei der Vermögensteuer der Fall, wenn sich Vermögensteile eines Steuerpflichtigen in einem anderen Staate (Belegenheitsstaat) als in dem Staate seines Wohnsitzes befinden, bei der Erbschaftsteuer, wenn sich auf Erben übergehende Vermögensteile des Verstorbenen in anderen Staaten (Belegenheitsstaaten) als in dem Staate des letzten Wohnsitzes des verstorbenen Erblassers oder u.U. der Erben befinden.

Der Generalberichterstatter und ein großer Teil der Diskussionsteilnehmer, besonders soweit sie aus Mittel- und Südamerika stammten, vertraten dabei die Auffassung, daß in Fällen dieser Art grundsätzlich der Belegenheitsstaat vor dem Wohnsitzstaat den Vorrang haben müsse. Hinsichtlich bestimmter Wirtschaftsgüter herrschte Übereinstimmung darüber, daß sie primär im Belegenheitsstaat zu den Steuern vom Vermögen heranzuziehen seien. Das gilt vor allem für den Grundbesitz, ferner für Betriebsvermögen, soweit in dem Belegenheitsstaat eine Betriebstätte besteht, dem das Vermögen gewidmet ist. Dagegen wird hinsichtlich des Kapitalvermögens, insbesondere soweit es sich um Aktien und ähnliche Anteile an Kapitalgesellschaften oder Obligationen und andere Kapitalforderungen handelt, besonders von den Vertretern der europäischen Staaten und der USA die Auffassung vertreten, daß hier in erster Linie der Staat des Wohnsitzes dieser Person maßgebend sei, die das in dem Belegenheitsstaat arbeitende Kapital besitze. Hierzu erklärte jedoch der Generalberichterstatter in seiner grundlegenden Zusammenfassung zum Generalbericht unter IV, daß das Recht zur Besteuerung nach modernen Grundsätzen von der Tatsache abhänge, daß der ökonomische Reichtum in der ökonomisch zugeordneten Aufgabe der Wirtschaftsgruppe benutzbar sein solle. Der Ort der Produktion und der Ausnutzung des Reichtums sei für das Recht zur Besteuerung maßgebend. Auf Grund dieser Prinzipien neigen die Vertreter dieser Auffassung dazu, auch das Kapitalvermögen dort zur Besteuerung heranzuziehen, wo es seine örtliche Wirksamkeit ausübt, also beispielsweise bei Dividenden im Staate der Gesellschaft, bei Obligationen im Wohnsitzstaat des Schuldners als Belegenheitsstaat. Es ist klar, daß diese Gedanken ihre Entsprechung und Hauptbedeutung bei den Steuern vom Einkommen haben und daß der Generalberichterstatter z.B. bei Kapitaleinkommen der Besteuerung im Quellenstaat gegenüber derjenigen im Wohnsitzstaat unbedingt den Vorzug geben würde.

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* Dr. h.c. W. Mersmann, Präsident des Bundesfinanzhofs, München war in Montevideo Vorsitzender des Resolutionskomitees.

So interessant die Diskussion dieser gegensätzlichen Auffassungen auch war, so konnte doch in diesem Punkte eine Einigung und eine gemeinsame Auffassung angesichts der stark divergierenden Theorien und z.T. auch Interessen nicht gefunden werden. Die Resolution enthält daher nur eine Anzahl der Punkte, in denen die Kongreßmitglieder übereinstimmen konnten und deren Festlegung für die internationale Praxis immerhin von Bedeutung sein könnte.

Zunächst betont die Resolution den Umstand, daß für die Abgrenzung des Begriffs der Steuerhoheit auf den Gebieten der Vermögensbesteuerung die entsprechenden Grundsätze bei der Einkommensbesteuerung in den in Betracht kommenden Ländern zu beachten sind.

Ohne eine besondere Wertung verweist der Kongreß dann auf die Tatsache, daß auf dem Gebiete der Vermögensteuern und Erbschaftsteuern die gleichzeitige Anwendung des Belegenheitsprinzip durch eine Regierung und des Prinzips der Wohnsitzbesteuerung durch die andere eine Quelle der internationalen Doppelbesteuerung ist, daß diese aber auf dem Gebiete der Erbschaftsteuern im allgemeinen durch Doppelbesteuerungsabkommen oder unilaterale Maßnahmen ausgeschaltet werden kann. Der Kongreß hebt dann die Besonderheit hervor, daß bei der Vermögensteuer, die nur in 8 Staaten erhoben wird, der Fall vorkommen kann, daß nur einer der beteiligten Staaten diese Abgabe erhebt. Der Kongreß befürwortet aber, auch in diesem Falle Erleichterungen zur Anwendung zu bringen. Gemeint ist damit Folgendes: Der Staat A erhebt eine allgemeine Vermögensteuer. Erstreckt sich das Vermögen eines in ihm wohnenden Steuerpflichtigen in Form von Grundbesitz in's Ausland, so wirkt der Staat A regelmäßig durch Abkommen auf die Besteuerung des im Ausland belegenen Grundbesitzes. Was geschieht aber, wenn der Grundbesitz in dem ausländischen Staate B liegt, der eine Vermögensteuer nicht erhebt? Nach Auffassung des Kongresses sollte auch in diesem Falle die Vermögensteuer des Staates A auf den im Staate B belegenen Grundbesitz nicht erhoben oder wenigstens ermäßigt werden.

Schließlich fordert der Kongreß, gleichfalls ohne grundsätzliche Wertung der Kollisionsmaßnahmen, daß diese in dem gleichen Staat konsequent durchgeführt werden, sowohl wenn dieser Staat Wohnsitzstaat, als auch wenn er Belegenheitsstaat ist. Wenn ein Staat z.B. als Wohnsitzstaat auf die Besteuerung in anderen Staaten belegenen Grundbesitzes und Betriebsvermögens im Rahmen einer Betriebstätte verzichtet, so wäre es unkonsequent, wenn derselbe Staat als Belegenheitsstaat nicht nur den auf seinem Gebiet belegenen Grundbesitz eines im Ausland wohnenden Steuerpflichtigen und gegebenenfalls dessen Betriebsvermögen heranziehen würde, sondern außerdem Teile seines Kapitalbesitzes. Die Forderung, in dieser Hinsicht konsequent zu verfahren, wurde von allen Kongreßteilnehmern geteilt und begrüßt.

Es ist zu erwarten, daß die hierzu angeschnittenen Theorien und Fragen, wenn auch zunächst kaum auf dem Gebiete der Steuern vom Vermögen, so doch auf dem Gebiete der Steuern vom Einkommen, künftige Kongresse in absehbarer Zeit wieder beschäftigen werden.

NEXT ISSUE

I.F.A. will hold its XXIIIrd Congress this year from September 8 to 12 in Rotterdam. The subjects are:

I. Recognition of services and licence of incorporeal rights between parent companies and their foreign subsidiaries.
Avoidance of double taxation in case of non-recognition by tax-administrations.

II. The possibilities and disadvantages of extending national tax reduction measures, if any, to foreign scientific, educational or charitable institutions.

The *next Bulletin issue*, a combined July, August, September 1969 issue, will be completely devoted to Dutch taxes and will contain, in particular, articles and texts of the specific Dutch unilateral double taxation relief provisions, the measures concerning international participations and T.V.A. in import and export relation. All contributions and texts of the provisions will be published in the three official IFA languages: English, German and French.

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ASPECTS OF NETHERLANDS TAXATION

From the 8th to the 13th of September, 1969 the members of the International Fiscal Association (I.F.A.) will gather in Rotterdam on the occasion of I.F.A.'s 23rd Congress, as guests of the Netherlands Branch.

At previous congresses it has been a tradition to furnish congress participants with a survey of the host country's tax system. Since information about the national tax systems of most European countries is readily available in several languages, the International Bureau of Fiscal Documentation suggested to the organizing committee that there should be a deviation from the customary road by turning a spotlight on a few special subjects of current international significance rather than providing a general description of the entire Dutch tax system. The subjects chosen are not only of importance to congress participants, they also have a wider interest and hence the decision to devote a special issue of the *Bulletin* to three articles for which the Bureau was fortunate enough to find three experts among the Dutch I.F.A. members.

The Tax on Value Added (T.V.A.) is today's fashion and this issue begins with a discussion of the international aspects of the Dutch T.V.A. which became effective on 1st January, 1969. The Netherlands relies heavily on its international trade. This is reflected in its income and corporate tax provisions and, as a matter of course, in the legal provisions of T.V.A. which by its nature may considerably affect imports and exports. Notwithstanding the common system of the E.E.C., the Dutch T.V.A. contains certain peculiarities which may interest other countries and foreign trading partners. This applies in particular to Article 17 of the Dutch T.V.A. Law, in which the Netherlands shows itself to be more European than the E.E.C.

By the same token, the Dutch have found international tax solutions to problems in individual and corporate taxation which did not exist in many other countries but which are now being considered as critical obstacles to the further internationalization of trade and commerce. In this connection mention should be made of E.E.C. deliberations on international parent-subsidiary relationships, concerning which the Commission recently submitted a draft directive to the Council. Traditionally the Netherlands has extended the tax exemption for inter-corporate dividends to dividends received from foreign subsidiaries. Within the E.E.C. only Belgium and France have a similar system. Many foreign investment problems with which other countries are faced do not occur in the Netherlands, and in the new Corporate Income Tax Law, to be effective as of 1970, the favourable system is even enlarged while undesirable consequences are being avoided.

Similarly, in accordance with its international position, the Netherlands has combined world-wide income taxation with a far-reaching application of the territoriality principle, especially with regard to business income. While including income derived through foreign permanent establishments in the tax base, a "credit" is granted *not* for foreign tax paid but for *Dutch* tax corresponding to the foreign income, *irrespective* of the rate of foreign tax. The exclusion of foreign income, as is often provided for in double taxation agreements, excludes

foreign losses as well. In the Netherlands those are immediately deductible. A sophisticated system of loss carry-overs avoids the provision of a double advantage to the taxpayer. The "credit" for Dutch rather than for foreign tax avoids most of the problems existing in countries applying the foreign tax credit method, a feature which is of special interest vis-à-vis developing countries. The loss provisions discussed in this issue are of special significance for countries such as France and Germany which unilaterally, or in double taxation agreements, adopt the principle of territoriality.

For further reference, the supplement to this issue contains the full text of the Dutch T.V.A. Law, as well as the relevant provisions (old and new) of legislation governing the treatment of inter-corporate dividends. Finally, it contains the full text of the unilateral measures against double taxation, now a Royal Decree of 1965, the basic principles of which, however, have been applied since 1893 (for the then Dutch Colonies) and, more generally, since 1920.

v.H.

ASPECTS DE LA FISCALITE NEERLANDAISE

Du 8 au 13 septembre, 1969 les membres de «l'International Fiscal Association» (IFA) vont se réunir à Rotterdam à l'occasion du 23ème congrès de l'IFA, en tant qu'invités du groupement néerlandais.

Il a toujours été la tradition de pourvoir les membres du Congrès d'un aperçu du système fiscal du pays organisateur. Mais puisque l'information au sujet des systèmes fiscaux nationaux des pays européens est à obtenir facilement, le Bureau International de Documentation Fiscale a suggéré au Comité organisateur de quitter les sentiers battus en mettant en relief quelques sujets spéciaux d'une signification internationale courante. Les sujets choisis n'ont pas seulement de l'intérêt pour les participants mais aussi en dehors; cette raison a provoqué la décision de sortir un numéro spécial du *Bulletin* contenant trois articles pour lesquels le Bureau a été heureux de pouvoir trouver trois experts, parmi les membres néerlandais de l'IFA.

La TVA étant à la mode, le numéro spécial débute avec une discussion traitant des aspects internationaux de la TVA néerlandaise, qui est entrée en vigueur le 1er janvier 1969. La Hollande est un pays qui dépend essentiellement du commerce international. Ceci se reflète dans l'imposition des revenus des personnes physiques et des sociétés ainsi que dans les règles traitant d'une taxe qui par sa nature peut avoir des répercussions sur les importations et les exportations. Bien qu'il y ait un système commun à la CEE, la TVA néerlandaise contient certaines particularités qui peuvent intéresser d'autres pays ainsi que les partenaires commerciaux. Ceci est particulièrement vrai pour art. 17 de la loi néerlandaise relative à la TVA, dans lequel la Hollande se montre plus européenne que la CEE.

De même, les Néerlandais ont trouvé des solutions fiscales internationales dans l'imposition des individus et des sociétés qui n'existaient pas dans beaucoup d'autres pays et qui maintenant sont considérés comme des obstacles pour une internationalisation plus complète du commerce et des échanges. Dans ce contexte il y a lieu de mentionner les délibérations de la CEE traitant des relations internationales entre sociétés-mères et filiales, problème sur lequel la Commission a récemment déposé un projet de directive devant le Conseil. Traditionnellement, la Hollande a étendu l'exonération fiscale pour les dividendes provenant d'une filiale aux dividendes reçus de filiales étrangères. Dans la CEE il n'y a que la Belgique et la France qui ont un système similaire. Beaucoup de problèmes au sujet des investissements à l'étranger avec lesquels d'autres pays sont confrontés ne se présentent pas en Hollande. Dans la nouvelle législation concernant l'impôt sur les sociétés, entrant en vigueur en 1970, le système avantageux est même étendu alors que les inconvénients en sont abolis.

En même temps, et en conformité avec sa position internationale, la Hollande a combiné l'imposition du revenu mondial avec une application de longue portée du principe de territorialité, spécialement en ce qui concerne les bénéfices industriels et commerciaux. Tout en englobant le revenu provenant d'un établissement stable étranger dans la base d'imposition, la Hollande applique un système de crédits, *non pas* pour l'impôt acquitté à l'étranger, mais pour le montant de l'impôt *néerlandais* correspondant au bénéfice étranger, ceci sans tenir compte du

taux de l'impôt étranger. L'exclusion du bénéfice étranger, comme il est souvent stipulé dans les conventions évitant les doubles impositions, exclut en même temps les pertes encourues à l'étranger. En Hollande, par contre, ces pertes sont déductibles immédiatement. Un système ingénieux de report de pertes exclut un double avantage pour le contribuable. En accordant un «crédit» pour l'impôt néerlandais plutôt que pour l'impôt étranger, on évite la plupart des inconvénients existant dans les pays appliquant la méthode du crédit fiscal étranger. Les règles régissant les pertes traitées dans le présent numéro sont d'une signification spéciale pour des pays comme la France et l'Allemagne qui unilatéralement ou dans des conventions adoptent le principe de la territorialité.

Pour une étude plus approfondie, le supplément à ce numéro contient le texte complet de la loi néerlandaise sur la TVA, ainsi que les textes (anciens et nouveaux) relatifs au traitement des dividendes distribués par des sociétés-filiales à leurs maisons-mères. Enfin, il contient le texte complet des mesures unilatérales contre la double imposition, actuellement réglé dans un décret Royal de 1965, dont les principes de base ont néanmoins été appliqués depuis 1893 (pour les colonies néerlandaises) et plus généralement depuis 1920.

v.H.

ASPEKTE DES NIEDERLÄNDISCHEN STEUERWESENS

Vom 8. bis 13. September 1969 versammeln sich die Mitglieder der Internationalen Vereinigung für Steuerrecht (IFA) anläßlich des 23. IFA-Kongresses als Gäste der niederländischen Landesgruppe in Rotterdam.

Bei den bisherigen Kongressen war es der Brauch, den Kongreßteilnehmern einen Überblick über das Steuersystem des Gastgeberlandes zu geben. Da Informationen über die Steuersysteme der meisten europäischen Länder in mehreren Sprachen verfügbar sind, schlug das Internationale Steuerdokumentationsbüro dem Veranstaltungskomitee vor, von dem üblichen Brauch abzuweichen und einige spezifische Themen von aktuellem internationalem Interesse zu beleuchten, anstatt eine allgemeine Übersicht über das gesamte niederländische Steuersystem zu geben. Die ausgewählten Themen sind nicht nur für die Kongreßteilnehmer von Interesse, sondern sie sind von allgemeiner Bedeutung. Deshalb wurde auch beschlossen, drei Artikeln, für die das Büro drei Experten unter den niederländischen IFA-Mitgliedern gewinnen konnte, eine Sonderausgabe des *Bulletin* zu widmen.

Die Mehrwertsteuer ist das Gespräch des Tages, und deshalb beginnt diese Ausgabe mit einer Diskussion über die internationalen Aspekte der niederländischen Mehrwertsteuer, die am 1. Januar 1969 eingeführt wurde. Die Niederlande hängen in hohem Maße von ihrem Außenhandel ab. Dies spiegelt sich in ihren Einkommen- und Körperschaftsteuervorschriften und selbstverständlich auch in ihren Gesetzesbestimmungen zur MWS wider, die auf Grund ihrer Beschaffenheit den Import und Export erheblich beeinflussen kann. Ungeachtet des gemeinsamen Systems der EWG enthält das niederländische MWS-System einige Besonderheiten, die andere Länder und ausländische Handelspartner interessieren könnten. Dies gilt insbesondere für Art. 17 des niederländischen MWS-Gesetzes, in dem die Niederlande sich als europäischer erweisen als die EWG selbst.

In demselben Sinne haben die Niederlande internationale steuerrechtliche Lösungen gefunden für Probleme der Einkommens- und Körperschaftsbesteuerung, die in vielen anderen Ländern zwar nicht bestanden, die jedoch heute als ernstliche Hindernisse für eine weitere Internationalisierung von Handel und Gewerbe betrachtet werden. In diesem Zusammenhang sind die Beratungen innerhalb der EWG über die internationalen Beziehungen zwischen Mutter- und Tochtergesellschaften zu erwähnen, zu denen die Kommission dem Rat kürzlich den Entwurf einer Richtlinie vorgelegt hat. Die Niederlande haben von jeher die Steuerbefreiung der zwischengesellschaftlichen Dividenden auf die Dividenden ausländischer Tochtergesellschaften ausgedehnt. In der EWG haben nur Frankreich und Belgien ein ähnliches System. Viele Probleme der Auslandsinvestitionen, wie sie in anderen Ländern auftreten, existieren in den Niederlanden nicht; und in dem neuen Körperschaftsteuergesetz, das 1970 in Kraft treten soll, wird die günstige steuerliche Behandlung sogar noch erweitert, während unerwünschte Folgen vermieden werden. So haben die Niederlande auch in Anbetracht ihrer internationalen Lage die Besteuerung von Einkünften aus allen Ländern mit einer breiten Anwendung des Territorialitätsprinzips kombiniert, vor allem im Hinblick auf gewerbliche Einkünfte. Einkünfte aus ausländischen Betriebstätten werden in die Besteuerungs-

grundlage mit einbezogen, aber „angerechnet" wird nicht die im Ausland entrichtete Steuer, sondern die entsprechende *niederländische* Steuer, und zwar *ohne Rücksicht* auf den ausländischen Steuersatz. Bei dem Ausschluß von ausländischen Einkünften aus der Besteuerungsgrundlage, wie er häufig in Doppelbesteuerungsabkommen vorgesehen ist, werden auch die Verluste ausgeschlossen. In den Niederlanden sind letztere sofort abzugsfähig. Ein gut durchdachtes System von Verlustvorträgen verhindert, daß der Steuerpflichtige einen doppelten Vorteil erhält. Mit der „Anrechnung" der niederländischen an Stelle der ausländischen Steuer werden die meisten der Probleme vermieden, die in den Ländern auftreten, die die ausländische Steuer anrechnen, ein Charakteristikum, das in den wirtschaftlichen Beziehungen mit den Entwicklungsländern von besonderer Bedeutung ist. Die in dieser Ausgabe behandelten Bestimmungen über die Behandlung von Verlusten sind vor allem für Länder wie Frankreich und Deutschland von Interesse, die einseitig oder im Rahmen von Doppelbesteuerungsabkommen das Territorialitätsprinzip anwenden.

Zur weiteren Information enthält der Anhang zu dieser Ausgabe den vollen Text des niederländischen MWS-Gesetzes sowie die Gesetzesbestimmungen (alte und neue) über die Behandlung von zwischengesellschaftlichen Dividenden. Außerdem enthält er den vollen Text der einseitigen Regelung zur Vermeidung der Doppelbesteuerung, heute eine Königliche Verordnung von 1965, deren Grundsätze jedoch bereits seit 1893 (für die damaligen niederländischen Kolonien) und ganz allgemein seit 1920 angewandt werden.

v.H.

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* * * * ARTICLES * * * *

DR. J.C.L. HUISKAMP:

SOME GENERAL PRINCIPLES OF DUTCH TAX LAW

I. REVENUE

Taxes are levied by the state, provinces and local authorities. In terms of revenue, provincial and local taxes are of minor importance; in the Netherlands direct taxes account for a greater part of the total tax revenue than indirect taxes, or cost-raising taxes. However, the balance is shifting in favour of indirect taxes as will be seen from the following table (take from the "Miljoenennota" 1969, official memorandum of the Ministry of Finance):

	Taxes on income, profits and net wealth, including succession duties (direct taxes)	Cost-raising taxes (indirect taxes)
	as a % of total tax revenue	as a % of total tax revenue
1965	59.1	40.9
1966	58.4	41.6
1967	57.8	42.2
1968	55.6	44.4
1969	55.2	44.8

It is expected that this trend will continue in the immediate future. The major indirect tax is the turnover tax or tax on value added (belasting over de toegevoegde waarde). This tax will provide an estimate of approx. 23.2% of total state tax revenue in 1969.
The major direct taxes are the individual income tax (inkomstenbelasting), the wage tax (loonbelasting), the net wealth tax (vermogensbelasting) which are expected to provide approx. 42.3% of the total 1969 state tax revenue, and the corporate income tax (vennootschapsbelasting) of which the estimated share is approx. 10.2%.

II. STRUCTURE OF THE MOST IMPORTANT TAXES

1. *Individual Income Tax, Net Wealth Tax, Corporate Income Tax*

The Individual Income Tax (inkomstenbelasting) is levied on the world-wide income of individuals resident in the Netherlands and the Dutch income of non-resident individuals in the Netherlands; the same principle applies *mutatis mutandis* to the net wealth tax (vermogensbelasting)* and the corporate income tax (vennootschapsbelasting). The concept of (net) income is defined empirically having no connection with concepts of civil law or economics. Capital gains are not taxable unless they are realized by the conduct of a business enterprise. For corporate income tax purposes, this means that all gains are taxable, since normally all transactions entered into by taxable entities affect business income regardless of whether they arise within or without the course of normal business activities. However a number of provisions

* On individuals only.

exist to mitigate or to abolish the tax burden on these gains in order to secure the continuity and expansion of the enterprise. In the private sector, taxation of capital gains only arises in the case of shareholders who, having a so-called "substantial interest" in a company, sell their shares at a gain, to which a reduced rate is applicable.

As world-wide income (or net wealth) is taxable, double taxation of foreign source income (or net wealth) could easily result. In order to alleviate this double taxation, the Decree of April 7, 1965 grants, in respect of individual income tax, net wealth tax and corporate income tax, unilateral relief for specified qualifying foreign source income (net wealth). This national provision applies only when a bilateral tax treaty does not affect the income (or net wealth) concerned. However, in terms of the method of avoiding double taxation, most tax treaties adopt the same principle or simply refer to the unilateral relief provisions. The Dutch unilateral relief measures imply the application of the so-called *tax exemption method with progression;* i.e. the right to take the foreign income or net wealth into consideration in determining the tax rate on domestic income or net wealth has been upheld.

Under the unilateral relief provisions, dividends do not belong to the specified qualifying foreign source income for which a relief exists; they are regarded as domestic income, and foreign taxes falling thereon may be treated as a *deductible expense.* In recent tax treaties however the *tax credit* system is used, following the line of the OECD draft convention. The exemption of the benefits (dividends and as of 1970 capital gains as well) from corporate income tax derived from a participation (deelnemingsvrijstelling) is not however, a method of avoiding international double taxation. The aim of this exemption is to avoid double taxation of affiliated profits. Consistent with this purpose the exemption is not only applicable on benefits derived from a participation in a resident company but from a participation in a non-resident company as well. This purpose must be stressed in order to get a clear conception of the exemption.

2. *Tax on Value Added*

The tax on value added (belasting over de toegevoegde waarde) introduced January 1, 1969, is calculated on a purely *territorial base.* There is no final tax in cases where economic consumption does not take place in the Netherlands.

Rates

As to the complete rates of the individual income tax and net wealth tax, see Supplementary Service to European Taxation, section B, a publication of the International Bureau of Fiscal Documentation; the complete rates of the corporate income tax and TVA have been published in section A of the same publication.

III. THE STRUCTURE OF OTHER TAXES, IN BRIEF

1. *Withholding Taxes*

a. The wage tax (loonbelasting) is a withholding tax on wages and salaries subject to the income tax. It is in some cases a final levy but is not an independent tax.

b. The dividend tax (dividendbelasting) is withheld from all dividends paid by resident corporations to residents or non-residents of the Netherlands. The amount withheld from residents of the Netherlands is treated as a prepayment of income tax or corporate income tax. The amount withheld from non-residents in the Netherlands is in most cases treated as final. Rate: 25%.

c. The withholding tax on income derived

from directorship of a company (commissarissenbelasting) will be abolished as of January 1, 1970.
d. There is no withholding tax on interest paid or on royalties.

2. *Inheritance and Gift Tax*
Inheritance and gift tax (successie- en schenkingsbelasting) is imposed on all property transferred by inheritance or by gift in cases where the deceased or donor is a resident of the Netherlands, irrespective the residence of the heir or donor (progressive rates). If the deceased or donor is not a resident of the Netherlands the tax is limited to real estate and limited types of other property located in the Netherlands (rate 6%).

3. *Lottery Tax*
A lottery tax (kansspelbelasting) is levied on prices of domestic lottery tickets and, in the case ot residents of the Netherlands, on prices of foreign lottery tickets as well. In the private level the tax is final; on the business level, it may be credited against individual income tax or corporate income tax. A unilateral relief provision is applicable to the lottery tax: See article 8 of the Decree of April 7, 1965. (Rate of tax: 15%)

4. *Registration Duties*
Registration duties (registratierechten) are levied on certain legal procedures. Deeds must be registered by a civil officer and a duty must be paid for the registration, as in case of a conveyance of real estate (rate of tax: 5%) and the issuance of shares by corporations (rate of tax: 2.5%)

5. *Stamp Duties*
Stamp duties (zegelrechten) are payable on a number of legal documents *inter alia* on the issue of domestic bonds and debentures and certain long term loans.

6. *Excise Duties*
Excise duties (accijnzen) are taxes on domestic consumption of special products: e.g. beer, spirits, wine, sugar, tobacco, mineral oils.

7. *Miscellaneous Taxes*
a) Real Estate Tax (grondbelasting), payable on the ownership of land and buildings in the Netherlands
b) Vehicle Road Tax (motorrijtuigenbelasting)
c) Personal Property and Rental Tax (personele belasting) and a number of minor, local taxes.

IV. LIST OF NETHERLANDS TAX TREATIES FOR THE AVOIDANCE OF DOUBLE TAXATION OF INCOME, NET WEALTH AND INHERITANCES

a) Taxation of income and/or net wealth

country	*concerning*	*concluded on*
Belgium	income	February 20, 1933
Canada	income	April 2, 1957; supplementary treaties: October 28, 1959 and February 3, 1965
Denmark	income, net wealth	February 20, 1957; supplementary treaty January 20, 1966
Finland	income, net wealth	March 29, 1954; supplementary treaty December 16, 1966

country	*concerning*	*concluded on*
France	income, net wealth	December 30, 1949, supplementary treaty July 24, 1952
Germany	income, net wealth	June 16, 1959
Hungary	income, net wealth	November 15, 1938
Ireland	income, net wealth	February 11, 1969 (not yet in force)
Italy	income, net wealth	January 24, 1957
Luxembourg	income, net wealth	May 8, 1968 (not yet in force)
Norway	income, net wealth	September 22, 1966
Sweden	income, net wealth	March 12, 1968
Switzerland	income, net wealth	November 12, 1951; supplementary treaty June 22, 1966
United Kingdom	income, net wealth	October 31, 1967
United States	income, net wealth	April 29, 1948; seupplementary treaty December 30, 1965

b) Taxation of inheritance

country	*concluded on*
Finland	March 29, 1954
Sweden	April 25, 1952
Switzerland	November 12, 1951
United Kingdom	October 15, 1948

DR. J.C.L. HUISKAMP:

PRINCIPES GENERAUX DU DROIT FISCAL NEERLANDAIS

I. REVENU GENERAL

Des taxes sont levées par l'état, les provinces et les autorités locales. Du point de vue du revenu fiscal général les taxes provinciales et locales sont d'une importance mineure; aux Pays-Bas les taxes directes prennent une part plus grande du revenu total que les taxes indirectes. Néanmoins la balance commence à pencher en faveur des taxes indirectes, ce qui peut se déduire de la table qui suit (les chiffres proviennent du «Miljoenennota» 1969, note officielle du Ministère des Finances):

	Taxes sur le revenu, les profits et la fortune, y compris les droits de succession (taxes directes)	taxes s'ajoutant au prix coûtant (taxes indirectes)
	exprimé en pourcentage du revenu fiscal total	exprimé en pourcentage du revenu fiscal total
1965	59,1	40,9
1966	58,4	41,6
1967	57,8	42,2
1968	55,6	44,4
1969	55,2	44,8

Il est prévu que ceci va se poursuivre dans un futur immédiat. La taxe indirecte la plus importante est la taxe sur les chiffre d'affaires ou taxe sur la valeur ajoutée (belasting over de toegevoegde waarde). Cette taxe rapportera un pourcentage estimé approximativement en 1969 à 23,2% du revenu fiscal de l'état.

Les taxes directes les plus importantes sont l'impôt sur le revenu des personnes physiques (inkomstenbelasting), taxe sur les salaires (loonbelasting), impôt sur la fortune (vermogensbelasting) qui doivent rapporter en 1969 un pourcentage approximatif estimé à 42,3 du revenu fiscal total de l'état, et l'impôt sur les sociétés (vennootschapsbelasting) par lequel la part est estimée approximativement à 10,2%.

II. STRUCTURE DES TAXES LES PLUS IMPORTANTES

1. *Impôt sur le revenu des personnes physiques, impôt sur la fortune, impôt sur les sociétés*

L'impôt sur le revenu des personnes physiques (inkomstenbelasting) est imposé sur le revenu mondial des personnes physiques résidentes des Pays-Bas et sur le revenu néerlandais des personnes physiques non résidentes aux Pays-Bas; le même principe s'applique *mutatis mutandis* à l'impôt sur la fortune (vermogensbelasting)* et à l'impôt sur les sociétés (vennootschapsbelasting). Le concept du revenu est défini d'une façon empirique puisqu'il n'a aucun rapport avec des concepts de droit civil ou d'économie. Les

* Seulement les personnes physiques.

plus-values du capital ne sont taxées que si elles sont realisées dans le cours normal de la vie d'une entreprise. Ceci veut dire que tous les gains sont taxés pour les besoins de l'impôt sur les sociétés, puisque normalement toutes les transactions dont ces personnes s'occupent, affectent le revenu de l'entreprise sans qu'il soit relevant qu'ils se déclarent endéans ou en dehors du cours normal des activités de l'entreprise. Néanmoins un nombre de règles existe pour mitiger ou abolir le poids de l'impôt sur ces profits, ceci pour assurer la continuité et l'expansion de l'entreprise. Dans le secteur privé l'imposition des plus-valeurs du capital ne se présente que dans le cas d'actionnaires qui, ayant un intérêt substantiel dans une compagnie, vendent leurs actions avec un profit (auquel s'applique un taux réduit).

Puisque le revenu mondial (ou de la fortune) est imposable, la double imposition du revenu de source étrangère (ou de la fortune) pourrait facilement se produire. Pour éviter cette double imposition le décret du 7 avril 1965 prévoit en rapport avec l'impôt sur le revenu des personnes physiques, l'impôt sur la fortune et l'impôt sur les sociétés des mesures unilatérales tendant à éliminer les doubles impositions pour des revenus spécifiquement de source étrangère (la fortune). Cette réglementation nationale ne s'applique que si un traité bilatéral ne règle pas les modalités de l'impôt sur le revenu ou l'impôt sur la fortune. Néanmoins, comme méthode pour éviter la double imposition la plupart des traités adopte le même principe ou se refère aux mesures unilatérales tendant à éviter les doubles impositions. Les mesures unilatérales néerlandaises tendant à éviter les doubles impositions impliquent l'application de la taxation fiscale avec progression, c'est à dire le droit de prendre en considération le revenu étranger ou la fortune dans la détermination du taux de la taxe sur le revenu intérieur ou la fortune.

Sous les mesures unilatérales tendant à éliminer les doubles impositions les dividendes n'appartiennent pas au revenu spécifique de source étrangère pour qui existe une exonération; ils sont considérés comme du revenu intérieur et les taxes étrangères payées en rapport avec ceci peuvent être considérées comme des dépenses déductibles. Néanmoins dans les traités fiscaux récents le système du crédit fiscal est utilisé, ceci en suivant les lignes determinées par le projet de la convention de l'OCDE. L'exonération de l'impôt sur les sociétés pour les profits (dividendes et à partir de 1970 aussi bien les plus-values) obtenus par la participation (deelnemingsvrijstelling) n'est néanmoins pas une méthode pour éviter la double imposition internationale. Le but de cette exonération est à éviter la double imposition des profits affiliés. En accordance avec ce but, l'exonération ne s'applique pas seulement aux bénéfices obtenus par une participation d'une compagnie résidente mais aussi pour une participation d'une compagnie non résidente. Ce dessein doit être souligné pour avoir une idée claire au sujet de l'exonération.

2. *Taxe sur la Valeur Ajoutée*

La taxe sur la valeur ajoutée (belasting over de toegevoegde waarde) introduit le 1er janvier 1969 est calculée sur une base purement territoriale. Il n'y a pas de taxe finale dans les cas où la consommation économique ne se fait pas en Hollande.

III. EN BREF LES STRUCTURES DES AUTRES TAUX

1. *Les taxes retenues à la source*

a. La taxe sur les salaires (loonbelasting) est une taxe retenue sur les appointements et les salaires imposables à l'impôt sur le revenu des personnes physiques. Dans un certain

Taux

Pour compléter les taux de l'impôt sur le revenu des personnes physiques, de l'impôt sur la fortune, voir Supplementary Service to European Taxation, section B, une publication du Bureau International de Documentation Fiscale; les taux complets de l'impôt sur les sociétés, et de la TVA ont été publiés dans la section A de la même publication.

nombre de cas une imposition finale, mais non pas une taxe indépendante.
b. Taxe sur les dividendes (dividendbelasting) est retenue sur les dividendes payées par des sociétés résidentes à des résidents et à des non résidents aux Pays-Bas. Le montant retenu dans le chef des résidents des Pays-Bas est traité comme un paiement d'avance de l'impôt sur les personnes physiques ou de l'impôt sur les sociétés. Le montant retenu dans le chef des non résidents dans les Pays-Bas est dans la plupart des cas considéré comme une imposition définitive. Taux: 25%.
c. La retenue à la source sur le revenu obtenu pour un commissariat d'une compagnie (commissarissenbelasting) sera abolie à partir du 1er janvier 1970.
d. Il n'y a pas de retenue à la source sur les intérêts et les redevances payées.

2. *Les Droits de Succession et les Droits de Donation*

Les droits de succession et les droits de donation (successie- en schenkingsbelasting) sont imposés sur toute propriété transférée par héritage ou par donation dans les cas où le *de cuius* ou le donateur est un résident des Pays-Bas, ceci sans tenir compte du lieu de résidence de l'héritier ou de celui qui reçoit (taux progressif). Si le *de cuius* ou le donateur n'est pas un résident des Pays-Bas le taux est limité à la propriété immobilière et à des catégories limitées à d'autres propriétés localisées sur le territoire des Pays-Bas (taux 6%).

3. *Taxe sur les Jeux de Hasard*

Une taxe sur les jeux de hasard (kansspelbelasting) est imposée sur les prix de tickets de loterie nationale et dans le cas d'un résident des Pays-Bas sur les prix des tickets de loterie étrangère. Au niveau privé la taxe est définitive, au niveau d'affaires, le montant peut être credité avec l'impôt sur le revenu des personnes physiques ou sur les sociétés. Une mesure unilatérale d'exonération est applicable à la taxe sur les jeux de hasard. Voir article 8 du Décret du 7 avril 1965 (taux de la taxe 15%).

4. *Droits d'Enregistrement*

Les droits d'enregistrement (registratierechten) sont imposés sur certains procédures légales. Certains actes doivent être enregistrés par un officier de l'état civil et une taxe doit être payée comme dans les cas d'une transmission de propriété immobilière (taux de la taxe 5%) et les émissions d'actions par les sociétés (taux de la taxe 2,5%).

5. *Droits de timbre*

Les droits de timbre (zegelrechten) sont payés sur un nombre de documents légaux entre autres les émissions d'obligations intérieures et sur certains emprunts à long terme.

6. *Droits d'Accise*

Les droits d'accise (accijnzen) sont des taxes sur la consommation intérieure des produits spéciaux comme la bière, les liqueurs, le vin, le sucre, le tabac et les huiles minérales.

7. *Taxes Diverses*

a. Impôt foncier (grondbelasting) payable pour une propriété terrienne ou de constructions aux Pays-Bas.
b. Taxe sur les véhicules à moteur (motor-

rijtuigenbelasting).
c. Impôt personnel sur la propriété (personele belasting) et un nombre de taxes locales mineures.

IV. LISTE DES TRAITES FISCAUX NEERLANDAIS POUR ELIMINER LA DOUBLE IMPOSITION EN MATIERE DE REVENU, DE FORTUNE ET DE SUCCESSION

a) Imposition du revenu et/ou de la fortune

pays	*sujet*	*conclu*
Allemagne	revenu, fortune	16 juin 1959
Belgique	revenu	20 février 1933
Canada	revenu	2 avril 1957; traités supplémentaires: 28 octobre 1959 et 3 février 1965
Danemark	revenu, fortune	20 février 1957; traité supplémentaire 20 janvier 1966
Etats-Unis	revenu, fortune	29 avril 1948; traité supplémentaire 30 décembre 1965
Finlande	revenu, fortune	29 mars 1954; traité supplémentaire 16 décembre 1966
France	revenu, fortune	30 décembre 1949, traité supplémentaire 24 juillet 1952
Hongrie	revenu, fortune	15 novembre 1938
Irlande	revenu, fortune	11 février 1969 (n'est pas encore en vigueur)
Italie	revenu, fortune	24 janvier 1957
Luxembourg	revenu, fortune	8 mai 1968 (n'est pas en vigueur)
Norvège	revenu, fortune	22 septembre 1966
Royaume-Uni	revenu, fortune	31 octobre 1967
Suède	revenu, fortune	12 mars 1968
Suisse	revenu, fortune	12 novembre 1951; traité supplémentaire 22 juin 1966

b) Imposition des successions

pays	*conclu*
Finlande	29 mars 1954
Royaume-Uni	15 octobre 1948
Suède	25 avril 1952
Suisse	12 novembre 1951

DR. J.C.L. HUISKAMP:

EINIGE ALLGEMEINE GRUNDSÄTZE DES NIEDERLÄNDISCHEN STEUERRECHTS

I. STEUERAUFKOMMEN

Die Steuern werden vom Staat, von den Provinzen und von den Gemeinden erhoben. Für das Steueraufkommen sind die Provinz- und Kommunalsteuern weniger von Bedeutung; in den Niederlanden machen die direkten Steuern einen größeren Teil des Gesamtsteueraufkommens aus als die indirekten Steuern oder Überwälzungsteuern. Jedoch verschiebt sich das Verhältnis allmählich zu Gunsten der indirekten Steuern, wie aus der nachstehenden Tabelle ersichtlich ist (entnommen aus „Miljoenennota" 1969, amtliche Mitteilungen des Finanzministeriums):

	Steuern auf Einkommen, Gewinne und Vermögen, einschl. Erbschaftsteuer (direkte Steuern)	Überwälzungsteuern (indirekte Steuern)
	(Als Prozentsatz des Gesamtsteueraufkommens)	
1965	59,1	40,9
1966	58,4	41,6
1967	57,8	42,2
1968	55,6	44,4
1969	55,2	44,8

Es wird erwartet, daß diese Tendenz sich in der nächsten Zeit fortsetzen wird. Die wichtigste indirekte Steuer ist die Umsatzsteuer oder Mehrwertsteuer (belasting over de toegevoegde waarde). Diese Steuer wird schätzungsweise 23,2 v.H. des Gesamtsteueraufkommens 1969 des Reiches ausmachen.

Die wichtigsten direkten Steuern sind die Einkommensteuer (inkomstenbelasting), die Lohnsteuer (loonbelasting) und die Vermögensteuer (vermogensbelasting), deren Anteil am Gesamtsteueraufkommen 1969 des Reiches zusammen etwa auf 42,3 v.H. geschätzt wird, und schließlich noch die Körperschaftsteuer (vennootschapsbelasting), deren Anteil nach Schätzungen ca. 10,2 v.H. beträgt.

II. STRUKTUR DER WICHTIGSTEN STEUERN

1. *Einkommensteuer, Vermögensteuer, Körperschaftsteuer*

Die Einkommensteuer wird von dem Gesamteinkommen des in den Niederlanden ansässigen Steuerpflichtigen und von den niederländischen Einkünften der nicht in den Niederlanden ansässigen Personen erhoben; derselbe Grundsatz gilt *mutatis mutandis* für die Vermögensteuer (vermogensbelasting – nur bei Privatpersonen) und für die Körperschaftsteuer (vennootschapsbelasting). Der Begriff des (Netto-) Einkommens wird empirisch definiert und hat keine Verbindung mit Begriffen des bürgerlichen Rechts oder der Wirtschaftswissenschaften. „Capital

gains" sind nicht steuerpflichtig, wenn sie nicht im Rahmen eines Geschäftsbetriebs erzielt wurden. Für die Zwecke der Körperschaftsteuer bedeutet das, daß alle Gewinne steuerpflichtig sind, da normalerweise alle Transaktionen, die von steuerpflichtigen juristischen Personen vorgenommen werden, sich auf die gewerblichen Einkünfte auswirken, gleichgültig, ob sie im Rahmen der normalen Geschäftstätigkeit liegen oder nicht. Es existiert jedoch eine Anzahl von Vorschriften, um die Steuerlast auf diesen Gewinnen zu mildern oder zu beseitigen und so die Kontinuität und Expansion des Unternehmens zu sichern. Im Privatsektor werden die „capital gains" nur im Falle von Aktionären besteuert, die eine sogenannte „wesentliche Beteiligung" an einer Gesellschaft haben und ihre Anteile mit einem Gewinn veräußern, auf den ein ermäßigter Steuersatz Anwendung findet.

Da das Einkommen (oder Vermögen) aus allen Ländern steuerpflichtig ist, könnte sich leicht eine Doppelbesteuerung von Einkünften (oder Vermögensbestandteilen) aus ausländischen Quellen ergeben. Um diese Doppelbesteuerung zu mildern, gewährt die Königliche Verordnung vom 7. April 1965 für bestimmte Einkünfte (Vermögensbestandteile) aus ausländischen Quellen eine einseitige Befreiung von der Einkommensteuer, der Vermögensteuer und der Körperschaftsteuer. Diese innerstaatliche Vorschrift gilt nur dann, wenn die betreffenden Einkommens- oder Vermögensbestandteile nicht in den Geltungsbereich eines bilateralen Doppelbesteuerungsabkommens fallen. Bezüglich der Methode der Vermeidung der Doppelbesteuerung verfahren jedoch die meisten Doppelbesteuerungsabkommen nach demselben Grundsatz oder beziehen sich einfach auf die Bestimmungen der einseitigen Befreiung. Die niederländische einseitige Regelung zur Vermeidung der Doppelbesteuerung ist mit der Anwendung der sogenannten *Steuerbefreiung mit Progressionsvorbehalt* verbunden, d.h. das Recht, die ausländischen Einkommens- oder Vermögensbestandteile bei der Bestimmung des Steuersatzes, mit dem das inländische Einkommen oder Vermögen zu besteuern ist, zu berücksichtigen, wurde beibehalten.

Nach den Bestimmungen der einseitigen Regelung gehören Dividenden nicht zu den spezifizierten ausländischen Einkünften, auf die die Befreiung anwendbar ist; sie werden als inländische Einkünfte betrachtet, und ausländische Steuern, die auf diese Dividenden erhoben wurden, können als *abzugsfähige Kosten* behandelt werden. In den neueren Doppelbesteuerungsabkommen jedoch wird – entsprechend dem OECD-Entwurf eines Doppelbesteuerungsabkommens – das System der Steueranrechnung angewendet. Die Befreiung der Gewinne aus einer Beteiligung (Dividenden und ab 1970 auch „capital gains") von der Körperschaftsteuer (deelnemingsvrijstelling) stellt jedoch keine Methode zur Vermeidung der internationalen Doppelbesteuerung dar. Zweck dieser Freistellung ist es, die Doppelbesteuerung der Gewinne von Muttergesellschaften und Tochtergesellschaften zu vermeiden. Demgemäß gilt die Freistellung nicht nur für Gewinne aus einer Beteiligung an einer ansässigen Gesellschaft, sondern auch für Gewinne aus einer Beteiligung an einer nichtansässigen Gesellschaft. Dieser Zweck muß hervorgehoben werden, damit eine klare Vorstellung von der Befreiung herrscht.

2. *Mehrwertsteuer*

Die am 1. Januar 1969 eingeführte Mehrwertsteuer (belasting over de toegevoegde waarde) wird auf rein *territorialer Basis* berechnet. Es erfolgt keine endgültige Besteuerung, wenn der wirtschaftliche Verbrauch nicht in den Niederlanden stattfindet.

Steuersätze
Für sämtliche Sätze der Einkommensteuer und der Vermögensteuer siehe Supplementary Service to European Taxation, Abschnitt B, eine Veröffentlichung des Internationalen Steuerdokumentationsbüros; die Sätze der Körperschaftsteuer und der MWS sind in Abschnitt A derselben Veröffentlichung enthalten.

III. DIE STRUKTUR DER ÜBRIGEN STEUERN IN KURZEN UMRISSEN

1. *Quellensteuern*

a) Die Lohnsteuer (loonbelasting) ist eine Quellensteuer auf Löhne und Gehälter, die der Einkommensteuer unterliegen. In einigen Fällen ist sie eine endgültige Steuer, aber sie ist keine selbständige Steuerart.

b) Die Dividendensteuer (dividendbelasting) wird erhoben auf alle Dividenden, die ansässige Gesellschaften (corporations) an ansässige und nicht-ansässige Personen in den Niederlanden ausschütten. Der von ansässigen Steuerpflichtigen erhobene Steuerbetrag wird als eine Vorauszahlung von Einkommen- oder Körperschaftsteuer behandelt. Der von nicht-ansässigen Steuerpflichtigen entrichtete Steuerbetrag wird in den meisten Fällen als endgültige Steuer behandelt. Satz: 25 v.H.

c) Die Quellensteuer auf Vergütungen aus einem Aufsichtsratsposten in einer Gesellschaft (commissarissenbelasting) wird ab 1. Januar 1970 abgeschafft.

d) Eine Quellensteuer auf Zinsen oder Lizenzgebühren existiert nicht.

2. *Erbschaft- und Schenkungsteuer*

Erbschaft- und Schenkungsteuer (successie- en schenkingsbelasting) wird auf alle durch Erbschaft oder Schenkung übertragenen Vermögenswerte erhoben, wenn der Erblasser oder Schenker in den Niederlanden ansässig war bzw. ist, ohne Rücksicht darauf, ob der Erbe oder Empfänger der Schenkung in den Niederlanden ansässig ist oder nicht (progressive Sätze). Wenn der Erblasser oder Schenker keine in den Niederlanden ansässige Person war bzw. ist, beschränkt sich die Besteuerung auf in den Niederlanden belegenes unbewegliches Vermögen und eine begrenzte Anzahl von anderen in den Niederlanden befindlichen Vermögenswerten (Satz: 6 v.H.).

3. *Lotteriesteuer*

Die Lotteriesteuer (kansspelbelasting) wird erhoben auf Gewinne aus inländischen Lotterielosen und im Falle von in den Niederlanden ansässigen Personen auch auf Gewinne aus ausländischen Lotterielosen. Auf privater Ebene hat die Steuer endgültigen Charakter, während sie auf betrieblicher Ebene auf die Einkommen- oder Körperschaftsteuer angerechnet werden kann. Eine Vorschrift der einseitigen Befreiung ist auf die Lotteriesteuer anwendbar: siehe Art. 8 der Verordnung vom 7. April 1965 (Steuersatz: 15 v.H.).

4. *Registerabgaben*

Registerabgaben (registratierechten) werden auf bestimmte Rechtsakte erhoben. Die Eintragungen müssen von einem Beamten vorgenommen werden, und für die Eintragung muß eine Abgabe entrichtet werden, z.B. bei der Übertragung von unbeweglichen Gütern (Satz: 5 v.H.) und bei der Ausgabe von Aktien durch Gesellschaften (corporations) (Satz: 2,5 v.H.).

5. *Stempelsteuer*

Stempelsteuern (zegelrechten) sind zu entrichten für eine Reihe von Urkunden, *inter alia* bei der Ausgabe von Inlandsobligationen und Schuldverschreibungen

und bei der Auflegung von bestimmten langfristigen Anleihen.

6. *Verbrauchsteuern*
Verbrauchsteuern (accijnzen) sind Steuern auf den inländischen Verbrauch von bestimmten Gütern: z.B. Bier, Spirituosen, Wein, Zucker, Tabak, Mineralöle.

7. *Verschiedene Steuern*
a. Grundsteuer (grondbelasting), zu entrichten auf Eigentum an Grundstücken und Gebäuden in den Niederlanden;
b. Kraftfahrzeugsteuer (motorrijtuigenbelasting)
c. Wohnungsteuer (personele belasting) und eine Anzahl kleinerer Kommunalsteuern.

IV. LISTE DER NIEDERLÄNDISCHEN DOPPELBESTEUERUNGSABKOMMEN AUF DEM GEBIETE DER EINKOMMENSTEUER, VERMÖGENSTEUER, UND ERBSCHAFTSTEUER

a) Einkommensteuer/Vermögensteuer

Land	*Betr.*	*Abgeschlossen am*
Belgien	Einkommen	20. Februar 1933
Dänemark	Einkommen, Vermögen	20. Februar, 1957; Ergänzungsabkommen 20. Januar 1966
Deutschland (Bundesrepublik)	Einkommen, Vermögen	16. Juni 1959
Finnland	Einkommen, Vermögen	29. März 1954; Ergänzungsabkommen 16. Dezember 1966
Frankreich	Einkommen, Vermögen	30. Dezember 1949; Ergänzungsabkommen 24. Juli 1952
Grossbritannien	Einkommen, Vermögen	31. Oktober 1967
Irland	Einkommen, Vermögen	11. Februar 1969 (noch nicht in Kraft)
Italien	Einkommen, Vermögen	24. Januar 1957
Kanada	Einkommen	2. April 1957; Ergänzungsabkommen: 28. Oktober 1959 und 3. Februar 1965
Luxemburg	Einkommen, Vermögen	8. Mai 1968 (noch nicht in Kraft)
Norwegen	Einkommen, Vermögen	22. September 1966
Schweden	Einkommen, Vermögen	12. März 1968
Schweiz	Einkommen, Vermögen	12. November 1951; Ergänzungsabkommen 22. Juni 1966
Ungarn	Einkommen, Vermögen	15. November 1938
Vereinigte Staaten von Amerika	Einkommen, Vermögen	22. September 1966

b) Erbschaftsteuer

Land	*Abgeschlossen am*
Finnland	29. März 1954
Grossbritannien	15. Oktober 1948
Schweden	25. April 1952
Schweiz	12. November 1951

A.E. DE MOOR:

INTERNATIONAL TRADE OF GOODS AND SERVICES WITH THE TVA IN OPERATION

The complete text of the Turnover Tax Act 1968 (Tax on Value Added) has been published in the Supplement to this Bulletin issue.

INTRODUCTION

It is well-known that the aim of the European Economic Community is the creation of a common market. The first step towards this aim was the forming of a Customs Union, for which it was necessary to break down the import duty barriers within the EEC. This aim has now been achieved: since July 1, 1968, import duties are no longer levied within the EEC. As import duties within the EEC were lowered and finally abolished, an increasingly strong need was felt to prevent a distortion of the conditions of competition by the levying of the turnover tax. Because most of the EEC countries did not operate a neutral system of turnover tax, there was a risk that the compensating levies at the frontiers would function as disguised import duties.

This is the reason why Section 99 of the Rome Treaty provides that the European Commission shall investigate in which way the Member States' legislations, as regards *inter alia* turnover tax, may be harmonised in the interest of the common market. After an ample investigation by the Commission, aided by two study groups, the final result is that two directives lay down that the levying of turnover tax in the EEC Member States shall take place according to the system of levying tax on the value added. This system, already adopted by France in 1954, was introduced in Western Germany on January 1, 1968 and in the Netherlands on January 1, 1969, whereas Belgium and Luxembourg will follow suit on January 1, 1970. Italy will probably not succeed in introducing the new system of turnover tax by January 1, 1970, the latest date prescribed in the directives.

The EEC has chosen the tax on value added —hereinafter referred to as "TVA"— because this tax system would make internal and external neutrality possible.

As regards internal neutrality, equality of tax burden on goods and services is achieved, even if goods and services are produced and made available along different production and distribution chains.

As regards external neutrality the TVA system enables imported goods and domestically produced goods to be taxed on the same basis, and exported goods to be exempted from the burden of turnover tax in the country where the goods were produced. With this system it is unnecessary to use "forfaitair" methods as was required with the cumulative system used until recently by the Netherlands and most of the other EEC countries.

Section 189 - 3 of the Rome Treaty provides that a directive is binding for the Member States as regards the aim to be achieved, whereas the national governments are left the choice as to the form and means of achieving that aim. Consequently the

legislation according to which the TVA is levied in the Member States is not identical. That would of course be difficult now that this legislation necessarily has connections with the national civil laws and the other parts of the fiscal laws which vary in each Member State. Furthermore the new legislation on turnover tax uses the terminology which has been current in the old legislation.

GENERAL DESCRIPTION OF THE TVA SYSTEM IN THE NETHERLANDS

Contrary to the name, the TVA in the Netherlands as well as in the other Member States is not a tax on value added (income type) but a pure consumption tax (consumption type). The directives also are based on this pure consumption tax[1]. This starting point requires that investments are not considered separate objects for taxation. However, when transferring the investment goods, TVA is charged and paid; but in principle this TVA is refunded completely and immediately to the buyer. Only during the transitional period after the introduction of the TVA system is an exception made for this, to which I will refer below.

The TVA is a net turnover tax, i.e. at each stage tax is only levied on that part of the value of the turnover that has not been taxed earlier, or has not been taxed up to the level of the rate applicable to the turnover in question. When working out this system there are in principle two possibilities, namely granting the entrepreneur the right of deduction of his outlays from his taxable sales (sales or cost-subtraction method) or granting the entrepreneur the right to deduct tax previously paid on his purchases (tax-credit method). In the EEC directives and therefore also in the Dutch legislation the system of deducting tax (tax-credit method) has been chosen, because only this method can guarantee a true functioning of the net turnover tax as consumption tax.

The method of deducting tax previously paid requires the entrepreneur to pay turnover tax on his total turnover, but it allows him to deduct the turnover tax for which he has been invoiced by other entrepreneurs. Consequently the TVA in transactions between enterprises subject to this tax is not a real burden but only an item to be passed on, since the entrepreneur charged with this turnover tax has the right to settle it immediately with his own tax liability. The amount of the rate, therefore, is of little importance in transactions between entrepreneurs, and levying the tax on these transactions normally does not represent any financing problems. Normally the tax only becomes a real burden, when goods are sold or services are rendered to consumers who are not entitled to deduction of tax previously paid, because they are not entrepreneurs. If the retail trade were not to be involved in the tax, which actually is not the case in the Netherlands, the tax is already a burden at the stage preceding the retail trade, because the retail trade is then not entitled to a deduction of tax previously paid. The real burden of tax, therefore, always exists at the ultimate stage of the TVA system. In order to achieve a neutral taxation on the prices of goods and services for consumers, it is desirable that the retail trade be involved in the levying of TVA. This does occur in France, Western Germany and the Netherlands, but very probably it will not in Italy. In the Belgian Draft Bill the retail trade is in principle considered as a tax paying entrepreneur, but in the case of the smaller retailers taxation will take place at the preceding stage.

The Dutch TVA rates are now 12% and 4%. The Act also includes a zero rate, meaning

1. See Directive One Section 2.

that no turnover tax is due on the turnover, whereas deduction of tax previously paid is allowed. This zero rate is of a technical nature, since with a few exceptions (e.g. newspapers), it does not apply to goods for national consumption, but it does apply for goods and services to be exported.

DEVIATIONS FROM THE SYSTEM

In general both the Dutch Act and the German one were drawn up according to the pure TVA theory. However, there is an important infringement of the theory, i.e. the regulation for exemptions. In the Netherlands, as in the German Act and in accordance with Directive Two (Section 11, para. 2) the tax previously paid is not refunded, if goods and services are exempted from turnover tax[2]. Cumulative effects would be created by this. The regulation for the exemptions must be distinguished from the zero rate mentioned above. With the zero rate one gets a deduction of previously paid tax, with the exemption regulation one does not. The zero rate, therefore, is theoretically more correct. This has been set up technically somewhat differently in Germany. In section 4 of the "Umsatzsteuergesetz 1967" a number of tax-free services are enumerated. Subsequently in section 15, para. 2, the right to a deduction of tax previously paid is refused except for the performances enumerated in items 1 to 5 of section 4. According to the Dutch terminology, therefore, the zero rate applies to services mentioned in section 4, items 1 to 5 and exemption applies to the other services mentioned in section 4. In the Belgian Bill exemptions with a right to a deduction —therefore comparable to the Dutch zero rate—are found in sections 39 to 43 of that Bill; in section 44 a number of exemptions are mentioned to which no deduction of tax previously paid is granted; they are therefore exemptions in the sense of the Dutch legislation. (See also the text of section 45 of the Belgian Bill).

Apart from this a deviation results from the regulation for small entrepreneurs, laid down in section 25 of the Dutch Act. This regulation provides that an entrepreneur—natural person—does not need to pay any TVA if on balance his TVA due would be *f* 1,200.—, or less, annually. If he would have to pay more than *f* 1,200.—, but less than *f* 3,000.— in tax per year, he only has to pay a part of this tax. The German Act too has a regulation for small entrepreneurs in section 19, which has been set up somewhat differently.

Furthermore the Dutch Act includes a special regulation for farmers, market gardeners, foresters and cattle breeders[3].

These entrepreneurs are by fiction of law not considered entrepreneurs, and are therefore not liable to turnover tax, but are not allowed to deduct tax previously paid. The buyers of these entrepreneurs receive a "forfaitair" deduction approximately equal to the tax previously paid on the outlays of the farmers, etc. This regulation is very similar to the regulation in section 24 of the German "Umsatzsteuergesetz" 1967 for farmers, etc., but it deviates in that farmers in the Dutch legislation are not considered entrepreneurs. This has certain consequences which we do not want to elaborate here.

Both the Dutch and the German Act create the possibility for farmers, etc., to opt for the normal application of the Act. In section 16 of the (Dutch) Act the possibility is opened up of ruling that the turnover tax on certain goods and services be not deductible. This is meant to prevent the absence of tax burden on goods and services not intended for business purposes but for private con-

2. Section 15, para. 2 of the Act.
3. Section 27 of the Act.

sumption. There is some similarity here to the "Eigenverbrauch" (private consumption) mentioned in section 1, para 1, 2c, of the "Umsatzsteuergesetz 1967"[4]. The possibility according to section 16 has been carried out in the mean time. The exclusion of the right to deduct tax previously paid is of no great importance economically but it does cause administrative problems.

TRANSITIONAL PROVISIONS FOR INVESTMENT GOODS AND STOCK

At the change from the old cumulative system to the TVA a problem existed in that under the operation of the TVA goods and services would be produced with investment goods and stock which had still been taxed according to the turnover tax. To prevent this, theoretically speaking, a refund of the old turnover tax on investment goods and stock at the time of the change-over would have to be given. This complete refund, however, was an impossibility for the Netherlands fiscal administration. But a refund was given for the greater part of the turnover tax paid on stock although the turnover tax on investment goods was not returned. On the contrary, turnover tax on investment goods imported or delivered after January 1, 1969, is not even completely deductible during the first few years. The regulation relating thereto can be found in section 45 of the Dutch Act. During the years 1969, 1970 and 1971 the tax on investment goods is only partly deductible, i.e. 30%, 60% or 90% according to whether the delivery or importation takes place in 1969, 1970 or 1971.

Note that the transitional provisions for investment goods apply to several other goods which are not investment goods: economic theory or accounting practice. It does not matter whether the goods will be normally capitalised or not. The Dutch Act uses the term "bedrijfsmiddelen". Rather than elaborate the meaning of this term here, we will use the term investment goods.

This transitional measure causes, even after the time of the change-over, a cumulative burden on goods and services produced in the Netherlands. This regulation indeed resembles in the main the transitional regulation in the German Act. In section 28 "Umsatzsteuergesetz 1967" refund of old turnover tax on stock is also provided for; in section 30 unburdening of investment goods is likewise introduced only step by step. The technical elaboration in the German Act is different from that in the Dutch Act. First a complete deduction of tax previously paid is granted, and then an investment tax is levied on the investment goods. The Belgian Bill has a transitional regulation similar to the Dutch Act. In respect of stock, restitution of transfer tax, invoice tax, luxury tax, tax on hiring out of movables and on transport is provided for in section 99 of the Bill. No refund of old turnover taxes is granted for investment goods, and section 100 of the Bill rules that tax on investment goods is only partly deductible for a period of four years after the Act comes into force.

MEANING OF THE TRANSITIONAL PROVISION FOR INVESTMENT GOODS FOR INTERNATIONAL TRADE

The introduction of the TVA has consequences for the levy on imports and for the exemption of turnover tax on exports. Previously a compensating tax was levied on goods imported into the Netherlands. This tax was assessed in such a way that imported goods would suffer about the same or a slightly lower tax burden as goods produced

4. See also Section 45, para. 2 of the Belgian Draft Bill.

in the Netherlands. The percentages to be levied on imports were assessed on a "forfaitaire" basis, so that certain differences from the tax burden on domestic products were apparent. After January 1, 1969, the same turnover tax rate applies to imports as well as to deliveries in the Netherlands, i.e. 12% or 4%. This, however, means that the burden of the Dutch turnover tax on foreign products is slightly less than that on Dutch products. This is because Dutch products suffer, apart from the 12% or 4% turnover tax levied on the delivery of the products, another turnover tax levy resulting from the transitional provision for investment goods. The turnover tax on investment goods acquired before January 1, 1969 has not been refunded and the turnover tax on investment goods purchased during the period January 1, 1969, to December 31, 1971 will be only partly refunded.

When added to the burden of the 12% or the 4% rate, this creates an extra burden estimated at 1% to 3% according to whether this extra burden is spread over a longer or a shorter period.

Before January 1, 1969, the Dutch turnover tax was refunded on exports. This refund was also made according to a "forfaitair" method, so that the refund was sometimes too large but in many cases too small. After January 1, 1969, exported goods are exempt from turnover tax, because the zero rate applies to them. This, however, does not mean that these exported goods no longer suffer any Dutch turnover tax. The transitional provision for investment goods again puts an extra burden on these exported goods, because the cost price of the exported goods includes the turnover tax on investment goods, which will also amount to 1% to 3% of the price of the product. The same situation also exists regarding imports to and exports from Germany and will occur in the near future regarding imports to and exports from Belgium; this is caused by the similar transitional provisions for investment goods in those countries.

It is therefore certainly misleading to say that the introduction of the TVA system by a country having such a transitional provision would mean a disguised devaluation, against which other countries would have to take counter measures. In fact, in the first few years after the change to the TVA system exports are normally not exempted from national turnover tax any more than was the case under the cumulative system. If one could indeed speak of a disguised devaluation, it would only be a devaluation of a few percentage points, spread over a relatively large number of years, i.e. the number of years that the transitional provision for investment goods still has an influence on the cost price of exported goods.

CONCEPT OF ENTREPRENEUR

In principle, everyone who is independently practising a trade or profession is an entrepreneur in the sense of Dutch legislation[5]. The legal form is of no importance. The entrepreneur may be a natural person, a legal person as well as a combination of natural persons or legal persons who operate as a unit in business without this combination having been put into a specific legal form. Neither nationality nor place of establishment is of any importance. The trade or profession may be exercised outside the Netherlands. This world-wide concept of entrepreneur is of significance for the levy of turnover tax as well as for the deduction of tax charged to the entrepreneur. If a foreign entrepreneur performs a delivery or renders a service in the Netherlands, the performance is taxable in principle, although

5. Section 7, para. 1 of the Act.

in many cases the tax will not be levied upon the foreign entrepreneur but upon the buyer of the good or service. On the other hand, if Dutch turnover tax is charged to a foreign entrepreneur, he can claim a tax refund from the Dutch revenue authorities. This will be treated in greater detail in one of the following sections of this article.

THE PLACE OF THE DELIVERY OF A GOOD OR THE RENDERING OF A SERVICE ACCORDING TO DUTCH LEGISLATION

Whether the delivery of a good or the rendering of a service is subject to Dutch turnover tax turns on the question of where the good is delivered or the service is rendered. Deliveries of goods and the rendering of services are taxable only when performed in the Netherlands by entrepreneurs within the scope of their enterprises[6]. In addition, there is one more taxable event, i.e. the importation of goods, which will be dealt with below.

The place where a delivery is made is:
a. in case the good is transported in connection with the delivery, the place where transportation begins; and
b. in other cases the place where the good is located at the moment of delivery[7].

This determination of the place of delivery is made in accordance with Directive Two (section 5, para. 4): the German "Umsatzsteuergesetz 1967" (section 3, para. 6 and 7) similarly defines the place of delivery. The regulation varies somewhat in Belgium, because the Belgian Bill first determines the moment of delivery (section 15) and subsequently (section 16) the place of delivery is then deduced from the place where the good was located at the moment of delivery.

If goods are imported into the Netherlands, the delivery by the foreigner therefore always takes place abroad, irrespective of the delivery conditions laid down in the agreement, unless the goods are first imported and a buyer is only found later. In the contrary case (where goods from the Netherlands are delivered to a foreign country) the place of delivery is therefore always in the Netherlands. In Germany this situation has been regulated in the same way.

The place of the rendering of the service in the Dutch Act has been regulated differently from the place of the rendering of the service as described in Directive Two. In section 6, para. 3 of Directive Two the place where the service is used is considered to be the place of the rendering of the service.

In the Dutch legislation (section 6, para. 2) the place where the service is rendered is in principle linked with the place where the renderer of the service lives or is established or the place where the buyer of the service lives or is established. In the case of transportation services, however, the place where the actual act of transportation is performed is designated as the place of the service. Further details are to be found in the text of section 6, para. 2, in the Supplement to this issue.

The description of the place of the service as set out in the Dutch legislation does not imply that all services which are performed in the Netherlands according to this definition are thus charged with Dutch turnover tax. In certain cases (exportation of services) corrections are made by using the zero rate.

In the German legislation, a third criterion is used for the place of the rendering of a service. The place of the rendering of a service is linked to the place where the performer of the service mainly carries out his activities (section 3, para. 10). In the case of transportation, however, the place of the

6. Section 1 of the Act.
7. Section 6, para. 1 of the Act.

service is, in the same way as in the Dutch legislation, linked to the place where the transport actually takes place. In the German legislation there are, in addition, provisions to the effect that, in the case where the place of the rendering of the service is in Germany, the TVA is not always levied. In section 4, item. 3, UStG 1967, certain services rendered to foreign clients, further defined in section 8 are brought within the exemption with a refund of tax previously paid.

The Belgian Bill (section 21) considers the place where the service is used as the place of the rendering of the service. Subject to evidence to the contrary, the service is presumed to have been used in Belgium, if one of the contracting parties is established in Belgium. The regulation for transportation services is the same as that in the Netherlands and Germany.

To avoid double taxation or no taxation at all on services, a harmonisation of the EEC countries laws in terms of the place ot the service would seem to be necessary.

GOODS DELIVERED OR SERVICES RENDERED BY FOREIGN ENTREPRENEURS

Because of the definition of the place of delivery, the place will probably always be abroad as regards imported goods, so that a foreign entrepreneur sending goods to the Netherlands would not perform a taxable delivery. But the foreigner may perform a taxable delivery if he first imports goods and then sells from stock. It will happen more frequently that foreigners perform services in the Netherlands. This does not mean that the foreigner who delivers a good or renders a service in the Netherlands has to pay TVA. Section 12 of the Act provides that the entrepreneur delivering a good or rendering a service while he does not live in or is not established within the Kingdom and has no permanent establishment there, is not required to pay turnover tax himself if the buyer of the good delivered or service rendered is an entrepreneur living or established within the Kingdom, or is an entity in the sense of the General Act on Taxes imposed by the Central Government[8] established within the Kingdom. In these cases, the tax on the delivery or service is levied upon the buyer. If, however, the above-mentioned foreign entrepreneur delivers a good or renders a service to, for instance, a private person, the turnover tax must be paid by the foreign entrepreneur.

GOODS DELIVERED OR SERVICES RENDERED TO FOREIGN ENTREPRENEURS

It often occurs that turnover tax is charged to a foreign entrepreneur on goods delivered or services rendered to him in the Netherlands, while he himself has rendered no performances within the country. This would, for instance, occur if a foreign entrepreneur who advertises, incurs travelling and hotel expenses, seeks advice, etc., in the Netherlands, sends the goods sold by him to the Dutch buyer from abroad. The place of the delivery is then abroad, so that he is not liable to pay TVA on his sales. The advertising agency, the hotel at which he stays, etc., do, however, charge him TVA. He can claim a refund of this TVA from the Dutch tax administration. The Act imposes no special restrictions regarding foreign entrepreneurs. The German Act (section 15, para 1) grants the right to a refund only to the entrepreneur who delivers goods or renders services or who has a place of establishment or a per-

8. Entities in the sense of the General Act on Taxes Imposed by the Central Government may include: legal persons, partnerships, firms and companies, other associations of persons, enterprises of public legal entities and holdings (see Section 2 of the General Act; Algemene wet inzake rijksbelastingen).

manent establishment in Germany. In the Belgian Bill (section 45) too the right to a refund of turnover tax previously paid is granted only to the foreign entrepreneur who delivers goods and renders services in Belgium. The foreign entrepreneur will probably also have to appoint a responsible representative, if the former has no permanent establishment in Belgium (Bill, section 55). The French legilations also requires a fiscal representative of the foreign entrepreneur in order to obtain a refund of turnover tax. All of these requirements are not imposed in the Netherlands. Nevertheless it is not very easy to obtain the refund in practice.

PROCEDURE TO BE FOLLOWED WHEN APPLYING FOR A REFUND

Although the Dutch Act in principle imposes no restrictions on the refunding of turnover tax to foreigners, there are some administrative complications in practice because the Dutch revenue department is only prepared to grant a refund if there exists a right to it in accordance with the legislative regulations.

If a foreign entrepreneur has a permanent establishment in the Netherlands, he comes within the jurisdiction of the Inspector of Customs and Excises in whose district the permanent establishment is located. In these cases the foreign entrepreneur will usually also deliver goods or render services in the Netherlands and in that case the same procedure applies to him as to a Dutch entrepreneur. If a foreigner has no permanent establishment, he usually falls within the jurisdiction of the Inspector of Customs and Excises in The Hague, Waldorpstraat 440. The foreign entrepreneur who has no permanent establishment will have to make a declaration to this Inspector of the turnover tax due if he carries out activities in the Netherlands which are subject to turnover tax (e.g. delivery of goods to private persons). If he is not liable to pay any turnover tax, he may apply to the same Inspector for a refund of the TVA charged to him. If he applies to the Inspector, the latter will send him a form on which the refund must be claimed. The refund will normally be applied for quarterly, but if large amounts are involved an application may be made monthly.

The original invoices (on which the TVA has been charged separately) must be produced with the application; these invoices will be returned to the foreign entrepreneur. Moreover, the foreign entrepreneur has to elect domicile in the Netherlands[9]. This may be a post office box number, but may also be, for instance, the address of a bank. Finally the foreigner will have to give a postal account number or a bank account number to which the refund can be transferred.

A representative living in the Netherlands, who is authorized to file the applications for a refund and to collect the refund, may be appointed. Unlike the situation existing in other countries one is not obliged to appoint such a representative. If a claim is made to the Inspector, he may ask for some facts to be substantiated:

a. If a refund is applied for by a foreigner, he will have to satisfy the Inspector that he is an entrepreneur, since non-entrepreneurs are not entitled to a refund of turnover tax. This rule applies to Dutchmen as well as to foreigners. The status of entrepreneur can be demonstrated to the Inspector in various ways. If the application is made by a well-known entity, the Inspector will probably certify quite easily the applicant as an entrepreneur. If, however, the entrepreneur's name is not internationally known, the In-

9. See section 57 of the General Act on Taxes Imposed by the Central Government.

spector may ask for further details. To give an example, the Inspector cannot easily judge whether a foreigner who presents himself as an adviser in fiscal matters really exercises that profession. The Inspector may then ask for example that a certificate of registration in the Trade Register be produced.
b. It will have to be proved to the Inspector that the foreign entrepreneur carries out activities which would be taxable in the Netherlands if they were accomplished there. As set out above, certain performances in the Netherlands are exempt. No TVA will be paid on this turnover, but the entrepreneur is not allowed a deduction of tax charged to him. Consequently there is no reason to give a refund of tax charged to the foreign entrepreneur who carries out activities which are exempt according to the Dutch legislation. For example: the service of insurance is exempt in the Netherlands, i.e. insurance companies are not liable to turnover tax on this service: but they do not receive a refund of tax charged to them. Foreign entrepreneurs entering into insurance agreements therefore receive no refund for tax charged to them.
The problem becomes complicated if entrepreneurs carry out both exempt and taxable performances, such as those carried out by banks. Certain services by banks are taxed; others, such as granting credits are exempt. Such entrepreneurs are refunded only a proportion of the tax charged to them. We do not with to go into the details of this complicated calculation at length. If the TVA is charged to a foreign bank in the Netherlands, it may no receive a refund of this TVA at all, or it may receive a total refund or a partial one. This depends upon whether the activities on which the TVA was charged were used to accomplish exempt activities, taxable ones or both types of activity. Needless to say, foreign entrepreneurs accomplishing activities partly taxed and partly exempt according to Dutch legislation will be faced with complicated situations if they wish to claim a refund of Dutch turnover tax. Fortunately, comparatively few activities are exempt in the Dutch legislation, and only a few of these performances are of importance to the international trade of goods and services (See the enumeration in section 11 of the Act in the Supplement to this publication)
c. Finally, the Inspector may also ask that it be proved that tax, the refund of which is claimed, has been paid for goods and services within the scope of the enterprise. An entrepreneur on a business trip in the Netherlands, having been charged the TVA on his hotel bill, can claim a refund of the TVA paid. But if the businessman is on holiday in the Netherlands, he cannot claim a refund of the TVA charged to him. The Inspector can therefore ask for evidence that the expenses have been incurred on behalf of and for the account of the enterprise. Whether further details are required depends on the nature of the performance. If the foreign entrepreneur has incurred advertising costs or obtained advice in the Netherlands, the Inspector may easily certify that these were business expenses. If only travelling and hotel expenses have been charged, the Inspector may inquire into the purpose of the trip.[10]

IMPORTATION OF GOODS

The importation of goods is a separate

10. The participants of the IFA congress have no claims for a refund of TVA on registration fees. In order to avoid administrative complications, in this particular situation, the fiscal authorities have ruled that no TVA will be invoiced. The TVA that is payable on balance will be settled with the fiscal authorities by the Dutch branch of the IFA.

taxable transaction[11]. In principle, the turnover tax on imported goods is due at importation. But the Dutch legislation offers (section 23) the possibility of postponing this levy in certain cases (the so-called shifting of the levy when importing). The tax is in this case due only at the time when it may be deducted again, so that on balance nothing will be paid.

Section 23 is applicable in two cases:

1. With respect to goods enumerated in Annex A to the Turnover Tax of 1968 Implementation Order, the levy on imports is always postponed if the goods are imported by entrepreneurs or entities in the General Act on Taxes imposed by the Government. The goods enumerated in the list are unsuitable for consumption by private persons, so that postponing the levy does not involve the risk that tax will be evaded. If foreign entrepreneurs import the goods mentioned in Annex A, the levy of turnover tax is postponed in these cases as well.

2. There is a possibility that entrepreneurs (and entities in the sense of the General Act on Taxes imposed by the Central Government, who as they are not entrepreneurs) may be designated for postponement of the levy on imports, even if the goods are not included in Annex A. This designation will only be granted to entrepreneurs etc. who carry on an administration in the Netherlands. Foreign entrepreneurs having no permanent establishment in this country can therefore not be designated.

If goods are imported and are at the moment already destined for a particular Dutch buyer, a shift may take place, if the Dutch entrepreneur has been designated to apply for a shifting of the levy. Settlement of the turnover tax will then take place, because the Dutch buyer will at that given moment be liable to pay the tax due in respect of importation, but will, at the same moment, be allowed to deduct the tax again.

As far as we know this shifting of the levy is unique in the EEC. Apparently, Belgium too considers as a shifting of the levy the case of imports into Belgium from the Netherlands. Under the old turnover tax legislation the Netherlands and Belgium already had a system whereby the levy of turnover tax on imports was shifted to the buyer.

If no shifting takes place, the tax must be paid immediately or in the short term.

If a foreign entrepreneur imports goods, there are two possibilities:

a. the goods are imported into the Netherlands and then sold by the foreign entrepreneur from stock. The foreign entrepreneur himself may then claim a refund of the turnover tax paid at importation. Normally the foreign entrepreneur will have a permanent establishment, so that he is liable to pay turnover tax on delivery of the goods. If he has no permanent establishment, he will be entitled to claim a refund from the Inspector in The Hague. But he may owe turnover tax on certain deliveries of goods to, for instance, private persons. As mentioned above, the rule that the buyer must pay the turnover tax on deliveries by a foreign entrepreneur does not apply to deliveries to private persons.

b. It will be more usual that goods imported from abroad are already destined for a Dutch buyer. This Dutch buyer may then claim a refund of the tax paid at importation. If the tax at importation has been paid by the foreign entrepreneur, he will of course charge the tax to the Dutch buyer, who can claim the refund of the tax from the tax authorities.

EXPORTATION OF GOODS

If goods are exported by an entrepreneur,

11. See section 1 of the Act.

the zero rate applies. Because the exporting entrepreneur has a right to deduction of previously paid tax for his purchases, the goods suffer no tax, since no tax is levied on their exportation. In this case there will always be a delivery of the goods which are exported. If there is no delivery of goods (for example when a Dutch entrepreneur sends goods to a branch abroad) there is no taxable event and a zero rate is not required.
The zero rate is included in List II-a-2 appended to the Act. As mentioned above, application of the zero rate does not prevent a residual turnover tax being hidden in the price of the goods, imposed by the transitional provision for business assets.

SERVICES RENDERED INTERNATIONALLY

According to the Dutch Act international transport of goods for import or export comes under the zero rate. International transport of persons also falls under the zero rate, provided such transport is effected by means of seagoing vessels or aircraft. These services subject to the zero rate are included in List II-b-1, 2 and 3. Moreover, the zero rate covers the service of rendering mediation in the conclusion of agreements, if the person to whom the service is rendered does not live, nor is established, within the Kingdom and has no permanent establishment there (See List II-b-4). Finally, the zero rate covers services, the payment of which is charged to a person neither living nor established within the Kingdom and having no permanent establishment there, provided he or someone to whom the service is rendered does not have the benefit of this service within the Kingdom (see List II-b-5).

INWARD AND OUTWARD PROCESSING

The new Act on turnover tax in the Netherlands does not grant exemptions to inward processing. It is not necessary, because as a result of the system of deduction of previously paid tax, the turnover tax paid at importation in the Netherlands is refunded automatically.
Contract processing will be considered (also in cases where it might be called manufacture of goods) as a service rendered on behalf of the foreign client, so that according to List II-b-5 the zero rate applies. In the case where the improved products are sold wholly or partly in the Netherlands, the foreign client performs a delivery relating to these goods, on which delivery the buyer will be subject to tax according to section 12, para. 2 of the Act. The part of the service relating to the goods sold in this country after processing may also be subject to the zero rate. As a result, the foreign entrepreneur can stay completely outside of the scope of the levy.
Generally speaking the Dutch Act does not grant exemptions to outward processing. Only when goods are exported, repaired abroad and reimported will an exemption be granted.

TEMPORARY IMPORTATION OF INVESTMENT GOODS

The Tariff Order, 1960 includes certain exemptions of import duties in the case of temporary importation which exemptions have also been declared applicable to the turnover tax. In section 53 of the Decree on Exemptions, Tariff Order 1960, a long list of goods is enumerated which are granted exemption from import duty and turnover tax in the case of temporary importation. These goods also include several that are considered as investment goods: for instance material required by artists, theatrical companies and orchestras; goods required by businessmen, by experts in the field of organisation and working methods, etc.; goods required by experts in charge of

topographical surveys; and machinery, apparatus, implements, etc., which are imported in order to be sampled or tested for definite purchase, etc. In all of these cases exemption from import duties and turnover tax is granted, since the goods will be re-exported from the Netherlands after a comparatively short time. It sometimes happens that the exemption provided for in section 53 of the Decree on Exemptions, Tariff Order 1960, is not applicable, although the goods will only remain a short time in the Netherlands, so that the absence of an exemption would result in an extremely heavy turnover tax burden. This burden arises when investment goods are imported in the transitional period during which the turnover tax on investment goods is not wholly deductible. If it concerns material from abroad (cranes, bulldozers, drilling plant, etc.) which is employed in works that are being carried out in this country, turnover tax is levied completely at importation (and will only be partly deductible in the transitional period), but at re-exportation a partial refund of that part of the turnover tax which could not be deducted completely after importation is granted.[12]

TEMPORARY EXPORTATION OF INVESTMENT GOODS

If investment goods are exported (e.g. in order to be repaired) an exemption from turnover tax (according to the Tariff Order) is applicable at reimportation. Tax will then only be levied on, roughly speaking, the cost of repairs. This tax levied at importation is always wholly deductible. If, however, the repairs abroad were so extensive that the goods could be said to have been manufactured anew, a new levy will follow, based on section 3, para. 1-h of the Act. In this case that investment goods are deemed to be manufactured abroad on the instructions of the Dutch entrepreneur who supplies material for this purpose. Turnover tax will then be paid by the Dutch entrepreneur on the total value of the investment goods. If, however, the materials which have been supplied, have already been used by the Dutch entrepreneur (for example when this entrepreneur sends old machinery which he has used to be renewed abroad) the total value need not include the value of the supplied materials (the used machinery). Actually, the tax payable on the basis of section 3, para. 1-h will then be calculated on the cost of repairs + the transportation costs. This tax is only partly deductible during the transitional period.

If the repairs abroad were not so far-reaching as to constitute a manufacture, but could be considered as the rendering of a service the tax paid at importation would be wholly deductible and no new levy would follow.

12. See departmental order of May 19, 1969, nr. D69/1781, OB-BTW 122.

A.E. DE MOOR:

LES ECHANGES INTERNATIONAUX DE BIENS ET SERVICES ET LA T.V.A. EN VIGUEUR

Le texte complet de la loi relative à la taxe sur le chiffre d'affaires 1968 (taxe sur la valeur ajoutée) a été publié dans le Supplément de ce numéro du Bulletin.

I. INTRODUCTION

Il est bien connu que l'objectif de la Communauté Européenne est la création d'un marché commun. La première mesure prise dans ce sens fut la création d'une Union Douanière qui nécessita la disparition des droits de douane à l'intérieur de la C.E.E. Ce but a maintenant été atteint: depuis le 1er juillet 1968 les droits de douane ne sont plus perçus dans la C.E.E. Alors que ces droits étaient abaissés pour finalement être supprimés, il devint de plus en plus pressant d'empêcher que le jeu de la concurrence soit faussé par la perception de Taxes sur le chiffre d'Affaires. Du fait que la plupart des pays de la C.E.E. n'appliquaient pas un système neutre de Taxes sur le chiffre d'Affaires, les droits de compensation perçus aux frontières risquaient en effet de fonctionner comme des droits de douane.

C'est la raison pour laquelle l'article 99 du Traité de Rome recommande à la Commission Européenne de rechercher de quelle façon les législations des Etats membres, en ce qui concerne les Taxes sur le chiffre d'Affaires, pourraient être harmonisées dans l'intérêt du marché commun. Après une étude exhaustive entreprise par la Commission, aidée de deux groupes d'études, la conclusion émise dans deux Directives fut que la perception des Taxes sur le Chiffre d'Affaires dans les Etats membres de la C.E.E. devrait s'insérer dans le système de perception de Taxes sur la Valeur Ajoutée. Ce système déjà adopté par la France en 1954, fut introduit en République Fédérale Allemande le 1er janvier 1968, aux Pays-Bas le 1er janvier 1969, et le sera en Belgique et au Luxembourg à partir du 1er janvier 1970. Il est peu probable, que l'Italie réussisse à l'introduire également à cette dernière date limite, prescrite dans les directives de la Commission.

La C.E.E. a choisi la Taxe sur la Valeur Ajoutée –T.V.A.– car ce système de perception devrait rendre possible une neutralité interne et externe.

La neutralité interne: l'Egalité de pression fiscale sur les biens et services est atteinte, même dans le cas où ces biens et services sont produits et rendus disponibles aux termes de chaînes de production et de distribution différentes.

La neutralité externe: la T.V.A. permet, d'une part, une égalité d'imposition entre les biens importés et les biens nationaux, et rend possible d'autre part, l'exonération de Taxes sur le chiffre d'Affaires de ces produits dans le pays d'origine.

Il devient ainsi inutile d'utiliser des méthodes «forfaitaires» que le systéme de Taxes en cascade utilisé encore récemment par les Pays-Bas et la plupart des autres pays de la C.E.E. rendait nécessaire.

L'article 189 – § 3 du Traité de Rome impose aux Etats membres un objectif commun,

mais laisse aux différents gouvernements la liberté de choisir la forme et les moyens de l'atteindre. C'est pourquoi les législations en matière de T.V.A. ne sont pas harmonisées. Cela serait évidemment difficile à réaliser maintenant, car ces législations ont nécessairement des liens avec les lois civiles et les autres catégories de lois fiscales qui varient d'un pays membre à un autre. Bien plus, les nouveaux textes utilisent la terminologie courante des anciennes législations.

DESCRIPTION GENERALE DU SYSTEME DE T.V.A. AUX PAYS-BAS

Contrairement à son nom, la T.V.A. aussi bien en Hollande que dans les autres états membres n'est pas une Taxe sur la Valeur Ajoutée (catégorie revenu) mais un simple impôt sur la consommation (catégorie consommation). Les Directives s'inspirent également de l'existence de ce simple impôt sur la consommation[1]. Ce premier point exige que les investissements ne soient pas soumis à une imposition distincte. La T.V.A. est imposée et payée lorsque les moyens d'investissement sont échangés, mais en principe cette T.V.A. est totalement et immédiatement remboursée à l'acquéreur. Une exception à ce principe à laquelle je me référerai plus loin est faite pendant la période de transition après l'introduction de la T.V.A. La T.V.A. est une Taxe sur le chiffre d'Affaires nette, c'est-à-dire qu'à chaque étape la Taxe n'est perçue que sur le chiffre d'Affaires qui n'a pas été imposé en amont, ou lorsque le taux d'imposition n'a pas encore atteint le taux appliquable au chiffre d'Affaires en question. De l'application de ce principe se dégagent théoriquement deux possibilités – ou bien l'on accorde à l'entrepreneur un droit à déduction sur le chiffre d'Affaires précédemment réalisé, ou bien l'on permet à cet entrepreneur de déduire la Taxe déjà acquittée. –

Le système de déduction de la Taxe payée en amont a été choisi dans les Directives de la C.E.E. et pour cette raison par les Pays-Bas, car seule cette méthode peut garantir l'emploi de la Taxe sur le chiffre d'Affaires nette comme un impôt sur la consommation. – Cette méthode oblige l'entrepreneur à acquitter la Taxe sur son chiffre d'Affaires total, mais elle l'autorise à déduire celle que lui ont facturée les autres entrepreneurs. En conséquence le système de T.V.A. perçue lors des échanges entre les entreprises qui y sont assujetties ne représente pas une charge réelle, mais seulement un moyen de la transmettre. En effet, l'entrepreneur supportant cette Taxe sur le chiffre d'Affaires a la possibilité de l'imputer immédiatement sur le montant de sa propre contribution. Ainsi le taux de cet impôt n'est pas très important dans les échanges entre les entrepreneurs et la charge résultant de sa perception ne pose normalement aucun problème financier.

La Taxe devient réellement une charge lorsque les biens sont vendus ou les services rendus à des utilisateurs qui ne peuvent pas déduire la Taxe payée en amont car ils ne sont pas entrepreneurs. Lorsque le commerce de détail n'est pas soumis à la Taxe, ce qui, en fait, n'est pas le cas aux Pays-Bas, celle-ci devient déjà une charge au niveau qui précède ce commerce de détail, car celui-ci n'a pas la possibilité de déduire la Taxe payée en amont.

La pression réelle de cette taxe se fait ainsi toujours sentir au dernier stade du système d'application de la T.V.A. Afin de permettre une imposition neutre sur les prix des biens et services vendus ou rendus aux utilisateurs, il est souhaitable que la T.V.A. soit étendue

1. Se reporter à l'article 2 de la deuxième Directive.

au commerce de détail. C'est ce qui a été fait en France, en République Fédérale allemande et aux Pays-Bas, mais ne le sera très probablement pas en Italie. Dans le Projet de loi belge, le commerce de détail est en principe considéré comme un entrepreneur assujetti, mais dans le cas des plus petits détaillants l'imposition interviendra au stade précédent.

Les taux de T.V.A. hollandaise sont actuellement de 12 et 4%. La loi prévoit également un taux zéro, qui signifie qu'aucune Taxe n'est due, alors que la déduction reste permise. Ce taux zéro est de nature technique. En effet à quelques exceptions près (la Presse) il ne s'applique pas aux biens produits aux Pays-Bas, mais seulement aux biens et services exportés.

LES DEROGATIONS

D'une façon générale, tant la loi hollandaise que la loi allemande durent se rapprocher de la pure théorie de la T.V.A. Il existe toutefois une importante entorse faite à cette théorie: la réglementation des exonérations. Selon la loi allemande et la Directive numéro deux (article 11 – § 2) la Taxe payée en amont n'est pas remboursée lorsque les opérations sont exonérées de Taxe sur le chiffre d'Affaires[2] Un effet cumulatif en résulterait. La réglementation des exonérations doit être distinguée du taux zéro mentionné plus haut. En effet la taux zéro permet la déduction de la Taxe payée en amont alors que l'exonération ne l'autorise pas. Le taux zéro est donc théoriquement plus correct. L'application technique a été quelque peu différente en Allemagne – au § 4 de l'«Umsatzsteuergesetz, 1967», un certain nombre d'opérations exemptes d'impôt sont énumérées. En conséquence, aux termes de l'article 15 – § 2, le droit à déduction de la Taxe payée en amont est refusé sauf pour les opérations énumérées dans les alinéas 1 à 5 inclus du § 4. Donc, selon la terminologie hollandaise, le taux zéro s'applique aux opérations mentionnées au § 4 alinéas 1 à 5 inclus, les exonérations s'appliquant aux autres opérations mentionnées dans ce paragraphe. Dans le projet de loi belge on peut trouver des exemptions ouvrant droit à déduction – donc comparables au taux zéro hollandais – dans les articles 39 à 45 inclus. Un certain nombre d'exemptions ne donnant pas droit à déduction de la Taxe payée en amont sont énumérées à l'article 44. Il existe donc des exemptions au sens de la législation hollandaise. Voir également le texte de l'article 45 de la loi belge.

En dehors de ce qui vient d'être exposé ci-dessus une dérogation est prévue par la réglementation pour les petits entrepreneurs, à l'article 25 de la loi hollandaise. La législation prévoit en effet qu'un entrepreneur, personne physique, ne paye aucune T.V.A. si le solde débiteur de sa T.V.A. est inférieur ou égal à 1.200 Fl dans l'année. Si ce solde est compris entre 1.200 et 3.000 Fl, seule une partie de cette Taxe est due. La loi allemande a également prévu, quoique différemment, certaines dispositions à l'égard des petits entrepreneurs (§ 19).

De plus, la législation hollandaise prévoit certaines dispositions en faveur des agriculteurs, des exploitants de jardins maraîchers, des horticulteurs, des sylviculteurs et des éleveurs de bétail.[3]

En effet, ces entrepreneurs ne sont pas, par une fiction de la loi, considérés comme tels et ne sont donc pas redevables de la Taxe sur le chiffre d'Affaires, mais ils ne peuvent déduire la Taxe payée en amont. Les utilisateurs de produits agricoles etc. bénéficient d'une déduction «forfaitaire» de la Taxe payée sur ces produits. Cette réglementation

2. Article 15, paragraphe 2 de la Loi.
3. Article 27 de la Loi.

est très semblable à celle prévue à l'article 24 de l'«Umsatzsteuergesetz 1967» allemand pour les agriculteurs etc. Mais elle diffère également en ce sens que la législation hollandaise n'assimile pas les agriculteurs à des entrepreneurs. Les conséquences de ces dispositions ne seront pas approfondies ici.
Les législations hollandaises et allemandes donnent toutes les deux la possibilité aux agriculteurs etc., d'opter pour l'application normale de la loi. Cette possibilité est ouverte par l'article 16 de la loi hollandaise aux termes duquel la Taxe sur le chiffre d'Affaires due sur certains biens et services n'est pas déductible. Ceci a pour objet d'éviter l'absence de pression fiscale sur les biens et services qui ne sont pas destinés au commerce mais plutôt à la consommation privée. On trouve ici quelque similitude avec le «Eigenverbrauch» (consommation privée) mentionnée à l'article 1 paragraphe 1, 2c de l'Umsatzsteuergesetz 1967[4]. La possibilité prévue à l'article 16 a été mise à exécution relativement rapidement. L'exclusion du droit à déduction de la Taxe payée en amont n'a pas une grande importance économique mais elle pose à l'Administration de réels problèmes.

LES MESURES TRANSITOIRES A L'EGARD DES BIENS D'INVESTISSEMENT

Lors du passage de l'ancien système cumulatif vers la T.V.A. un problème apparu concernant les opérations assujetties à la T.V.A. biens et services produits, ou rendus, à l'aide des biens d'investissement et des stocks qui avaient été soumis à l'ancienne Taxe sur le chiffre d'Affaires. Afin d'éviter cet inconvénient, la Taxe sur le chiffre d'Affaires aurait dû être théoriquement remboursée. Toutefois l'Administration fiscale hollandaise était dans l'impossibilité de faire ces remboursements. La Taxe sur le chiffre d'Affaires payée sur les stocks fut cependant en grande partie remboursée. Celle payée sur les biens d'investissement ne le fut pas. Bien au contraire, la Taxe sur les chiffres d'Affaires payée sur les biens importés ou livrés après le 1er janvier 1969 n'est même pas complètement déductible pendant les premières années. L'article 45 de la loi hollandaise contient des dispositions à cet égard. En 1969-1970- et 1971, la Taxe payée sur les biens d'investissement ne sera déductible qu'en partie: 30%, 60% ou 90% selon que les biens seront importés ou livrés en 1969, 1970 ou 1971.
Ces dispositions transitoires ont pour effet, même après la période de changement, de créer une pression cumulative sur les biens et services produits aux Pays-Bas. Cette réglementation offre de grandes similitudes avec la période transitoire prévue par la loi allemande. L'article 28 de l'«Umsatzsteuergesetz 1967» prévoit également le remboursement de l'ancienne Taxe sur le chiffre d'Affaires. L'article 3 prévoit que la déduction de la Taxe payée en amont sur les biens d'investissement sera introduite par étapes. L'élaboration technique de la loi allemande est différente de celle de la loi hollandaise. Tout d'abord une déduction de Taxe complète est accordée, puis une Taxe sur les investissements est perçue sur ces biens d'investissement.
Le projet de loi belge prévoit également des dispositions transitoires similaires. A l'égard des stocks, l'article 99 de la loi prévoit la restitution de la Taxe de transmission, de la Taxe de facture, de la Taxe de luxe et de la taxe sur les locations mobilières et les transports. Aucune restitution de l'ancienne Taxe sur le chiffre d'Affaires n'est accordée pour les biens d'investissement, et l'article 100 de la loi prévoit que la Taxe sur ces

4. Voir également l'article 45, paragraphe 2 du Projet de loi belge.

biens ne sera qu'en partie déductible pendant une période de 4 ans après l'entrée en vigueur de la loi.

LES CONSEQUENCES DES MESURES TRANSITOIRES SUR LES ECHANGES INTERNATIONAUX DE BIENS D'INVESTISSEMENT

L'introduction de la T.V.A. entraîne certaines conséquences sur les perceptions afférentes aux importations et sur les exonérations de Taxe à l'exportation. Autrefois une Taxe compensatoire était perçue sur les biens importés aux Pays-Bas. Cette Taxe était déterminée de telle façon que les biens supportaient une charge fiscale égale ou légèrement inférieure à celle des biens produits aux Pays-Bas. Les taux d'imposition étaient calculés forfaitairement, de telle sorte que certaines différences de charge fiscale entre les biens importés et les biens nationaux devenaient flagrantes.

Depuis le 1er janvier 1969 le même taux est applicable aux biens importés ou fabriqués en Hollande: 12% ou 4%. Toutefois la pression fiscale de la Taxe sur les biens importés est légèrement moindre. Cela est dû au fait que, outre les 12% ou 4%, les biens fabriqué aux Pays-Bas supportent également une légère Taxe résultant des dispositions transitoires en matière de biens d'investissement. En effet, la Taxe sur le chiffre d'Affaires supportée par les biens d'investissement acquis avant le 1er janvier 1969, n'est pas restituée, et celle afférente aux biens achetés entre le 1er janvier 1969 et le 31 décembre 1971 ne sera qu'en partie remboursée. Ainsi, aux taux de 12% ou 4% viendra s'ajouter une charge supplémentaire de 1% à 3% selon que la durée d'étalement de cette charge est plus ou moins brève.

Avant le 1er janvier 1969 la Taxe sur le chiffre d'Affaires hollandaise était remboursée à l'exportation. Cette restitution était également établie sur des bases «forfaitaires» de telle sorte qu'elle était parfois trop généreuse, mais dans la plupart des cas très insuffisante. Depuis le 1er janvier 1969, les produits exportés, sont exonérés de Taxe, car ils bénéficient du taux zéro applicable aux exportations. Ceci, toutefois ne signifie pas que les biens exportés ne supportent plus de Taxe sur le chiffre d'Affaires hollandaise. En effet, les dispositions transitoires à l'égard des biens d'investissement font supporter à ces exportations une charge supplémentaire, dont l'évaluation est également de 1 à 3%, due au fait que le prix de revient de ces produits comprend une légère Taxe sur les biens d'investissement.

Le problème est le même à l'égard des importations et des exportations en Allemagne. Il en sera bientôt de même avec la Belgique, car des dispositions transitoires similaires existent dans ces deux pays.

Il serait toutefois certainement excessif d'affirmer que l'adoption de la T.V.A. par un pays donné, ayant prévu de telles dispositions transitoires, puisse s'analyser comme une dévaluation déguisée, obligeant les autres pays à adopter des contre-mesures. En réalité, pendant les premières années d'application de la T.V.A., les exportations ne seront pas plus exonérées de Taxe sur le Chiffre d'Affaires hollandaise qu'elles ne l'étaient du temps de l'imposition en cascade. Si l'on veut réellement parler de dévaluation déguisée, celle-ci ne pourrait qu'être extrêmement faible et répartie sur un certain nombre d'années, nombre d'années correspondant à celles durant lesquelles les mesures transitoires à l'égard des biens d'investissement auront encore une influence sur les prix de revient des produits exportés.

LA DEFINITION DE L'ENTREPRENEUR

En principe, toute personne qui exerce un commerce ou une profession de façon indé-

pendante est un entrepreneur au sens de la Législation hollandaise[5]. La forme juridique n'a pas d'importance. L'Entrepreneur peut être une personne physique, une personne morale ou encore un ensemble de personnes physiques et morales exerçant une activité commune, sans avoir pour autant une forme juridique déterminée. La nationalité ou le lieu d'Etablissement n'ont pas plus d'importance. L'activité commerciale ou la profession peuvent être exercées hors des Pays-Bas. Cette définition de l'Entrepreneur au sens le plus large entraîne des répercussions tant à l'égard de la perception de la Taxe qu'en ce qui concerne la Déduction de Taxe que peut opérer ledit Entrepreneur. Si un Entrepreneur étranger exécute une livraison ou un service aux Pays-Bas, l'opération est en principe taxable, bien que dans la plupart des cas ce ne soit pas l'Entrepreneur étranger, mais l'utilisateur du bien ou du service qui acquittera la taxe. D'autre part, si l'Entrepreneur étranger paye lui-même cette taxe, il peut en réclamer la restitution à l'administration fiscale. Ce point particulier sera examiné en détail dans une des sections suivantes.

LE LIEU OU LA LIVRAISON EST EFFECTUEE OU LE SERVICE RENDU SELON LA LEGISLATION HOLLANDAISE

La Définition du lieu où la livraison ou le service sont exécutés détermine les conditions d'assujettissement à la Taxe hollandaise. Les opérations sur biens et services ne sont imposables que si elles sont réalisées aux Pays-Bas par des Entrepreneurs, dans le cadre de leur entreprise.[6]

Il existe en outre une autre opération imposable, l'importation de biens, qui sera traitée plus loin. Le lieu où est effectuée la livraison est:

a) Dans le cas où le transport du bien est lié à la livraison: le lieu où commence ce transport.

b) Dans les autres cas, le lieu où se trouve le bien au moment de la livraison.[7]

Cette définition du lieu de la livraison correspond à celle donnée dans la deuxième Directive (article 5, paragraphe 4), tandis que l'«Umsatzsteuergesetz 1967» allemand (article 3, paragraphes 6 et 7) reprend la même définition.

Cette définition diffère quelque peu en Belgique, car le projet de loi belge précise tout d'abord le moment de la livraison (article 15); puis le lieu de la livraison est déduit de l'endroit où se trouvait le bien au moment de la livraison.

Si les biens sont importés en Hollande, la livraison est donc toujours réputée avoir eu lieu à l'étranger, indépendamment des conditions de livraisons prévues au contrat, à moins que les biens soient importés, puis l'acquéreur recherché par la suite. Inversement, si des produits hollandais sont livrés à un pays étranger, le lieu de livraison est donc toujours en Hollande. L'Allemagne a adopté des dispositions semblables. La définition du lieu où le service est rendu, retenue par la loi hollandaise, est différente de celle décrite dans le deuxième Directive. Aux termes de l'article 6, paragraphe 3 de cette Directive, le lieu où le service est rendu est celui où il est utilisé. Selon la législation hollandaise (article 6, paragraphe 2), le lieu de la prestation du service est en principe fonction du lieu où le prestataire vit ou est établi. Ce n'est que dans le cas où la prestation est un transport que le lieu où est convenu ce transport est retenu comme le lieu de prestation. Nous examinerons le texte de l'article 6, paragraphe 2, dans un supplément. Cette définition du lieu de la prestation du

5. Article 7, paragraphe 1 de la Loi.
6. Article 1 de la Loi.
7. Article 6, paragraphe 1 de la Loi.

service telle qu'elle est retenue par la législation hollandaise n'implique pas obligatoirement que tout service correspondant à cette définition supporte la taxe sur le chiffre d'affaires hollandaise. Dans certains cas (exportation de services), des corrections sont apportées par l'emploi du taux zéro.

La législation allemande retient un troisième critère. En effet, le lieu de prestation de service est directement lié à l'endroit où le prestataire exerce ses activités (article 3, paragraphe 10). Ce n'est que dans le cas où le service rendu est un transport que, comme dans la législation hollandaise, le lieu est celui où le transport est convenu. La législation allemande prévoit également que la T.V.A. n'est pas due dans le cas où le lieu de prestation est en Allemagne. Aux termes de l'article 4, paragraphe 3 de l'UStG 1967, certaines opérations faites avec des clients étrangers, définis par ailleurs à l'article 8, bénéficient de l'exemption avec remboursement de la taxe payée en amont.

Le projet de loi belge (article 21) considère que le lieu d'utilisation du service est celui de la prestation. Sauf preuve contraire, le service est supposé utilisé en Belgique, si une des parties au contrat est établie en Belgique. La réglementation en matière de transport est la même qu'en Allemagne et aux Pays-Bas. Afin d'éviter une double imposition, en l'absence totale d'imposition des services, une harmonisation des définitions du lieu du service rendu dans les législations de la C.E.E. semble nécessaire.

LES LIVRAISONS OU LES SERVICES RENDUS PAR DES ENTREPRENEURS ETRANGERS

Du fait de la définition retenue pour le lieu où est rendu le service, ce dernier, en ce qui concerne les biens importés, sera probablement toujours situé à l'étranger de telle sorte que, un entrepreneur étranger envoyant des biens en Hollande, ne réalise pas une opération imposable. Mais un étranger peut réaliser une livraison imposable s'il importe un bien pour le revendre ensuite. La fréquence des opérations de services réalisées par les étrangers aux Pays-Bas ira en augmentant. Ceci ne signifie pas que l'étranger qui fournit un bien ou rend un service en Hollande doive acquitter la T.V.A. L'article 12 de la loi du 28 juin 1968 sur la taxe sur le chiffre d'affaires prévoit qu'un entrepreneur réalisant une opération de livraison ou de service, s'il ne vit pas ou n'a pas d'établissement stable dans le Royaume, n'a pas à acquitter lui-même la taxe lorsque son acquéreur est ou bien un entrepreneur vivant ou établi dans le Royaume, ou encore une personne morale établie dans le Royaume au sens de la Loi générale sur les impôts d'état.[8] Dans ce cas, la taxe est acquittée par l'acquéreur ou l'utilisateur. Si, toutefois, l'entrepreneur étranger mentionné ci-dessus, réalise une opération de livraison ou de service, avec, par exemple, une personne physique la taxe devra être acquittée par ledit entrepreneur étranger.

LES LIVRAISONS FAITES OU LES SERVICES RENDUS A DES ENTREPRENEURS ETRANGERS

Il arrive fréquemment que la taxe soit supportée par un entrepreneur étranger pour les opérations dont il est le bénéficiaire alors qu'il ne réalise lui-même aucune opération aux Pays-Bas. Ce cas se présente, par exemple, lorsque l'entrepreneur qui fait de la publicité, engage des frais de voyage ou

8. Les Personnes au sens de la Loi générale sur les impôts d'état peuvent comprendre: les personnes morales, les sociétés en nom collectif, les firmes et les sociétés, les autres associations de personnes, les entreprises et les participations publiques personnes morales (voir l'article 2 de la Loi générale; Algemene wet inzake rijksbelastingen).

d'hôtel, recherche des conseils etc. . . . aux Pays-Bas, vend à un utilisateur hollandais des produits achetés par lui à l'étranger. Le lieu de livraison est alors à l'étranger, de telle sorte qu'il n'est pas passible de la T.V.A. sur ses achats. Or, l'Agence de publicité, l'hôtel où il réside, etc. . . . lui font supporter la T.V.A. Il peut en réclamer le remboursement à l'administration fiscale hollandaise. La loi n'impose aucune restriction en ce qui concerne les entrepreneurs étrangers. La législation allemande (article 15, paragraphe 1) n'accorde cette restitution qu'à l'entrepreneur qui réalise des opérations de livraisons ou de prestations de services en Allemagne, ou qui y possède une entreprise ou un établissement stable.

De même, dans le projet de la loi belge (article 45), le remboursement de la taxe payée en amont n'est accordé qu'aux entrepreneurs qui exercent leur activité en Belgique. Un entrepreneur étranger devra probablement faire agréer un représentant responsable s'il ne possède pas d'établissement stable en Belgique (article 55 du projet de loi). Cette dernière disposition se retrouve également dans la législation française qui exige la présence d'une représentant fiscal de l'entrepreneur si celui-ci veut prétendre au remboursement.

Aucune de ces exigences ne se retrouve dans la législation hollandaise, bien que le remboursement ne soit pas du tout facile.

LA PROCEDURE DE DEMANDE DE REMBOURSEMENT

Bien que la loi hollandaise n'impose en principe aucune condition aux étrangers pour les remboursements de la taxe, il existe en pratique certaines complications administratives. En effet, l'administration fiscale hollandaise n'est disposée à autoriser les remboursements que dans le cas où ils sont prévus par la législation.

Lorsqu'un entrepreneur étranger possède un établissement stable en Hollande, il relève de la compétence de l'Inspecteur des Contributions du lieu où est situé cet établissement stable. Dans ce cas, l'entrepreneur étranger réalise généralement des opérations de livraisons ou de prestations de services aux Pays-Bas et la procédure à suivre sera la même que pour un entrepreneur hollandais. Si un entrepreneur étranger n'a pas d'établissement stable, l'Inspecteur des Douanes et des Droits Indirects à La Haye, Waldorpstraat 440, est en principe toujours, sauf une exception peu importante, compétent. Cet entrepreneur devra déclarer à cet Inspecteur la taxe due s'il exerce aux Pays-Bas des activités passibles de la T.V.A. (par exemple, une livraison de biens à des personnes physiques). S'il ne doit pas payer de taxe, il doit réclamer au même Inspecteur le remboursement de la T.V.A. qu'il a supportée. Ce dernier lui enverra un imprimé à remplir pour faire sa demande de remboursement. Cette demande devra se faire trimestriellement ou mensuellement dans le cas de montants très importants. Les originaux des factures sur lesquels les montants de T.V.A. sont portés séparément doivent être joints à la demande. Ces factures seront ensuite retournées à l'entrepreneur.

D'autre part, l'Entrepreneur étranger devra élire domicile aux Pays-Bas[9], soit par l'intermédiaire d'une Boîte postale, soit d'une Banque. Enfin, l'Entrepreneur étranger devra donner un numéro de compte-chèques postal ou de compte-chèques bancaire, où seront versés les remboursements. Il pourra désigner un Représentant domicilié aux Pays-Bas, autorisé à déposer les demandes et à recevoir les remboursements. Mais à la différence de certains autres pays, ce représentant n'est pas indispensable aux Pays-Bas.

9. Conformément à l'article 57 de la Loi générale sur les impôts d'état.

L'Inspecteur peut, lors d'une demande, exiger toute justification qui lui semble nécessaire.

a) Un étranger devra être en mesure de prouver à l'Inspecteur qu'il est Entrepreneur, car un non-Entrepreneur ne peut prétendre au remboursement de la taxe sur le chiffre d'affaires. Ceci est valable tant pour les Hollandais que pour les Etrangers. Cette preuve peut être apportée de différentes façons. Si la demande est présentée par une société connue, l'Inspecteur acceptera probablement assez facilement le qualificatif d'Entrepreneur. Mais si l'Entrepreneur n'est pas internationalement connu, l'Inspecteur pourra lui demander de plus amples informations. Ainsi, l'Inspecteur ne peut facilement juger si un conseiller fiscal, se présentant comme tel, exerce réellement cette profession, et il peut alors lui réclamer une attestation d'inscription au Registre du Commerce.

b) L'Entrepreneur devra prouver à l'Inspecteur qu'il réalise des opérations susceptibles d'être taxées aux Pays-Bas, dans le cas où celles-ci sont réalisées dans ce pays. Ainsi que nous l'avons noté plus haut, certaines opérations ne sont pas taxées en Hollande. La T.V.A. n'est pas due, mais parallèlement la déduction de la taxe supportée n'est pas permise. En conséquence, il n'y a aucune raison de rembourser la taxe supportée par un Entrepreneur étranger lorsqu'il exerce une activité qui n'est pas imposable au regard de la législation hollandaise.

Exemple: Les opérations d'assurances sont exemptées aux Pays-Bas, ceci a comme résultat que les Compagnies d'Assurances ne sont pas passibles de la Taxe pour cette activité, mais ne peuvent prétendre au remboursement de la taxe qu'elles supportent. Les entrepreneurs étrangers qui s'insèrent dans des contrats d'assurances ne peuvent donc pas non plus réclamer la restitution de la taxe qu'ils supportent.

Les choses deviennent plus délicates lorsque les Entrepreneurs font des opérations qui sont taxées et d'autres qui ne le sont pas, telles, par exemple, les opérations de banque. Certains services rendus par une Banque sont taxés, d'autres comme les ouvertures de crédits ne le sont pas. Seule une partie de la taxe est remboursée à de tels entrepreneurs. Nous n'entrerons pas dans le détail du mécanisme car cela nous entraînerait trop loin. Si la T.V.A. est supportée par une banque étrangère aux Pays-Bas, il est possible que cette T.V.A. ne lui soit pas remboursée ou qu'elle obtienne un remboursement total ou partiel. Cela dépend des opérations passibles de la T.V.A. qui furent réalisées pour exercer une activité elle-même exemptée ou taxée ou encore mixte. Il est inutile de préciser que les Entrepreneurs qui se trouvent devant une telle situation se heurteront à certaines complications lorsqu'ils demanderont le remboursement de la taxe hollandaise. Fort heureusement, il existe comparativement peu d'opérations exonérées par la Législation hollandaise, et seul un petit nombre de ces opérations ont une importance dans le commerce international. L'énumération de l'article 11 de la Loi est reprise dans un supplément à cette publication.

c) Enfin l'Inspecteur peut également exiger de l'Entrepreneur qui fait sa demande qu'il prouve que cette taxe a bien été payée pour des biens et des services entrant dans le cadre de son objet social. Un Entrepreneur en voyage d'affaires en Hollande peut prétendre au remboursement de la T.V.A. inscrite sur sa note d'hôtel, chose qui devient impossible si cet homme d'affaires est venu faire un voyage touristique. L'Inspecteur peut donc demander des preuves comme quoi les dépenses ont bien été engagées au nom et pour le compte de l'Entreprise. La variété des précisions réclamées dépend de la nature des opérations. Si l'entrepreneur

étranger a engagé des dépenses de publicité ou de conseils aux Pays-Bas, l'Inspecteur peut facilement les accepter comme des dépenses d'affaires. Mais il peut demander plus de détails sur le but du voyage lorsque seules des dépenses de transport ou d'hôtels ont été engagées.[10]

LES IMPORTATIONS

L'importation de biens est une opération taxable particulière[11]. En principe, la taxe sur le chiffre d'affaires est toujours due à l'importation. Mais dans son article 23, la loi hollandaise offre la possibilité de transférer le paiement dans certains cas (appelé le transfert de la taxe sur importation). La taxe n'est alors exigible qu'au moment où elle peut être déduite à nouveau, d'où finalement aucun règlement n'est nécessaire.

Les dispositions de l'article 23 s'appliquent dans deux cas:

1) En ce qui concerne les biens énumérés à l'annexe A de la Loi portant réforme de la taxe sur le chiffre d'affaires du 28 juin 1968, le paiement de la taxe sur les importations peut toujours être transféré. Les biens énumérés dans cette liste étant impropres à la consommation des personnes physiques, cette dernière disposition ne comporte donc pas de risque de fraude. De même, lorsqu'un Entrepreneur étranger importe des biens mentionnés dans l'annexe A, le paiement de la taxe est également différé.

Les Entrepreneurs et les personnes morales au sens de la Loi générale sur les impôts d'état, dans la mesure où ils ne sont pas entrepreneurs, peuvent également bénéficier d'un transfert de perception même si les biens ne sont pas mentionnés dans l'annexe A. Seuls les Entrepreneurs qui exercent leur activité par l'intermédiaire d'un établissement stable situé en Hollande peuvent bénéficier de cette disposition. Les Entrepreneurs étrangers ne possédant pas d'établissement stable dans ce pays ne peuvent donc pas y prétendre.

Si les biens importés sont destinés à un acquéreur hollandais déjà connu, le transfert peut avoir lieu si l'Entrepreneur hollandais a eu l'autorisation de la solliciter. Le règlement de la taxe interviendra ensuite, car l'acheteur hollandais devra à un moment donné payer la taxe afférente à l'importation, mais pourra au même moment déduire de nouveau cette taxe. Ce système du transfert est, à notre avis, unique dans la C.E.E. Apparemment, la Belgique l'autorise dans le cas d'importation en provenance des Pays-Bas. Sous l'empire de l'ancienne législation sur la taxe sur le chiffre d'affaires, la Belgique et les Pays-Bas possédaient déjà un système de transfert de la taxe vers l'acquéreur.

Si aucun transfert n'a lieu, la taxe doit être réglée immédiatement ou à court terme. Ainsi, lorsqu'un Entrepreneur étranger importe des biens, deux possibilités lui sont offertes:

a) Les biens sont tout d'abord importés en Hollande pour être vendus ensuite par un Entrepreneur étranger: ce dernier peut alors demander lui-même le remboursement de la taxe à l'importation. Ainsi, cet Entrepreneur étranger aura généralement un établissement stable afin d'être passible de la taxe sur les opérations de livraison des biens. S'il n'a pas d'établissement stable, il pourra réclamer le remboursement de la taxe à l'Inspecteur à La Haye. Mais il peut encore être redevable de de la taxe sur des livraisons de marchandises à des personnes physiques, par exemple.

10. Les participants au congrès de l'IFA reçoivent aucun remboursement sur les droits d'inscription. Pour éviter les complications administratives, dans ce cas particulier, les autorités fiscales ont décidé qu'aucune T.V.A. serait facturée. La T.V.A. qui sera à payer à la fin va être déterminée avec la coopération des autorités fiscales par la branche néerlandaise de l'IFA.

11. Voir l'article 1 de la Loi.

Comme nous l'avons vu plus haut, la règle qui impose à l'acquéreur le paiement de la taxe sur le chiffre d'affaires sur des biens livrés par un Entrepreneur étranger, ne s'applique pas lorsque l'acquéreur est une Personne Physique.

b) Mais il arrive plus fréquemment que les biens importés soient déjà destinés à un acquéreur hollandais. Ce dernier pourra alors réclamer la restitution de la taxe payée à l'importation. Si celle-ci a été réglée par l'Entrepreneur étranger, celui-ci pourra bien entendu la faire supporter à l'acquéreur hollandais, qui, à son tour, pourra en demander la restitution à l'administration fiscale.

LES EXPORTATIONS DE BIENS

Le taux zéro est applicable lorsque les biens sont exportés par un entrepreneur. Etant donné d'une part que l'exportateur a le droit de déduire la taxe payée en amont et d'autre part qu'aucune taxe ne frappe les exportations, les biens ne supportent aucune taxe. Dans ces cas il s'agira bien toujours de la livraison de biens, qui sont exportés. Cette livraison est alors sujette au taux zéro. Si d'autre part il n'y a pas de livraison (par exemple, un entrepreneur envoie des biens à une filiale étrangère) il n'y a pas de fait imposable, et pour cette raison un taux zéro n'est pas nécessaire. Le taux zéro est inclus dans l'annexe II – a – 2 se rapportant à la Loi. Comme nous l'avons exposé plus haut, l'application du taux zéro n'empêche pas qu'un reste de taxe sur le chiffre d'affaires soit encore incorporé au prix de revient des biens, conséquence des dispositions transitoires à l'égard des biens d'investissement.

LES PRESTATIONS DE SERVICE INTERNATIONALES

Aux termes de la législation hollandaise, les transports internationaux de marchandises exportées ou importées bénéficient du taux zéro. Il en est de même des transports de personnes lorsque ces derniers se font par air ou par mer. Les taux zéro sont inclus dans l'annexe II – b – 1, 2 et 3. Le taux zéro s'applique en outre au service d'intermédiaire intervenant dans la conclusion des accords lorsque le bénéficiaire du service ne vit pas, n'est pas établi ou ne possède pas d'établissement stable en Hollande (cf. Annexe II – b – 4). Enfin le taux zéro est applicable aux services dont le règlement est effectué par une personne qui ne vit pas, n'est pas établie ou n'a pas d'établissement stable en Hollande, à la condition que cette personne, ou toute autre personne bénéficiaire du service, ne retire aucun profit de ce service à l'intérieur du Royaume (cf. Annexe II – b – 5).

LE COMMERCE DE PERFECTIONNEMENT ACTIF ET PASSIF

La nouvelle loi sur la taxe sur le chiffre d'affaires aux Pays-Bas n'accorde pas d'exonération au commerce de Perfectionnement Actif.
Cela n'est pas nécessaire car le système d'imputation de la taxe payée en amont entraîne le remboursement automatique de la taxe payée à l'importation en Hollande.
Le perfectionnement apporté à l'armement des navires doit, dans le cas de ce que l'on pourrait appeler les biens manufacturés, être considéré comme un service rendu au nom du client étrange, de telle sorte que, conformément à l'annexe II – b – 5, le taux zéro est applicable. Dans le cas où les produits élaborés sont vendus entièrement ou partiellement aux Pays-Bas, le client étranger effectue une livraison de ces biens, livraison sur laquelle il doit acquitter la taxe conformément à l'article 12, § 2 de la Loi. La prestation de service afférente aux biens vendus dans ce pays après élaboration peut également bénéficier du taux zéro. En conséquence de ce qui précède, le client étranger peut

échapper complètement à la perception de la taxe. D'une manière générale la loi néerlandaise n'accorde pas d'exemptions pour le commerce de Perfectionnement Passif. C'est seulement quand les biens sont exportés, réparés à l'étranger et reimportés qu'une exemption est accordée.

LES IMPORTATIONS TEMPORAIRES DE BIENS D'EQUIPEMENT

L'article 53 du décret sur les exonérations du code des Douanes de 1960 énumère une longue série de biens pour lesquels est accordée une exonération des droits de douane et de taxe sur le chiffre d'affaires dans le cas d'importation temporaire. Cette liste comprend certains biens qui sont assimilés à des biens d'investissement. Citons par exemple: les accessoires des Artistes, des compagnies théâtrales ou des orchestres, les biens demandés par les hommes d'affaires, par les experts dans le domaine des méthodes d'organisation et de gestion etc. . . . les équipements des experts pour la topographie, les machines, le matériel, les instruments etc. . . . importés dans le but d'être mis à l'essai et contrôlés avant la commande définitive, etc. . . . Dans tous les cas, l'exonération dont nous venons de parler est accordée, puisque ces biens seront réexportés après un délai relativement court. Il arrive parfois que l'exonération, prévue à l'article 53 des exemptions du tarif des Douanes de 1960 ne soit pas applicable, bien que ces biens ne demeurent que peu de temps aux Pays-Bas, de telle sorte que la disparition de l'exonération fait peser une lourde charge due à la taxe sur le chiffre d'affaires. Cette charge se fait sentir quand les biens d'équipement sont importés pendant la période transitoire durant laquelle la taxe sur les importations n'est pas entièrement déductible. Ainsi, en ce qui concerne les matériels étrangers (grues, bulldozers, matériel de forage, etc. . . .) à l'aide desquels des travaux sont réalisés en Hollande, la taxe est totalement perçue à l'importation (Taxe qui ne sera qu'en partie déductible pendant la période transitoire), tandis que la partie de la taxe qui n'a pas pu être déduite est remboursée au moment de la réexportation.[12].

LES EXPORTATIONS TEMPORAIRES DE BIENS D'EQUIPEMENT

Si les biens d'équipement sont exportés dans le but, par exemple, d'être réparés, l'exemption de taxe prévue dans le code des Douanes est applicable. La taxe ne sera alors perçue, approximativement, que sur le montant des réparations. Cette taxe perçue à l'importation est toujours entièrement déductible. Si toutefois les réparations effectuées à l'étranger sont telles que l'on puisse établir que les biens ont été remis à neuf, une nouvelle perception, prévue à l'article 3 – 1 – h de la pourrait en résulter.

Il est précisé dans ce cas qu'il s'agit de fabrication de biens d'équipement par une tierce partie avec du matériel mis à sa disposition. La taxe doit alors être payée sur le montant global du prix de revient du bien d'équipement. Si toutefois, le bien d'équipement rendu disponible avait déjà été utilisé auparavant par l'Entrepreneur dans son entreprise, le prix de revient ne doit pas comprendre la valeur de l'ancien bien d'équipement. La taxe payée sur la réparation du bien n'est alors qu'en partie déductible pendant la période transitoire.

Par contre, si la réparation effectuée à l'étranger ne peut pas être assimilée à la fabrication d'un bien, mais correspond à une simple prestation de service, la taxe payée au retour de ce bien est totalement déductible et aucune autre taxe ne saurait être perçue.

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12. Arrêté Ministériel du 19 mai 1969, N° D 69/1781, OB-BTW 122.

A. E. DE MOOR:

DER GRENZÜBERSCHREITENDE WAREN- UND DIENSTLEISTUNGSVERKEHR UNTER DEM MEHRWERTSTEUERSYSTEM

Der vollständige Text des Umsatzsteuergesetzes 1968 (Mehrwertsteuer) ist in dem Supplement zu diesem Heft des Bulletins aufgenommen.

EINFÜHRUNG

Das Ziel der Europäischen Wirtschaftsgemeinschaft ist bekanntlich die Schaffung eines gemeinsamen Marktes. Der erste Schritt zu diesem Ziel hin war die Errichtung einer Zollunion, für die die Einfuhrzollschranken innerhalb der EWG abgebaut werden mußten. Dieses Ziel ist nunmehr erreicht: Seit dem 1. Juli 1968 werden innerhalb der EWG keine Einfuhrzölle mehr erhoben. Als die Einfuhrzölle in der EWG gesenkt und schließlich ganz beseitigt wurden, machte sich in wachsendem Maße die Notwendigkeit bemerkbar, eine Verfälschung der Wettbewerbsbedingungen infolge der unterschiedlichen Umsatzbesteuerung zu verhindern. Da die meisten EWG-Länder kein neutrales Umsatzsteuersystem hatten, bestand die Gefahr, daß die an den Grenzen erhobenen Ausgleichsteuern zu einer Art versteckter Einfuhrzölle werden würden.

Aus diesem Grund bestimmt Artikel 99 des EWG-Vertrags, die EG-Kommission solle prüfen, auf welche Weise die Gesetze der Mitgliedstaaten auch auf dem Gebiet der Umsatzsteuer im Interesse des Gemeinsamen Marktes harmonisiert werden könnten. Das Ergebnis einer ausführlichen Untersuchung, die die Kommission mit Unterstützung von zwei Arbeitsgruppen durchführte, besteht in zwei Richtlinien, in denen festgelegt wird, daß die Umsatzsteuer in den EWG-Mitgliedstaaten in Form einer Steuer auf den Wertzuwachs erhoben werden soll. Dieses System, von Frankreich bereits im Jahre 1954 eingeführt, trat in Westdeutschland am 1. Januar 1968 und in den Niederlanden am 1. Januar 1969 in Kraft, während Belgien und Luxemburg am 1. Januar 1970 nachziehen werden. Italien wird es wahrscheinlich nicht gelingen, das neue Umsatzsteuersystem am 1. Januar 1970 – laut Richtlinie der spätestmögliche Termin – einzuführen.

Die EWG hat sich für die Mehrwertsteuer – im folgenden MWS genannt – entschieden, weil dieses Steuersystem die interne und externe steuerliche Neutralität ermöglicht.

Interne Neutralität: Lieferungen und sonstige Leistungen tragen dieselbe steuerliche Belastung, selbst wenn diese Lieferungen und Leistungen durch verschiedene Produktions- und Verteilerketten hergestellt und verteilt werden.

Externe Neutralität: Das MWS-System ermöglicht eine identische steuerliche Behandlung von eingeführten und einheimischen Erzeugnissen sowie die Befreiung von Ausfuhrlieferungen von der Umsatzsteuer des Landes, in dem sie hergestellt wurden. Auf diese Weise ist es nicht mehr nötig, „Pauschalierungs-Methoden" anzuwenden, wie dies bei dem System der Bruttoallphasen-

umsatzsteuer erforderlich war, das bis vor kurzem in den Niederlanden und den meisten anderen EWG-Ländern in Kraft war.
Artikel 189, Abs. 3 des EWG-Vertrags schreibt vor, daß eine Richtlinie für die Mitgliedstaaten verbindlich ist, was das zu erreichende Ziel anbelangt, daß den nationalen Regierungen jedoch die Wahl der Form und der Mittel zur Erreichung dieses Ziels überlassen wird. Demgemäß wird die MWS in den verschiedenen Mitgliedstaaten auf der Grundlage unterschiedlicher Gesetze erhoben. Dies würde natürlich eine schwierige Situation schaffen, da diese Gesetze zwangsläufig mit dem nationalen Zivilrecht und den übrigen Teilen des nationalen Steuerrechts zusammenhängen, die von Land zu Land verschieden sind. Dazu kommt daß die neuen Umsatzsteuergesetze die Terminologie benutzen, die in den früheren Gesetzen gebräuchlich war.

ALLGEMEINE BESCHREIBUNG DES MEHRWERTSTEUERSYSTEMS IN DEN NIEDERLANDEN

Entgegen ihrer Bezeichnung ist die MWS in den Niederlanden ebenso wie in den anderen Mitgliedstaaten keine Steuer auf den Mehrwert (Einkommensteuer), sondern eine reine Verbrauchsteuer. Auch die Richtlinien gehen von dieser reinen Verbrauchsteuer aus.[1] Auf Grund dieser Tatsache werden Investitionen nicht als gesonderte Besteuerungsobjekte angesehen. Bei dem Umsatz von Investitionsgütern dagegen, wird MWS erhoben und entrichtet, die jedoch dem Benutzer grundsätzlich unverzüglich voll erstattet wird. Nur in der Übergangszeit nach Einführung des MWS-Systems wird eine Ausnahme hiervon gemacht, auf die ich im folgenden zurückkommen werde.
Die MWS ist eine Netto-Umsatzsteuer, d.h. auf jeder Stufe wird eine Steuer nur von demjenigen Teil des Wertes des Umsatzes erhoben, der noch nicht zuvor oder nicht mit dem vollen Satz besteuert worden ist, der auf den betreffenden Umsatz anwendbar ist. Bei einer Ausgestaltung dieses Systems gibt es im Prinzip zwei Möglichkeiten, nämlich dem Unternehmer das Recht entweder auf Abzug von einem früheren Umsatz oder auf Vorsteuerabzug zu gewähren. In den EWG-Richtlinien und deshalb auch in dem niederländischen Gesetz wurde das System des Vorsteuerabzugs gewählt, weil nur dieses Verfahren ein reibungsloses Funktionieren der Netto-Umsatzsteuer als Verbrauchsteuer gewährleistet.
Bei dem Verfahren des Vorsteuerabzugs muß der Unternehmer Umsatzsteuer von seinem Gesamtumsatz zahlen, er kann jedoch die Umsatzsteuer absetzen, die ihm von anderen Unternehmern in Rechnung gestellt wurde. Folglich stellt die MWS auf zwischenbetriebliche Transaktionen, die dieser Steuer unterliegen, keine echte Belastung dar, sondern nur einen Rechnungsposten, der weitergegeben wird, denn der Unternehmer, der diese Umsatzsteuer zahlen muß, ist berechtigt, sie unverzüglich mit seiner eigenen Steuerschuld zu verrechnen. Die Höhe des Satzes ist deshalb bei zwischenbetrieblichen Transaktionen von geringer Bedeutung, und die Besteuerung dieser Transaktionen wirft normalerweise keine Finanzierungsprobleme auf. Die Steuer wird erst dann zu einer echten Belastung, wenn die Lieferungen und sonstigen Leistungen für Abnehmer durchgeführt werden, die keinen Anspruch auf Vorsteuerabzug haben, weil sie keine Unternehmer sind. Wenn der Einzelhandel nicht als Steuerstufe eingeschaltet ist, was in den Niederlanden aber nicht der Fall ist, wirkt sich die Steuer auf der Stufe vor dem Einzelhandel als echte Belastung aus, weil in diesem Fall der Einzelhandel

1. Siehe Art. 2 der Richtlinie 1.

nicht zum Vorsteuerabzug berechtigt ist. Die eigentliche Steuerlast liegt deshalb immer auf der letzten Stufe des MWS-Systems. Um zu einer neutralen Steuerbelastung in den Preisen von Waren und Dienstleistungen für die Abnehmer zu gelangen, sollte der Einzelhandel als Stufe in das MWS-System eingeschaltet werden. Dies ist der Fall in Frankreich, Westdeutschland und den Niederlanden; in Italien dagegen wird es sehr wahrscheinlich anders sein. Im belgischen Gesetzentwurf wird der Einzelhändler grundsätzlich als umsatzsteuerpflichtiger Unternehmer betrachtet; nur im Falle der kleineren Einzelhändler wird die Besteuerung auf der vorhergehenden Stufe erfolgen.

Die niederländischen MWS-Sätze betragen heute 12 v.H. und 4 v.H. Das Gesetz enthält auch einen Null-Satz; das bedeutet, daß der Umsatz nicht steuerpflichtig ist, während der Anspruch auf Vorsteuerabzug besteht. Dieser Null-Satz hat technischen Charakter. Mit wenigen Ausnahmen (Tageszeitungen) findet er keine Anwendung auf Waren für den Verbrauch im Inland, sondern nur auf Ausfuhrlieferungen und Leistungen für ausländische Auftraggeber.

ABWEICHUNGEN VON DEM SYSTEM

Im großen ganzen liegt sowohl dem niederländischen als auch dem deutschen Gesetz die Theorie der reinen MWS zu Grunde, jedoch wird sie erheblich eingeschränkt durch die Regelung der Befreiungen. Ähnlich dem deutschen Gesetz und in Übereinstimmung mit der Richtlinie 2 (Art. 11, Abs. 2) besteht kein Anspruch auf Vorsteuerabzug, wenn die Lieferungen oder sonstige Leistungen von der Umsatzsteuer befreit sind.[2] Dadurch würde eine kumulierende Wirkung zustande kommen. Man muß die Regelung der Befreiungen von dem oben erwähnten Null-Satz unterscheiden. Bei dem Null-Satz besteht Anspruch auf Vorsteuerabzug, im Falle der Befreiung besteht dieser Anspruch nicht. Der Null-Satz ist deshalb theoretisch korrekter. In Deutschland wurde dieser Punkt technisch etwas anders geregelt. In § 4 des deutschen Umsatzsteuergesetzes 1967 werden eine Anzahl steuerfreier Leistungen aufgezählt. In § 15, Abs. 2 wird das Recht auf Vorsteuerabzug verweigert mit Ausnahme der in § 4, 1 - 5 aufgezählten Leistungen. Nach der niederländischen Terminologie ist deshalb der Null-Satz anwendbar auf Leistungen gemäß § 4, 1 – 5, während die Befreiung für die übrigen in § 4 genannten Leistungen gilt. In dem belgischen Gesetzentwurf finden sich Befreiungen mit dem Recht auf Vorsteuerabzug – vergleichbar also dem niederländischen Null-Satz – in den Artikeln 39-43; in Art. 44 werden eine Reihe von Befreiungen aufgezählt, für die kein Vorsteuerabzug gewährt wird. Es handelt sich dabei also um Befreiungen im Sinne des niederländischen Gesetzes (siehe auch Wortlaut von Art. 45 des belgischen Gesetzentwurfs). Außerdem besteht eine Abweichung auf Grund der Vorschrift für kleine Unternehmer in Art. 25 des niederländischen Gesetzes. Dieses Vorschrift bestimmt, daß ein Unternehmer – eine natürliche Person – keine MWS zu zahlen braucht, wenn seine MWS-Schuld im Jahr durchschnittlich f 1.200 oder weniger beträgt. Liegt sie höher, aber immer noch unter f 3000, so braucht er nur einen Teil dieser Steuer zu entrichten. Auch das deutsche Gesetz enthält in § 19 eine Vorschrift für Kleinunternehmer, die jedoch etwas anders ausgestaltet ist.

Ferner enthält das niederländische Gesetz eine Sonderbestimmung für Bauern, Gemüse- und Gartenbaubetriebe, für Forstwirtschaft und Viehzüchter.[3]

2. Art. 15, Abs. 2 des Gesetzes.
3. Art. 27 des Gesetzes.

Diese Unternehmer werden auf Grund einer Rechtsfiktion nicht als Unternehmer betrachtet und sind daher nicht umsatzsteuerpflichtig, haben aber auch keinen Anspruch auf Vorsteuerabzug. Die Abnehmer dieser Unternehmer erhalten einen „Pauschal"-Abzug etwa in Höhe der zuvor auf die Produkte der Bauern usw. gezahlten Steuer. Diese Bestimmung ist sehr ähnlich derjenigen in § 24 des deutschen Umsatzsteuergesetzes 1967 für Bauern usw., unterscheidet sich jedoch von der deutschen Bestimmung insofern, als Bauern in dem niederländischen Gesetz nicht als Unternehmer gelten. Dies hat einige Konsequenzen, auf die wir hier nicht näher eingehen. Sowohl das niederländische als auch das deutsche Gesetz gibt den Bauern usw. die Möglichkeit, für die Besteuerung ihrer Umsätze nach den allgemeinen Vorschriften des Gesetzes zu optieren.

In Art. 16 des niederländischen Gesetzes ist die Möglichkeit vorgesehen, zu bestimmen, daß die Umsatzsteuer auf bestimmte Lieferungen und sonstige Leistungen nicht abzugsfähig ist. Damit soll vermieden werden, daß Lieferungen und sonstige Leistungen, die nicht für gewerbliche oder berufliche Zwecke, sondern für den Eigenverbrauch bestimmt sind, steuerfrei ausgehen. Dies erinnert an den „Eigenverbrauch" in § 1, Abs. 1, 2c des deutschen Umsatzsteuergesetzes 1967.[4] Die Möglichkeit gemäß Art. 16 ist inzwischen genutzt worden. Die Verweigerung des Rechtes auf Vorsteuerabzug hat keine große wirtschaftliche Bedeutung, verursacht jedoch verwaltungstechnische Probleme.

ÜBERGANGSVORSCHRIFT FÜR WIRTSCHAFTSGÜTER DES ANLAGEVERMÖGENS

Bei der Umstellung von dem alten System der kumulativen Umsatzsteuer auf die MWS bestand das Problem darin, daß unter dem System der MWS die Lieferungen und sonstigen Leistungen mittels Wirtschaftsgütern des Anlagevermögens und mittels Lagervorräten ausgeführt würden, die noch nach dem alten System besteuert worden waren. Um dies zu verhindern, müßte theoretisch gesehen im Zeitpunkt der Umstellung eine Erstattung der alten Umsatzsteuer auf die Wirtschaftsgüter des Anlagevermögens und das Vorratsvermögen des Unternehmens gewährt werden. Diese Erstattung war jedoch für die niederländischen Steuerbehörden unmöglich durchzuführen. Allerdings wurde der größere Teil der Umsatzsteuer vom Vorratsvermögen erstattet; die Umsatzsteuer auf die Wirtschaftsgüter des Anlagevermögens dagegen wurde nicht erstattet. Im Gegenteil, die Umsatzsteuer auf nach dem 1. Januar 1969 importierte oder gelieferte Wirtschaftsgütern ist in den ersten Jahren nicht einmal voll abzugsfähig. Die diesbezügliche Vorschrift ist in Art. 45 des niederländischen Gesetzes enthalten. In den Jahren 1969, 1970 und 1971 ist die Steuer von Wirtschaftsgütern des Anlagevermögens nur teilweise abzugsfähig, und zwar zu 30 v.H., 60 v.H. oder 90 v.H. je nach dem, ob die Lieferung oder Einfuhr 1969, 1970 oder 1971 erfolgt.

Diese Übergangsregelung bewirkt selbst nach der Umstellung auf die MWS eine kumulative Belastung von Waren und Dienstleistungen, die in den Niederlanden ausgeführt werden. Sie entspricht im wesentlichen der Übergangsregelung in dem deutschen Gesetz. In § 28 des deutschen Umsatzsteuergesetzes 1967 ist ebenfalls die Erstattung der alten Umsatzsteuer vorgesehen; durch § 30 wird der Abzug der früher auf Wirtschaftsgüter des Anlagevermögens gezahlten Steuer ebenfalls nur stufenweise eingeführt.

4. Siehe auch Art. 45, Abs. 2 des belgischen Gesetzentwurfs.

Die technische Regelung ist im deutschen Gesetz allerdings anders als im niederländischen. Zuerst wird ein voller Vorsteuerabzug gewährt, und dann wird eine Investitionssteuer von den Wirtschaftsgütern erhoben. Auch der belgische Gesetzentwurf enthält eine ähnliche Übergangsvorschrift.
Für das Vorratsvermögen ist in Art. 99 des Entwurfs eine Erstattung der Umsatzsteuer (taxe de transmission), der Sondersteuer bei entgeltlichen Übertragungen von beweglichen Sachen und Werkleistungen (taxe de facture sur les transmissions und taxe de facture sur les entreprises d'ouvrage), der Luxussteuer (taxe de luxe), der Sondersteuer auf Vermietung und Verpachtung von Sachen und Rechten (taxe sur les locations de choses mobilières) und der Beförderungsteuer (taxe sur les transports)vorgesehen. Nicht erstattet wird die alte Umsatzsteuer von Wirtschaftsgütern des Anlagevermögens, und Art. 100 des Entwurfs bestimmt, daß die Steuer auf die Wirtschaftsgüter für einen Zeitraum von vier Jahren nach Inkrafttreten des Gesetzes nur teilweise abzugsfähig ist.

DIE BEDEUTUNG DER ÜBERGANGSVORSCHRIFT (FÜR WIRTSCHAFTSGÜTER DES ANLAGEVERMÖGENS) FÜR DEN INTERNATIONALEN HANDEL

Die Einführung der MWS wirkt sich auf die Einfuhrbesteuerung und die Befreiung von Exporten von der Umsatzsteuer aus. Bisher wurde eine Ausgleichsteuer bei der Einfuhr in die Niederlande erhoben. Diese Steuer wurde so berechnet, daß die eingeführten Waren ungefähr dieselbe oder eine etwas geringere steuerliche Belastung zu tragen hatten als die niederländischen Produkte. Die Prozentsätze der von den Einfuhren zu erhebenden Steuer wurden „pauschal" berechnet, so daß natürlich gewisse Unterschiede zu der steuerlichen Belastung der einheimischen Produkte auftraten.
Seit dem 1. Januar 1969 gilt für Einfuhren und für Lieferungen in den Niederlanden derselbe Umsatzsteuersatz von 12 v.H. oder 4 v.H. Dies bedeutet jedoch, daß die Umsatzsteuerbelastung der ausländischen Produkte in jedem Fall etwas geringer ist als die der entsprechenden niederländischen Erzeugnisse. Der Grund hierfür ist, daß auf den niederländischen Produkten abgesehen von der bei Lieferung erhobenen Umsatzsteuer von 12 oder 4 v.H. noch etwas zusätzliche Umsatzsteuer liegt, und zwar infolge der Übergangsvorschrift für Wirtschaftsgüter des Anlagevermögens, denn die Umsatzsteuer auf vor dem 1. Januar 1969 angeschafften Wirtschaftsgütern wurde nicht erstattet, und die Umsatzsteuer auf zwischen dem 1. Januar 1969 und dem 31. Dezember 1971 angeschafften Wirtschaftsgütern wird nur teilweise erstattet werden. Zusätzlich zu der Steuer von 12 oder 4 v.H. bewirkt diese Regelung eine Extrabelastung von schätzungsweise 1 bis 3 v.H. je nach dem, ob diese Extrabelastung über einen längeren oder kürzeren Zeitraum verteilt wird.
Vor dem 1. Januar 1969 wurde die niederländische Umsatzsteuer auf Exporte erstattet. Auch diese Erstattung erfolgte „pauschal", so daß der erstattete Betrag manchmal zu hoch, in vielen Fällen aber auch zu niedrig war. Seit dem 1. Januar 1969 sind Ausfuhrlieferungen umsatzsteuerfrei, weil für sie der Null-Satz gilt. Das bedeutet jedoch nicht, daß auf diesen Ausfuhrlieferungen keinerlei niederländische Umsatzsteuer mehr liegt. Die Übergangsbestimmung für Wirtschaftsgüter des Anlagevermögens bewirkt auch für diese Lieferungen eine Extrabelastung, weil der Selbstkostenpreis der exportierten Ware einen kleinen Betrag an Umsatzsteuer auf Wirtschaftsgüter des Anlagevermögens enthält, der auch hier etwa 1 bis 3 v.H. des Warenpreises ausmacht.

Dieselbe Situation besteht bei Einfuhren nach und Ausfuhren von Deutschland, und dasselbe gilt in absehbarer Zeit auch für Einfuhren nach und Ausfuhren von Belgien, und zwar auf Grund ähnlicher Übergangsvorschriften für Wirtschaftsgüter des Anlagevermögens in diesen Ländern.

Es ist deshalb ganz bestimmt übertrieben zu behaupten, die Einführung der MWS in einem bestimmten Land, das eine solche Übergangsbestimmung hat, sei gleichbedeutend mit einer verschleierten Abwertung, gegen die andere Länder Gegenmaßnahmen ergreifen müssen. In den ersten Jahren nach der Umstellung auf die MWS werden die Ausfuhren nämlich von der nationalen Umsatzsteuer nicht weitergehend befreit als unter dem alten Umsatzsteuersystem. Falls man wirklich von einer verschleierten Abwertung sprechen könnte, so könnte es sich lediglich um eine Abwertung von einigen wenigen Prozenten handeln, verteilt über eine verhältnismäßig große Anzahl von Jahren, d.h. auf soviele Jahre, wie die Übergangsbestimmung für Wirtschaftsgüter des Anlagevermögens sich noch auf die Selbstkostenpreise der exportierten Waren auswirkt.

BEGRIFF DES UNTERNEHMERS

Grundsätzlich ist jeder ein Unternehmer im Sinne des niederländischen Gesetzes,[5] der eine gewerbliche oder berufliche Tätigkeit selbständig ausübt. Die Rechtsform ist ohne Bedeutung. Der Unternehmer kann eine natürliche Person, eine juristische Person oder eine Vereinigung von natürlichen und juristischen Personen sein, die geschäftlich als Einheit handeln, ohne daß diese Vereinigung eine bestimmte Rechtsform erhalten hätte. Nationalität und Ort der Niederlassung sind ebenfalls ohne Bedeutung. Die gewerbliche oder berufliche Tätigkeit kann außerhalb der Niederlande ausgeübt werden. Dieser weltweite Begriff des Unternehmers ist sowohl für die Erhebung der Umsatzsteuer als auch für den Abzug von Steuern, die dem Unternehmer in Rechnung gestellt wurden, von Bedeutung. Wenn ein ausländischer Unternehmer eine Lieferung oder sonstige Leistung in den Niederlanden ausführt, ist die Leistung grundsätzlich steuerpflichtig, obwohl in vielen Fällen nicht der ausländische Unternehmer, sondern vielmehr der Abnehmer der Lieferung oder Dienstleistung die Steuer wird entrichten müssen. Wenn andererseits dem ausländischen Unternehmer niederländische Umsatzsteuer auferlegt wird, kann er die Steuer von den niederländischen Finanzbehörden zurückfordern. Dies wird in einem der folgenden Kapitel dieses Artikels noch im einzelnen behandelt.

DER ORT DER LIEFERUNG ODER SONSTIGEN LEISTUNG NACH NIEDERLÄNDISCHEM RECHT

Die Antwort auf die Frage, wo eine Lieferung oder sonstige Leistung durchgeführt wird, ist entscheidend für die Antwort auf die Frage, ob die Lieferung oder sonstige Leistung der niederländischen Umsatzsteuer unterliegt. Nur solche Lieferungen und sonstigen Leistungen sind steuerpflichtig, die von Unternehmern im Rahmen ihrer Unternehmen in den Niederlanden ausgeführt werden.[6] Außerdem gibt es noch einen steuerlichen Tatbestand, und zwar die Einfuhr von Waren, die später behandelt wird. Der Ort, an dem eine Lieferung durchgeführt wird, ist

a) der Ort, an dem der Transport beginnt, wenn die Waren bei der Lieferung befördert werden müssen;

b) in anderen Fällen der Ort, an dem sich

5. Art. 7, Abs. 1 des Gesetzes.
6. Art. 1 des Gesetzes.

die Ware im Zeitpunkt der Lieferung befindet.[7]
Diese Bestimmung des Ortes der Lieferung steht in Einklang mit der Richtlinie 2 (Art. 5, Abs. 4); auch das deutsche Umsatzsteuergesetz 1967 (§ 3, Abs. 6 und 7) beschreibt den Ort der Lieferung auf diese Art. In Belgien ist dieser Punkt etwas anders geregelt: der belgische Gesetzentwurf bestimmt zuerst den Zeitpunkt der Lieferung in Art. 15 und dann erst (s. Art. 16) den Ort der Lieferung, der auf den Ort festgelegt wird, an dem sich die Ware im Zeitpunkt der Lieferung befand.
Wenn Waren in die Niederlande eingeführt werden, findet deshalb die Lieferung durch den ausländischen Unternehmer stets im Ausland statt, ungeachtet der im Vertrag festgelegten Lieferbedingungen, es sei denn, die Waren werden zuerst eingeführt, und der Abnehmer wird erst danach gefunden. Wenn umgekehrt Waren aus den Niederlanden in ein anderes Land geliefert werden, liegt der Ort der Lieferung stets in den Niederlanden. In Deutschland wurde dieser Punkt genauso geregelt.
Der Ort der Dienstleistung wurde im niederländischen Gesetz anders geregelt als in der Richtlinie 2. In Art. 6, Abs. 3 der Richtlinie 2 wird der Ort, an dem die Dienstleistung in Anspruch genommen wird, als der Ort der Erbringung betrachtet. In dem niederländischen Gesetz (Art. 6, Abs. 2) ist der Ort der Dienstleistung grundsätzlich mit dem Ort identisch, an dem der Unternehmer, der die Dienstleistung erbringt, wohnt oder seine Niederlassung hat. Nur im Falle von Beförderungsleistungen wird der Ort, an dem die Beförderung faktisch erfolgt, als Ort der Dienstleistung bezeichnet. Wir verweisen ferner auf den Wortlaut von Art. 6, Abs. 2 im „Supplement". Die Beschreibung des Ortes der Dienstleistung in dem niederländischen Gesetz bedeutet in Wirklichkeit nicht, daß alle Dienstleistungen, die in den Niederlanden gemäß dieser Beschreibung erbracht werden, auch der niederländischen Umsatzsteuer unterliegen. In bestimmten Fällen (Leistungen für ausländische Auftraggeber) werden Korrekturen mittels des Null-Satzes vorgenommen.
Das deutsche Gesetz enthält für die Bestimmung des Ortes der Dienstleistung ein drittes Kriterium. In diesem Gesetz ist nämlich der Ort der Dienstleistung mit dem Ort verbunden, an dem der Unternehmer, der die Dienstleistung erbringt, seine Tätigkeit hauptsächlich ausübt (§ 3, Abs. 10). Nur bei Beförderungsleistungen ist der Ort der Dienstleistung ebenso wie im niederländischen Gesetz der Ort, an dem die Beförderung tatsächlich stattfindet. Das deutsche Gesetz enthält ebenfalls Bestimmungen des Inhalts, daß auch dann, wenn der Ort der Dienstleistung in Deutschland liegt, nicht immer MWS erhoben wird. In § 4, Nr. 3 des deutschen Umsatzsteuergesetzes 1967 werden bestimmte Leistungen für ausländische Auftraggeber, die in § 8 ausführlich definiert werden, von der MWS befreit bei gleichzeitigem Anspruch auf Vorsteuerabzug.
Der belgische Gesetzentwurf (Art. 21) betrachtet den Ort, an dem die Dienstleistung in Anspruch genommen wird, als den Ort der Dienstleistung. Falls nicht das Gegenteil erwiesen ist, wird angenommen, daß die Dienstleistung in Belgien in Anspruch genommen wurde, wenn eine der Vertragsparteien in Belgien ansässig ist.
Die Regelung der Beförderungsleistungen ist dieselbe wie in den Niederlanden und in Deutschland.
Um eine Doppelbesteuerung oder eine Nichtbesteuerung von Dienstleistungen zu vermeiden, erscheint eine Harmonisierung der Bestimmungen bezüglich des Ortes

7. Art. 6, Abs. 1 des Gesetzes.

einer Dienstleistung in den EWG-Gesetzen notwendig.

LIEFERUNGEN ODER DIENSTLEISTUNGEN AUSLÄNDISCHER UNTERNEHMER

Auf Grund der Definition des Ortes der Lieferung wird dieser Ort wahrscheinlich bei Einfuhrlieferungen stets im Ausland liegen, so daß ein ausländischer Unternehmer, der Waren in die Niederlande schickt, keine steuerpflichtige Lieferung ausführt. Er führt jedoch möglicherweise dann eine steuerbare Lieferung aus, wenn er Waren einführt und dann aus den Lagerbeständen verkauft. Was die „Sonstige Leistungen" anbelangt kann es oft passieren daß eine steuerbare Leistung in den Niederlanden vorliegt. Dies bedeutet nicht, daß der Ausländer, der in den Niederlanden eine steuerbare Lieferung oder sonstige Leistung ausführt, immer MWS zahlen muß. Art. 12 des Umsatzsteuergesetzes 1968 sieht vor, daß ein Unternehmer, der in den Niederlanden eine Lieferung oder sonstige Leistung ausführt, jedoch nicht im Königreich wohnt oder ansässig ist und dort keine Betriebstätte hat, selber keine Umsatzsteuer zu zahlen braucht, wenn der Abnehmer der Lieferung oder sonstigen Leistung ein Unternehmer, der im Königreich wohnt oder ansässig ist, oder ein im Königreich ansässiges Steuersubjekt im Sinne des Allgemeinen Gesetzes über die staatlichen Steuern ist.[8] In diesen Fällen wird der Abnehmer für die Lieferung oder sonstige Leistung besteuert. Wenn jedoch der oben erwähnte ausländische Unternehmer eine Lieferung oder Dienstleistung z.B. für eine Privatperson durchführt, so ist die Umsatzsteuer von ihm selbst zu entrichten.

LIEFERUNGEN ODER SONSTIGE LEISTUNGEN FÜR AUSLÄNDISCHE UNTERNEHMER

Häufig wird einem ausländischen Unternehmer Umsatzsteuer für Lieferungen oder sonstige Leistungen auferlegt, die für ihn in den Niederlanden ausgeführt werden, während er selbst in den Niederlanden keine Leistungen erbringt. Dies wäre z.B. der Fall, wenn ein ausländischer Unternehmer, der in den Niederlanden Werbekosten sowie Reise- und Hotelspesen macht, Beratungsdienste in Anspruch nimmt usw., aus dem Ausland Waren sendet, die er einem niederländischen Abnehmer verkauft hat. Der Ort der Lieferung befindet sich dann im Ausland, so daß der ausländische Unternehmer mit seinen Verkäufen nicht der niederländischen MWS unterliegt. Die Werbeagentur, das Hotel in dem er übernachtet hat, berechnen ihm jedoch MWS. Diese MWS kann er von den niederländischen Steuerbehörden zurückverlangen. Das Gesetz erlegt keine besonderen Beschränkungen bezüglich ausländischer Unternehmer auf. Das deutsche Gesetz (§ 15, Abs. 1) begründet den Anspruch auf Erstattung nur für den Unternehmer, der in Deutschland Lieferungen oder sonstige Leistungen durchführt oder dort seinen Sitz oder eine Betriebstätte hat.

Auch der belgische Gesetzentwurf (Art. 45) sieht einen Anspruch auf Erstattung der zuvor gezahlten Umsatzsteuer nur für diejenigen ausländischen Unternehmer vor, die Lieferungen oder sonstige Leistungen in Belgien ausführen. Der ausländische Unternehmer wird wahrscheinlich auch einen verantwortlichen Vertreter ernennen müs-

8. Steuersubjekte in Sinne des Allgemeinen Gesetzes über die staatlichen Steuern können einschließen: Juristische Personen, Personenunternehmen, Firmen und Gesellschaften (companies), sonstige Personenvereinigungen, Unternehmen öffentlich-rechtlicher Körperschaften und Beteiligungen (Siehe Art. 2 des Allgemeinen Gesetzes; Algemene wet inzake rijksbelastingen).

sen, wenn er selbst keine Betriebstätte in Belgien hat (Art. 55 des Gesetzentwurfs). Nach dem französischen Recht muß der ausländische Unternehmer ebenfalls einen steuerlichen Bevollmächtigten in Frankreich haben, wenn er die Erstattung der ihm in Rechnung gestellten MWS erlangen will. All diese Forderungen bestehen in den Niederlanden nicht. Trotzdem ist es nicht ganz leicht, die Erstattung zu erlangen.

VERFAHREN FÜR DIE BEANTRAGUNG EINER ERSTATTUNG

Obwohl das niederländische Gesetz grundsätzlich keine Beschränkungen für die Erstattung der MWS an Ausländer auferlegt, gibt es in der Praxis einige verwaltungstechnische Schwierigkeiten, weil die niederländischen Finanzämter zu der Erstattung natürlich nur dann bereit sind, wenn ein Anspruch auf Erstattung gemäß den gesetzlichen Bestimmungen besteht.

Wenn ein ausländischer Unternehmer in den Niederlanden eine Betriebstätte unterhält, ist für ihn der Steuerinspektor des Bezirks zuständig, in dem seine Betriebstätte liegt. In diesen Fällen wird der ausländische Unternehmer gewöhnlich auch in den Niederlanden Lieferungen und sonstige Leistungen bewirken, und dann findet auf ihn dasselbe Verfahren Anwendung wie auf einen niederländischen Unternehmer.

Wenn der ausländische Unternehmer keine Betriebstätte in den Niederlanden hat, ist stets – abgesehen von einer unbedeutenden Ausnahme – der Inspektor für Einfuhrzölle und Verbrauchsteuern in Den Haag, Waldorpstraat 440, zuständig. Der ausländische Unternehmer ohne Betriebstätte in den Niederlanden muß an diesen Inspektor eine Erklärung über die fälligen Umsatzsteuern richten, wenn er in den Niederlanden umsatzsteuerpflichtige Leistungen erbringt (z.B. Warenlieferungen an Privatpersonen). Wenn er keine Umsatzsteuer zu zahlen braucht, kann er an denselben Inspektor einen Antrag auf Erstattung der MWS richten, die ihm in Rechnung gestellt wurde. Wenn er sich an den Inspektor wendet, wird dieser ihm ein Formular zusenden, auf dem die Erstattung beantragt werden muß. Die Erstattungsanträge müssen normalerweise vierteljährlich eingereicht werden, jedoch kann auch ein monatlicher Antrag gestellt werden, wenn es sich um hohe Beträge handelt. Die Originalrechnungen, auf denen die MWS gesondert ausgewiesen ist, müssen zusammen mit dem Antrag vorgelegt werden. Die Rechnungen werden dem ausländischen Unternehmer zurückgereicht. Außerdem muß der ausländische Unternehmer einen Wohnsitz in den Niederlanden angeben.[9] Dies kann eine Postschließfachnummer sein oder auch z.B. die Adresse einer Bank. Schließlich muß der Ausländer noch ein Postscheck- oder Bankkonto angeben, auf das der erstattete Betrag überwiesen werden kann.

Der ausländische Unternehmer kann einen in den Niederlanden lebenden Vertreter ernennen, der berechtigt ist, die Erstattungsanträge einzureichen und die erstatteten Beträge entgegenzunehmen. Im Gegensatz zu der Regelung in anderen Ländern ist der Unternehmer hierzu jedoch nicht verpflichtet.

Wenn an den zuständigen Inspektor ein Antrag gestellt wird, kann der Unternehmer die Aufforderung erwarten dies und jenes glaubhaft zu machen:

a. Wenn ein Ausländer eine Erstattung beantragt, muß er dem Inspektor glaubhaft machen, daß er Unternehmer ist, denn Personen, die nicht Unternehmer sind, haben keinen Anspruch auf Erstattung der Umsatzsteuer. Dies gilt für Niederländer

9. Art. 57 des Allgemeinen Gesetzes.

ebenso wie für Ausländer. Der Nachweis, daß der Antragsteller Unternehmer ist, kann auf verschiedene Weise geführt werden. Wenn der Antrag von einer bekannten Gesellschaft eingereicht wird, wird der Inspektor wahrscheinlich ohne weiteres akzeptieren, daß es sich bei dem Antragsteller um einen Unternehmer handelt. Wenn jedoch der Name des Unternehmers nicht international bekannt ist, kann der Inspektor weitere Auskünfte fordern. Beispielsweise kann er nicht ohne weiteres beurteilen, ob ein Ausländer, der sich ihm gegenüber als Steuerberater bezeichnet, diesen Beruf auch tatsächlich ausübt. In diesem Fall kann der Inspektor eine Bescheinigung über die Eintragung im Handelsregister verlangen.

b. Dem Inspektor muß glaubhaft gemacht werden, daß der ausländische Unternehmer Lieferungen oder sonstige Leistungen ausführt, die in den Niederlanden steuerpflichtig wären, wenn er sie dort erbringen würde. Wie oben ausgeführt, sind bestimmte Leistungen in den Niederlanden steuerfrei. Dann braucht keine MWS für sie entrichtet zu werden, aber der Unternehmer hat dann auch keinen Anspruch auf Vorsteuerabzug. Folglich liegt kein Grund vor, die dem ausländischen Unternehmer in Rechnung gestellte Umsatzsteuer zu erstatten, wenn der Unternehmer Leistungen erbringt, die nach den niederländischen Gesetzesbestimmungen von der Steuer befreit sind.

Beispiel: Die Leistungen von Versicherungen sind in den Niederlanden von der Steuer befreit, d.h. Versicherungsgesellschaften sind für diese Leistungen nicht umsatzsteuerpflichtig, haben folglich aber auch keinen Anspruch auf Vorsteuerabzug. Deshalb erhalten auch ausländische Unternehmer, die Versicherungsverträge abschließen, keine Erstattung der ihnen berechneten Steuer.

Schwieriger wird die Sache, wenn der Unternehmer sowohl steuerfreie als auch steuerpflichtige Leistungen bewirkt, wie dies z.B. bei Banken der Fall ist. Bestimmte Leistungen der Banken sind steuerpflichtig, andere wiederum, wie Kreditgewährung, sind steuerfrei. Solche Unternehmer haben nur Anspruch auf Erstattung eines Teils der ihnen in Rechnung gestellten MWS. Wir möchten diese Frage hier nicht weiter im einzelnen behandeln, weil sie uns zu weit führen würde. Wenn einer ausländischen Bank in den Niederlanden MWS auferlegt wird, erhält sie diese Steuer möglicherweise überhaupt nicht zurück, oder sie erhält eine volle Erstattung oder eine Teilerstattung. Das hängt davon ab, ob die Leistungen, für die die MWS berechnet wurde, zur Durchführung im Prinzip steuerfreier Leistungen, steuerpflichtiger Leistungen oder beider Arten von Leistungen benutzt wurden. Es versteht sich wohl von selbst, daß ausländische Unternehmer, die nach dem niederländischen Gesetz sowohl steuerpflichtige als auch steuerfreie Leistungen bewirken, sich in einer schwierigen Lage befinden, wenn sie die Erstattung der niederländischen Umsatzsteuer beantragen wollen. Glücklicherweise sind in dem niederländischen Gesetz nur verhältnismäßig wenige Lieferungen oder sonstige Leistungen von der Steuer befreit, und von diesen Leistungen sind wiederum nur wenige im grenzüberschreitenden Waren- und Dienstleistungsverkehr von Bedeutung (siehe Aufzählung in Art. 11 des Gesetzes im „Supplement" zu dieser Veröffentlichung).

c. Schließlich kann der Inspektor noch den Nachweis dafür verlangen, daß die Steuer, deren Erstattung beantragt wird, für Lieferungen und sonstige Leistungen im Rahmen des Unternehmens des Antragstellers entrichtet wurde. Ein Unternehmer, der sich auf einer Geschäftsreise in den Niederlanden befindet und dem auf seiner Hotelrechnung MWS berechnet wird, kann die Erstattung

dieser MWS beantragen. Befindet er sich jedoch im Urlaub in den Niederlanden, kann er die ihm berechnete MWS nicht absetzen. Der Inspektor kann deshalb Belege darüber fordern, daß die Ausgaben im Auftrag und für die Zwecke des Unternehmens getätigt wurden. Es hängt von der Art der Leistung ab, ob weitere Auskünfte verlangt werden. Wenn der ausländische Unternehmer in den Niederlanden Werbekosten gehabt oder Beratungsdienste in Anspruch genommen hat, mag der Inspektor ohne weiteres davon ausgehen, daß es sich um geschäftliche Aufwendungen gehandelt hat. Wenn ihm nur Reise- und Hotelkosten entstanden sind, kann der Inspektor einen Nachweis über den Zweck der Reise fordern.[10]

EINFUHR

Die Einfuhr von Gütern ist ein gesonderter Steuertatbestand.[11] Grundsätzlich wird die Umsatzsteuer auf Einfuhrlieferungen bereits bei der Einfuhr tällig. Aber das niederländische Gesetz bietet in Art. 23 die Möglichkeit, die Besteuerung in bestimmten Fällen aufzuschieben (die sogenannte Steuerstundung bei der Einfuhr). Die Steuer wird dann erst fällig in dem Zeitpunkt, in dem sie wieder abgesetzt werden kann, so daß letzten Endes keine Steuer zu entrichten ist.

Art. 23 ist in zwei Fällen anwendbar:

1. Bei Waren, die in einer bestimmten Liste aufgeführt sind (Anhang A der Durchführungsbestimmung zum Umsatzsteuergesetz 1968) wird die Besteuerung der Einfuhren immer aufgeschoben. Die in der Liste aufgeführten Waren eignen sich nicht für den Verbrauch durch Privatpersonen, so daß bei einer Steuerstundung nicht die Gefahr der Steuerhinterziehung besteht. Wenn ein ausländischer Unternehmer die in Anhang A aufgezählten Waren einführt, wird die Besteuerung ebenfalls aufgeschoben.

2. Für Unternehmer und für Steuersubjekte im Sinne des Allgemeinen Gesetzes über die staatlichen Steuern, soweit diese Steuersubjekte bereits nicht nach den allgemeinen Bestimmungen Unternehmer sind, besteht die Möglichkeit einer Steuerstundung bei der Einfuhr auch solcher Waren, die nicht in Anhang A aufgeführt sind. Diese Möglichkeit wird nur solchen Unternehmern gewährt werden, die in den Niederlanden eine Niederlassung haben. Ausländische Unternehmer ohne Betriebstätte in den Niederlanden können deshalb nicht in den Genuß dieser Möglichkeit kommen. Wenn Waren eingeführt werden, die im Zeitpunkt der Einfuhr bereits für einen bestimmten niederländischen Kunden bestimmt sind, kann eine Steuerstundung gewährt werden, wenn der niederländische Kunde ermächtigt ist, eine Steuerstundung zu beantragen. Es findet dann nur eine Verrechnung der Umsatzsteuer statt, weil der niederländische Abnehmer in einem bestimmten Zeitpunkt die für die Einfuhr fällige Steuer entrichten muß, gleichzeitig aber diese Steuer wieder absetzen kann.

Unseres Wissens ist diese Steuerstundung in der EWG einmalig. Anscheinend erwägt auch Belgien eine Steuerstundung bei Einfuhren aus den Niederlanden nach Belgien. Unter dem alten Umsatzsteuersystem hatten die Niederlande und Belgien bereits eine Regelung, unter der die Umsatzsteuer auf Einfuhren erst bei dem Abnehmer erhoben wurde.

Wird die Besteuerung nicht aufgeschoben,

10. Die Teilnehmer des IFA-Kongresses können eine Erstattung der Mehrwertsteuer auf Registrierungsgebühr nicht geltend machen. Zur Vermeidung administrativer Schwierigkeiten haben die Steuerbehörde in diesem Sonderfall angeordnet, dass keine Mehrwertsteuer fakturiert werden soll. Die endgültige Mehrwertsteuer wird von der niederländischen Gruppe übernommen werden.

11. Siehe Art. 1 des Gesetzes.

so muß die Steuer sofort oder kurzfristig entrichtet werden. Wenn ein ausländischer Unternehmer Waren einführt, bestehen zwei Möglichkeiten:
a. Die Waren werden in die Niederlande eingeführt und dann von dem ausländischen Unternehmer aus den Lagerbeständen verkauft. In diesem Fall hat der ausländische Unternehmer selbst Anspruch auf Erstattung der Einfuhrumsatzsteuer. Oft wird der ausländische Unternehmer eine Betriebstätte in den Niederlanden haben, so daß er mit der Lieferung der Waren umsatzsteuerpflichtig wird. Hat er keine Betriebstätte, so kann er die Erstattung bei dem Inspektor in Den Haag beantragen. Dabei kann sich jedoch herausstellen, daß er noch Umsatzsteuer für die Lieferung von Waren z.B. an Privatpersonen schuldet. Die Vorschrift, daß bei Lieferung durch einen ausländischen Unternehmer der Abnehmer die Umsatzsteuer entrichten muß, ist – wie oben erwähnt – nicht anwendbar auf Lieferungen an Privatpersonen.
b. Häufiger wird es so sein, daß aus dem Ausland eingeführte Waren bereits für einen niederländischen Abnehmer bestimmt sind. Letzterer kann dann die Erstattung der bei der Einfuhr entrichteten Steuer beantragen. Wenn die Steuer bei der Einfuhr von dem ausländischen Unternehmer entrichtet worden ist, wird er diese Steuer natürlich dem niederländischen Kunden in Rechnung stellen, der seinerseits wiederum die Erstattung bei der Steuerbehörde beantragen wird.

AUSFUHR VON WAREN

Wenn Waren von einem Unternehmer ausgeführt werden, findet der Null-Satz Anwendung. Da der exportierende Unternehmer Anspruch auf Vorsteuerabzug hat, tragen die Lieferungen keine Steuer, weil bei ihrer Ausfuhr keine Steuer erhoben wird. In diesem Falle liegt eine Lieferung von Waren vor. Wenn keine Lieferung vorliegt (z.B. wenn ein Unternehmer Waren an eine Zweigniederlassung im Ausland sendet) ist von einem steuerbaren Tatbestand nicht die Rede und ein Null-Satz ist also nicht notwendig. Der Null-Satz ist in Liste II-a-2 des Gesetzes enthalten.
Wie oben erwähnt, verhindert die Anwendung des Null-Satzes nicht, daß ein kleiner Rest an Umsatzsteuer in dem Preis der Waren enthalten ist, und zwar auf Grund der Übergangsvorschrift für Wirtschaftsgüter des Anlagevermögens.

GRENZÜBERSCHREITENDER DIENSTLEISTUNGSVERKEHR

Nach dem niederländischen Gesetz ist auf die grenzüberschreitende Warenbeförderung der Null-Satz anwendbar. Die grenzüberschreitende Personenbeförderung fällt ebenfalls in den Geltungsbereich des Null-Satzes, vorausgesetzt, daß diese Beförderung zur See oder in der Luft erfolgt. Die Null-Sätze sind in Liste II-b-1, 2 und 3 enthalten. Ferner gilt der Null-Satz für Dienstleistungen bei der Vermittlung von Geschäften, wenn die Person, für die die Leistung erbracht wird, im Königreich weder wohnt noch ihren Sitz oder eine Betriebstätte dort hat (siehe Liste II-b-4). Schließlich ist der Null-Satz anwendbar auf Dienstleistungen, die von einer Person bezahlt werden, die weder in den Niederlanden wohnt noch dort ihren Sitz oder eine Betriebstätte hat, vorausgesetzt, daß weder diese noch eine andere Person, für die die Leistung erbracht wird, den Nutzen von dieser Leistung in den Niederlanden hat (siehe Liste II-b-5).

AKTIVER UND PASSIVER VEREDELUNGSVERKEHR

Das neue Umsatzsteuergesetz in den Niederlanden gewährt keine Befreiungen für den aktiven Veredelungsverkehr. Das ist nicht

erforderlich, weil im System des Vorsteuerabzugs die bei der Einfuhr in die Niederlande entrichtete Umsatzsteuer automatisch erstattet wird. Die Lohnveredelung muß auch in solchen Fällen, wo sie als Be- oder Verarbeitungsvorgang bezeichnet werden kann, als eine Leistung im Auftrag eines ausländischen Auftraggebers betrachtet werden, so daß gemäß Liste II-b-5 der Null-Satz anwendbar ist. Falls die veredelten Produkte ganz oder teilweise in den Niederlanden verkauft werden, führt der ausländische Auftraggeber bezüglich dieser Waren eine Lieferung aus, für die der Abnehmer gemäß Art. 12, Abs. 2 des Gesetzes steuerpflichtig ist. Der Teil der Leistung, der sich auf die nach Veredelung in den Niederlanden verkauften Güter bezieht, kann ebenfalls den Null-Satz erhalten. Infolgedessen kann der ausländische Auftraggeber völlig außerhalb des Besteuerungsbereichs bleiben.

Auch die Befreiung des passiven Veredelungsverkehrs gilt nicht für die Umsatzsteuer, es sei denn, dass es sich handelt um Waren die im Ausland repariert sind und wieder eingeführt werden.

VORÜBERGEHENDE EINFUHR VON WIRTSCHAFTSGÜTERN DES ANLAGEVERMÖGENS

Der Zolltarif 1960 enthält einige Befreiungen vom Einfuhrzoll in Fällen der vorübergehenden Einfuhr, und diese Befreiungen wurden auch als für die Umsatzsteuer gültig erklärt. In Art. 53 der Verordnung über die Befreiungen gemäß Zolltarif 1960 wird eine lange Reihe von Waren aufgeführt, die im Falle der vorübergehenden Einfuhr vom Einfuhrzoll und von der Umsatzsteuer befreit werden. Zu diesen Waren gehören auch einige, die als Wirtschaftsgüter des Anlagevermögens zu betrachten sind. Wir erwähnen zum Beispiel: Gegenstände, die von Künstlern, Theaterensembles und Orchestern, von Geschäftsleuten, Fachleuten auf dem Gebiet der Organisation und Arbeitsrationalisierung oder von Experten für topographische Vermessungen benötigt werden, ferner Maschinen, Apparate, Geräte usw., die eingeführt werden, um vor dem endgültigen Kauf erprobt oder getestet zu werden usw. usw. In all diesen Fällen wird die Befreiung vom Einfuhrzoll und von der Umsatzsteuer gewährt, da die Waren nach einer verhältnismäßig kurzen Zeit aus den Niederlanden wieder ausgeführt werden. Es kommt manchmal vor, daß die Befreiung gemäß Art. 53 nicht anwendbar ist, obwohl die Waren nur kurze Zeit in den Niederlanden verbleiben, so daß die Nichtbefreiung zu einer außerordentlich hohen Umsatzsteuerbelastung führen würde. Diese Belastung entsteht dann, wenn Wirtschaftsgüter des Anlagevermögens in der Übergangsperiode eingeführt werden, in der die Umsatzsteuer auf Einfuhren nicht voll absetzbar ist. Wenn es sich um Material aus dem Ausland handelt (Kräne, Bulldozer, Bohrmaschinen usw.), mit dessen Hilfe Arbeiten in den Niederlanden ausgeführt werden, kann die Umsatzsteuer in voller Höhe bei der Einfuhr erhoben werden (die in der Übergangsperiode nur teilweise absetzbar ist), während bei der Wiederausfuhr ein Teil der Umsatzsteuer erstattet wird, die nach der Einfuhr nicht voll abzugsfähig war.[12]

VORÜBERGEHENDE AUSFUHR VON WIRTSCHAFTSGÜTERN DES ANLAGEVERMÖGENS

Wenn Wirtschaftsgüter des Anlagevermögens z.B. zum Zwecke der Reparatur ausgeführt werden, findet bei Wiedereinfuhr

12. Siehe Ministerieller Erlaß vom 19. Mai 1969 – Nr. D 69/1781 OB-BTW 122.

eine Befreiung von der Umsatzsteuer gemäß dem Zolltarif statt. Die Steuer wird dann, grob gesprochen, nur von den Reparaturkosten erhoben. Diese bei der Einfuhr erhobene Steuer ist immer voll absetzbar. Wenn jedoch die im Ausland ausgeführten Reparaturen von solchem Ausmaß waren, daß von den Gütern gesagt werden kann, daß sie praktisch neu be- oder verarbeitet worden sind, so wäre eine neue Besteuerung die Folge, und zwar auf Grund von Art. 3 -1-h des Gesetzes. In diesem Fall geht es nämlich um die Herstellung von Wirtschaftsgütern durch eine dritte Partei aus Material, das dieser dritten Partei zur Verfügung gestellt wurde. In diesem Fall ist die Umsatzsteuer auf die Gesamtkosten der Produktion des Wirtschaftsgutes fällig. Wenn jedoch das zur Verfügung gestellte Wirtschaftsgut bereits zuvor von dem Unternehmer in seinem Unternehmen benutzt worden ist, brauchen die Produktionskosten nicht den Wert des alten Wirtschaftsgutes einzuschließen. Die Steuer, die entrichtet wurde, um das Wirtschaftsgut verfügbar zu haben, ist dann während der Übergangsperiode nur teilweise abzugsfähig.

Wenn die im Ausland ausgeführten Reparaturen nicht so weitreichend waren, daß sie einen Be- oder Verarbeitungsvorgang darstellten, sondern als Dienstleistung betrachtet werden können, ist die bei der Einfuhr entrichtete Steuer voll abzugsfähig, und eine neue Besteuerung findet nicht statt.

Besteuerung der Ausländer

Von Rechtsanwalt Dr. Arnold Heining, Steuerreferent im BDI und Generalsekretär der Deutschen IFA-Landesgruppe. 2. überarbeitete und ergänzte Auflage erscheint Herbst 1969, ca. 450 Seiten DIN A5, Ganzleinen ca. 45,– DM.

Die Besteuerung international verflochtener Gesellschaften

Von Rechtsanwalt Dr. G.N. Hohensee †, Wirtschaftsprüfer und Steuerberater. 2. neubearbeitete und erweiterte Auflage von Rechtsanwalt Dr. Christoph Bellstedt, Fachanwalt für Steuerrecht, erscheint Herbst 1969. Ca. 300 Seiten DIN A5, 1969, broschiert ca. 35,– DM.

Wohnsitz- oder Ursprungsprinzip?

Die Vermeidung der internationalen Doppelbesteuerung sowie der internationalen Steuerflucht durch Wohnsitzverlagerung bei ausschließlicher Anwendung des Ursprungsprinzips. Von Dipl.-Kfm. Dr. H.W. Endriss. 126 Seiten DIN A5, 1967, broschiert 18,– DM.

Das Doppelbesteuerungsproblem bei den direkten Steuern

Von Prof. Dr. jur. Armin Spitaler †. 2. Auflage 1967, Abdruck der 1. Auflage von 1936. 694 Seiten, Lexikonformat, Ganzleinen 65,– DM.

Das Mehrwertsteuergesetz – Added Value Tax Law

Deutsch-englische Textausgabe mit kurzer Einführung. Von Rechtsanwalt Dr. H. Karsten Schmidt (Attorney at Law, Illinois/USA, zugelassen am Obersten Gerichtshof der USA Washington), Rechtsanwalt Dr. Wulf H. Döser (MCompl.) und Rechtsanwalt Dr. Christoph Bellstedt. Mit einem Geleitwort von Staatsminister a.D. Dr. Otto Schmidt (Wuppertal) MdB, Vorsitzender des Finanzausschusses des Deutschen Bundestages. 146 Seiten DIN A5, 1967, broschiert 20,– DM.

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M.J. VAN ROOYEN:

THE SUBSTANTIAL HOLDING PRIVILEGE IN NETHERLANDS CORPORATE INCOME TAX

Some observations following recent amendments to the substantial holding privilege. — Some national and international aspects of this exemption.

The complete text of the legal provisions concerning the Substantial Holding Privilege has been published in the Supplement to this Bulletin issue.

INTRODUCTION

The 1969 Corporate Income Tax Law is to come into force on 1st January, 1970. This law replaces the 1942 Corporate Income Tax Decree introduced during the German occupation and based on the German "Körperschaftsteuer".

The amending of Netherlands corporate income tax has been a lengthy business. The bill was first submitted on 27th June, 1960, being itself amended in 1963 and 1968 to mention but two occasions, and subsequently passed the Second Chamber on 17th June, 1969. The bill's passage through the First Chamber is unlikely to delay its entry into force, since the First Chamber does not have the right to amend and could only throw the bill out in its entirety.

The principal object of the general review was the renewal of the legal form of the tax and also in particular the replacement of the occupation Decrees by Laws.

At the same time material amendments to certain points were envisaged. The chief changes have been introduced in the substantial holding (= Deelneming) privilege system and the rules applying to portfolio investment organizations and co-operative societies.

The double levy on distributed profits will remain in full for the time being[1].

The "Deelneming" privilege system as at present included in the Netherlands Corporate Income Tax Law will be discussed in the following. Special attention will be paid to the changes in the "Deelneming" privilege system and to the international aspects of the system in general.

The amendments to the "Deelneming" privilege in 1960 and 1968 have already been commented on in some detail[2].

I. NATURE AND SCOPE OF THE "DEELNEMING" PRIVILEGE

The "Deelneming" privilege in respect of

1. During the debates in the Second Chamber the Minister promised that a study memorandum on the double levy would be drawn up before 1st July, 1970.
2. Reference may be made to:
- A.F. Tuk in "De Naamloze Vennootschap", October 1960, p. 112 et seq.
- J. van Hoorn Jr., *ibid.*, p. 116 et seq.
- A.L. Brok in "Maandblad voor Accountancy en Bedrijfshuishoudkunde", November 1960, p. 386 et seq. and February 1962, p. 55 et seq.
- J.F.M. Giele in "Weekblad voor Fiscaal Recht", 28th January, 1961, No. 4539, p. 81 et seq.
- A.F. Tuk in "Weekblad voor Fiscaal Recht", 12th September, 1968, No. 4912, p. 789 et seq.
- J.F.M. Giele in "Belastingbeschouwingen", September 1968, p. 166 et seq.
- Dr. J.H. Christiaanse in "Belastingbeschouwingen", May 1969, p. 85 et seq.
- "New Corporation Income Tax Bill in the Netherlands" in European Taxation, October 1968, p. 218 et seq.

participations in resident subsidiary companies has been applicable since 1893. No restrictive conditions such as a minimum participation percentage were laid down and the entire dividend was exempted.
For participations in non-resident subsidiary companies the privilege dates from 1915. The minimum participation to qualify was set at 90% and only a part (50%) of the dividend was exempted.
In 1927 the treatment of participations in non-resident companies was placed on a virtually equal footing with that of participations in resident companies by the abolition of the minimum percentage requirement.
The 1942 Corporate Income Tax Decree granted the "Deelneming" privilege for both domestic and foreign participations, together with exemption of the entire dividend, for participations of 25%.
The 1969 Corporate Income Tax Law[3] extends the "Deelneming" privilege as regards both domestic and foreign participations to all gains from participations and reduces the minimum participation to 5%[4].
In future not only will the dividends be exempt, but all fluctuations in the value of the participation (capital gains and capital losses) will therefore also be disregarded when determining the taxable profit. This means that all capital gains are tax-free and the capital losses non-deductible with the exception, however, of the loss incurred upon the liquidation of a subsidiary.
The "Deelneming" privilege is intended to prevent double taxation for companies. It is therefore entirely separate from the problem of the so-called double taxation on distributed profits, viz. corporate income tax in the case of legal entities and income tax for individual shareholders.[5]

The "Deelneming" privilege is an application under restrictive conditions of the "non bis in idem" principle, which means that the same profit is not taxed twice if a company holds shares in another. In Netherlands tax legislation prevention of this double taxation is limited to shareholdings of a certain economic significance. On the contrary, in the Belgian tax system, for instance, no minimum percentage is required to qualify for exemption and the "non bis in idem" principle is fully applied.
For the "Deelneming" privilege to be applied really consistently, double taxation should be prevented for all participations, without any distinction being made in principle between resident and non-resident subsidiaries. As a consequence there is in principle equal treatment of dividends distributed by resident and non-resident subsidiaries. It also amounts to a unilateral measure for the prevention of international double taxation. This exemption was incorporated in Netherlands legislation back in 1915 because the Netherlands was then a large-scale exporter of capital (primarily to its former colonies).
From the history of the law[6] it is apparent that extension of the "Deelneming" privile-

3. In the rest of this article the 1969 Corporation Tax Law will be referred to as "the Law" and the 1942 Corporation Tax Decree as "the Decree".
4. The text of Section 12 of the Law and of Section 10 of the Decree is included in the supplement to this issue of the Bulletin.
5. For a recent study of this double taxation reference may be made to A. Jacquemin and C. Parmentier "La double imposition des bénéfices distribués; vers une solution européenne". This study prompted the writer's article "De economische dubbele heffing over uitgedeelde winsten in de E.E.G." (The economic double taxation on distributed profits in the E.E.C.) in "Belastingbeschouwingen", June-July 1969, Nos. 6–7, p. 109 et seq.
6. For a detailed account of the history of the "Deelneming" privilege see Dr. J.H. Christiaanse "Deelnemingsvrijstelling" (1963), p. 18-68.

ge to non-resident subsidiaries was introduced simultaneously and parallel with the unilateral measure for the prevention of double taxation for foreign branches, since there was not considered to be any fundamental difference between branches and subsidiaries[7]. However, to bring out this parallel a 90% participation was required. The view could be taken that the subsidiary was just another—indirect—form of carrying on business abroad, with the profits tax of the non-resident subsidiary being considered as a tax burden so to speak on the profit earned by the parent company on the capital invested in the non-resident subsidiary.

In principle no distinction was made between domestic and foreign participations, either. It was not thought important at the time whether the exemption was granted in respect of tax on profit from a subsidiary in the Netherlands or abroad[8]. Quite a revolutionary line to take regarding international tax law in those days!

The two aspects would also appear to be clearly brought out in the Explanatory Memorandum to the 1960 bill. The "Deelneming" privilege applies in principle equally for foreign and domestic participations. At the same time a Netherlands enterprise carrying on business in another country through a subsidiary benefits from the same facility as if it conducted its.business there in the form of a permanent establishment[9]. Here, therefore, we see the parallel with the permanent establishment.

There is accordingly a close relationship between the "Deelneming" privilege as regards domestic and foreign participations, the only difference being that in the case of foreign participations a restrictive condition is imposed. In both the Decree and the Law the "Deelneming" privilege is dealt with in one and the same Section for domestic and foreign participations.

The company or association which is not established in the Netherlands must be subjected to a tax which is levied in some form on profits by another State (Section 12, subsection 3). The Law therefore requires that the subsidiary be subject to a profits tax; it is, however, sufficient if the subsidiary is "subjectively liable to taxation". It is not required that there should always be an "objective liability to taxation" (obligation to pay). This is important when "pioneer facilities" are granted abroad or some other form of tax holiday is applicable.

For completeness it should be pointed out that the 1956 unilateral measure for the prevention of double taxation[10] does require that a permanent establishment abroad be objectively liable, which means that profits from a foreign permanent establishment cannot be tax-free if an an objective exemption has been granted elsewhere[11].

The term "State" further indicates that the profits tax should be at the State level; local or regional taxes are not therefore relevant. The only material requirement as regards this profits tax is that it must be a profit-based tax and not e.g. one levied on turnover.

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7. Printed Documents of Second Chamber, 1914-15, No. 5.
8. Printed Documents of Second Chamber, 1926-27, No. 56.
9. Explanatory Memorandum to Corporation Tax bill, Second Chamber document, Session 1959-60, Document 6000, No. 3, p. 13. Hereinafter cited as "Explanatory Memorandum, No. 3".
10. Section 2, subsection 2 *(in fine)* of the Royal Decree providing for Unilateral Relief from Double Taxation, of 7th April, 1965 ("Staatsblad" 145).
11. Another difference is that the exemption of the profit of the foreign permanent establishment is included in the tax conventions concluded by the Netherlands, and that the "Deelneming" privilege for dividends from foreign participations is governed by national legislation.

This would also conflict with the Netherlands policy regarding the prevention of international double taxation. No minimum rate is set for the foreign profits tax, the level of this tax being therefore a matter for the other State to decide[12].

This attitude of the Netherlands regarding foreign taxation leads – from the fiscal angle – to equal conditions of competition in the country where the investment is effected. With the exemption system as applied in the Netherlands a low foreign tax rate is a definite advantage, unlike the credit system in which additional tax is levied on dividends received from non-resident subsidiaries to bring the amount paid up to the domestic level, thereby leading to equal competition conditions in the investor's state of domicile. For the "Deelneming" privilege to be applicable to foreign participations the additional condition – besides the formal 5% requirement – that this participation does not form an investment must also be satisfied (Section 12, subsection 7).

As will be seen when the technical rules relating to the "Deelneming" privilege are discussed, a further difference is that the costs connected with foreign participations are not deductible (Section 12, subsection 4). The difference in treatment between resident and non-resident subsidiaries is therefore quite small, since the "Deelneming" privilege also applies to all advantages in the case of non-resident subsidiaries, while the exception permitting the deduction of losses incurred upon the liquidation of a subsidiary is likewise applicable to a non-resident subsidiary (Section 12, subsection 5).

In the writer's opinion the "Deelneming" privilege must always be viewed in comparison with the treatment of the permanent establishment, while the exemption must moreover be restricted with a view to the taxation of portfolio investment dividends for natural persons. If the "Deelneming" privilege were also to apply to foreign dividends this would be a unilateral prevention of double taxation through exemption for the company. However, it is also desirable for domestic portfolio investment dividends that there should be a clear demarcation between participations and portfolio investments.

In particular the parallel with the permanent establishment will be considered in detail.

II. THE PARALLEL BETWEEN SUBSIDIARY AND PERMANENT ESTABLISHMENT OUTSIDE THE NETHERLANDS

Equal treatment of foreign subsidiary and permanent establishment should result in the profit being taxed abroad and exempted in the homeland, with compensation for any foreign losses. There are, however, two important differences in the results of the fiscal treatment of subsidiaries and permanent establishments: the compensation of foreign losses and the foreign withholding tax on participation dividends.

A. *The compensation of losses incurred abroad*

1. *Difference in compensation for losses*

A loss by the foreign permanent establishment is directly offsettable against the profits of the domestic company through normal accounting rules, but a loss by a foreign participation is not in principle deductible, at least as long as liquidation is not involved. Losses on loans to foreign subsidiaries are, however, deductible.

The exemption for profits earned in later years is then reduced by the amount of the loss previously offset. Thus for the purposes of exemption in the Netherlands profits and

12. Memorandum in Reply to the Second Chamber; Session 1962-63, Document 6000, No. 9, p. 25. Hereinafter cited as "Memorandum in Reply, No. 9".

losses of the permanent establishment are in fact balanced over the years[13].
The exclusion in principle of losses on domestic and foreign participations as a consequence of the extension of the privilege to all fluctuations in value (capital gains and capital losses) leads to a fundamental difference with the system for permanent establishments. The fact that a loss incurred upon liquidation can be offset against the parent company's profits brings the subsidiary more into line with the permanent establishment once again, however. We shall nevertheless base ourselves on this difference in the following, since at least a protracted delay in the setting off of the loss can occur and since for this reason alone the decision to liquidate will not be taken in a hurry. This difference would of course only have major practical consequences if the subsidiary had been making a loss for a number of years.
The Netherlands system for the taxation of companies with permanent establishments outside the Netherlands is that besides exemption of the profit the losses are deductible from the profit as computed for tax purposes.

The European Commission's proposal regarding the permanent establishment

It is proposed in the Draft Directive of 15th January, 1969, on mergers, divisions and contributions of assets that a company with a permanent establishment in another member state should be taxed on the profit in that state, while the member state in which the company is established should refrain from taxing that profit (Section 12, subsections 1 and 2).
The Commission recognizes, however, that the foreign losses are not deductible in this system, while such deduction is deemed desirable for various reasons. It accordingly proposes that the company may on request be taxed according to the "world profit" system. This means that the profits and losses of permanent establishments in other countries would be included in the company's profits, a reduction being granted to prevent double taxation (Section 12, subsection 3). If a company opts for this system it will be applicable to permanent establishments in all member states for the period of five years. It can be extended to permanent establishments in one or more states outside the E.E.C. if the conventions for the prevention of double taxation so permit.

2. *Fiscal consolidation*

Permanent establishments and subsidiaries can only be treated on a fully equal footing if the fiscal consolidated profit system[14] is applied for international concerns ("groups"), in accordance with the "world profit" system with regard to permanent establishments.
In the economic concept of consolidation actual economic status takes precedence over the legal form of the enterprise. A subsidiary all shares in which are held by the parent company is accordingly considered as a branch. The economic relationships of internationally oriented trade and industry are not then affected for tax purposes by differences in legal form. Otherwise the permanent establishment form could be desirable for risky foreign investments from the tax angle.
It would represent a great step forward if this consolidation system were also to be made applicable to foreign subsidiaries.

13. Section 3, subsection 3 of the Royal Decree providing for unilateral relief from double taxation. See also the article by *J. Bouwsma, infra.*
14. The term "fiscal consolidation" does not imply that a commercial consolidated balance sheet is required.

Losses of the—legally—independent non-resident subsidiary—which is in principle outside the Netherlands tax orbit—could be set off against the consolidated profit of the parent company. The great advantage therefore lies in the direct horizontal setting off of the foreign subsidiary's losses over a number of years against the concern's other results, which becomes all the more important when the possibility of vertical loss compensation in the subsidiary is less.
The fiscal unit system in fact results in the "Deelneming" privilege being superfluous for consolidated participations, since dividends from participations are then viewed as profit transfers within the concern. In this case consolidation is a real alternative likely to prove of greater value.

3. *The European Commission's proposal regarding fiscal consolidation*

In its Draft Directive of 15th January, 1969, concerning the tax system for parent-subsidiary relationships in the E.E.C. member states the European Commission also included a proposal for a fiscal consolidation system for subsidiaries in other member states (Art. 7)[15].
If the participation is at least 50% the parent may opt for consolidation. The system will then apply obligatorily for all subsidiaries in the E.E.C. and will remain in force for not less than five years. The system may also be made applicable for a minimum of five years to subsidiaries in one or more countries outside the E.E.C. upon request. The concern will, however, be free to choose regarding certain countries. The profits from all the subsidiaries concerned will be incorporated in the parent's operating results, due account being taken in one way or another of taxes levied in the countries involved (corporate income tax and, in the writer's opinion, also dividend withholding tax, especially with respect to third countries).
The European Commission proposes 50% as the criterion for consolidation, which is a rough delimitation. It is, however, a matter of the actual economic power over the subsidiary's course of business. In most cases a 50% shareholding will be sufficient for this, although a higher or lower percentage may sometimes be required.
The European Commission is to carry out a further study for the technical implementation of the system.
In France a broadly similar consolidated profit system for majority interests in domestic and foreign subsidiaries is already applied.

4. *Fiscal consolidation in the Netherlands ("Fiscal unit")*

Netherlands corporate tax legislation includes the "fiscal unit" system, under wich the entire concern is taxed as one unit. Upon request the Minister of Finance is empowered to declare, on conditions to be laid down by him, that domestic subsidiaries all shares in which are held by the parent company are deemed to be absorbed by the parent company (Section 14)[16].

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15. For an explanation of the Draft Directive see George Gosset in "La Fiscalité du Marché Commun", April 1969, p. 27 et seq.
See also Dr. H. Debatin in "Aussenwirtschaftsdienst des Betriebsberaters", May 1969, p. 129.
A comprehensive analysis of the draft directive appeared in a special issue of "European Taxation", July 1969. An English translation of the draft directive is published in "Supplementary Service to European Taxation", Section D, July 1969.

16. Under the Decree the fiscal unit was regulated in Section 27 of the 1940 Profits Tax Decree, which was applied through Section 32, subsection 5 of the Decree.
The provisions of Section 14 of the Law correspond very largely with those of Section 27.

The advantage of this is that besides the direct compensation of profits and losses within the concern all inter-company settlements are eliminated and also for instance the participation dividends. Costs incurred by the parent for the participation in the subsidiary are then also deductible as concern costs. The system is therefore comparable with a genuine commercial consolidation. The fiscal unit system also means that assets and participations can be moved within the concern tax-free, while cost, price and profit problems also become simpler ("inter-company profits")[17].

In the Netherlands fiscal unit system the unit is considered as one tax-paying body with one tax declaration. This is therefore a step further than e.g. the German "Organschaft" system, in which the subsidiaries remain separately liable for taxation and only the individually calculated profits and losses of these subsidiaries are lumped together[18]. As in the German system, the integration permitted by the Netherlands regulations is restricted to domestic subsidiaries.

Contrary to Section 14 of the Law, Section 27 of the Decree did not in principle exclude consolidation of foreign subsidiaries. The Minister of Finance has never, however, authorized the inclusion of foreign subsidiaries in a fiscal unit.

Comparison of the Netherlands fiscal unit system with the E.E.C. plan indicates that the Netherlands system is more restricted. For domestic subsidiaries a 100% participation is required, while consolidation of foreign subsidiaries is not permitted.

5. *Comparison of the Netherlands "Deelneming" privilege and the fiscal unit system for Netherlands subsidiaries*

When comparing the tax regulations applicable to a foreign subsidiary and a permanent establishment the fiscal unit system was put forward as a potential alternative for the "Deelneming" privilege in order to obtain an even greater analogy with the rules for a permanent establishment: direct offsetting of losses and no (foreign) dividend withholding tax on profit transfers. The fiscal unit system is, however, a real alternative to the "Deelneming" privilege as far as domestic subsidiaries are concerned, although the advantage to be gained by it is limited to loss compensation. There will not in fact be any domestic dividend withholding tax involved if the receiving body is entitled to the "Deelneming" privilege.[19].

The Netherlands parent company of a 100% Netherlands subsidiary in fact has a real choice between the two systems. The "Deelneming" privilege is based on the legal independence of parent and subsidiary, even as regards 100% subsidiaries. This is demonstrated by the simple fact that besides the "Deelneming" privilege there is upon request also the fiscal unit system, in which the subsidiary is viewed as a branch[20].

Now that losses on participations are no longer deductible in principle the new "Deelneming" privilege provisions differ to a greater extent from the fiscal unit principle in which losses by subsidiaries are directly and fully offsettable. This difference

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17. A description of the Netherlands fiscal unit system is given by Dr. J.H. Christiaanse in "La Fiscalité du Marché Commun", February 1969, p. 3 et seq.

18. See also Dr. A.J. Rädler in "Die direkten Steuern der Kapitalgesellschaften und die Probleme der Steueranpassung in den sechs Staaten der Europäischen Wirtschaftsgemeinschaft", 1960, p. 183.

19. Section 4, subsection 2 of 1965 Dividend Tax Law ("Staatsblad" 621).

20. Judgements of Netherlands Supreme Court of 8th May, 1957, B.N.B. 1957/208 and 7th March, 1962, B.N.B. 1962/166.

was much less under the old "Deelneming" privilege system, since losses on participations were then deductible.
The exclusion of loss compensation also conflicts with the European Commission proposal already referred to, although this proposal relates only to foreign participations. The European Commission presumes of course that domestic losses are already offsettable!
Compared with the "Deelneming" privilege the fiscal unit system now results in an advantage, making the latter system even more attractive from the tax angle. The fiscal unit system is after all primarily of interest on account of the loss compensation and less because of the exemption of profits which would in any case already be exempted through the "Deelneming" privilege.
For 100% Netherlands participations there is one further reason for switching over to the fiscal unit system if at all possible. As far as 100% participations are concerned the "Deelneming" privilege is in fact of relatively minor significance. However, now that losses are no longer deductible under the "Deelneming" privilege, the criterion for fiscal consolidation is even more important fiscally than previously. The formal and legal 100% criterion can now lead to differences in competition when losses are involved, and these differences would be less at a criterion of 50%. A concern with 100% domestic subsidiaries has a large possible fiscal advantage in comparison with other concerns with large domestic majority participations of up to 99% and for that matter also vis-à-vis a concern with chiefly (100%) foreign subsidiaries!
As far as domestic participations are concerned the fiscal consolidation criterion should be reduced to 50%, or 51%, in order to permit loss compensation within the concern for these majority participations as well. This figure is more realistic, more neutral from the fiscal angle and more in line with the commercial requirements for consolidation.
The fiscal unit system should be made applicable to "dependent" subsidiaries when the parent company holds the majority of the stock. The "Deelneming" privilege should then primarily be made applicable to "independent" subsidiaries in which the parent only holds a minority interest, even although the system applies in principle to all participations.
However, it is precisely the low 5% criterion for participation as included in the Netherlands law which makes the "Deelneming" privilege rather ambiguous. It applies not only for the genuine parent-subsidiary relationships but also for small participations, while the same thinking as regards the independence of the subsidiary governs the fiscal treatment of these two economically very different forms of participation. In itself, however, this low percentage is not incorrect, bearing in mind that the legislation is based on the "non bis in idem" principle.
Particularly the fact that a concern with 100% domestic participations applies through the fiscal unit system direct loss compensation, or will be able to do so, is one reason for extending consolidation to foreign participations according to the same criterion, but at least for 100% participations in foreign subsidiaries. This would also be in line with the European Commission's proposal.
If it is accepted that there is not in principle any difference between domestic and foreign participations, there is not in fact any reason for making a distinction as regards consolidation and certainly not if consolidation gives new fiscal advantages in comparison with the "Deelneming" privilege.

B. *Foreign withholding tax on dividends from participations*

1. *The Netherlands attitude regarding participations*

A foreign withholding tax on dividends received from non-resident subsidiaries is also an obstacle to the equal treatment of subsidiaries and permanent establishments. As already noted, dividend withholding tax does not apply in the case of dividends received from resident subsidiaries if the shareholder is entitled to the "Deelneming" privilege. Profit transfers, particularly within a concern, may not give rise to taxation. The "Deelneming" privilege accordingly results in fact in exemption from corporate income tax and dividend withholding tax when profits are transferred to the parent company: taxation remains restricted to corporate income tax due from the resident subsidiary.

For foreign participations foreign withholding tax on dividends from such participations amounts to an extra burden since neither "credit against tax" nor "credit against income" is possible: the dividend from the participation is not in fact included in the taxable profit. This is contrary to what is permitted in the case of individuals, where tax conventions provide for dividend withholding tax to be credited against income tax.

Netherlands treaty policy has always been directed towards eliminating or limiting to the maximum extent possible foreign withholding tax on dividends from participations, in order to strike as close as possible a fiscal balance between the treatment of permanent establishments and subsidiaries. The distribution of profits within a concern corresponds very largely with profit transfers within an enterprise[21].

A lower withholding tax on dividends from participations is also generally accepted internationally and most tax conventions include separate provisions for dividends received by a parent company from subsidiaries. The OECD draft convention proposes a 5% withholding tax on dividends from participations of at least 25%[22]. The Netherlands has made the reservation that it will endeavour to reduce the withholding tax to nil in its conventions[23]. Up to the present the Netherlands has largely succeeded in this policy, although a 5% rate has been accepted in the conventions with the United States and the United Kingdom.

2. *The European Commission's proposal in respect of the common system of taxation in parent-subsidiary relationships*

In a common market such as the E.E.C. there is of course all the more reason for eliminating withholding tax on dividends from participations besides the extension of the "Deelneming" privilege to subsidiaries in other member states.

In the Draft Directive already referred to the European Commission sets out a common tax system for parent-subsidiary relationships which includes the proposal that the "Deelneming" privilege should also be applied to dividends from participations in other member countries, and that dividend withholding tax should be abolished on the subsidiary level in order to arrive at a genuinely tax-free distribution of profits within the concern (Sections 4 and 5). The parent company is therefore treated as if it had earned the profit itself and not received

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21. Memorandum on the general review of fiscal legislation. Letter of 27th July, 1960, to Second Chamber; Session of 1959–60, document 5380–6000, No. 9, p. 13.
22. Section 10, subsection 2, a.
23. See notes to the OECD draft convention, p. 106, point 51 (English text).

it via the subsidiary.
Taxation in the case of international concerns would then be limited by this E.E.C. proposal to the foreign corporate income tax payable by the subsidiary.
The proposal that no dividend withholding tax be levied is a more far-reaching one than extension of the "Deelneming" privilege to foreign participations, an extension which already exists to a considerable extent in practice. In the E.E.C. withholding tax on dividends from participations is usually 5% and sometimes more, even apart from the specific aspects of the split rate system which can lead to higher withholding tax.
The criterion for participations has been set at 20%, which must be viewed as a compromise between the percentages included in the legislations of the member states. The 20% criterion means that the system is not only applicable to genuine parent-subsidiary relationships: the title of and the notes to the Draft Directive wrongly imply that this is the case, since the exemption also applies for other relationships. We consider it strange that this proposal does not leave the possibility open for this system also to be extended to subsidiaries in certain third states, as is done in the case of fiscal consolidation, since both proposals are in a sense based on the same thinking.
The European Commission does not wish to state any opinion regarding the question whether the costs relating to foreign participations should or should not be deductible for tax purposes.
It has, however, suggested that member states—such as France and Belgium—which fix the costs of participations at a certain (lump-sum) percentage of the dividend received, could set this percentage at not more than 5% (Section 4, conclusion).
In the writer's opinion this proposal of the European Commission should be understood to mean that if only 95% of the dividend is exempted, the costs of the foreign participation are deductible in toto. If, however, in certain states—such as the Netherlands—a 100% exemption is granted, it would appear that costs which are not charged to the foreign subsidiary are not deductible.
The different states therefore have a choice here between two systems for eliminating the costs of foreign participations. In practice the quantitative effect of this alternative will not usually be the same; this will depend on the relationship between the dividends and the costs of all participations together.
A comparison of the European Commission's proposal and the Netherlands system reveals that the Netherlands rules regarding the participation percentage are less restrictive. It would appear unlikely that the Netherlands will give up its more favourable system.
With regard to the subject of the exemption the Netherlands is the only country which goes further than exemption of the dividend.

III. THE FISCAL TREATMENT OF PARTICIPATIONS AND PORTFOLIO INVESTMENTS

1. *The distinction between participations and portfolio investments*

To distinguish between participations and portfolio investments a solely formal criterion (5%) is included in the Law as regards relationships between resident enterprises (Section 12, subsection 6). For foreign interests, besides the low 5% requirement a material criterion is also set, viz. that the shareholding may not form a portfolio investment (subsection 7). The burden of proof lies with the tax authorities. When designating participations smaller than 5%

the same condition will apply for domestic and foreign participations as when the Decree was in force: the participation must be in the normal line of business (subsection 8).
In the Explanatory Memorandum to the bill the material difference between participations and portfolio investments is set forth as follows: "A participation will be deemed to exist if there is a not too farfetched connection between the business of the enterprise which acquires the shareholding and that of the enterprise in which the interest is acquired. A distinction should be made between the holding of shares in view of the relationship resulting therefrom with the enterprise in which the interest is acquired and the holding of shares purely as a portfolio investment in securities[24].
In the first case there is a business link between the two bodies, so that there is a sound reason why the profit should only be taxed once, while in the case of an investment this business tie does not exist. The Law therefore sets a formal criterion for distinguishing between participations and portfolio investments, thereby—according to the Explanatory Memorandum—approaching reasonably close in general to reality.
The material criterion for exemption for participations in foreign companies, which is also intended to prevent a flight into foreign portfolio investment companies, could lead to the establishment of a Netherlands portfolio investment company. This is all the more attractive since the Netherlands tax system for portfolio investment organizations is in fact almost as favourable as that applicable in other countries. A material criterion in addition to the 5% requirement would therefore also in fact be desirable for interests in domestic companies. The legislators have not deemed this necessary, provided participations in portfolio investment organizations are excluded from the "Deelneming" privilege, so that there can be no abuse through cumulation of the "Deelneming" privilege and the facilities of the portfolio investment organization system[25]. Before taking a closer look at this cumulation, a brief survey of the entirely modified system for portfolio investment organizations may not be out of place.

2. *The tax rules in respect of investment organizations*

Section 27 of the Law states that further rules of a different import shall be laid down by Royal Decree regarding the taxation of portfolio investment organizations ("beleggingsinstellingen") (Subsection 1, a)[26].
Investment organization status is accorded to portfolio investment companies ("beleggingsmaatschappijen") established in the Netherlands and (open) investment funds ("fondsen voor gemene rekening"), the objects and activities of which are the investment of capital exclusively or almost exclusively in the form of securities, immovable property and loans secured by mortgages; these organizations must also satisfy a number of conditions (Subsection 2, a to d incl.).
These conditions include that the profit must be paid out within eight months and that at least 80% of the funds to be invested in

24. Explanatory Memorandum, No. 3, p. 13.
25. Memorandum in Reply, No. 9, p. 26 and 41.
26. Explanatory Memorandum to the Second Amendment Bill, document of Second Chamber, Session 1967-68, document 6000, No. 17, p. 7, 8 and 12. To be cited hereinafter as Second Explanatory Memorandum, No. 17. The technical effect of the portfolio investment organization system is dealt with in greater detail in the Further Memorandum in Reply to the Second Chamber; Session 1968-69, document 6000, No. 22, p. 16-23. Hereinafter cited as Further Memorandum in Reply, No. 22.

securities must be financed with the organization's own funds (Subsection 2, a and b). A portfolio investment organization within the meaning of Section 27 is therefore an exempted investment organization which meets the requirements set. These conditions are in fact included in the definition.

A portfolio investment organization established in the Netherlands will moreover only be eligible for exemption if foreign shareholders do not hold more than 25% of the capital, so that the setting up of a portfolio investment organization in the Netherlands cannot result in non-residents subject to taxation on Netherlands sources of income being able to reduce their limited Netherlands tax liability (Subsection 2, d). The open investment funds, whose certificates are negotiable, are treated by the Law as portfolio investment organizations. These open funds are subjectively liable to taxation under the Law (Section 2, subsection 1, e).

The system for portfolio investment organizations has been extended to interest and yields from immovable property in addition to dividends, so that the possible fields of portfolio investment for these organizations have been considerably widened[27].

3. *The relation between the "Deelneming" privilege and the rules governing portfolio investment organizations*

Upon the amendment of the bill in 1968 the "Deelneming" privilege was excluded for participations in portfolio investment organizations (Section 12, subsection 2). The reason for this was that the authorities wished to prevent the tax saving by deferment which could be possible through the "inclusion" of a portfolio investment company[28]. The "Deelneming" privilege is accordingly applicable to participations in a non-exempted portfolio investment organization which has not therefore met the conditions.

The 5% requirement could otherwise be avoided by setting up a subsidiary company as a portfolio investment organization. Without the provisions of Section 12, subsection 2, if a shareholding is not eligible for the "Deelneming" privilege, a subsidiary could be set up to which the shares could be transferred, if recognition as a portfolio investment organization were to be obtained by meeting the conditions laid down. This could result in the subsidiary being exempted from corporate income tax, provided the profit is distributed within eight months. Were it not for this provision, the parent company would be entitled to the "Deelneming" privilege in respect of dividends from the subsidiary, while in addition any capital gain upon sale of the interest would also be untaxed[29].

A further provision is that the portfolio investment organization shall not be entitled to the "Deelneming" privilege, even when the interest concerned is larger than 5% (Section 12, subsection 2).

The double taxation can only be prevented if the specific conditions of the portfolio investment organization system are satisfied (e.g. distribution of profits within eight months)[30].

A holding company with mainly foreign participations is not, however, a portfolio investment organization. There is no question of investment in the sense of Section 12 subsection 7 if the Netherlands parent company acts as a holding company of foreign subsidiaries which are themselves

27. Second Explanatory Memorandum, No. 17, p. 7.
28. Second Explanatory Memorandum, No. 17, p. 11.
29. Memorandum in Reply, No. 9, p. 41.
30. Second Explanatory Memorandum, No. 17, p. 11.

conducting business (operating companies). The "Deelneming" privilege therefore also applies for dividends received by a genuine holding company.

The privilege likewise applies for participations in a foreign holding company. It is not considered to be a portfolio investment if a foreign subsidiary acts as the holder of shares in other subsidiary companies which are also established outside the Netherlands and which conduct the same type of business as the Netherlands parent company. The relationship with the entities behind the holding company must therefore also be considered if need be[31].

It can in general be stated that an entity is not deemed to be a portfolio investment organization if the object stated in its Articles of Association is not limited to the portfolio investment of capital or if its actual activities go beyond straightforward investment—e.g. include the managing of companies—or if one of the conditions is not satisfied[32].

Unlike the portfolio investment organization rules, it is not a prerequisite for the "Deelneming" privilege that the company holding the interest should act solely as a holding company. The profits from other forms of business are taxed in the normal manner.

4. *The "Deelneming" privilege and "Base Companies"*

Owing to the favourable "Deelneming" privilege the Netherlands is an attractive country to foreign concerns for the establishment of holding companies, and the more so since the "Deelneming" privilege also applies if the holding company also has other activities of its own making it more than just a "base company".

The "Deelneming" privilege moreover makes a "base company" unnecessary as far as foreign subsidiaries are concerned, since postponement of taxation on the dividends is already obtained through the "Deelneming" privilege. After all, no requirements are laid down regarding distribution, as in the case of the Netherlands portfolio investment organizations system. Income may therefore be freely amassed in the entity which enjoys the "Deelneming" exemption, unless the foreign tax authorities assume a "deemed dividend"—as is—reportedly—done in the United States, for instance—if the holding company does not have any business activities of its own.

The Netherlands tax rules regarding holding companies are also unsuitable for the setting up of base companies because the exemption is restricted to the gains from participations —dividends and capital gains on the shares— and does not apply to interest, royalties or other capital gains.

IV. MECHANISM OF THE "DEELNEMING" PRIVILEGE IN THE 1969 CORPORATE INCOME TAX LAW

1. *Beneficiaries from the exemption*

Under the Decree the "Deelneming" privilege was restricted both as regards the entities liable to tax and the nature of the profit components.

These restrictions resulted mainly from the occupation authorities' view that entities and natural persons should be placed on the same footing, thereby placing the accent on the nature of the exemption as an exception. A pronouncedly anthropomorphic approach of this type does not feature in the taxation of the profits of entities established in the Netherlands.[33]

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31. Memorandum in Reply, No. 9, p. 24 and 25.
32. Further Memorandum in Reply, No. 22, p. 16.
33. Explanatory Memorandum No. 3, p. 13.

This wide scope of the "Deelneming" privilege resulted in it being extended to all persons liable to corporate income tax, and to all gains received through participations.
All entities liable to corporate income tax are entitled to the "Deelneming" privilege: co-operative societies and other foundations as well as ordinary companies—investment organizations are excepted (Section 12, subsection 2).
The exemption has also been extended: it now also applies to participations in open investment funds and membership of co-operative associations besides participations in ordinary companies. The reason for this extension was that open investment funds have been made liable .to taxation in principle and that membership of a co-operative association is in general in the nature of regular course of business operations ("normale uitoefening van bedrijf").

The permanent establishment of a foreign parent company

A parent company established outside the Netherlands is also entitled to the "Deelneming" privilege if its permanent establishment in the Netherlands includes participations in resident or non-resident subsidiaries. Chapter II of the Law is correspondingly applicable for non-residents liable to limited Netherlands taxation as regards the determination of their Netherlands sources of income (Section 17, subsection 1). It is subsequently expressly laid down that Section 12 must be observed (Section 17, subsection 2). If the permanent establishment in the Netherlands holds participations in Netherlands subsidiaries, the exemption granted is of the "domestic" type and if it holds participations in foreign subsidiaries the exemption is of the "foreign" type.
The latter will probably occur more frequently and is comparable with the situation of a foreign parent company with a subsidiary in the Netherlands with participations outside the Netherlands.
A difference as regards dividend withholding tax remains, however, since unlike the subsidiary the permanent establishment in the Netherlands is not subject to Netherlands dividend withholding tax.[34]

2. *The "Deelneming" concept* (qualifying participation)

The Law refers to a participation ("Deelneming"), while the Decree spoke of a "substantial interest" ("aanmerkelijk belang"). The exemption is applicable if the entity liable to tax has held a participation uninterruptedly since the beginning of the year (subsection 1), which means that it must hold at least 5% of the share capital (subsection 6).
The Law therefore sets three requirements: shareholdership, qualifying participation and "qualifying holding period".

a) Shareholdership

The taxpayer must be a shareholder in the company paying the dividends. The non-reciprocity requirement has been dropped, as has that of direct shareholdership. However, it would not appear to be the intention that indirect shareholdership should count towards the obligatory 5%, since under civil law shareholdership implies direct shareholding. If indirect shareholdership were to count towards the 5% requirement, this should be made expressly clear in the text of the Law as is also done elsewhere in fiscal legislation.
In Section 19, subsection 5, of the Law, which forbids the offsetting of losses in the case of "empty" companies, indirect and

34. Secton 1, subsection 1 of the 1965 Dividend Tax Law.

direct shareholdership are expressly referred to.
A similar description is given in the definition of the "substantial interest", in Section 39 of the 1964 Income Tax Law.

b) Qualifying participation

The Law distinguishes between participations in ordinary companies, domestic open investment funds and membership of a domestic or foreign co-operative association.
A participation in a domestic company is deemed to exist if there is a minimum holding of 5% of the paid-up share capital (subsection 6).
For a participation in a foreign company, in addition to the 5% requirement, the condition is also set that the shareholding may not form a portfolio investment (subsection 7).
A "foreign-type" exemption means that the parent company is established in the Netherlands and the subsidiary in a foreign country (including the Netherlands Antilles or Surinam).
A participation in a domestic open fund is deemed to exist of there is a minimum holding of 5% of the number of certificates issued (subsection 6).
Membership of a co-operative association in itself entitles the member to the exemption (subsection 1).
The reduction of the percentage for participations appears to be an extension of the "Deelneming" privilege, but it amounts in fact to a confirmation of the actual present state of affairs. All that has happened is that the exemption for participations of less than 25%, as granted on numerous occasions in the past, has now been incorporated in the Law. Up to the present the exemption has been granted by the Minister in such cases, with authority to do so being delegated to the Tax Inspectors as early as 1945. This authority has been utilized on a very extensive scale, so that the limit has not in fact had great significance. This authority to designate other participations as eligible is now included in the Law for participations smaller than 5%, if it is in the regular course of business operations of the parent or has been acquired in the general interest (subsection 8). As already noted, it would appear that this applies both to resident and non-resident subsidiaries.

c) Qualifying holding period

The taxpaying entity is required to have held a participation uninterruptedly since the beginning of the year, but this does not mean that it must hold it for a full book year. The shares must only be held from the beginning of the year until the dividend is received, and do not then have to be retained till the end of the book year.
This requirement has been incorporated with a view to preventing dividend stripping, since the dividend is also included in the purchase price of the participation and does not form a gain from the participation. However, sound fiscal accounting principles alone require this writing down, so that its incorporation in the legislation is really superfluous. This was true under the Decree, and is certainly so under the Law, now that write-offs of the participation as a rule are no longer deductible from the taxable profit. The Minister has stated that in the case of a real increase in a participation in the course of a year, e.g. from 75% to 85%, the "Deelneming" privilege will also be granted in respect of dividends from the additional 10% although this will not have been held since 1st January[35].

35. Report of verbal consultations between the Minister and the Second Chamber Finance Committee, Document 6000, No. 25, p. 22. Hereinafter cited as Report on Verbal Consultations, No. 25.

This would appear to indicate that the real criterion as regards this condition is the duration of the holding after the dividend has been received, although this interpretation conflicts with the formal requirement of holding from the beginning of the year.

3. *Object of the "Deelneming" privilege*

In the Law the object of the "Deelneming" privilege has been made much wider. All gains (including losses) from the participation or membership are left out of consideration when calculating the profit. Besides dividends, all changes in the value of the participation itself will be excluded[36].

a) The concept of gains and losses

To go by the Explanatory Memorandum, the gains concept relates to the balance of certain positive and negative gross amounts[37]. This means on the one hand that both increases and falls in value (i.e. capital gains and losses) are left out of consideration, and on the other hand that the "Deelneming" privilege has become a gross exemption so that the costs relating to the participation will also be deductible from now on.

Under the Decree the exemption was a net one, in that these costs were not deductible (Section 15). The fact that the exclusion under the "Deelneming" privilege now also applies to "negative gains" (losses) is also apparent from the provision that liquidation losses may also be deducted from the profit by way of exception (Section 12, subsection 5).

The positive amounts involved include the dividends received from the participation (and payments on profit sharing notes), and also profits made upon the sale of the shares or liquidation of the subsidiary. Losses are the writing-down of the book value of the participation and losses upon sale and, in principle, upon liquidation[38].

The exemption also applies to hidden profit distributions – in that case there is also economic double taxation – and free shares from profit reserves (bonus shares).

b) Scope of the extension of the "Deelneming" exemption

From the Explanatory Memorandum it is apparent that both profits and losses will now only be taken into account once for corporate income tax purposes. This is achieved if the rises and falls in value of the participation are disregarded when the profit of the participating entity is computed. Viewed overall, the fluctuations in the value of a participation amount to a reflection of the profits and losses of the entity concerned for the participating entity[39].

The "Deelneming" exemption is designed to prevent double taxation of the same profit, so that there is not in fact any reason for making a distinction between rises in value of the participations and dividends. The rise in value of the participation amounts after all to a reflection of the subsidiary's profit, however, not only of its already taxed profits (open reserves), but also future profit yet to be taxed (undisclosed reserves and goodwill).

This extension is of considerable significance for trade and industry since up till now it has only been possible to have realized capital gains exempted through "artificial" dividend payments in cash or bonus shares. This was not always in the interest of the subsidiary, however.

The taxpayers have also obtained greater freedom. The exemption of capital gains from participations can lead to foreign concerns transferring certain participations from the Netherlands to other parts of the concern,

36. Explanatory Memorandum, No. 3, p. 14.
37. Explanatory Memorandum, No. 3, p. 20.
38. Explanatory Memorandum, No. 3, p. 20.
39. Explanatory Memorandum, No. 3, p. 14.

or moving such participations to the Netherlands.
The fact that capital losses are disregarded as a counterpart to the exemption of increases in value above the acquisition price appears fair as a principle, since these losses also represent a reflection of the subsidiary's losses. These losses can be set off within the limits permitted and to the extent that this is done there is no reason for also permitting set-off by the parent company. The disregarding of the losses is therefore intended to prevent double setting-off of losses. There is all the more reason for this since the losses are viewed as the counterpart of the – exempted – dividends and increases in value[40].
This disregarding of the losses is a real step back for enterprises. Up to the present losses could be set off against the profit of the parent company by writing the participation down, if the value of the participation fell below the acquisition price. As an exception losses incurred upon liquidation are deductible, but this, however, means that actual losses are only deducted later than at present and then only upon liquidation.

4. *Losses of liquidated subsidiaries*
As an exception losses incurred upon liquidation of a subsidiary are taken into account when computing the profit of the parent company (Section 12, subsection 5). The liquidation loss is the difference between what is termed the "amount sacrificed" and the sum of the liquidation payments received.
This exception is justified by the view that it satisfies the rule that losses suffered should be taken into account as far as possible for tax purposes[41]. A liquidation loss cannot after all be offset against the subsidiary's results – there is either no carry-back for losses or a too restricted one – while the loss on the participation may not be deducted by the parent company (Section 12, subsection 1).
The liquidation of the subsidiary results in the definitive loss of the possibility of setting-off the subsidiary's losses against its profits[42].
This is – we assume – the reason why losses upon the sale of a participation are not deductible. In principle any loss incurred upon the sale of a participation should be offsettable against the concern profit. However, even in this case the independence of the subsidiary – which is not liquidated – is the primary consideration.
In this set-up the "Deelneming" privilege has in fact a two-fold nature: in the case of current profits and losses (and liquidation profits) the fiscal independence of the subsidiary is taken as the basis, but in the case of the liquidation loss the "group" concept is followed, i.e. the subsidiary is viewed as a part of the parent entity. The "Deelneming" privilege is intended to prevent the double offsetting of losses (losses not deductible by parent) and achieve once-only offsetting (liquidation loss deductible by parent).
The deduction of a liquidation loss amounts to any loss arising from the liquidation of the subsidiary being deductible for the parent company in the year in which the size of this loss is finally determined, i.e. the year in which the liquidation is completed. Instead of determining the loss of the subsidiary itself and transferring it to the parent, which would encounter major difficulties in practice, the loss upon liquidation that appears in the books of the parent will be deductible[43].
In this way the loss is determined in a fairly rough and lump-sum fashion. There is not therefore any direct connection between the size of the non-set off loss of the subsidiary and the liquidation loss to be taken into ac-

40. Memorandum in Reply, No. 9, p. 23.
41. Explanatory Memorandum, No. 3, p. 14.
42. Explanatory Memorandum, No. 3, p. 20.
43. Explanatory Memorandum, No. 3, p. 20.

count as far as the parent's participation is concerned[44].

Loss deduction will also be permitted in the case of situations which are materially the same as liquidation.

Nationalization of a foreign participation is placed on the same footing as liquidation if it can be assumed that the parent entity has lost all control in the subsidiary. It is, however, also possible that the investment may continue to prove profitable after nationalization, e.g. through a joint venture type arrangement[45].

The amount sacrificed (effective acquisition price)

The amount which is sacrificed for the acquisition of a participation is not only determined by what is paid at the time of the acquisition – the purchase price – but also by all which is paid by the parent entity up to the moment of liquidation of the subsidiary. The amount sacrificed is increased by capital payments from the parent entity and also, in the writer's opinion, by the bonus shares issued by the subsidiary the par value of which is as it were paid in by the parent.

It is commented in the Explanatory Memorandum that the amount sacrificed may be lower than the purchase price of the participation, particularly if reserves which influenced that price are distributed after the acquisition of the participation[46].

The determination of the dividend comprised in the acquisition price can be difficult, the more so since the purchase price is also and above all influenced by the profit yet to be taxed (undisclosed reserves and goodwill) of the subsidiary in addition to the open reserves featuring in its commercial balance sheet. The amount sacrificed will sometimes have to be based on figures other than those in the accounts, since the book value does not always reflect the amount sacrificed. The reason for this is that despite earlier depreciation of the participation as a result of losses by the subsidiary the higher cost of acquisition is also one of the factors which determines the liquidation loss. This is reasonable since the earlier writing-down did not result in a deductible loss under the Law, but is now taken into account upon liquidation[47].

A transitional provision sets the amount sacrificed at not higher than the book value at the end of the last year in which tax is levied under the provisions of the Decree (Section 29, subsection 5). This is the book value at the end of 1969. Under the Decree write-downs below the acquisition price of a participation were in fact offsettable against the taxable profit.

A fuller definition of the "amount sacrificed" concept is needed for cases in which a participation is acquired through a transaction with an affiliated entity. When a participation is acquired by a company acting as a component of a concern ("Group") the amount sacrificed is the amount paid by the concern as a whole and not the amount sacrificed by a certain part of the concern (subsection 5, *in fine*)[48].

This special provision relates not only to the participations acquired after the Law came into force, but also participations already held in 1969. Under the old system the tax authorities usually refrained from taxing profits on the sale of participations for practical reasons, provided the purchasing company included the participation in its balance sheet at the book value used by the selling company.

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44. Further Memorandum in Reply, No. 22, p. 21.
45. Report on Verbal Consultations, No. 25, p. 23, point 66.
46. Explanatory Memorandum, No. 3, p. 20.
47. Memorandum in Reply, No. 9, p. 24.
48. Memorandum in Reply, No. 9, p. 24.

In cases where tax has been levied a flexible attitude will be adopted[49].

5. *Valuation of participations*

Taxable profit must be computed according to sound (fiscal) business practice in accordance with a consistent line of conduct which may only be varied if this is justified by sound fiscal business practice[50]. Since under the Decree changes in the value of the participation affected the taxable profit, the valuation system was checked against sound fiscal business practice. Valuation at acquisition price, acquisition price or "lower going concern value", and at intrinsic value are possible systems of valuation.

Hence under the Decree it was not in accordance with sound fiscal business practice to value a participation at acquisition price if its value were to fall permanently below that figure owing to losses by the subsidiary[51].

Valuation at intrinsic value had drawbacks under the Decree, since increases in the value of the participation through profits made by the subsidiary were then also – directly – taxed at the parent.

This double taxation has been done away with by the Law, with the result that this system of valuation – which is also more correct from the commercial angle – no longer encouters obstacles of a fiscal nature.

Now that under the Law the fluctuations in the value of the participation are disregarded when computing the profit and the valuation therefore has no effect on the taxable profit, it could be said that this valuation no longer need be in accordance with sound fiscal business practice and therefore is entirely neutral as regards the determination of the profit for tax purposes. Any valuation system may be chosen and the value of the participation may even be fixed at the acquisition price, whatever its actual fluctuations. The actual rises and falls in value are then disregarded, which would be a simple method to use in practice. Even the entering of an amount pro memoria would be possible.

Since changes in the system of valuation employed will no longer have any effect on the taxable profit under the Law, it is also no longer necessary for such changes to be justified by sound fiscal business practice within the meaning of Section 9. However, the Explanatory Memorandum to the bill includes this requirement[52].

Permanent valuation at acquisition price is therefore possible under the Law, since there is no longer an obligation to write down below acquisition price as under the Decree. One of course is quite free to do so depending on the valuation system adopted though there will be nothing to be gained by it.

The exception made for liquidation losses would not appear to alter this conclusion. Such losses can in fact be set at values other than the figures stated in the accounts, if the book value is lower than the amount sacrificed on account of previous write-downs.

Sound fiscal business practice, however, plays a role under the Law for the computation of the amount sacrificed, since the loss incurred on the liquidation of a subsidiary has to be taken into account when determining the taxable profit of the parent company. Sound fiscal business practice will in fact be the criterion for deciding whether dividends

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49. Further Memorandum in Reply, No. 22, pp. 29 and 30.

50. Section 7, subsection 1 of the Law states that the determination of the profit for income tax purposes is applicable, see also particularly Section 9 of the 1964 Income Tax Law regarding sound fiscal business practice.

51. Supreme Court judgement of 25th January, 1961, B.N.B. 1961/101.

52. Explanatory Memorandum, No. 3, p. 20.

are included in the acquisition price of a participation and if so the amount which must be written off from the acquisition price for these dividends[53].

This is not an obstacle to permanent valuation at acquisition price, since this question of the writing down of dividends purchased with a participation would only arise in the event of liquidation if the taxable liquidation loss were to have to be determined. Writing down may therefore be done without regard to the amounts stated in the books.

The amount sacrificed will in any case have to be set at a value other than that indicated by the books if any system other than valuation at acquisition price is used.

The liquidation loss rules, on the other hand, clearly favour this neutral value. In addition, there is also the practical argument that there is little point in regularly changing the fiscal value of all participations when these changes do not have any effect on the taxable profit and are also unnecessary for the determining of any loss should the participations be liquidated in the distant future. It would, however, be theoretically correct to write down the purchased dividend straight away at the time of payment, since this dividend does not in fact form a part of the pure acquisition price.

The question when a dividend should be written off was highly important under the Decree, since writing off was an obstacle to obtaining the "Deelneming" privilege for dividends owing to the "write-off clause" in Section 10, subsection 1.

Section 10, subsection 1 of the Decree specified that dividends received from the participation were tax exempt in so far as they did not have to be deducted from the book value of the shareholding. There was not ot course any reason to exempt dividends received by the parent company if by some other means – through reduction of the book value of the participation – an amount equal to the dividend had already been deducted from the fiscal profit. This "write-off clause" accordingly served to prevent dividends being deducted twice.

This clause has not been incorporated in the Law, because besides gains all losses are left out of consideration, as is the writing down of the acquisition price upon the payment of purchased dividends. Exemption of the dividend does not then result in double taxation, so that a provision such as the clause referred to is not needed, while since losses incurred by liquidation may be set at figures other than those shown by the books there is no need for one as regards the determining of such losses either.

6. *Costs of participation*

Costs related to exempted profit components were not accepted as deductible under the Decree (Section 15). The Law does not include a provision to this effect, something which represents a major improvement for trade and industry. In future costs relating to a participation, such as the costs of a loan for the acquisition of the participation and the so-called administration costs, will no longer have to be deducted from the exempted profits (dividends). This will prevent these costs – as up to the present – being offsettable against profits for neither the parent company nor the subsidiary[54].

This applies, however, to the costs for domestic participations only; costs for foreign participations will remain non-deductible (Section 12, subsection 4).

Under the Decree the interest on loans raised to finance participations was not classed as a deductible cost in the meaning of Section 15. The holding company's own costs were,

53. Memorandum in Reply, No. 9, p. 24.
54. Explanatory Memorandum, No. 3, p. 20.

however, deductible, such as the initial expenses and the costs of its own administration[55]. As a result of the provisions of Section 15, if the parent company took the costs for participations for its own account this was an obstacle to deduction. As a consequence parent companies were as it were obliged to charge such costs to the subsidiaries. In the case of foreign subsidiaries, parent companies will, however, have to continue charging the costs if they are to avoid this fiscal drawback.
When a domestic parent company participates in a foreign subsidiary the Explanatory Memorandum advises caution because of the possibility that parties involved might burden the profit of the domestic parent with considerable sums in the form of interest on loans raised to finance the acquisition of the participation[56]. The non-admission for deduction of interest in respect of foreign participations prevents a part of the profit earned by the parent in the Netherlands escaping taxation through deduction of the interest. This could not occur with domestic participations, because the full profit earned in the Netherlands is taxed, so that deduction of costs incurred on behalf of the Netherlands subsidiary can be viewed as entirely fair.
Foreign concerns – without the non-deductibility of interest clause – could for instance have new companies set up outside the Netherlands by a Netherlands subsidiary (production company), which would be loaned the necessary capital by the parent concern. The interest would then be charged to the Netherlands (production) profit, while the dividends would flow freely to the foreign parent entity[57].
In this connection it may be added that the holding of foreign subsidiaries in the Netherlands is attractive since the Netherlands does not have any withholding tax on interest, not even for non-residents. In addition, withholding tax on dividends from participations which go to the foreign parent entity are in general reduced to nil by conventions.
Costs relating to the participation or membership are only deductible if and in so far as it is reasonable to assume that they contribute indirectly to the generation of business income taxable in the Netherlands (Section 12, subsection 4). This not only excludes cases where the domestic parent is a direct shareholder in the foreign subsidiary, but also cases of indirect shareholdings, e.g. through domestic holding companies[58].
The term "contribute indirectly" indicates the relationship between the costs incurred by the parent in respect of the participation and the taxable profit made by the subsidiary. It therefore relates not to the benefits enjoyed by the parent company from the participation – these are after all disregarded when computing the parent's profit – but to the profits of the entity in which the interest is held[59]. With this interpretation the financing behind the investment is irrelevant for fiscal purposes[60].
The reasons for the non-admission of cost deduction in the case of foreign participations are given in detail in the Explanatory Memorandum to the bill. In this connection it is interesting to look into the fiscal position of the financing of the participation itself, viz. the share capital put into the subsidiary and the loan capital provided.
Any loss of shares in the subsidiary is not deductible as long as the subsidiary is not liqui-

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55. Judgement of Supreme Court of 20th February, 1959, B.N.B. 1959/131.
56. Explanatory Memorandum, No. 3, p. 20.
57. Report on Verbal Consultations, No. 23, p. 25, point 64.
58. Memorandum in Reply, No. 9, p. 25.
59. Further Memorandum in Reply, No. 22, p. 19.
60. Report on Verbal Consultations, No. 25, p. 23, point 64.

dated. A loss on a loan to it is deductible, however, since this is a matter of the valuation of a claim. The Law has not been changed on this point, which means that depreciation can be applied with respect to this claim if required by sound fiscal business practice[61].
As regards the fiscal consequences of this loan financing the following should be noted. In Netherlands tax legislation a loan to a subsidiary is never placed on the same footing as a participation: the "Stammkapital" theory does not apply in the Netherlands.
The financing of a subsidiary by means of a loan results in a corporate income tax on the interest which is totally in contrast with that on dividend: the interest is taxed at the parent and may be deducted by the subsidiary.

Interest is also deductible in principle by the subsidiary in the case of a loan to a foreign subsidiary, while in so far as conventions concluded by the Netherlands are applicable there is no foreign withholding tax on interest. The parent company has to pay tax on the interest, unlike the position with dividends.

61. Report on Verbal Consultations, No. 25, p. 23, point 65.

M.J. VAN ROOIJEN:

LE REGIME FISCAL DES SOCIETES-MERES ET FILIALES D'APRES L'IMPOT NEERLANDAIS SUR LES SOCIETES

Quelques observations par rapport aux modifications récentes dans la législation. – Quelques aspects nationaux et internationaux de l'exonération des dividendes entre sociétés affiliées.

Le texte complet des dispositions légales relative au Régime Fiscal des sociétés-mères et filiales a été publié dans le Supplément de ce numéro du Bulletin.

INTRODUCTION

Le 1er janvier 1970 entrera en vigueur la Loi sur l'Impôt sur les Sociétés de 1969, qui remplacera le Décret sur l'Impôt sur les Sociétés de 1942, introduit pendant l'occupation allemande, à l'exemple du «Körperschaftsteuer» allemand.

La modification de la législation néerlandaise en matière de l'impôt sur les sociétés a été un travail de longue haleine. Déposé le 27 juin 1960, le projet de loi lui-même a subi plusieurs modifications, notamment en 1963 et en 1968, pour être adopté finalement, le 17 juin 1969, par la Chambre des Députés (Seconde Chambre). Il est à prévoir que la déliberation au Sénat (Première Chambre) n'empêchera pas l'entrée en vigueur de la Loi, étant donné que cette Assemblée, ne jouissant pas du droit d'amendement, ne pourrait, le cas échéant, que rejeter le projet de loi dans sa totalité.

Le renouvellement de la forme juridique de l'imposition et en particulier le remplacement des Décrets datant de l'occupation allemande par des Lois ont constitué les principaux objectifs de la révision générale. En même temps on a envisagé des modifications matérielles à certains points. Les modifications les plus importantes ont été apportées au régime de l'exonération fiscale des participations et à celui des institutions d'investissement et de placement et des sociétés coopératives. Pour le moment la double imposition sur les bénéfices distribués restera en pleine vigueur[1]. Le regime de l'exonération fiscale des participations aux Pays-Bas, tel qu'il vient d'être incorporé dans la Loi sur l'Impôt sur les Sociétés, fera l'objet des observations suivantes, qui porteront en particulier sur les modifications apportées à ce régime et sur les aspects internationaux de l'exonération en général.

Les modifications proposées au régime de l'exonération fiscale des participations ont fait l'objet de commentaires détaillés[2].

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1. Au cours de la déliberation à la Seconde Chambre le ministre a assuré qu'avant le 1er juillet 1970 il sera mis au point un mémorandum d'étude sur l'imposition double.

2. Voir: A.F. Tuk dans «De Naamloze Vennootschap» d'octobre 1960, p. 112 et s.
J. van Hoorn Jr., ibid. p. 116 et s.
A.L. Brok dans «Maandblad voor Accountancy en Bedrijfshuishoudkunde» de novembre 1960, p. 386 et de février 1962, p. 55 et s.
J.F.M. Giele dans «Weekblad voor Fiscaal Recht» du 28 janvier 1961, No. 4539, p. 81 et s.
A.F. Tuk dans «Weekblad voor Fiscaal Recht» du 12 septembre 1968, No. 4912, p. 789 et s.
J.F.M. Giele dans «Belastingbeschouwingen» de septembre 1968, p. 166 et s.
J.H. Christiaanse dans «Belastingbeschouwingen» de mai 1969, p. 85 et s.
«New Corporation Income Tax Bill in the Netherlands» dans «European Taxation» d'octobre 1968, p. 218 et s.

I. NATURE ET BUT DE L'EXONERATION DES PARTICIPATIONS

L'exonération fiscale par rapport aux participations dans une société filiale résidente (participations intérieures), remonte déjà à 1893. Elle n'était pas soumise à des conditions restrictives, telles qu'un pourcentage de participation minimum, et était valable pour le dividende entier. En ce qui concerne les participations dans une société filiale étrangère (participations extérieures), l'exonération date de 1915. Le pourcentage de participation minimum requis était de 90 et l'exemption ne portait que sur une partie (50%) du dividende.

L'abolition en 1927 du pourcentage minimum a mis les participations intérieures et étrangères presque sur le même pied quant à leur traitement fiscal. Le Décret sur l'Impôt sur les Sociétés de 1942 accordait l'exonération pour les participations intérieures et étrangères, le dividende entier étant exempté pour des participations de 25%. La Loi sur l'Impôt sur les Sociétés de 1969[3] a étendu l'exonération des participations intérieures et étrangères à tous les avantages découlant de participations, tout en réduisant à 5% la participation minimum requise[4]. A l'avenir non seulement les dividendes jouiront de l'exonération fiscale, mais en déterminant les bénéfices imposables on fera donc abstraction de toutes fluctuations de la valeur de la participation. Cela signifie donc que toutes les plus-values sont exonérées et que les moins-values ne sont plus déductibles, à l'exception cependant de la perte essuyée lors de la liquidation d'une filiale.

L'exonération des participations a pour but d'éviter que entre personnes morales il y ait double imposition. Il faut donc bien distinguer entre cette exonération et le problème de la double imposition des bénéfices distribués, c'est-à-dire l'impôt sur les sociétés dans le cas de sociétés anonymes et l'impôt sur le revenu frappant les actionnaires qui sont des personnes physiques[5].

L'exonération des participations est une application, sous des conditions restrictives, du principe «non bis in idem», selon lequel le même bénéfice ne peut être frappé deux fois d'impôt si une société anonyme détient des actions d'une autre.

Dans la législation fiscale néerlandaise, la prévention de cette double imposition est limitée à des participations revêtant une certaine importance économique. Par contre, le système fiscal belge, par exemple, ne pose pas la condition d'un pourcentage minimum et applique le principe «non bis in idem» dans toute son ampleur.

L'application toute rigoureuse de l'exonération des participations requiert que la double imposition soit évitée pour toutes les participations sans faire, en principe, de distinction entre des filiales nationales et étrangères. En conséquence, le traitement de dividendes distribués par des filiales étrangères et nationales est en principe égal. Cela représente en même temps une mesure unilatérale pour éviter la double imposition internationale. Cette exonération a déjà été incorporée dans la législation nationale en 1915, parce qu'à l'époque les Pays-Bas étaient une nation exportant

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3. Dans la suite du présent article, la Loi sur l'Impôt sur les Sociétés de 1969 sera dénommée «la Loi», et le Décret sur l'Impôt sur les Sociétés de 1942 se dénommera «le Décret».

4. Les textes de l'Article 12 de la Loi et de l'Article 10 du Décret ont été incorporés dans le supplément au présent numéro du Bulletin.

5. Pour une étude récente sur cette double imposition, voir: A. Jacquemin et C. Parmentier: «La double imposition des bénéfices distribués, vers une solution européenne». C'est à propos de cette étude que nous avons écrit l'article «Dubbele heffing over uitgedeelde winsten in de E.E.G.» (la double imposition économique des bénéfices distribués dans la CEE) publié dans «Belastingbeschouwingen», juin-juillet 1969, No. 6/7, p. 109 et s.

beaucoup de capitaux (surtout vers les anciennes colonies).
L'historique de la Loi[6] révèle que l'extension de l'exonération des participations aux filiales étrangères s'est opérée simultanément et parallèlement à la mesure unilatérale pour la prévention de la double imposition par rapport aux établissements stables à l'étranger, parce qu'il n'y aurait pas de différence essentielle entre ces derniers et les filiales[7]. Cependant, pour faire ressortir ce parallèle, on exigeait une participation de 90%. On pourrait affirmer que la société filiale n'est qu'une autre modalité – indirecte – de l'exercice d'activités à l'étranger, ce qui permet de considérer l'impôt sur les bénéfices de la filiale étrangère pour ainsi dire comme une charge fiscale sur les bénéfices réalisés par la société-mère sur le capital qu'elle a investi dans la filiale étrangère. En principe il n'y avait pas non plus de différence entre les participations nationales et étrangères. On attachait peu d'importance en ce temps-là à la question si l'exonération était accordée en raison d'une imposition des bénéfices d'une filiale établie aux Pays-Bas ou à l'étranger[8], ce qui traduit une vue assez révolutionnaire pour l'époque sur le droit fiscal international!
A notre avis, l'Exposé des motifs du projet de loi présenté en 1960 fait ressortir, lui aussi, l'un et l'autre aspect. L'exonération des participations s'applique en principe de même façon aux participations étrangères et nationales. Par ailleurs, une entreprise néerlandaise exerçant des activités à l'étranger par l'intermédiaire d'une filiale, bénéfice des mêmes facilités que si elle y exerçait ses activités sous forme d'un établissement stable[9]. C'est ici que surgit le parallèle avec l'établissement stable. Aussi y a-t-il un rapport étroit entre l'exonération des participations nationales et étrangères, la seule différence consistant en ce que ces dernières sont soumises à une condition restrictive. Tant dans le Décret que dans la Loi, l'exonération des participations nationales et étrangères se trouve incorporée dans un seul article.
Les sociétés ou associations qui ne sont pas établies aux Pays-Bas doivent être assujetties à un impôt à prélever de manière ou d'autre sur les bénéfices par un autre Etat. (art. 12, para. 3). La Loi requiert donc que la filiale soit assujettie à un impôt sur les bénéfices; il suffit pourtant que la filiale soit «subjectivement» redevable de l'impôt» à l'étranger. Un «assujettissement objectif» à l'impôt sur les bénéfices (obligation de payement) n'est donc pas toujours requis. Cela est important si le pays étranger accorde des facilités dites de pionnier ou qu'il y existe une autre forme de «tax holiday». Signalons pour être complet que la mesure unilatérale pour éviter la double imposition de 1965[10] exige bien l'assujettissement objectif pour un établissement stable à l'étranger, ce qui signifie que les bénéfices d'un établissement stable à l'étranger ne sont pas exonérés lorsqu'une exonération objective est accordée à l'étranger[11].

6. Pour une esquisse détaillée de l'historique de l'exonération des participations dans la législation fiscale néerlandaise, voir: J.H. Christiaanse: «Deelnemingsvrijstelling» (1963), p. 18-68.
7. Documents Imprimés de la Seconde Chambre, 1914-1915 No. 5.
8. Documents Imprimés de la Seconde Chambre, 1926-1927, No. 56.
9. Exposé des motifs accompagnant le projet de loi sur l'Impôt sur les Sociétés, document de la Seconde Chambre, session 1959-1960, document 6000, No. 3 page 13, à denommer ci-après: «Exposé des motifs No. 3».
10. Art. 2, par. 2 de l'Arrêté Royal instituant des mesures unilatérales pour la prévention de la double imposition du 7 avril 1965 (Bulletin des Lois 145).
11. Une autre différence consiste à ce que l'exonération des bénéfices de l'établissement stable étranger est incorporée dans les conventions de doubles impositions conclues par les Pays-Bas, et que celle relative aux dividendes provenant des participations étrangères est prévue dans la législation nationale.

Le terme «Etat» indique d'ailleurs que l'impôt sur les bénéfices doit revêtir un caractère national; il ne suffit donc pas que cet impôt soit perçu au niveau local ou régional. Du reste la seule condition matérielle imposée à cet impôt sur les bénéfices c'est qu'il doit grever, en effet, les bénéfices et non pas par exemple le chiffre d'affaires. Ceci serait encore contraire à la politique néerlandaise en matière de la prévention de la double imposition internationale. Il n'est pas fixé de taux minimum à l'impôt étranger sur les bénéfices, son niveau étant donc une question à decider par l'autre Etat[12].

Cette attitude des Pays-Bas envers l'imposition étrangère aboutit, du point de vue fiscal, à l'égalité des conditions de concurrence au pays où l'investissement est effectué. Dans le système d'exonération tel qu'il est appliqué aux Pays-Bas, un taux réduit de l'impôt étranger représente un avantage définitif, à la différence du système de crédit d'impôt où les dividendes reçus de filiales étrangères sont soumis à des impôts additionnels jusqu'à concurrence du niveau national, ce qui aboutit à l'égalité des conditions de concurrence dans l'Etat où l'investisseur est domicilié.

En plus de la condition formelle que la participation miminum doit être de 5%, il faut, pour que les participations étrangères puissent bénéficier de l'exonération, qu'elles ne constituent pas un investissement (Art. 12, par. 7).

Comme il se révélera lors du traitement du mécanisme du régime des sociétés-mères, une autre différence consiste en ce que les frais relatifs aux participations étrangères ne sont pas déductibles (Art. 12, par. 4.). La différence de traitement entre les filiales nationales et étrangères est par conséquent assez petite, étant donné que le régime des sociétés-mères s'applique, dans le cas de filiales étrangères aussi, à tous les avantages, tandis que l'exception permettant la déduction de pertes subies par suite de liquidation est également applicable aux filiales étrangères (Art. 12, par. 5).

A notre avis, on peut soutenir qu'il faut toujours regarder le régime des sociétés-mères à la lumière du traitement de l'établissement stable, tout en le limitant d'ailleurs en considération de l'imposition des dividendes de placement de personnes physiques.

Si l'exonération des participations s'appliquait aussi aux dividendes de placement étrangers, cela constituerait pour la société anonyme une prévention unilatérale de la double imposition par la voie de l'exemption. Toutefois aussi en ce qui concerne les dividendes de placement nationaux, il est désirable qu'on fasse une démarcation nette entre les participations et les placements.

Nous entrerons en particulier dans les détails quant au parallèle entre la filiale et l'établissement stable.

II. LE PARALLELE ENTRE LA FILIALE ET L'ETABLISSEMENT PERMANENT A L'ETRANGER

Un traitement égal de la filiale étrangère et de l'établissement stable aboutirait à ce que les bénéfices seraient grevés d'impôts à l'étranger et exemptés à la métropole, avec compensation pour les pertes éventuelles à l'étranger. Deux différences importantes se dessinent pourtant dans le résultat du traitement fiscal de la filiale et de l'établissement stable, à savoir, la compensation des pertes subies à l'étranger et la retenue étrangère à la source sur les dividendes de participation.

12. Mémoire en réponse à la Seconde Chambre, session 1962-1963, document 6000, No. 9, page 25, à denommer ci-après: «Mémoire en réponse No. 9».

A. *La compensation des pertes subies à l'étranger*

1. *Différences quant à la compensation des pertes*

Une perte subie par l'établissement stable étranger est directement compensable contre les bénéfices de la société anonyme nationale suivant les procédés comptables courants, mais une perte subie quant à une participation étrangère n'est en principe pas déductible, du moins pour autant qu'il n'est pas question de liquidation. D'ailleurs les pertes subies sur des prêts accordés à des filiales étrangères restent, elles, déductibles.

L'exonération pour les bénéfices réalisés pendant des années postérieures est cependant réduite du montant des pertes précédemment compensées. Ainsi les bénéfices et pertes de l'établissement permanent sont en fait balancés au cours des années aux fins de l'exonération aux Pays-Bas[13].

Exclure en principe les pertes sur les participations nationales et étrangères comme conséquence de l'extension du régimè des sociétés-mères à toutes les fluctuations de la valeur (plus-values ainsi que moins-values) aboutit a une différence essentielle avec le régime de l'établissement stable. Certes, le fait qu'une perte de liquidation puisse être compensée contre les bénéfices de la société-mère rapproche la figure de la filiale de l'établissement permanent. Néanmoins, dans la suite nous partirons de cette différence essentielle, vu qu'il peut se produire au moins un délai prolongé, sinon définitif, de la compensation des pertes et que l'on ne s'empressera pas pour cette seule raison de procéder à la liquidation de la société. Evidemment cette différence essentielle n'entraînera des conséquences pratiques importantes que si la filiale subit des pertes pendant une série d'années.

Le régime fiscal néerlandais des sociétés avec des établissements stables à l'étranger comporte donc, outre l'exonération du bénéfice, l'imputation des pertes au bénéfice fiscal.

La proposition de la Commission Européenne concernant l'établissement stable:

Dans le Projet de Directive du 15 janvier 1969 en matière de fusions, scissions et apports d'actifs, il est proposé qu'une société ayant un établissement stable dans un autre pays membre, soit imposée pour le bénéfice réalisé dans ce pays-là, et que le pays membre où la société est établie s'abstienne de l'imposition de ce bénéfice (Article 12, par. 1 et 2). Toutefois, la Commission admet que dans ce système les pertes subies à l'étranger ne sont pas déductibles, déduction qu'elle estime souhaitable pour plusieurs raisons. C'est pourquoi elle propose que sur la demande de la société l'imposition se fasse selon le système dit du «bénéfice mondial». Cela implique que les bénéfices et les pertes des établissements stables étrangers sont incorporés dans le bénéfice de la société, que l'on frappe d'un impôt réduit afin de prévenir la double imposition (Article 12, par. 3).

Si ce système est adopté, il s'appliquera aux établissements stables dans tous les pays membres pendant 5 années. Il est susceptible d'être étendu aux établissements stables dans un ou plusieurs pays en dehors de la C.E.E., si les conventions visant la prévention de la double imposition l'admettent.

2. *Consolidation fiscale*

L'établissement stable et la filiale ne peuvent être traités effectivement sur pied d'égalité que si le système de la consolidation fiscale des bénéfices[14] est appliqué aux sociétés imbriquées internationales, conformément au système du «bénéfice mondial» par rapport

13. Art. 3, par. 3 de l'Arrêté Royal sur la prévention de la double imposition. Voir l'étude de M. *Bouwsma* ci-après.

14. Le terme «consolidation fiscale» n'implique pas qu'il soit requis un bilan commercial consolidé.

aux établissements stables.
Dans la conception économique de la consolidation, c'est la situation économique réelle qui l'emporte sur la forme juridique de l'entreprise. Une filiale dont toutes les actions sont détenues par la société-mère est de ce chef considérée comme une succursale. Les rapports économiques de la vie industrielle et commerciale à orientation internationale ne sont pas affectés alors du point de vue fiscal par des différences de forme juridique. Autrement, pour des investissements hasardeux à l'étranger, l'établissement stable pourrait s'avérer désirable pour des raisons fiscales.
Un grand pas en avant serait marqué si ce système de consolidation était rendu applicable aux filiales étrangères. Les pertes éventuelles de la filiale (juridiquement) indépendante – qui n'est pas assujettie à l'impôt néerlandais – seraient imputables aux bénéfices consolidés de la société-mère. Le grand avantage réside donc dans la compensation horizontale directe pes pertes subies par la filiale étrangère au cours d'une série d'années par les autres résultats de la société imbriquée, ce qui devient plus important à mesure que la possibilité d'une compensation verticale des pertes par la filiale même est plus petite.
Le régime de l'unité fiscale revient en fait à rendre superfétatoire le régime des sociétés-mères pour les participations consolidées, les dividendes de participation étant alors considerées comme des transferts de bénéfice à l'intérieur de la société imbriquée. Dans ce cas, la consolidation représente une alternative réelle et plus complète.

3. *La proposition de la Commission Européenne relative à la consolidation fiscale*

Dans son Projet de Directive du 15 janvier 1969 concernant le régime fiscal applicable aux sociétés-mères et filiales aux Etats membres de la C.E.E., la Commission Européenne a fait aussi une proposition relative à un régime de consolidation fiscale de filiales établies dans d'autres Etats membres (Art.7)[15].
Dans le cas de participations d'au moins 50%, la société-mère peut opter pour le régime de consolidation. Celui-ci s'appliquera alors obligatoirement à toutes les filiales dans la C.E.E. et restera en vigueur pendant 5 ans au moins. Sur demande, l'application de ce régime pourra être étendue encore pour une période minimum de 5 ans à des participations dans un ou plusieurs pays en dehors de la C.E.E., la société imbriquée étant toutefois libre de choisir certains pays. Les bénéfices de toutes ces filiales seront incorporés aux résultats d'exploitation de la société-mère, compte tenu, de manière ou d'autre, des impôts prélevés à l'étranger (impôt sur les sociétés et, à notre avis, aussi la retenue à la source sur les dividendes, particulièrement par rapport à des pays tiers).
La Commission Européenne propose d'adopter une participation de 50% comme critère pour la consolidation, ce qui n'est qu'une délimitation grossière. Cependant, ce dont il s'agit c'est le pouvoir économique de fait sur la marche des affaires de la filiale. Le plus souvent une possession de 50% des actions suffira à cet effet, bien que parfois il faille un pourcentage plus haut ou plus bas. La Commission Européenne se penchera encore sur les questions de procédure afférentes à la mise en exécution de la réglementation.
Un régime de consolidation fiscale des bénéfices ressemblant grosso modo à celui que nous venons de décrire, est déjà appliqué en France aux participations majoritaires dans des filiales nationales et étrangères.

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15. Pour un exposé concernant le Projet de Directive, voir: Georges Gosset dans «La Fiscalité du Marché Commun» d'avril 1969, p. 27 et s. Voir aussi: H. Debatin dans «Aussenwirtschaftsdienst des Betriebsberaters» de mai 1969, p. 129. Une analyse détaillée en anglais a paru dans «European Taxation», juillet 1969.

4. *Consolidation fiscale aux Pays-Bas («unité fiscale»)*

La législation néerlandaise en matière de fiscalité des sociétés connaît le régime de l'unité fiscale en vertu duquel toute la société imbriquée (le «groupe») est imposée comme un seul organisme. Sur demande, le ministre des Finances a la faculté de déclarer, à des conditions à fixer par lui, que des filiales résidentes dont la société-mère détient toutes les actions sont considérées comme ayant été absorbées par celle-ci (Art. 14)[16]. Outre la compensation immédiate des pertes et des bénéfices, l'unité fiscale offre l'avantage que tout les transferts à l'intérieur de la société imbriquée sont éliminés, donc aussi, par exemple, les dividendes de participation. Les frais encourus par la société-mère en vue de la participation dans la filiale sont alors déductibles comme frais de la société imbriquée. Ce régime est donc comparable avec une vraie consolidation commerciale. En effet, l'unité fiscale signifie également que les éléments d'actif et les participations peuvent être transférés à l'intérieur de la société imbriquée sans être atteints par l'impôt, tout en simplifiant d'ailleurs les problèmes se rattachant aux coûts, aux prix et aux bénéfices («intercompany profits»)[17].

Dans le régime néerlandais de l'unité fiscale, l'unité est considérée comme un seul organisme imposable devant présenter une seule déclaration fiscale. Cela va donc plus loin que le régime allemand de l'«Organschaft», sous lequel chacune des filiales reste individuellement soumise à l'impôt, tout en ne considérant en bloc que les pertes et profits calculés séparément pour les filiales[18]. De même que dans le régime allemand, l'intégration permise par les dispositions néerlandaises se limite aux filiales résidents.

A l'encontre de l'article 14 de la Loi, l'article 27 du Décret n'excluait pas, en principe, la consolidation de filiales étrangères. Cependant le ministre des Finances n'a jamais autorisé l'incorporation de filiales étrangères dans l'unité fiscale.

Une comparaison du régime néerlandais de l'unité fiscale avec le projet de la C.E.E. révèle que la réglementation néerlandaise est plus restreinte. Pour les filiales nationales une participation de 100% est requise, alors que la consolidation de filiales étrangères est impossible.

5. *Comparaison des régimes néerlandais de l'exonération des participations et de l'unité fiscale pour les filiales néerlandaises*

En comparant les réglementations fiscales applicables aux filiales étrangères et aux établissements stables, nous avons relevé le régime de l'unité fiscale comme alternative éventuelle de l'exonération des participations étrangères afin d'obtenir une analogie encore plus poussée avec la réglementation relative à l'établissement stable: compensation directe des pertes et transferts de bénéfices exemptés d'impôt (étranger) sur les dividendes. Pour les filiales nationales, cependant, l'unité fiscale est une alternative réelle de l'exonération des participations, encore que l'avantage découlant de cette unité se limite à la compensation des pertes. En effet, il ne sera pas question d'impôt national sur les dividendes si la so-

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16. Sous le Décret, l'unité fiscale était réglementée dans l'article 27 du Décret sur l'Impôt sur les Bénéfices de 1940, qui était applicable à travers l'article 32, par. 5 du Décret.
Le règlement prévu à l'article 14 de la loi s'accorde presque entièrement avec celui de l'article 27.

17. Pour une description du régime fiscal des sociétés imbriquées néerlandaises par J.H. Christiaanse, voir «La Fiscalité du Marché Commun» de février 1969, p. 3 et s.

18. Voir aussi: A.J. Rädler dans «Die direkten Steuern der Kapitalgesellschaften und die Probleme der Steueranpassung in den sechs Staaten der Europäischen Wirtschaftsgemeinschaft, 1960, p. 183.

ciété recevant les dividendes a droit à l'exonération des participations[19].

En fait, la société-mère néerlandaise d'une filiale néerlandaise à 100% a le choix réel entre l'un et l'autre régime. L'exonération des participations d'après le régime des sociétés-mères a pour point de départ l'indépendence juridique de la société-mère et de la filiale, même s'il s'agit de filiales à 100%. La preuve en est déjà donnée par le simple fait qu'à côté de l'exonération des participations existe le régime de l'unité fiscale en vertu duquel la filiale est considérée comme succursale[20].

Maintenant que les pertes résultant de participations ne sont en principe plus déductibles, il se trouve que la nouvelle réglementation sur l'exonération des participations s'écarte dans une plus grande mesure du principe de l'unité fiscale selon lequel les pertes de filiales sont immédiatement et entièrement compensables. Cette différence était beaucoup moins marquée sous l'ancien régime de l'exonération des participations, puisque les pertes résultant de participations étaient déductibles.

L'exclusion de la compensation des pertes est aussi en contradiction avec la proposition susmentionnée de la Commission Européenne, encore que celle-ci ne porte que sur les participations étrangères. La Commission Européenne présume, bien entendu, que les pertes intérieures sont, elles, compensables!

En comparaison de l'exonération des participations, le régime de l'unité fiscale procure désormais un avantage qui le rend encore plus attrayant. L'intérêt de ce régime réside après tout dans la compensation des pertes plutôt que dans l'exemption des bénéfices réalisés par les filiales, ceux-ci tombant déjà sous le régime des sociétés-mères.

Dans le cas de participations néerlandaises à 100%, il y a désormais une raison de plus de passer, si possible, au régime de l'unité fiscale.

En fait, le régime des sociétés-mères est relativement peu intéressante lorsqu'il s'agit de participations à 100%. Etant donné cependant que les pertes ne sont plus déductibles en vertu du nouveau régime des sociétés-mères, le critère pour la consolidation fiscale revête encore plus d'importance qu'auparavant, du point de vue fiscal. Le critère formel et juridique de 100% est à présent susceptible de produire des différences de concurrence lorsqu'il est question de pertes, ce qui serait le cas dans une moindre mesure si l'on adoptait un critère de puissance économique de plus de 50%. Une société imbriquée à filiales nationales à 100% pourrait bénéficier d'un avantage fiscal considérable par rapport à d'autres sociétés imbriquées à grandes participations majoritaires nationales allant jusqu'à 99%, ainsi que d'ailleurs à toute société imbriquée ayant principalement des participations étrangères (à 100%)!

En ce qui concerne les participations nationales, il faudrait que le critère pour la consolidation soit remplacé par celui de puissance économique de 50% ou 51%, pour que la compensation des pertes à l'intérieur de la société inbriquée soit rendue possible aussi dans le cas de ces participations majoritaires. C'est un critère plus réaliste, plus neutre du point de vue fiscal, et mieux adapté aux conditions commerciales requises pour la consolidation.

Le régime de l'unité fiscale devrait s'appliquer aux filiales «dépendantes» dont la majorité des actions sont détenues par la société-mère. Le régime de l'exonération des participations devrait alors s'appliquer en premier lieu aux filiales «indépendantes» où la société-mère ne possède qu'une minorité des actions, bien

19. Art. 4, par. 2 de la Loi sur l'Impôt sur les Dividendes 1965 (Bulletin des Lois 621).
20. Arrêts de la Cour de Cassation (Hoge Raad), rendus le 8 mai 1957 (B.N.B. 1957/208) et le 7 mars 1962 (B.N.B. 1962/166).

qu'en principe ce régime soit évidemment valable pour toutes les participations.
C'est précisément le critère peu élevé de 5%, fixé par la loi néerlandaise pour les participations, qui rend assez ambiguë cette réglementation. Elle est valable non seulement pour les relations entre sociétés-mères et filiales, mais encore pour les petites participations, et les mêmes idées fondamentales sont suivies quant à l'indépendance de la filiale pour ces formes de participations si différentes du point de vue économique. Compte tenu du point de départ «non bis in idem», ce bas pourcentage n'est cependant pas injustifié.
Surtout le fait qu'une société imbriquée à participations nationales à 100%, adoptant le régime de l'unité fiscale, aura ou pourra obtenir la faculté de compenser immédiatement ses pertes, est une raison d'étendre la consolidation aux participations étrangères selon le même critère, mais au moins aux participations à 100% dans des filiales étrangères. Une telle mesure serait également conforme à la proposition de la Commission Européenne.
Si l'on accepte qu'en ce qui concerne le régime des sociétés-mères il n'y a pas de différence de principe entre les participations nationales et étrangères, il n'y a en fait pas de raison fondamentale de faire une distinction entre elles dans le cas de la consolidation, et encore moins si la dernière procure de nouveaux avantages fiscaux par rapport à l'exonération des participations.

B. *La retenue étrangère à la source sur les dividendes*

1. *Position néerlandaise à l'égard de participations*

La retenue étrangère à la source sur les dividendes provenant de participations fait obstacle à l'égalité des filiales et des établissements stables.
Dans le cas d'une participation nationale, il y a, nous l'avons dit, exemption de retenue à la source sur les dividendes si l'actionnaire a droit à l'exonération d'après le régime des sociétés-mères. Les transferts de bénéfices, surtout ceux à l'intérieur de la société imbriquée, ne doivent pas donner lieu à des impositions. L'exonération des participations implique donc en fait une exemption d'impôt sur les sociétés et de la retenue à la source lors de transferts de bénéfices à la société-mère: l'imposition se limite à l'impôt sur les sociétés grevant la filiale nationale.
Dans le cas des participations étrangéres, la retenue étrangère à la source sur les dividendes revient en fait à une charge supplémentaire, car le recours au crédit d'impôt et même à la déduction de la retenue étrangère du bénéfice de la société-mère est exclu: en effet, le dividende provenant d'une participation n'est pas compris dans le bénéfice imposable, cela par opposition à la retenue sur les dividendes qui, en vertu d'une convention fiscale, est imputable sur l'impôt sur le revenu lorsque le bénéficiaire des dividendes est une personne physique.
La politique néerlandaise en matière de conventions fiscales a toujours visé à exclure ou à restreindre au minimum la retenue étrangère frappant les dividendes provenant de participations, afin d'approcher le plus possible l'équilibre entre l'établissement stable et la filiale. La distribution de bénéfices à l'intérieur d'une société imbriquée correspond dans une très large mesure aux transferts de bénéfices à l'intérieur d'une même entreprise[21].
Une retenue à la source moins élevée sur les dividendes provenant de participations est aussi acceptée de façon générale sur le plan international; la plupart des conventions comprennent une réglementation spéciale

21. Note relative à la révision générale de la législation fiscale. Lettre adressée le 27 juillet 1960 à la Seconde Chambre; session 1959-1960, document 5380-6000, No. 9, page 13.

concernant les dividendes dans les relations entre sociétés-mères et filiales. Le projet de convention de l'O.C.D.E. prévoit une retenue de 5% sur les dividendes provenant de participations d'au moins 25%[22]. A ce sujet, les Pays-Bas ont fait la réserve que dans leurs conventions ils s'efforceront de réduire à zéro la retenue sur ces dividendes[23]. Jusqu'ici, les Pays-Bas ont réussi à pousser ce principe dans la majorité des cas. Ils ont néanmoins accepté un taux de 5% dans leurs conventions avec les Etats-Unis et le Royaume-Uni.

2. *Proposition de la Commission Européenne concernant le régime fiscal commun applicable aux sociétés-mères et filiales*

A l'intérieur d'un marché commun tel que la C.E.E., il y a évidemment encore plus de raisons de supprimer la retenue à la source sur les dividendes provenant de participations tout en étendant l'exonération des participations aux filiales établies dans d'autres pays membres.

Dans son projet de directive déjà mentionné, la Commission Européenne a élaboré un régime fiscal commun applicable aux relations entre sociétés-mères et filiales. Il y est proposé d'appliquer l'exonération des participations également aux dividendes provenant de participations dans d'autres membres, et de supprimer la retenue à la source sur les dividendes au niveau de la filiale pour obtenir ainsi une distribution de bénéfices réellement exempte d'impôts à l'intérieur de la société imbriquée (Art. 4 et 5).

On traite donc la société-mère comme si elle avait réalisé le bénéfice elle-même et non pas par l'intermédiaire de la filiale.

D'après cette proposition de la C.E.E., l'imposition dans le cas des participations internationales se limiterait à l'impôt étranger sur les sociétés grevant la filiale.

La proposition de supprimer la retenue à la source sur les dividendes est plus radicale que celle d'étendre l'exonération des participations aux participations étrangères, ce qui en pratique a déjà été fait de manière générale.

A l'intérieur de la C.E.E. aussi, la retenue à la source sur les dividendes provenant de participations est le plus souvent de 5% et parfois plus, sans parler encore des aspects spécifiques du système du taux différencié de l'impôt sur les sociétés qui risque de produire une retenue sur les dividendes encore plus élevé.

Le critère pour la participation a été fixé à 20%, ce qu'il faut interpréter comme un compromis entre les divers pourcentages prévus dans les législations des pays membres.

Le critère de 20% signifie que le régime s'applique non seulement aux participations du type société-mère/filiale proprement dites: le titre et l'exposé des motifs du Projet de Directive le suggèrent à tort. En effet, l'exonération s'applique également à d'autres formes de participation.

Nous trouvons étonnant que cette proposition ne laisse pas la possibilité d'appliquer ce régime aussi aux dividendes provenant de filiales établies dans certains pays tiers, cela contrairement à la proposition relative à la consolidation fiscale, et malgré le fait qu'à certains égards les deux propositions prennent la même pensée comme point de départ.

La Commission Européenne déclare qu'elle ne veut pas se prononcer sur la question de savoir si les frais se rapportant aux participations étrangères doivent être oui ou non fiscalement déductibles.

Elle a cependant proposé que ceux parmi les pays membres (comme la France et la Belgique) qui déterminent les frais se rapportant aux participations d'une manière forfaitaire, sur la base d'un certain pourcentage du divi-

22. Art. 10, par. 2, sous *a*.

23. Voir note explicative concernant le projet de convention de l'O.C.D.E., page 106, point 15 (version anglaise).

dende reçu, puissent fixer ce forfait à un maximum de 5% (Art. 4, conclusion). A notre avis il faudrait interpreter cette proposition de la Commission Européenne en ce sens que si seulement 95% du dividende sont exempts, les frais de la participation étrangère seront déductibles dans leur intégralité. Si par contre dans tel ou tel pays membre – comme c'est le cas des Pays-Bas – une exemption de 100% est accordée, les frais non portés en compte de la filiale étrangère ne sont pas déductibles. Ici, le législateur national a donc le choix entre deux systèmes servant à exclure les frais de participations étrangères de la déduction. En pratique, l'effet quantitatif de ces deux alternatives sera souvent inégal: il dépend de la proportion entre les dividendes et les frais de l'ensemble des participations.

Une comparaison entre la proposition de la Commission Européenne et le régime néerlandais montre que la réglementation néerlandaise en matière du pourcentage de la participation est moins restrictive. Nous estimons que les Pays-Bas n'abandonneront probablement pas leur régime plus souple. En ce qui concerne l'exonération, ce pays est seul à ne pas se borner à l'exemption du dividende.

III. TRAITEMENT FISCAL DE PARTICIPATIONS ET DE PLACEMENTS[24]

1. *Distinction entre participations et placements*

Pour distinguer les participations et les placements, la Loi ne fixe qu'un critère formel (5%) dans le cas des participations nationales (Art. 12, par. 6). Quant aux participations étrangères, en plus de ce bas pourcentage de 5%, un critère matériel est fixé, à savoir que la possession d'actions ne doit pas constituer un placement (par. 7). La charge de la preuve incombe d'ailleurs à l'Inspecteur des Contributions. En ce qui concerne la détermination de participations inférieures à 5%, les participations nationales et étrangères seront soumises à la même condition qu'à l'époque où le Décret était en vigueur: la participation doit s'inscrire dans le cadre de l'exercice des activités normales de l'entreprise (par. 8).

Dans l'Exposé des motifs du projet de loi, la distinction matérielle entre les participations et les placements est ainsi definie: «Une participation sera admise s'il existe un rapport pas trop lointain entre l'entreprise qui acquiert la participation et celle dans laquelle la participation est acquise. Il faut faire une distinction entre la détention d'actions en faveur du rapport qui en découle avec l'entreprise dans laquelle la participation est acquise, et la détention d'actions comme placement en valeurs pur et simple»[25]. Dans le premier cas il y a un lien professionnel entre deux organismes, de sorte qu'il y a lieu de n'imposer qu'une seule fois le bénéfice. Ce lien n'existe pas dans le cas du placement. La Loi fixe donc un critère formel afin de distinguer participations et placements, approchant, selon l'Exposé des motifs, en général d'assez près la realité. Le critère matériel ajouté pour que des participations étrangères soient exonerées, et par lequel on vise entre autres à prévenir la fuite dans une société de placement étrangère, pourrait aboutir à la création d'une société de placement néerlandaise. Cela est d'autant plus attrayant que le régime fiscal néerlandais applicable aux institutions de placement est en fait presque aussi favorable que les régimes qui existent à l'étranger. C'est pourquoi, outre les 5%, un critère matériel serait souhaitable également dans le cas des participations nationales. Le législateur n'a pas estimé nécessaire d'imposer ce critère, pourvu que les participations dans des institutions de placement soient exclues de l'exonération des participa-

24. Le terme «placement» est employé dans les paragraphes suivants pour indiquer l'investissement privé, c.à.d. non-professionnel, dans des valeurs mobilières («portfolio-investment»).

25. Exposé des motifs, No. 3, page 13.

tions; ainsi, il ne peut y avoir d'abus par cumul de l'exonération des participations et des facilités du régime des placements[26].
Avant d'examiner en détail cette accumulation, nous donnerons – pour une meilleure compréhension de notre exposé – un bref aperçu du régime, entièrement modifié, applicable aux institutions de placement.

2. *Le régime fiscal des institutions de placement*
L'article 27 de la Loi stipule qu'au moyen d'un arrêté royal il sera donné des règles dérogatoires ultérieures par rapport à l'imposition d'institutions de placement (par. 1 sous a)[27].
Sont considérées comme des institutions de placement: les sociétés anonymes établies aux Pay-Bas et des fonds communs (ouverts) de placement dont le but et les activités effectives consistent dans le placement de capitaux exclusivement ou presque en valeurs mobilières, biens immeubles et créances hypothécaires, lesquels sociétés et fonds doivent satisfaire à un certain nombre de conditions (par. 2, sous a-d).
Les conditions posées sont entre autres que les bénéfices soient distribués dans les huits mois et qu'au moins 80% de l'argent à placer en valeurs mobilières soit financé avec les propres capitaux du fonds ou de la société (par. 2, sous a et b). Une institution de placement dans le sens de l'article 27 est donc une institution de placement exonérée remplissant les conditions, lesquelles sont de fait comprises dans la définition.
En outre une institution de placement établie aux Pays-Bas n'entre en ligne de compte pour etre exonérée que si les actionnaires non-résidents, s'il y en a, y participent pour un pourcentage qui ne dépasse pas 25, de sorte que la création d'une institution de placement aux Pays-Bas n'a pas comme conséquence que les non-résidents qui sont imposables, aux Pays-Bas, pour leurs revenus de source néerlandaise puissent réduire leurs obligations fiscales néerlandaises (par. 2, sous d).
Les fonds communs ouverts de placement, dont les titres de participation sont négociables, sont considérés par la Loi comme des institutions de placement. En vertu de la Loi ces fonds ouverts sont devenus des sujets passifs d'impôt (article 2, par. 1, sous e).
Le régime pour les institutions de placement a été étendu aux intérêts et rendements de biens immeubles à côté de dividendes, ce qui élargit sensiblement le champ d'activité des institutions de placement[28].

3. *La relation entre l'exonération des participations en vertu du régime des sociétés-mères et filiales et le régime pour les institutions de placement*
En vertu de la modification du projet de loi en 1968 le régime des sociétés-mères et filiales ne s'applique pas aux participations dans des institutions de placement (article 12, par. 2). La raison de cette exclusion est qu'on veut empêcher que l'imposition soit remise à des années ultérieures ainsi donnant lieu à une économie, ce qui serait possible au moyen de l'intercalation d'une société de placement[29]. Par contre, le régime des sociétés-mères s'applique donc bien aux participations dans une institution de placement non exonérée, c.à.d. une institution qui n'a pas rempli les conditions.
Sinon, c'est qu'en créant une filiale comme

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26. Mémoire en réponse, No. 9, pages 26 et 41.
27. Exposé des motifs de la deuxième note modificatrice, document de la Seconde Chambre; session 1967-1968, document 6000, No. 17, p. 7, 8 et 12; à dénommer ci-après: Deuxième Exposé des motifs, No. 17. Le deuxième Mémoire en réponse à la Seconde Chambre entre dans les détails de la mise au point technique du régime des institutions de placement; session 1968-1969, document 6000, No. 22, p. 16-23, à dénommer ci-après: Deuxième Mémoire en réponse, No. 22.
28. Deuxième Exposé des motifs, No. 17, p. 7.
29. Deuxième Exposé des motifs, No. 17, p. 11.

institution de placement on pourrait se soustraire à la condition de 5%.
Si une possession d'actions n'entre pas en ligne de compte pour l'exonération, on pourrait, à défaut de la disposition de l'article 12, par. 2, fonder une filiale revêtant la forme d'une société anonyme, à laquelle les actions seraient cédées si, en remplissant les conditions imposées, on pouvait la faire reconnaître comme institution de placement. Cela aurait pour conséquence que la filiale serait exonérée de l'impôt sur les sociétés, à condition que les bénéfices soient distribués dans un délai de huit mois. La société-mère aurait droit à l'exonération des participations en ce qui concerne les dividendes reçus de la filiale, tandis qu'en outre la plus-value éventuelle des fonds réalisée lors de la vente de la participation, serait exempt d'impôt[30].
Il est disposé aussi que l'institution de placement n'a pas droit à l'exonération des participations, même pas pour celles dépassant les 5% (article 12, par. 2).
La double imposition ne peut être évitée qu'en remplissant les conditions spécifiques imposées aux institutions de placement (par exemple, distribution dans un délai de huit mois)[31].
Cependant, une «holding» aux participations étrangères, n'est pas une institution de placement. Il n'est pas question de placement dans le sens de l'article 12 par. 7, si la société-mère agit comme société holding de filiales étrangères déployant leurs propres activités. L'exonération des participations est donc aussi valable pour des participations dans une «holding» étrangère. Aucun placement n'est supposé d'exister non plus lorsqu'une filiale étrangère à son tour détient une participation dans ses propres filiales également établies à l'étranger et dont les activités sont à peu près semblables à celles de la société-mère néerlandaise. Au besoin il faut donc considérer la relation avec les organismes à l'arrière-plan[32].
On peut dire en général qu'il n'existe pas d'institution de placement si le but statutaire ne se borne pas au placement de capitaux, ou si les activités comprennent en fait davantage que les opérations de placement, par exemple la gérance de sociétés anonymes; il n'y a pas d'institution de placement non plus si une des conditions n'est pas remplie[33].
Contrairement au régime applicable aux institutions de placement, l'application du régime des sociétés-mères n'est pas subordonné à la condition que la société-mère fasse exclusivement fonction de «holding». Les bénéfices des autres activités sont normalement imposés.

4. *Le réginie des sociétés-mères et filiales et les «base companies»*

L'importante exonération des participations rend les Pays-Bas attrayants pour les sociétés imbriquées étrangères quand ils veulent y créer des sociétés holding, d'autant plus que l'exonération néerlandaise est également applicable quand la société holding exerce aussi des activités à elle, n'étant donc pas une vraie «base company».
L'exonération des participations étrangères rend du reste superflue la «base company», cette exonération permettant déjà de réaliser un ajournement de l'imposition sur les dividendes. C'est qu'il n'existe pas, comme sous le régime néerlandais pour les institutions de placement, de distribution obligatoire. On est donc libre de thésauriser des recettes dans l'organisme jouissant de l'exonération des participations, à moins que le fisc étranger n'admette l'existence d'un dividende presumé («deemed dividend»), comme par exem-

30. Mémoire en réponse, No. 9, p. 41.
31. Deuxième Exposé des motifs, No. 17, p. 11.
32. Mémoire en réponse, No. 9, p. 24 et 25.
33. Deuxième Mémoire en réponse, No. 22, p. 16.

ple aux Etats-Unis, au cas où la société holding n'exerce pas d'activités à elle.
Le régime fiscal néerlandais pour les sociétés holding ne se prête pas à la création de «base companies» pour une autre raison encore, à savoir que l'exonération se borne aux avantages – dividendes et plus-values réalisées sur les actions – tirés des participations, excluant les intérêts, redevances et autres formes de plus-values.

IV. MECANISME DU REGIME FISCAL DES SOCIETES-MERES ET FILIALES DANS LA LOI SUR L'IMPOT SUR LES SOCIETES 1969

1. *Contribuables pouvant bénéficier du régime des sociétés-mères*

Le Décret avait limité l'application du régime favorable tant en ce qui concerne les catégories de contribuables que par rapport à la nature des éléments exonérés du bénéfice.
Les limitations découlaient notamment de la conception des autorités occupantes ayant introduit le Décret selon laquelle les personnes morales et physiques étaient à placer sur la même ligne, l'accent tombant sur le caractère exeptionnel de l'exonération des participations. Cette manière de penser inspirée d'un anthropomorphisme poussé à l'extrême n'est pas à l'origine de l'impôt sur les bénéfices des sociétés établies aux Pays-Bas[34].
Cette large conception de l'exonération des participations a abouti à son extension à tous les contribuables frappés de l'impôt sur les sociétés et à tous les avantages découlant d'une participation.
Toutes les personnes morales assujetties à l'impôt sur les sociétés ont droit à l'exonération des participations: les sociétés anonymes aussi bien que les coopératives, autres associations et les fondations; les institutions de placement en sont exclues (article 12, par. 2). L'exonération est valable non seulement pour les participations dans les sociétés ayant un capital divisé en actions, mais encore pour les participations dans les fonds communs ouverts de placements et pour les participations comme membre une société coopérative. La raison de cette extension est que les fonds communs de placements sont, en principe, devenus contribuables et qu'en général la participation à une société coopérative est dans la ligne de l'exercice d'activités normales d'une entreprise.

L'établissement stable d'une société-mère étrangère

Une société-mère établie à l'étranger a aussi droit à l'exonération des participations si son établissement stable aux Pays-Bas comprend des participations dans des filiales néerlandaises ou étrangères. Pour la détermination des bénéfices de source néerlandaise revenant à des contribuables non-résidents, le Chapitre II de la Loi (article 17, par. 1) est appliqué de la même façon. Ensuite il est stipulé expressément qu'entre autres l'article 12 est à observer (article 17, par. 2). Lorsque l'établissement stable néerlandais a des participations dans des filiales néerlandaises, il est question d'exonération de participations nationales; lorsqu'il a des participations dans des filiales étrangères, il est question d'exonération de participations étrangères.
La dernière situation sera probablement plus fréquente et est comparable à celle où une société-mère étrangère a une filiale aux Pays-Bas avec participations hors des Pays-Bas. Il reste cependant une différence à l'égard de la retenue sur les dividendes car contrairement à la filiale, l'établissement stable aux Pays-Bas n'est pas frappé de retenue néerlandaise sur les dividendes[35].

34. Exposé des motifs, No. 3, p. 13.
35. Article 1, par. 1, de la Loi sur l'Impôt sur les Dividendes 1965.

2. *La notion de «Deelneming»* (participation qualifiée)

La Loi parle de participation («deelneming») tandis que le Décret parlait d'un intérêt substantiel («aanmerkelijk belang»). L'exonération s'applique lorsque le contribuable a possédé une participation sans interruption depuis le début de l'année (par. 1), ce qui revient à dire qu'il doit posséder au moins 5% du capital actions (par. 6)

La Loi pose donc trois conditions: qualité d'actionnaire, participation qualifiée et possession dite annale.

a) Qualité d'actionnaire

Le contribuable doit être actionnaire de la société distributrice. La condition de la non-réciprocité a disparu, tout comme celle de la qualité d'actionnaire direct. Nous ne croyons pas cependant qu'on ait l'intention de faire valoir la qualité d'actionnaire indirect pour la condition de 5%, car du point de vue du droit civil la qualité d'actionnaire implique qu'elle est directe.

Nous sommes d'avis que, si la qualité d'actionnaire indirect comptait pour la condition de 5%, cela devrait ressortir expressément du texte de la Loi, tout comme ailleurs dans la législation fiscale.

L'article 19, par. 5, de la Loi, défendant la compensation des pertes pour les sociétés anonymes en sommeil, vise expressément la qualité d'actionnaire direct et indirect.

Une description identique figure dans la définition de l'intérêt substantiel («aanmerkelijk belang») à l'article 39 de la Loi sur l'Impôt sur le Revenu 1964.

b) Participation qualifiée

La loi distingue entre participations dans des sociétés anonymes, participations dans des fonds communs résidents de placements et participations à titre de membre dans une coopérative nationale ou étrangère.

Il y a participation dans une société anonyme résidente en cas de la possession de 5% au minimum du capital actions nominal souscrit (par. 6). Pour une participation dans une société anonyme étrangère, la Loi exige, outre les 5%, que la possession d'actions ne constitue pas de placement (par. 7). Il y a participation étrangère lorsque la société-mère est établie aux Pays-Bas et la filiale hors des Pays-Bas (c'est-à-dire qu'elle peut se trouver aussi aux Antilles néerlandaises ou au Surinam). Il y a participation dans un fond commun ouvert de placements en cas d'une possession de 5% au minimum des titres de participation (par. 6).

La qualité de membre d'une coopérative donne déjà droit à l'exonération (par. 1).

La réduction du pourcentage minimum de participation semble être une extension de l'exonération des participations, mais ne fait en réalité que confirmer la situation de fait telle qu'elle existe actuellement; la différence est que l'exonération accordée déjà souvent dans le passé pour des participations inférieures à 25% se trouve maintenant ancrée dans la Loi. Jusqu'ici l'exonération était dans ces cas accordée par le ministre, laquelle compétence a été déléguée dès 1945 à l'Inspecteur. Ensuite cette compétence a été utilisée à très grande échelle, de sorte que la limite de 25% n'a pas eu de réelle signification. Cette compétence d'accorder une exonération a maintenant été englobée dans la Loi pour des participations inférieures à 5%, à condition que celles-ci s'accordent avec les activités normales ou qu'elles soient prises dans l'intérêt général (par. 8). Comme nous l'avons déjà dit, nous estimons que cela compte et pour les participations nationales et pour les participations étrangères.

c) Possession annale

Le contribuable doit posséder une participation sans interruption depuis le début de

l'année. Il ne s'agit pas d'une possession vraiment annale dans le sens de possession durant l'exercice entier. Les actions n'ont à se trouver en possession du contribuable que depuis le début de l'année jusqu'à l'encaissement du dividende et non pas jusqu'à la fin de l'exercice.
Cette condition tient au désir d'empêcher la pratique du «dépouillement du dividende» («dividend stripping»), car le dividende acheté avec la participation est compris dans le prix d'achat de la participation sans faire partie des avantages inhérents à celle-ci. Le bon usage commercial déjà oblige à un tel amortissement, de sorte que cette condition est au fond superflue. Compte tenu du Décret et notamment de la Loi, il est permis de faire ce raisonnement, maintenant que les amortissements des actions ne sont plus portés à la charge des bénéfices fiscaux.
Le ministre a promis qu'en cas d'augmentation réelle de la participation au cours de l'année, par exemple lorsque la participation est portée de 75 à 85%, l'exonération des participations sera également accordée pour les dividendes sur les 10% additionnels, bien que les actions nouvelles ne soient pas en possession du contribuable à partir du 1er janvier.[36]
Cette promesse montre à notre avis que c'est en fait la durée de la possession *après* la jouissance du dividende qui est essentielle en ce qui concerne cette condition, encore que cette interprétation soit contraire à la condition formelle de la possession d'actions à partir du début de l'année.

3. *Objet du régime des sociétés-mères et filiales*

L'objet de l'exonération des participations a été beaucoup étendu dans la Loi. Tous les avantages (pertes comprises) découlant de la participation n'entrent pas en ligne de compte pour la détermination du bénéfice. Outre les dividendes, tous les changements de valeur de la participation elle-même seront exclus.[37]

a) La notion d'avantages et de pertes

L'Exposé des motifs fait ressortir que la notion d'avantages se rapporte au solde de certains montants bruts positifs et négatifs[38]. Cela signifie d'une part que ni les plus-values ni les moins-values ne seront prises en considération, et d'autre part que l'exonération des participations a pris la forme d'une exonération brute, de telle sorte que les frais se rapportant à la participation sont désormais déductibles.
Le Décret prévoyait une exonération nette, puisque ces frais n'étaient pas déductibles (Art. 15). Que l'exclusion porte également sur les «avantages négatifs», c.à.d. les pertes, est montré encore par le fait qu'à titre exceptionnel les pertes de liquidations sont, elles, déductibles du bénéfice (Art. 12, par. 5).
Peuvent être considérés comme «avantages positifs» les versements de dividendes provenant de la participation (et les versements sur actions de jouissance), ainsi que la plus-value réalisée lors de la vente des actions ou de la liquidation de la filiale. Sont «avantages négatifs» les amortissements sur la valeur comptable de la participation, la perte subie lors de la vente et, en principe, celle subie lors de la liquidation.[39].
L'exonération est aussi valable pour les distributions dissimulées de dividendes – puisqu'il y a, ici encore, double imposition économique – et pour les actions gratuites distribuées par prélèvement sur des réserves de bénéfices.

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36. Rapport des discussions entre le Ministre et la Commission permanente des Finances de la Seconde Chambre, document 6000, No. 25, p. 22; à dénommer ci-après: «Rapport des discussions, No. 25».
37. Exposé des motifs, No. 3, page 14.
38. Exposé des motifs, No. 3, page 20.
39. Exposé des motifs, No. 3, page 20.

b) Teneur de l'extension du régime des sociétés-mères et filiales

L'Exposé des motifs fait apparaître que l'exonération étendue des participations a pour but de prendre en considération les bénéfices et les pertes qu'une seule fois pour l'impôt sur les sociétés.

Ce système «cohérent» est réalisé si en effectuant le calcul du bénéfice de la société participante on ne tient pas compte des augmentations et diminutions de la valeur de la participation. Dans leur ensemble, les variations de la valeur d'une participation reflètent en effet chez la société participante les bénéfices et pertes de la société dans laquelle la participation est prise.[40]

L'exonération des participations tend à prévenir la double imposition du même élément de bénéfice, de sorte qu'en fait il n'y a pas de raison de faire une distinction entre les augmentations de la valeur des participations, c.à.d. les plus-values, et les dividendes. L'augmentation de la valeur de la participation reflète après tout le bénéfice de la filiale, encore que ce soit non seulement le bénéfice déjà imposé de la filiale (réserves ouvertes), mais encore le bénéfice futur encore à imposer (réserves latentes et goodwill).

Cette extension revêt une grande importance pour les entreprises, car jusqu'ici la plus-value réalisée sur les ventes ne pouvait être exonérée que par voie de versements forcés de dividendes, en espèces ou en actions gratuites. Cela n'était pourtant pas toujours dans l'intérêt de la filiale.

Ensuite, une plus grande liberté a été accordée aux entreprises: l'exonération des plus-values provenant de participations peut amener des sociétés imbriquées étrangères à transférer certaines participations des Pays-Bas vers un autre élément du groupe, ou bien à les déplacer vers les Pays-Bas.

Il paraît juste, en principe, qu'en contrepartie de l'exonération des plus-values réalisées au-dessus du prix de revient des actions, les pertes jusqu'à concurrence du prix de revient restent hors de considération, parce qu'elles reflètent aussi la perte de la filiale. A l'intérieur des limites de la compensation des pertes, ces pertes peuvent être compensées auprès de la filiale; à cet égard il n'y a aucune raison d'admettre la compensation aussi chez la société-mère.

L'exclusion des pertes est donc motivée par la prévention de la double compensation de pertes. Elle est d'autant plus justifiée que les pertes sont considérées comme contrepartie des dividendes et des plus-values exonérées[41].

L'exclusion des pertes est un véritable pas en arrière pour les entreprises. Jusqu'ici les pertes pouvaient être imputées sur le bénéfice de la société-mère par amortissement sur la participation, lorsque la valeur de la participation descendait au-dessous du prix de revient. A titre exceptionnel, les pertes subies en cas de liquidation sont, elles, déductibles, ce qui implique cependant que les pertes réelles seront déduites beaucoup plus tard que jusqu'à présent et seulement lorsqu'on procède à la liquidation.

4. *Pertes de filiales liquidées*

A titre exceptionnel, les pertes subies en cas de liquidation d'une filiale entrent en ligne de compte lors de la détermination du bénéfice de la société mère (Art. 12, par. 5). La perte de liquidation est la différence entre le montant «sacrifié» et la somme des versements reçus par suite de la liquidation.

Le motif de cette exception est qu'on fait justice à la règle selon laquelle les pertes doivent autant que possible être prises en considération pour l'imposition[42]. En effet,

40. Exposé des motifs, No. 3, page 14.
41. Mémoire en réponse, No. 9, page 23.
42. Exposé des motifs, No. 3, page 14.

une perte de liquidation n'est plus compensable fiscalement chez la filiale, le report déficitaire en arrière («carry back») étant impossible ou trop limité, tandis que cette perte sur la participation ne serait pas non plus déductible chez la société-mère (Art. 12, par. 1). La liquidation de la filiale exclut définitivement la possibilité de compenser encore les pertes de la filiale avec des bénéfices propres[43]. Cette situation est probablement aussi la raison pour laquelle une moins-value réalisée lors de la vente d'une participation n'est pas déductible. En principe, toute perte éventuelle découlant de la vente de participations devrait être imputée sur le bénéfice de la société imbriquée. Cependant, même dans ce cas-ci l'indépendance de la filiale reste primordiale puisqu'elle n'est pas liquidée.

Dans ce système, l'exonération des participations revêt un double caractère: en ce qui concerne les bénéfices et pertes courants (et les bénéfices de liquidation) on se base sur l'indépendance fiscale de la filiale, mais quant aux pertes de liquidation on applique le principe de la société imbriquée, c'est-à-dire la filiale est considérée comme élément de la société-mère. L'exonération des participations sert à la fois à prévenir la double compensation de pertes (les pertes générales ne sont pas déductibles chez la société-mère) et à réaliser la compensation unique de pertes (les pertes de liquidation sont déductibles chez la société-mère).

La compensation d'une perte de liquidation revient à ce que la perte éventuelle qui, en cas de liquidation de la filiale, s'exprime dans une réduction de la valeur des participations de la société-mère, entre en ligne de compte chez celle-ci dans l'année dans laquelle l'ampleur de cette perte peut être définitivement fixée, à savoir l'année dans laquelle la liquidation a été achevée. Donc, au lieu de déterminer la perte non compensée chez la filiale et de la transférer à la société-mère – ce qui présenterait de graves inconvénients pratiques – la perte qui se manifeste définitivement dans le chef de la société-mère est compensée chez celle-ci.[44]

Ainsi la perte est déterminée de manière assez grossière et forfaitaire. Par conséquent, il n'y a pas de lien direct entre l'ampleur de la perte non compensée chez la filiale et la perte de liquidation de la participation à prendre en considération chez la mère.[45]
La déduction de pertes sera également admise dans des situations matériellement équivalentes à la liquidation.
On considère comme équivalente à la liquidation la nationalisation d'une participation étrangère lorsqu'on peut admettre que la société-mère a perdu toute son influence. Cependant, il est aussi possible qu'après la nationalisation l'investissement continue à procurer des avantages, p.ex. par une organisation du type «entreprise en participation»[46].

Le montant sacrifié

Le montant sacrifié à l'acquisition d'une participation est déterminé non seulement par ce qui a été sacrifié au moment de l'acquisition – à savoir le prix d'achat – mais par tout ce qui a été sacrifié par la société-mère à la participation jusqu'au moment de la liquidation. Le montant sacrifié est augmenté notamment des versements de capitaux de la société-mère ainsi que, à notre avis, d'actions gratuites distribuées par la filiale et dont la

43. Exposé des motifs, No. 3, page 20.
44. Exposé des motifs, No. 3, page 20.
45. Mémoire supplémentaire en réponse, No. 22, page 21.
46. Rapport des discussions, No. 25, page 23, point 66.

valeur nominale a été restituée pour ainsi dire par la société-mère.
Dans l'Exposé des motifs on signale que le montant sacrifié peut se situer au-dessous du prix d'achat de la participation, en particulier lorsqu'après l'acquisition de la participation on a procédé à la distribution de réserves qui ont affecté le prix d'achat.[47]
La détermination du dividende compris dans le prix d'acquisition peut présenter des difficultés, d'autant plus que le prix d'achat se trouve affecté aussi et surtout par le bénéfice de la filiale à imposer encore dans l'avenir (réserves latentes et goodwill), en plus que par les réserves ouvertes figurant au bilan commercial.
Dans certains cas le montant sacrifié devra être déterminé de façon extra-comptable, parce que la valeur comptable ne reflète pas toujours le montant sacrifié. Cela s'explique par le fait que malgré l'amortissement opéré antérieurement sur la valeur de la participation à la suite de pertes subies par la filiale, le prix d'achat original compte tout de même parmi les éléments qui déterminent la perte de liquidation. Ceci est raisonnable, car sous la Loi l'amortissement antérieur ne conduisait pas à une perte déductible, alors qu'il n'entre en ligne de compte que lors de la liquidation.[48]
Dans une disposition transitoire le montant sacrifié est établi à un niveau ne dépassant pas la valeur comptable à la fin de la dernière année sur laquelle l'imposition s'est faite conformément au Décret (Art. 29, par. 5), c'est-à-dire la valeur comptable de fin 1969. En effet, en vertu du Décret les amortissements au-dessous du prix d'achat d'une participation étaient déjà imputés au bénéfice fiscal.
Une description plus complète de la notion de «montant sacrifié» est nécessaire pour les cas où une participation a été acquise par suite d'une transaction avec une société affiliée. Dans le cas de l'acquisition d'une participation dans le cadre de la société imbriquée, le montant sacrifié est celui sacrifié par l'ensemble de la société imbriquée, et non pas celui sacrifié par un certain élément de la société imbriquée (par. 5, conclusion)[49].

Cette disposition spéciale concerne non seulement les participations acquises après l'entrée en vigueur de la Loi, mais encore les participations existantes en 1969. En effet, sous l'ancien régime le fisc, pour des raisons d'ordre pratique, s'est souvent abstenu d'imposer les plus-values résultant de la vente de participations à condition que la société anonyme acquérante comptabilise la participation pour la valeur comptable telle qu'elle figurait au bilan de la société anonyme cédante. Une attitude souple sera prise à l'égard des cas où les bénéfices auraient été imposés[50].

5. *Evaluation de participations*
Le bon usage commercial – et fiscal – exige que le bénéfice fiscal soit déterminé selon une ligne de conduite stable que l'on ne peut modifier que si le bon usage commercial le justifie[51].
Etant donné que sous le Décret les changements de la valeur de la participation affectaient le bénéfice fiscal, le système de l'évaluation était comparé au bon usage commercial et fiscal. Les systèmes d'évaluation considérés étaient ceux basés sur l'un des trois critères suivants: (a) prix de revient; (b) prix de revient ou valeur professionnelle moins élevée; (c) valeur intrinsèque.

47. Exposé des motifs No. 3, page 20.
48. Mémoire en réponse, No. 9, page 24.
49. Mémoire en réponse, No. 9, page 24.
50. Mémoire supplémentaire en réponse, No. 22, pages 29 et 30.
51. L'article 7, par. 1 de la Loi stipule l'applicabilité de la détermination du bénéfice aux fins de l'impôt sur le revenu, notamment celle de l'article 9 de la Loi sur l'Impôt sur le Revenu 1964, concernant le bon usage commercial.

Ainsi, on ne considérait pas conforme au bon usage commercial, sous le Décret, d'évaluer de manière permanente une participation sur la base de son prix de revient lorsque, par suite de pertes de la filiale, la valeur professionnelle de la participation descendait définitivement au-dessous du prix de revient[52].

L'évaluation basée sur la valeur intrinsèque présentait des inconvénients sous le Décret, car les augmentations de la valeur de la participation résultant du bénéfice de la filiale étaient également imposées – directement – chez la société-mère.

Cette double imposition a été supprimée par la Loi, de sorte que ce système d'évaluation – plus correct aussi du point de vue commercial – ne rencontre plus d'inconvénients fiscaux.

Maintenant que sous la Loi il n'est plus tenu compte des variations de la valeur de la participation dans la détermination du bénéfice, et que par conséquent l'évaluation n'a plus d'effet sur le bénéfice fiscal, on pourrait soutenir que cette évaluation n'a plus besoin d'être comparée au bon usage commercial et fiscal, et qu'elle s'effectue en fait de maniére tout à fait neutre par rapport à la détermination du bénéfice fiscal. On peut choisir n'importe quel système d'évaluation, et l'on pourrait aussi fixer la valeur de la participation au niveau du prix de revient, quelles que soient les variations effectives de la valeur. Il serait alors automatiquement fait abstraction des augmentations et diminutions effectives de la valeur dans la détermination du bénéfice fiscal, méthode simple en pratique. Il serait même possible d'en donner une indication «pour mémoire».

Du fait que sous la Loi, un changement de système d'évaluation n'a plus d'effet sur le bénéfice fiscal, il n'est pas nécessaire non plus qu'un tel changement soit justifié par le bon usage commercial dans le sens de l'article 9. Cette condition est cependant posée par l'Exposé des motifs concernant le projet de loi[53].

La Loi offre donc la possibilité d'une évaluation permanente basée sur le prix de revient, car il n'existe plus d'amortissement obligatoire au-dessous du prix de revient, comme c'était le cas sous le Décret. On peut évidemment amortir de son propre gré, en fonction du système d'évaluation choisi, bien qu'un tel amortissement de la participation ne présente aucun avantage du point de vue fiscal.

A notre avis le régime d'exception des pertes de liquidation ne change rien à cette conclusion. En effet, ces pertes peuvent être déterminées de manière extra-comptable si par suite d'éventuels amortissements antérieurs la valeur comptable est inférieure au montant sacrifié.

Bien sûr, le bon usage commercial et fiscal continue à jouer un rôle sous la Loi lorsqu'il s'agit de déterminer le montant sacrifié, car la perte de liquidation d'une participation constitue, elle, un élément dans la détermination du bénéfice de la société-mère. En effet, le bon usage commercial est décisif pour la question de savoir si les dividendes sont compris dans le prix de revient d'une participation, et par conséquent de celle de savoir jusqu'à concurrence de quel montant il y a lieu d'opérer un amortissement du prix de revient par rapport à ces dividendes[54].

Cette pratique n'empêche pas une évaluation permanente basée sur le prix de revient, car la question de l'amortissement de dividendes compris dans l'achat, dominée par le bon usage commercial, ne se poserait que lors

52. Arrêt de la Cour de Cassation (Hoge Raad), rendu le 25 janvier 1961, B.N.B. 1961/101.
53. Exposé des motifs, No. 3, page 20.
54. Mémoire en réponse, No. 9, page 24.

d'une éventuelle liquidation nécessitant la détermination de la perte de liquidation fiscale. L'amortissement peut donc s'effectuer de manière extra-comptable.
D'ailleurs, le montant sacrifié devra de toute façon se déterminer de manière extra-comptable si l'on adopte un système d'évaluation autre que celui basé sur le prix de revient. Le régime de la perte de liquidation milite, lui, manifestement en faveur de cette valeur neutre. Il s'y ajoute l'argument pratique qu'il serait peu utile d'apporter régulièrement des modifications à la valeur fiscale de toutes les participations, qui tout de même n'auraient pas d'effet sur le bénéfice fiscal et ne seraient pas requises non plus pour la détermination de la perte éventuelle résultant d'une liquidation qui pourrait se produire dans un avenir éloigné. Théoriquement parlant il serait pourtant juste d'amortir le dividende compris dans l'achat dès sa distribution, car en fait ce dividende ne constitue pas un élément du prix de revient net.
La question de savoir quand il faut amortir un dividende, revêtait une grande importance sous le Décret, parce qu'en vertu de la clause dite de l'amortissement (Art. 10, par. 1), son imputation sur la participation faisait obstacle à l'exonération de dividendes provenant de participations.
L'Article 10, par. 1 du Décret stipulait que les dividendes reçus en raison de participations étaient exonérés pour autant que la valeur comptable de la participation n'en devait pas être réduite. Il n'y avait évidemment aucune raison d'exonérer des dividendes chez la société-mère quand par une autre voie – à savoir la réduction de la valeur comptable de la participation – un montant égal à ce dividende avait déjà été imputé sur le bénéfice fiscal. Cette clause de l'amortissement prévenait donc la double déduction du dividende.
La clause de l'amortissement n'a pas été incorporée dans la Loi parce qu'on fait abstraction de toutes les plus-values et moins-values tels que la perte résultant de l'amortissement du prix de revient lors de la distribution de dividendes compris dans l'achat. Alors l'exonération du dividende ne donne pas lieu à une double exonération, de sorte qu'on n'a pas besoin de clause de l'amortissement.
Celle-ci n'est pas requise non plus aux fins de la détermination des pertes de liquidation, qui peut se faire de manière extracomptable.

6. *Frais de participations*
Les frais se rapportant à des éléments de bénéfice exonérés n'étaient pas acceptés sous le Décret comme des frais déductibles (Art. 15). Cette disposition n'a plus été incorporée dans la Loi, ce qui représente une nette amélioration pour les entreprises. Désormais, les frais se rapportant à la participation, p.ex. ceux d'emprunts d'argent par lesquels la participation est financée, et les frais dits de gestion, ne doivent plus être déduits de l'avantage exonéré. Par cela on empêche que, comme c'était le cas jusqu'ici, ces frais ne puissent être imputés ni au bénéfice de la société-mère ni à celui de la filiale[55].
Cependant, cela ne s'applique qu'aux frais de participations nationales; ceux de participations étrangères resteront non déductibles dans l'avenir (Art. 12, par. 4).
Sous le Décret, les intérêts d'emprunts destinés au financement d'une participation étaient considérés comme des frais non déductibles dans le sens de l'article 15. Les frais propres de la «holding» étaient, eux, déductibles, de même que les frais de constitution et ceux de la gestion propre[56]. La

55. Exposé des motifs, No. 3, page 20.
56. Arrêt de la Cour de Cassation (Hoge Raad), rendu le 20 février 1959, B.N.B. 1959/131.

disposition de l'article 15 avait pour conséquence qu'en prenant pour son propre compte les frais de participations, la société-mère mettait obstacle à la déduction.
Cette disposition fiscale obligeait, pour ainsi dire, la société-mère de porter ces frais à la charge de la filiale. Pour les participations étrangères il restera nécessaire porter ces frais à la charge de la filiale afin d'éviter ce désavantage fiscal.
Une certaine prudence doit être observée selon l'Exposé des motifs dans le cas de participation d'une société-mère nationale dans une filiale étrangère, vu le risque que les intéressés ne réduisent considérablement le bénéfice de la société-mère nationale en raison des intérêts d'emprunts avec lesquels la participation dans la filiale étrangère a été financée[57]. En ne permettant pas la déduction des intérêts pour les participations étrangères, on empêche qu'une partie du bénéfice réalisé aux Pays-Bas par la société-mère reste exempte d'impôt par la déduction de la charge des intérêts. Ce danger n'existe pas dans le cas de participations nationales, où la totalité du bénéfice réalisé aux Pays-Bas est imposée, de sorte qu'on peut considérer comme juste la déduction de frais encourus en faveur de la filiale néerlandaise.
A défaut de la disposition de l'Article 12, par 4, des sociétés imbriquées étrangères pourraient faire établir p.ex. de nouvelles sociétés anonymes à l'étranger par une filiale néerlandaise (société de production), à laquelle le capital nécessaire à l'établissement serait prêté par la société-mère étrangère. Les intérêts seraient alors déduits du bénéfice (de production) néerlandais, tandis que les dividendes s'achemineraient librement vers la société-mère étrangère[58].
A ce propos il convient de signaler qu'il est attrayant de détenir aux Pays-Bas des participations dans des filiales étrangers parce que les Pays-Bas ne connaissent pas de retenue à la source pour ce qui concerne les intérêts, même lorsque les intérêts sont payés à des non-résidents. En outre, grâce à des conventions fiscales, la retenue à la source sur les dividendes reçus en raison de participations par la société-mère – est en général réduite à zéro.
Les frais se rapportant à la participation ne sont déductibles que dans la mesure où l'on peut admettre qu'ils servent indirectement à la réalisation de bénéfices imposables aux Pays-Bas (Art. 12, par. 4). Cela exclut non seulement les cas où la société-mère nationale détient directement les actions de la filiale étrangére, mais encore les cas où les actions sont détenues indirectement, p.ex. par une société holding nationale[59].
Le terme «servir indirectement» exprime le rapport qui existe entre les frais encourus par la société-mère en raison de la participation et le bénéfice imposable réalisé par la filiale. Le terme ne s'applique donc pas aux avantages dont jouit la société-mère en raison de la participation, puisque ceux-ci ne sont pas pris en considération dans la détermination du bénéfice de la société-mère, mais aux bénéfices de l'organisme dans lequel la participation est prise[60]. Compte tenu de cette interprétation, le financement de l'investissement qui se trouve à la base de l'opération, ne joue aucun rôle[61].
Dans l'Exposé des motifs du projet de loi, des raisons circonstanciées sont alléguées pour la non-admission de la déduction des frais encourus par suite de participations étrangères. Il est intéressant, dans ce contexte, d'exa-

57. Exposé des Motifs, No. 3, page 20.
58. Rapport des discussions, No. 25, page 23, point 64.
59. Mémoire en réponse, No. 9, page 25.
60. Mémoire supplémentaire en réponse, No. 22, page 19.
61. Rapport des discussions, No. 25, page 23, point 64.

miner la position prise par le fisc à l'égard du financement même de la participation, à savoir le capital investi, sous forme d'actions, dans la filiale et le capital prêté à elle.
Une perte éventuelle sur la participation en actions dans la filiale n'est pas déductible tant qu'il n'est pas question de liquidation. Par contre, une perte sur un prêt à la filiale est déductible, car il s'agit ici de l'évaluation d'une créance. La Loi n'a pas été modifiée sur ce point, ce qui signifie que la créance peut être amortie si le bon usage commercial et fiscal l'exige[62].
En ce qui concerne les conséquences fiscales de ce financement de prêts, nous voudrions faire encore la remarque suivante. Dans le droit fiscal néerlandais, un prêt d'argent accordé à une filiale n'est jamais considéré comme équivalent à une participation: aux Pays-Bas on n'applique pas la doctrine dite du «Stammkapital».
Le financement d'une filiale au moyen d'un prêt conduit à une imposition des intérêts tout à fait contraire à celle du dividende: les intérêts sont imposés chez la société-mère et déductibles chez la filiale. Dans le cas d'un prêt à une filiale étrangère, les intérêts sont en principe aussi déductibles chez la filiale, tandis qu'en vertu des conventions fiscales conclues par les Pays-Bas les retenues étrangères à la source sont supprimées par rapport aux intérêts payés à un résident des Pays-Bas. Aux Pays-Bas, les intérêts sont, par opposition aux dividendes, imposées chez la société-mère.

62. Rapport des discussions, No. 25, page 23, point 65.

M.J. VAN ROOIJEN:

DAS SCHACHTELPRIVILEG IN DER NIEDERLÄNDISCHEN KÖRPERSCHAFTSTEUER

Untersuchung auf Grund vor kurzem erfolgter Änderungen des Schachtelprivilegs („Deelnemingsvrijstelling").
Einige nationale und internationale Aspekte dieser Steuerbefreiung.

Der vollständige Text der gesetzlichen Bestimmungen bezüglich des Schachtelprivilegs ist in dem Supplement zu diesem Heft des Bulletins aufgenommen.

EINLEITUNG

Am 1. Januar 1970 tritt das Körperschaftsteuergesetz 1969 („Wet op de vennootschapsbelasting 1969") in Kraft. Es tritt an die Stelle der Körperschaftsteuerverordnung 1942 („Besluit op de Vennootschapsbelasting 1942"), das bei der deutschen Besetzung nach dem Vorbild der deutschen Körperschaftsteuer eingeführt wurde.

Die Revision der niederländischen Körperschaftsteuer hat lange gebraucht. Die Vorlage trägt das Datum des 27. Juni 1960, mit Änderungen aus den Jahren 1963 und 1968. Inzwischen wurde das Gesetz am 17. Juni 1969 von der Zweiten Kammer angenommen. Es ist zu erwarten, dass die Behandlung in der Ersten Kammer das Inkrafttreten des Gesetzes nicht verhindern wird, da die Erste Kammer nicht das Recht zu Abänderungen hat und den Gesetzesentwurf eventuell nur als ganzen verwerfen kann.

Bei der allgemeinen Reform stand die Erneuerung der gesetzlichen Form der Besteuerung im Vordergrund und besonders auch der Ersatz von Verordnungen aus der Besatzungszeit durch Gesetze.

Ebenso wurden an einigen Punkten auch materielle Änderungen bezweckt. Die wichtigsten Änderungen erfuhr die Regelung des Schachtelprivilegs und die Regelung der Kapitalanlagegesellschaften und Genossenschaften.

Die Doppelbesteuerung ausgeschütteter Gewinne bleibt vorläufig in vollem Umfang bestehen[1].

Die Regelung des Schachtelprivilegs in den Niederlanden, so wie sie jetzt in das Körperschaftsteuergesetz aufgenommen ist, bildet den Gegenstand der nachfolgenden Untersuchung. Besondere Aufmerksamkeit sollen dabei die Veränderungen der Regelung des Schachtelprivilegs sowie allgemein die internationalen Aspekte des Schachtelprivilegs finden.

Zu den in den Jahren 1960 und 1968 vorgeschlagenen Änderungen der Regelung des Schachtelprivilegs liegen ausführliche Kommentare vor[2].

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1. Der Minister gab bei der Behandlung in der Zweiten Kammer die Zusage, dass vor dem 1. Juli 1970 ein Untersuchungsbericht über die Doppelbesteuerung fertiggestellt werden soll.
2. Ich verweise auf:
   - A.F. Tuk in „De Naamloze Vennootschap", Oktober 1960, S. 112 ff.
   - J. van Hoorn Jr. in „De Naamloze Vennootschap", Oktober 1960, S. 116 ff.
   - A.L. Brok in „Maandblad voor Accountancy en Bedrijfshuishoudkunde", November 1960,

I. ART UND ZIEL DES SCHACHTELPRIVILEGS

Das nationale Schachtelprivileg bei Beteiligungen in im Inland ansässige Kapitalgesellschaften (inländische Beteiligungen) gibt es schon seit 1893. Dabei wurden keine einschränkenden Bedingungen, wie z.B. Mindestsatz einer Beteiligung gestellt, und die gesamte Dividende war steuerfrei. Das internationale Schachtelprivileg bei Beteiligungen in am Ausland ansässige Kapitalgesellschaften (ausländische Beteiligungen) datiert bereits aus dem Jahre 1915. Als einschränkende Bedingung war eine Mindestbeteiligung von 90% gültig und nur ein Teil (50%) der Dividende war steuerfrei.

Bereits 1927 wurde eine fast gleichartige Behandlung inländischer und ausländischer Beteiligungen dadurch erreicht, dass der Mindestsatz abgeschafft wurde.

In der Körperschaftsteuerverordnung 1942 galt das Schachtelprivileg bei inländischen und ausländischen Schachtelbeteiligungen bei einer Mindestbeteiligung von 25% für die Gesamtdividende.

Beim Körperschaftsteuergesetz[3] 1969 ist das Schachtelprivileg bei inländischen und ausländischen Beteiligungen auf alle Vorteile der Beteiligungen ausgedehnt worden und die Mindestbeteiligung wurde auf 5% gesenkt[4]. In Zukunft sind nicht nur die Dividenden steuerfrei, sondern alle Wertschwankungen der Beteiligung bleiben also bei der steuerlichen Gewinnermittlung ausser Betracht. Das bedeutet also, dass alle Gewinne steuerfrei und Verluste nicht abzugsfähig sind, mit Ausnahme des Verlustes bei Liquidation einer Tochtergesellschaft.

Das Schachtelprivileg hat das Ziel, Doppelbesteuerung innerhalb von Körperschaften zu verhindern. Das Schachtelprivileg ist also völlig getrennt von der Problematik der sog. Doppelbesteuerung ausgeschütteter Gewinne: nämlich der Körperschaftsteuer bei der Aktiengesellschaft und der Einkommensteuer bei Aktionären – natürlichen Personen[5].

Das Schachtelprivileg ist ein Anwendungsfall des Rechtsgrundsatzes „ne bis in idem" unter einschränkenden Bedingungen, das bedeutet, die Steuer wird nicht zweimal auf dieselben Gewinne erhoben, wenn eine Gesellschaft Eigentum am Aktienkapital einer anderen Gesellschaft besitzt.

In der niederländischen Steuergesetzgebung wird die Vermeidung dieser Doppelbesteuerung auf Eigentum am Aktienkapital in bestimmtem wirtschaftlichen Umfang eingeschränkt. Dagegen wird z.B. im belgischen Steuersystem kein Mindestsatz der Beteiligung für die Steuerbefreiung gefordert und der Rechtsgrundsatz „ne bis in idem" in vollem Umfang angewendet.

S. 386 ff. und Februar 1962, S. 55 ff.
- J.F.M. Giele in „Weekblad voor Fiscaal Recht", 28. Januar 1961, Nr. 4539, S. 81 ff.
- A.F. Tuk in „Weekblad voor Fiscaal Recht", 12. September 1968, Nr. 4912, S. 789 ff.
- J.F.M. Giele in „Belastingbeschouwingen", September 1968, S. 166 ff.
- Dr. J.H. Christiaanse in „Belastingbeschouwingen", Mai 1969, S. 85 ff.
- „New Corporation Income Tax Bill" in den Niederlanden in „European Taxation", Oktober 1968, S. 218 ff.

3. Im Verlauf dieser Untersuchung werden das Körperschaftsteuergesetz 1969 als das Gesetz und die Körperschaftsteuerverordnung 1942 als die Verordnung bezeichnet.

4. Der Text von Art. 12 des Gesetzes und Art. 10 der Verordnung ist in der Beilage zu diesem Bulletin abgedruckt.

5. Wegen einer neueren Studie zu dieser Doppelbesteuerung verweise ich auf A. Jacquemin und C. Parmentier „La double imposition des bénéfices distribués; vers une solution européenne". Diese Studie war Veranlassung für meinen Artikel über „Doppelbesteuerung von ausgeschütteten Gewinnen in der EWG" („Economische dubbele heffing over uitgedeelde winsten in de EEG") in der Zeitschrift „Belastingbeschouwingen", Juni-Juli 1969, Nr. 6/7, S. 109 ff.

Eine sehr konsequente Anwendung des Schachtelprivilegs erfordert, dass Doppelbesteuerung bei allen Beteiligungsverhältnissen vermieden wird, wobei prinzipiell kein Unterschied zwischen in- und ausländischen Tochtergesellschaften gemacht wird. Also ist im Prinzip eine gleichartige Behandlung aus- und inländischer Tochtergesellschaften gegeben. Gleichzeitig ist das auch eine unilaterale Massnahme zur Vermeidung internationaler Doppelbesteuerung. Diese Steuerbefreiung wurde bereits 1915 in die nationale Gesetzgebung übernommen, da die Niederlande damals im sehr grossem Umfang Kapital exportierten (vor allen Dingen in die damaligen Kolonien).

Aus der Entstehensgeschichte der gesetzlichen Regelung[6] wissen wir, dass die Erweiterung des Schachtelprivilegs auf über die Grenze reichende Schachtelbeteiligungen gleichzeitig und parallel mit der unilateralen Massnahme zur Vermeidung von Doppelbesteuerung bei Filialen im Ausland vor sich ging, weil angeblich kein wesentlicher Unterschied zwischen Filialen und Tochtergesellschaften vorhanden war[7]. Um diese Parallele zu unterstreichen, wurde für das Schachtelprivileg aber eine Mindestbeteiligung von 90% gefordert. Man könnte annehmen, die Tochtergesellschaft sei nur eine andere – indirekte – Form der Geschäftsausübung im Ausland, wodurch die Gewinnbesteuerung der ausländischen Tochtergesellschaft gewissermassen als Steuerlast auf den Gewinn angesehen werden kann, den die Muttergesellschaft mit dem in die ausländische Tochtergesellschaft investierten Kapital erzielt. Es gab prinzipiell auch keinen Unterschied zwischen Beteiligungen im In- und Ausland. Es wurde damals nicht für wichtig gehalten, ob die Steuerbefreiung in Zusammenhang mit der Gewinnbesteuerung der Tochtergesellschaft im Inland oder aber im Ausland gewährt wurde[8]. Eine für jene Zeit ziemlich revolutionäre Vorstellung des Aussensteuerrechts!

Auch in der Denkschrift zum 1960 vorgelegten Gesetzesentwurf kommen beide Aspekte u.E. zu ihrem Recht. Das Schachtelprivileg gilt prinzipiell gleichermassen für ausländische wie für inländische Beteiligungen. Ausserdem geniesst eine niederländische Unternehmung, die im Ausland ein Geschäft in Form einer Tochtergesellschaft führt, das gleiche Entgegenkommen wie in dem Fall, wo sie diesen Betrieb dort in Form einer Betriebstätte führt[9]. Hier sehen wir also die Parallele zur Betriebstätte.

Es besteht dann auch ein enges Verhältnis zwischen dem Schachtelprivileg bei inländischen und bei ausländischen Beteiligungen; nur wird bei ausländischen Beteiligungen eine einschränkende Bedingung gestellt. In der Verordnung ebenso wie im Gesetz ist das Schachtelprivileg für in- und ausländische Beteiligungen in einem Artikel geregelt.

Nicht in den Niederlanden ansässige Gesellschaften oder Vereine müssen seitens eines anderen Staates einer in irgendeiner Form auf dem Gewinn erhobenen Steuer unterliegen (Art 12 Absatz 3). Das Gesetz fordert also Unterworfensein unter eine Gewinnsteuer; es ist aber bereits ausreichend, dass die Tochtergesellschaft im Ausland „subjektiv steuerpflichtig" ist. Es wird also nicht gefordert, dass für den Gewinn immer eine

6. Wegen einer ausführlichen Schilderung der Geschichte des niederländischen Schachtelprivilegs verweise ich auf Dr. J.H. Christiaanse: „Schachtelprivileg" („Deelnemingsvrijstelling"), 1963, S. 18-68.
7. Drucksachen der Zweiten Kammer („Gedrukte Stukken"), 1914-1915, Nr. 5.
8. Drucksachen der Zweiten Kammer („Gedrukte Stukken"), 1926-1927, Nr. 56.
9. Denkschrift zum Gesetzesentwurf zur Körperschaftsteuer, Dokument der Zweiten Kammer; Sitzungsperiode 1959-1960, Dokument 6000, Nr. 3, S. 13, nachfolgend „Denkschrift Nr. 3" genannt.

„objektive Steuerpflicht" (Zahlungspflicht) besteht. Dies ist von Bedeutung, falls im Ausland sog. „pioneer facilities" bestehen oder falls von einer anderen Form des „tax holiday" die Rede ist.
Vollständigkeitshalber sei noch darauf hingewiesen, dass in der einseitigen Massnahme zur Vermeidung von Doppelbesteuerung 1965[10] für eine Betriebstätte im Ausland die objektive Steuerpflicht doch gefordert wird, was bedeutet, dass der Gewinn aus der Betriebstätte im Ausland nicht steuerfrei sein kann wenn eine objektive ausländische Steuerbefreiung gewährt worden ist[11].
Der Begriff „Staat" weist ferner darauf hin, dass die Besteuerung des Gewinns auf Landesebene erfolgen muss. Örtliche oder regionale Gewinnbesteuerung ist also nicht hinreichend.
Im übrigen wird an diese Gewinnsteuer die einzige materielle Forderung gestellt, dass sie eine Steuer auf den Gewinn sein muss und z.B. nicht eine Steuer auf den Umsatz. Das stünde auch in Widerspruch zur niederländischen Haltung gegenüber der Vermeidung internationaler Doppelbesteuerung. Für die ausländische Gewinnsteuer wird kein bestimmter Minimalsatz aufgestellt. Die Höhe dieser Steuer ist also eine Angelegenheit des anderen Staates[12].
Diese niederländische Haltung hinsichtlich der Steuererhebung im Ausland führt – fiskalisch gesehen – zu gleichen Wettbewerbsverhältnissen im Land der Investition. Ein niedriger ausländischer Steuersatz ist beim niederländischen System der Steuerbefreiung („exemption") unbedingt ein Vorteil. Dies steht im Gegensatz zum „credit system", bei dem die Steuer auf die aus einer ausländischen Beteiligung überwiesenen Dividenden auf dem inländischen Satz angehoben wird, was zu gleichen Wettbewerbsverhältnissen im Sitzstaat der investierenden Gesellschaft führt.

Für das internationale Schachtelprivileg wird als besondere Bedingung – neben der formellen 5%-Klausel – gefordert, dass die Beteiligung im Ausland nicht der Kapitalanlage dient (Art. 12 Absatz 7).
Wie sich noch bei der Besprechung der technischen Regelung des Schachtelprivilegs zeigen wird, besteht ein weiterer Unterschied darin, das die Kosten von Beteiligungen im Ausland nicht abzugsfähig sind (Art. 12 Absatz 4). Der Unterschied in der Behandlung von in- und ausländischen Tochtergesellschaften ist also ziemlich gering, weil das Schachtelprivileg auch bei ausländischen Tochtergesellschaften für alle Vorteile gilt, auch der ausnahmsweise gewährte Abzug von Liquidationsverlusten für die ausländischen Tochtergesellschaften (Art. 12 Absatz 5).
Man kann u.E. voraussetzen, dass das Schachtelprivileg immer im Vergleich mit der Behandlung der Betriebstätte gesehen, und ausserdem im Hinblick auf die Besteuerung von Dividenden aus Kapitalanlagen natürlicher Personen beschränkt werden muss.
Würde das Schachtelprivileg auch für Dividenden aus Kapitalanlagen im Ausland gelten, dann wäre dies für die Gesellschaften eine einseitige Vermeidung der Doppelbesteuerung durch die Steuerbefreiung („exemption"). Aber auch für die Dividenden

10. Art. 2 Ende von Absatz 2 der Einseitigen Massnahme zur Vermeidung von Doppelbesteuerung vom 7. April 1965 (Staatsblad 145).
11. Ein weiterer Unterschied besteht darin, dass die Steuerbefreiung des Gewinns der Betriebstätte im Ausland in die niederländischen Doppelbesteuerungsabkommen und das Schachtelprivileg für Dividenden aus ausländischen Beteiligungen in die niederländischen Gesetze übernommen wurden.
12. Antwortnote an die Zweite Kammer; Sitzungsperiode 1962-1963, Dokument 6000, Nr. 9, S. 25. Nachfolgend „Antwortnote Nr. 9" genannt.

aus inländischen Kapitalanlagen ist eine Abgrenzung zwischen Beteiligungen und Kapitalanlagen erwünscht.
Insbesondere soll die Parallele zur Betriebstätte ausführlich untersucht werden.

II. DIE PARALLELE ZWISCHEN TOCHTERGESELLSCHAFT UND BETRIEBSTÄTTE IM AUSLAND

Eine gleichartige Behandlung von ausländischer Tochtergesellschaft und Betriebstätte müsste dazu führen, dass der Gewinn im Ausland, unter Steuerbefreiung im Mutterland mit Ausgleich eventueller ausländischer Verluste, besteuert wird. Es gibt aber zwei wichtige Unterschiede im Ergebnis der steuerlichen Behandlung von Tochtergesellschaft und Betriebstätte: der Ausgleich von Auslandsverlusten und die ausländische Kapitalertragsteuer auf Dividendenausschüttungen der im Ausland ansässigen Tochtergesellschaften.

A. *Der Ausgleich von Auslandsverlusten*

1. *Unterschied im Verlustausgleich*

Im Hinblick auf die Verluste gilt, dass ein Verlust der Betriebstätte im Ausland über die normalen Regeln der Gewinnermittlung sotort bei der Gesellschaft im Inland ausgeglichen werden kann, dass jedoch der Verlust bei einer Beteiligung an einer Tochtergesellschatt im Ausland prinzipiell nicht abzugsfähig ist, jedenfalls nicht, so lange es sich nicht um eine Liquidation handelt. Im übrigen bleiben Verluste bei Darlehen an Tochtergesellschatten im Ausland doch abzugsfähig. Die Steuerbefreiung für in Folgejahren erzielte Gewinne wird jedoch um den früher verrechneten Verlust gekürzt. Gewinne und Verluste der Betriebstätte werden also tatsächlich im Lauf der Jahre für die Steuerbefreiung in den Niederlanden aufgerechnet[18].
Der prinzipielle Ausschluss von Verlusten bei in- und ausländischen Beteiligungen als Konsequenz der Erweiterung des Schachtelprivilegs auf Wertsteigerungen und -minderungen (Kapitalgewinne und Kapitalverluste) führt zu einem grundsätzlichen Unterschied gegenüber der steuerlichen Regelung für die Betriebstätte.
Dass ein Liquidationsverlust mit dem Gewinn der Muttergesellschaft ausgeglichen werden kann, rückt die Tochtergesellschaft wieder stärker in die Nähe der Betriebstätte. Nachfolgend soll aber von diesem prinzipiellen Unterschied ausgegangen werden, da mindestens eine langdauernde Aussetzung oder Aufhebung des Verlustausgleichs eintreten können und nicht aus diesen Gründen allein schnell zur Liquidation geschritten werden wird. Natürlich führt dieser prinzipielle Unterschied nur dann zu belangreichen praktischen Folgen, wenn die Tochtergesellschaft während einer Reihe von Jahren Verluste erleidet. Das niederländische System der Besteuerung von Gesellschaften mit Betriebstätten im Ausland wirkt sich also so aus, dass neben Befreiung des Gewinns die Verluste zu Laten des steuerlichen Gewinns gehen.

Der Vorschlag der Kommission der EWG zur Betriebstätte

Im Richtlinienentwurf vom 15. Januar 1969 zu Fusionen, Spaltungen und Einbringung von Unternehmensteilen wird vorgeschlagen, dass eine Gesellschaft mit einer Betriebstätte in einem anderen Mitgliedstaat dort der Gewinnbesteuerung unterliegt, während der Mitgliedstaat, in dem die Gesellschaft ihren Sitz hat, von Besteuerung dieses Gewinns absieht (Art. 12 Absatz 1 und 2).
Die Kommission erkennt aber an, dass bei diesem System Verluste im Ausland nicht

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13. Art. 3 Absatz 3 der Einseitigen Massnahme zur Vermeidung von Doppelbesteuerung.

abzugsfähig sind, was sie aus verschiedenen Gründen für erwünscht hält. Sie schlägt daher vor, dass die Gesellschaft auf Antrag nach dem System des Weltgewinns besteuert wird. Das beinhaltet, dass Gewinne und Verluste der Betriebstätte im Ausland in den Gewinn der Gesellschaft übernommen werden, wobei eine Steuerermässigung zur Vermeidung von Doppelbesteuerung gewährt wird (Art. 12 Absatz 3).
Falls für dieses System optiert wird, findet es während 5 Jahren in allen Mitgliedstaaten auf Betriebstätten Anwendung. Es kann auf Betriebstätten in einem oder mehr Staaten ausserhalb der EWG erweitert werden, falls die Abkommen zur Vermeidung von Doppelbesteuerung das zulassen.

2. *Steuerliche Konsolidierung*

Eine echte Gleichstellung von Betriebstätte und Tochtergesellschaft ist erst erreichbar, wenn das System des sog. steuerlich konsolidierten Gewinns[14], analog zum System des Weltgewinns für die Betriebstätte, auf internationale Konzernverhältnisse angewandt würde.
Im wirtschaftlichen Konzept der Konsolidierung überwiegt der wirkliche wirtschaftliche Status gegenüber der Rechtsform der Unternehmung. Eine Tochtergesellschaft, deren Aktienkapital ganz im Eigentum der Muttergesellschaft steht, wird also gewissermassen als Filiale angesehen. Die wirtschaftlichen Beziehungen der international orientierten Wirtschaftsunternehmungen werden dann durch Unterschiede der Rechtsform steuerlich nicht beeinflusst. Für riskante Investitionen im Ausland könnte andererseits die Form der Betriebstätte aus steuerlichen Gründen erwünscht sein.
Würde dieses System der Konsolidierung auch auf Tochtergesellschaften im Ausland angewandt, so wäre das ein grosser Fortschritt. Verluste der (rechtlich) selbstständigen Tochtergesellschaft im Ausland – die prinzipiell ausserhalb der inländischen Besteuerung steht – würden zu Lasten des konsolidierten Gewinns der Muttergesellschaft gehen. Der grosse Vorteil liegt also im sofortigen horizontalen Ausgleich der von der Tochtergesellschaft im Ausland während einer Reihe von Jahren erlittenen Verluste mit den übrigen Konzernergebnissen, was um so belangreicher ist, je geringer die Möglichkeit eines vertikalen Verlustausgleichs bei der Tochtergesellschaft selbst ist.
Die Regelung der „steuerlichen Einheit" („fiscale eenheid") führt dazu, dass das Schachtelprivileg eigentlich für konsolidierte Beteiligungen überflüssig ist, da Dividenden aus Beteiligungen (Schachteldividenden) dann als Gewinnüberweisungen innerhalb des Konzerns angesehen werden. Die Konsolidierung ist in diesem Fall eine wirkliche und vollwertigere Alternative.

3. *Der Vorschlag der Kommission der EWG zur steuerlichen Konsolidierung*

Die Kommission der EWG hat im Richtlinienentwurf vom 15. Januar 1969 über das Steuersystem bei Mutter-Tochterverhältnissen in den Mitgliedstaaten der EWG auch ein System steuerlicher Konsolidierung von Tochtergesellschaften in anderen Mitgliedstaaten vorgeschlagen (Art. 7)[15].
Bei Beteiligungen von mindestens 50% kann man für die Besteuerung des konsolidierten Gewinns optieren. Die Regelung soll dann für alle Tochtergesellschaften in der EWG

14. Der Ausdruck „steuerliche Konsolidierung" bedeutet nicht, dass eine konsolidierte Bilanz im Sinne des Handelsrechts erforderlich wäre.
15. Für die Auseinandersetzung mit dem Richtlinienentwurf verweise ich auf einen Artikel von Georges Gosset in „Europäische Steuerzeitung" vom April 1969, S. 27 ff.
Siehe auch Dr. H. Debatin in „Aussenwirtschaftsdienst des Betriebsberaters" vom Mai 1969, S. 129.

obligatorisch sein und mindestens fünf Jahre in Kraft bleiben. Auf Antrag kann diese Regelung auch während mindestens fünf Jahren auf Beteiligungen Anwendung finden, die in einem oder mehreren Staaten ausserhalb der EWG liegen. Der Konzern ist hierbei aber in der Wahl bestimmter Länder frei. Die Betriebsergebnisse aller dieser Tochtergesellschaften werden in das Betriebsergebnis der Mutterunternehmung aufgenommen, wobei auf die eine oder andere Art der im Ausland erhobenen Steuer (Körperschaftsteuer und u.E. auch Quellenabzug auf Dividenden, vor allem mit Bezug auf dritte Länder) auf diese konsolidierten Gewinne Rechnung getragen werden soll.
Die Kommission der EWG schlägt als Massstab für Konsolidierung eine Beteiligung von 50% vor, was eine grobe Abgrenzung ist. Es geht aber um den tatsächlichen wirtschaftlichen Einfluss auf den Gang der Dinge bei der Tochtergesellschaft. Meistens ist dazu ein Kapitalbesitz von 50% ausreichend; manchmal kann ein höherer oder niedrigerer Prozentsatz erforderlich sein. Die Kommission wird noch eine nähere Untersuchung zur technischen Durchführung dieser Regelung vornehmen.
In Frankreich ist dieses System des konsolidierten Gewinns bei Mehrheitsbeteiligungen an in- und ausländischen Tochtergesellschaften bereits in grossen Zügen bekannt.

4. *Steuerliche Konsolidierung in den Niederlanden („fiscale eenheid")*

Das niederländische Steuerrecht kennt in der Körperschaftsteuer die Regelung der sog. steuerlichen Einheit („fiscale eenheid"), wobei der ganze Konzern als eine Körperschaft besteuert wird. Auf Antrag kann der Minister der Finanzen unter bestimmten, von ihm gestellten Bedingungen erklären, dass inländische Tochtergesellschaften, deren gesamtes Aktienkapital im Eigentum der Muttergesellschaft steht, als in der Muttergesellschaft aufgegangen gelten (Art. 14)[16]. Der Vorteil liegt neben der sofortigen Gewinn- und Verlustverrechnung darin, dass alle konzerninternen Geschäftsvorgänge eliminiert werden und z.B. zuch die Dividenden aus Beteiligungen. Auch Aufwendungen, die die Muttergesellschaft zwecks Beteiligung an der Tochtergesellschaft gemacht hat, sind dann als Kosten des Konzerns abzugsfähig. Das ist also vergleichbar mit einer echten Konsolidierung im Sinn des niederländischen Handelsrechts. Die steuerliche Einheit führt nämlich auch dazu, dass Betriebsmittel und Beteiligungen innerhalb des Konzerns steuerfrei übertragen werden können, während Kosten-, Preis- und Gewinnaufteilungsprobleme sich vereinfachen („intercompany profits")[17].
In der niederländischen Regelung der steuerlichen Einheit wird der Konzern als ein Steuerpflichtiger mit einer Steuererklärung angesehen. Dieses geht also weiter als z.B. das deutsche System der „Organschaft", in dem die Tochtergesellschaften jede für sich steuerpflichtig bleiben, jedoch nur die für die Konzerngesellschaften gesondert ermittelten Gewinne und Verluste zusammengefasst werden[18]. Wie im deutschen System ist auch die niederländische Integration auf

16. „Die steuerliche Einheit" war in Art. 27 der Gewinnsteuerverordnung 1940 („Besluit op de Winstbelasting 1940") geregelt, der über Art. 32 Absatz 5 der Verordnung Anwendung fand.
Die Regelung in Art. 14 stimmt ziemlich genau mit der in Art. 27 überein.
17. Prof. Dr. J.H. Christiaanse gibt in „Europäische Steuerzeitung" vom Februar 1969, S. 3 ff eine Beschreibung der niederländischen Regelung der steuerlichen Einheit.
18. Siehe auch Dr. A. Rädler: „Die direkten Steuern der Kapitalgesellschaften und die Probleme der Steueranpassung in den sechs Staaten der Europäischen Wirtschaftsgemeinschaft", 1960, S. 183.

inländische Tochtergesellschaften beschränkt. Entgegen Art. 14 des Gesetzes wird gemäss der Verordnung in Art. 27 die Konsolidierung ausländischer Tochtergesellschaften im Prinzip nicht ausgeschlossen. Der Minister der Finanzen hat aber noch nie die Erlaubnis zur Einbeziehung ausländischer Tochtergesellschaften in die steuerliche Einheit erteilt.

Ein Vergleich der niederländischen Regelung der steuerlichen Einheit mit dem EWG-Plan zeigt, dass die niederländische Regelung begrenzter ist. Für inländische Tochtergesellschaften wird eine 100%ige Beteiligung gefordert, während die Konsolidierung ausländischer Tochtergesellschaften unmöglich ist.

5. *Vergleich der niederländischen Regelung des Schachtelprivilegs und der steuerlichen Einheit für niederländische Tochtergesellschaften*

In Rahmen des Vergleichs der steuerlichen Regelung für die ausländische Tochtergesellschaft mit der für die Betriebstätte ist die Regelung der steuerlichen Einheit als potentieller Alternative für das über die Grenze reichende Schachtelprivileg betont worden, um eine noch grössere Analogie mit der Regelung für die Betriebstätte zu erreichen: sofortiger Verlustausgleich und keine (ausländische) Quellenabzug auf Dividenden bei Gewinnüberweisung. Für die inländische Tochtergesellschaften ist die steuerliche Einheit aber eine wirkliche Alternative zum Schachtelprivileg, auch wenn ihr Vorteil nur auf den Gewinnausgleich beschränkt ist. Die inländischen Dividendensteuer fehlt nämlich, wenn der Empfänger als Gesellschaft ein Recht auf Schachtelprivileg hat[19].

Die niederländische Muttergesellschaft einer 100%igen niederländischen Tochtergesellschaft hat nämlich wirklich die Wahl zwischen beiden Regelungen. Das Schachtelprivileg geht von der rechtlichen Selbstständigkeit von Mutter- und Tochtergesellschaften aus, auch bei 100%igen Tochtergesellschaften. Allein die Tatsache, dass neben dem Schachtelprivileg auch die Regelung der steuerlichen Einheit besteht, nach der die Tochtergesellschaft gewissermassen als Filiale angesehen wird, beweist das bereits[20].

Jetzt, wo Verluste bei Beteiligungen prinzipiell nicht mehr abzugsfähig sind, bedeutet das, dass die Neuregelung des Schachtelprivilegs sich vom Grundsatz der steuerlichen Einheit entfernt, nach dem Verluste von Tochtergesellschaften sofort und völlig verrechnet werden können. Dieser Unterschied war bei der alten Regelung des Schachtelprivilegs viel geringer, da Verluste bei Beteiligungen abzugsfähig waren. Der Ausschluss eines Verlustausgleichs läuft auch dem genannten Vorschlag der Kommission der EWG zuwider, auch wenn das nur für ausländische Beteiligungen gilt. Die Kommission der EWG setzt selbstverständlich voraus, dass bei Verlusten im Inland ein Verlustausgleich vorhanden ist!

Die Regelung der steuerlichen Einheit führt nun im Vergleich mit dem Schachtelprivileg zu einem Vorteil, so dass die steuerliche Einheit noch anziehender wird. Die Bedeutung der Regelung der steuerlichen Einheit liegt ja vor allem im Verlustausgleich und weniger im Ausschluss von Gewinnen, die ja doch bereits durch das Schachtelprivileg steuerfrei sein würden.

Bei 100%igen inländischen Beteiligungen gibt es jetzt einen Grund mehr, falls möglich

19. Art. 4 Absatz 2 des Dividendensteuergesetzes 1965 (Staatsblad 621).
20. Urteile des Hohen Rates vom 8. Mai 1957, B.N.B. 1957/208 – Entscheidungen in Steuersachen – und vom 7. März 1962, B.N.B. 1962/166.

zur Regelung der steuerlichen Einheit überzugehen. Das Schachtelprivileg hat bei 100%igen Beteiligungen tatsächlich relativ geringe Bedeutung. Wo jetzt aber Verluste unter dem Schachtelprivileg nicht mehr abzugsfähig sind, ist das Kriterium steuerlicher Konsolidierung noch mehr als zuvor von grossem Interesse. Das formalrechtliche Kriterium der 100%igen Beteiligungen kann jetzt zu unterschiedlichen Wettbewerbsverhältnissen führen, falls Verluste eintreten, was bei wirtschaftlichem Beherrschungskriterium von über 50% weniger der Fall wäre. Ein Konzern mit 100%igen inländischen Tochtergesellschaften hat einen möglicherweise grossen steuerlichen Vorteil gegenüber anderen Konzernen mit grossen inländischen Mehrheitsbeteiligungen bis zu 99% und übrigens auch im Hinblick auf einen Konzern mit überwiegend (100%igen) ausländischen Beteiligungen! Bei inländischen Gesellschaftsverhältnissen müsste das Kriterium steuerlicher Konsolidierung auf dieses wirtschaftliche Beherrschungskriterium von 50% oder 51% verlegt werden, damit auch für diese Mehrheitsbeteiligungen Verlustausgleich innerhalb des Konzerns möglich wird. Dieses Kriterium ist realistischer, steuerlich neutraler und stärker in Übereinstimmung mit den handelsrechtlichen Anforderungen an Konsolidierung.
Die Regelung der steuerlichen Einheit würde für die „unselbständigen" Tochtergesellschaften gelten, bei denen die Muttergesellschaft die Mehrheit des Aktienkapitals besitzt. Die Regelung des Schachtelprivilegs würde dann an erster Stelle für die „selbständigen" Tochtergesellschaften gelten, an denen die Muttergesellschaft nur eine Minderheit besitzt, selbst wenn die Regelung prinzipiell natürlich für alle Beteiligungen gilt.
Aber gerade die niedrige 5%-Klausel in der niederländischen Gesetzgebung lässt die Regelung ziemlich zweideutig werden. Sie gilt nicht nur für das echte Mutter-Tochterverhältnis, sondern auch für kleine Beteiligungen, während für diese wirtschaftlich stark von einander abweichenden Beteiligungen steuerlich die gleiche Selbständigkeitsphilosophie im Hinblick auf die Tochtergesellschaft gilt. An und für sich ist dieser niedrige Prozentsatz aber unter Berücksichtigung des Ausgangspunktes „ne bis in idem" nicht ungerecht.
Vor allem der Umstand, dass ein Konzern mit 100%igen inländischen Beteiligungen über die steuerliche Einheit tatsächlich die Möglichkeit sofortigen Verlustausgleichs hat oder erwerben kann, ist ein Grund dafür, die Konsolidierung auch auf Beteiligungen im Ausland nach denselben Kriterien, jedoch mindestens auf 100%ige Beteiligungen an ausländischen Tochtergesellschaften auszudehnen. Das wäre auch in Übereinstimmung mit dem Vorschlag der Kommission der EWG.
Unterstellt man, dass bei dem Schachtelprivileg kein prinzipieller Unterschied zwischen den in- und ausländischen Beteiligungen besteht, dann gibt es eigentlich keinen unausweichlichen Grund im Hinblick auf die Konsolidierung doch einen Unterschied zu machen und sicher nicht, wenn die Konsolidierung im Vergleich zum Schachtelprivileg neue steuerliche Vorteile mit sich bringt.

B. *Ausländischer Quellenabzug auf Schachteldividenden*

1. *Der niederländische Standpunkt bei Schachtelbeteiligungen*

Ein ausländischer Quellenabzug auf Schachteldividenden steht der Gleichheit zwischen Tochtergesellschaft und Betriebstätte auch im Weg.
Bei inländischen Schachtelbeteiligungen unterbleibt, wie schon gesagt, der Quellen-

abzug, wenn der Aktionär ein Anrecht auf Schachtelprivileg hat. Gewinnüberweisungen dürfen kein Anlass zur Besteuerung sein, vor allen Dingen nicht solche innerhalb eines Konzerns. Mit dem Schachtelprivileg geht also tatsächlich eine Steuerbefreiung von Körperschaft- und Dividendensteuer bei Gewinnüberweisung zur Muttergesellschaft einher: die Besteuerung bleibt auf die Erhebung der Körperschaftsteuer bei der Tochtergesellschaft beschränkt. Bei ausländischen Schachtelbeteiligungen ist der ausländische Quellenabzug auf Schachteldividenden tatsächlich eine extra Belastung, da weder „credit against tax" noch „credit against income" möglich ist: Schachteldividenden sind nämlich nicht im steuerbaren Gewinn einbegriffen. Dies steht in Gegensatz zu dem gemäss Abkommen verrechenbaren Quellenabzug auf Dividenden, die im Einkommen einer natürlichen Person einbegriffen sind.

Die niederländische Politik bei Doppelbesteuerungsabkommen war stets darauf gerichtet, den ausländischen Quellenabzug auf Schachteldividenden auszuschliessen oder so weit wie möglich einzuschränken, um steuerlichem Gleichgewicht zwischen Betriebstätte und Tochtergesellschaft möglichst weitgehend nahezukommen. Gewinnausschüttung innerhalb eines Konzerns zeigt ein grosses Mass von Übereinstimmung mit der Gewinnüberweisung innerhalb des gleichen Unternehmens[21].

International wird ein niedrigerer Quellenabzug auf Schachteldividenden auch allgemein akzeptiert, und in den meisten Abkommen findet sich eine besondere Regelung für Dividenden in sog. Mutter-Tochterverhältnissen.

Im Musterabkommen der OECD wird für Schachtelbeteiligungen von mindestens 25% ein 5%iger Abzug vorgeschlagen[22]. Die Niederlande haben hierzu den Vorbehalt gemacht, dass sie sich bei Abkommen bemühen werden, den Quellenabzug auf den Wert Null zu reduzieren[23]. Bisher konnten die Niederlande diese Politik grösstenteils erfolgreich durchsetzen. In die Abkommen mit den Vereinigten Staaten und dem Vereinigten Königreich ist aber ein 5%iger Steuersatz aufgenommen worden.

2. *Der Vorschlag der Kommission der EWG für Schachtelbeteiligungen*

In einem Gemeinschaftsmarkt wie der EWG gibt es natürlich ein Grund mehr den Quellenabzug bei Schachteldividenden zu unterlassen, neben der Erweiterung des Schachtelprivilegs auf Tochtergesellschaften in anderen Mitgliedstaaten.

In dem bereits genannten Richtlinienentwurf hat die Kommission der EWG ein gemeinschaftliches Steuersystem für Mutter-Tochterverhältnisse entwickelt. Darin wird vorgeschlagen, das Schachtelprivileg auch auf Schachteldividenden in anderen Mitgliedstaaten anzuwenden, wogegen auch vorgeschlagen wird, den Quellenabzug bei der Tochtergesellschaft wegfallen zu lassen, um zu einer echten steuerfreien Gewinnausschüttung innerhalb des Konzerns zu kommen (Art. 4 und 5). Die Muttergesellschaft wird also so behandelt, als ob sie den Gewinn selbst und nicht durch die Tochtergesellschaft erzielt hat. Die Besteuerung bei internationalen Gesellschaftsverhältnissen würde durch diesen EWG-Vorschlag auf die im Ausland bei der Tochtergesellschaft erhobene Körperschaftsteuer beschränkt werden.

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21. Denkschrift zur allgemeinen Reform der Steuergesetzgebung. Brief an die Zweite Kammer vom 27. Juli 1960; Sitzungsperiode 1959-1960, Dokument 5380-6000, Nr. 9, S. 13.
22. Art. 10 Absatz 2, unter *a*.
23. Siehe Denkschrift zum Musterabkommen der OECD, S. 106, Punkt 51 (englischer Text).

Der Vorschlag, keinen Quellenabzug zu erheben, reicht weiter als die Erweiterung des Schachtelprivilegs auf ausländische Beteiligungen, die in der Praxis im allgemeinen bereits besteht.
Auch innerhalb der EWG beträgt den Quellenabzug auf Schachteldividenden meistens 5% und liegt manchmal noch höher. Hierbei wird von den spezifischen Aspekten des Systems des gespaltenen Körperschaftsteuersatzes abgesehen, dass zu einem noch höheren Quellenabzug führen kann.
Das Kriterium für eine Beteiligung ist auf 20% festgelegt worden, was als ein Kompromiss zwischen den unterschiedlichen Prozentsätzen in der Gesetzgebung der Mitgliedstaaten angesehen werden muss. Diese 20%ige Mindestbeteiligung bedeutet, dass die Regelung nicht nur auf echte Mutter-Tochterverhältnisse anzuwenden ist: Titel und Denkschrift zum Richtlinienentwurf lassen dies zu Unrecht vermuten. Die Steuerbefreiung gilt nämlich auch für andere Beteiligungsverhältnisse.
Es ist u.E. bemerkenswert, dass in diesem Entwurf nicht die Möglichkeit offengelassen wird, diese Regelung auch auf Dividenden von Tochtergesellschaften anzuwenden, die in bestimmten Drittstaaten ihren Sitz haben. Das steht in Gegensatz zum Vorschlag über die steuerliche Konsolidierung, während beide Vorschläge in gewisser Weise doch von demselben Gedanken ausgehen.
Die Kommission der EWG will nicht darüber urteilen, ob die Kosten die mit Beteiligungen im Ausland in Zusammenhang stehen, abzugsfähig sein müssen oder nicht. Sie hat aber vorgeschlagen, dass Mitgliedstaaten – wie Frankreich und Belgien – die die Kosten von Beteiligungen pauschal auf einen bestimmten Prozentsatz der bezogenen Dividenden festlegen wollen, diese Pauschale auf maximal 5% festsetzen dürfen (Ende von Art. 4).
Dieser Vorschlag der Kommission ist u.E. so auszulegen, dass die Kosten der Beteiligung im Ausland – falls nur 95% der Dividenden steuerfrei bleiben – voll abzugsfähig sind. Falls aber in bestimmten Mitgliedstaaten – wie den Niederlanden – eine 100%ige Steuerbefreiung gewährt wird, dann sind u.E. die Kosten, mit denen die ausländische Tochtergesellschaft nicht belastet wird, nicht abzugsfähig.
Der nationale Gesetzgeber hat hier also die Wahl zwischen zwei Systemen um die Kosten von Beteiligungen im Ausland vom Abzug bei der Gewinnermittlung auszuschliessen. In der Praxis wird der quantitative Effekt dieser Alternative meistens nicht gleichwertig sein; er ist abhängig von der Relation zwischen Dividenden und Kosten aller Beteiligungen insgesamt.
Ein Vergleich des Vorschlags der Kommission mit der niederländischen Regelung zeigt, dass diese, was den Mindestbeteiligungssatz angeht, noch grosszügiger ist. Es ist u.E. nicht zu erwarten, dass die Niederlande ihre günstigere Regelung aufgeben.
Die Niederlande sind im Hinblick auf das Objekt des Schachtelprivilegs der einzige Staat, der über die Befreiung von Dividenden hinausgeht.

III. DIE STEUERLICHE BEHANDLUNG VON BETEILIGUNGEN UND KAPITALANLAGEN

1. *Der Unterschied zwischen Beteiligungen und Kapitalanlagen*

Im Gesetz wird zur Unterscheidung von Beteiligungen und Kapitalanlagen ausschliesslich ein formales Kriterium (5%) für inländische Beteiligungen festgelegt (Art. 12 Absatz 6). Für ausländische Beteiligungen wird neben der niedrigen 5%-Klausel auch ein materielles Kriterium festgelegt, nämlich dass Eigentum am Aktienkapital keine Kapitalanlage sein darf (Absatz 7). Die Be-

weislast liegt im übrigen bei den Finanzämtern. Für den Nachweis von Beteiligungen unter 5% soll für in- und ausländische Beteiligungen die gleiche Bedingung wie zur Zeit der Verordnung gelten: die Beteiligung muss auf der Linie normaler Betriebsausübung liegen (Absatz 8).

In der Denkschrift zum Gesetzesentwurf wird der materielle Unterschied zwischen Beteiligungen und Kapitalanlagen folgendermassen bezeichnet: „Vorliegen einer Beteiligung wird angenommen, falls ein nicht zu entfernter Zusammenhang zwischen dem eigenen und dem Betrieb vorliegt, an dem eine Beteiligung besteht. Es ist zu unterscheiden zwischen dem Halten von Aktien wegen der sich daraus ergebenden Beziehung zwischen dem eigenen und dem Betrieb, an dem die Beteiligung besteht, und dem Halten von Aktien rein als Kapitalanlage in Wertpapieren"[24]. Im ersten Fall besteht ein sachliches Band zwischen zwei Unternehmen, so dass Veranlassung gegeben ist, den Gewinn nur einmal zu besteuern. Bei Kapitalanlage ist das sachliche Band nicht vorhanden. Das Gesetz legt also ein formales Kriterium zur Unterscheidung von Beteiligungen und Kapitalanlagen fest. Hiermit kommt man laut Denkschrift der Wirklichkeit im allgemeinen ausreichend nahe.

Das materielle Kriterium für das Schachtelprivileg bei über die Grenze reichenden Schachtelbeteiligungen – das auch dazu bestimmt ist, die Flucht in eine ausländische Kapitalanlagegesellschaft zu verhindern – könnte zur Errichtung einer niederländischen Kapitalanlagegesellschaft führen. Dies ist umso anziehender, als das Steuersystem in den Niederlanden für Kapitalanlageinstitute tatsächlich beinahe genau so günstig ist wie das des Auslands. Ein materielles Kriterium neben der 5%-Klausel wäre daher auch eigentlich im nationalen Schachtelprivileg erwünscht. Der Gesetzgeber hat dies nicht für nötig gehalten, weil Beteiligungen an Kapitalanlageinstitute von dem Schachtelprivileg ausgeschlossen sind, so dass kein Missbrauch durch Kumulierung des Schachtelprivilegs und der Steuerbefreiung nach der Regelung für Kapitalanlageinstitute möglich ist[25].

Bevor wir näher auf diese Kumulierung eingehen, folgt – zum besseren Verständnis – ein kurzer Überblick über die völlig geänderte Regelung für Kapitalanlageinstitute.

2. *Die steuerliche Regelung für Kapitalanlageinstitute*

In Art. 27 des Gesetzes wird bestimmt, dass mittels Durchführungsverordnung nähere abweichende Regeln zur Besteuerung von Kapitalanlageinstitute gegeben werden sollen (Absatz 1, unter *a*)[26].

Als Kapitalanlageinstitute („beleggingsinstellingen") gelten: Aktiengesellschaften (Kapitalanlagegesellschaften – „beleggingsmaatschappijen") und offene Investmentfonds aus gemeinsame Rechnung („fondsen voor gemeenschappelijke rekening"), mit Sitz in den Niederlanden, deren Zielsetzung und tatsächliche Tätigkeit darin besteht, Vermögen ausschliesslich oder fast ausschliesslich in Wertpapieren, unbeweglichem Vermögen und Hypothekenpfandbriefen anzulegen; diese Körperschaften müssen einer Reihe von Bedingungen genügen (Absatz 2, unter *a - d*).

24. Denkschrift Nr. 3, S. 13.
25. Antwortnote Nr. 9, S. 26 und 41.
26. Denkschrift zur Zweiten Änderungsnote, Dokument der Zweiten Kammer; Sitzungsperiode 1967-1968, Dokument 6000, Nr. 17, S. 7, 8 und 12, nachfolgend „Zweite Denkschrift Nr. 17" genannt.
Auf die technische Ausarbeitung der Regelung für Kapitalanlageinstiute wird ausführlicher eingegangen in der Zweiten Antwortnote an die Zweite Kammer; Sitzungsperiode 1968-1969, Dokument 6000, Nr. 22, S. 16-23, nachfolgend „Zweite Antwortnote Nr. 22" genannt.

Bedingungen sind unter anderem, dass der Gewinn innerhalb von acht Monaten ausgeschüttet und die in Wertpapieren anzulegenden Mittel mindestens zu 80% mit Eigenkapital finanziert werden (Absatz 2, unter *a* und *b*). Ein Kapitalanlageinstitut im Sinne des Art. 27 ist also ein von der Körperschaftsteuer befreites Kapitalanlageinstitut, das die gestellten Bedingungen erfüllt. Die Bedingungen sind nämlich auch in die Definition übernommen worden.
Ein Kapitalanlageinstitut mit Sitz in den Niederlanden kommt ausserdem nur für eine Steuerbefreiung in Betracht, falls ausländische Aktionäre höchstens 25% des Aktienkapitals besitzen, so dass die Gründung einer Kapitalanlagegesellschaft in den Niederlanden nicht dazu führt, dass sog. beschränkte Steuerpflichtige (Gebietsfremde) ihre beschränkte niederländische Steuerpflicht verringern können (Absatz 2, unter *d*).
Offene Investmentfonds auf gemeinsame Rechnung, deren Teilhaberscheine verkäuflich sind, werden laut Gesetz wie Kapitalanlagegesellschaften behandelt. Diese offenen Investmentfonds sind laut Gesetz „subjektiv steuerpflichtig" geworden (Art. 2 Absatz 1, unter *e*).
Die Regelung für Kapitalanlageinstitute ist neben Dividenden erweitert auf Zinsen und Erträge aus unbeweglichem Vermögen, so dass die Anlagemöglichkeiten für die Kapitalanlageinstitute ansehnlich erweitert sind[27].

3. *Das Verhältnis zwischen dem Schachtelprivileg und der Regelung für Kapitalanlageinstitute*

Bei der Änderung des Gesetzesentwurfs im Jahre 1968 wurde das Schachtelprivileg für Beteiligungen an Kapitalanlageinstitute ausgeschlossen (Art. 12 Absatz 2). Der Grund dafür war, dass man der Steuereinsparung mittels Aufschub entgegenwirken wollte, die durch das Zwischenschalten einer Kapitalanlagegesellschaft möglich wäre[28]. Das Schachtelprivileg wird folglich doch auf Beteiligungen in einem nicht von der Körperschaftsteuer befreiten Kapitalanlageinstitut angewandt, das also nicht den Bedingungen genügte.
Durch Gründung einer Tochtergesellschaft als Kapitalanlagegesellschaft könnte die 5%-Klausel sonst umgangen werden. Falls ein Aktienpaket für das Schachtelprivileg nicht in Betracht kommt, könnte ohne die Bestimmung von Art. 12 Absatz 2 eine Tochtergesellschaft gegründet werden, an die die Anteile übertragen werden, falls die Anerkennung als Kapitalanlageinstitut dadurch erreicht wird, dass die gestellten Bedingungen erfüllt werden. Das würde ohne diese Bestimmung zur Folge haben, dass die Tochtergesellschaft von der Körperschaftsteuer befreit wird, vorausgesetzt, der Gewinn wird innerhalb von acht Monaten ausgeschüttet. Die Muttergesellschaft hätte dann für die von der Tochtergesellschaft bezogenen Dividenden ein Anrecht auf Schachtelprivileg, während ausserdem der eventuelle Vermögenszuwachs bei Verkauf der Beteiligung steuerfrei bliebe[29].
Ebenso wird bestimmt, dass das Kapitalanlageinstitut kein Anrecht auf Schachtelprivileg hat, auch nicht für Beteiligungen, die den Satz von 5% überschreiten (Art. 12 Absatz 2).
Die Doppelbesteuerung kann allein vermieden werden, falls den spezifischen Bedingungen der Regelung für Kapitalanlageinstitute genügt wird (z.B. Ausschüttung innerhalb von acht Monaten)[30].
Eine Holding mit ausländischen Beteiligungen ist aber keine Kapitalanlagegesellschaft. Es kann keine Rede von Kapitalanlage

27. Zweite Denkschrift Nr. 17, S. 7.
28. Zweite Denkschrift Nr. 17, S. 11.
29. Antwortnote Nr. 9, S. 41.
30. Zweite Denkschrift Nr. 17, S. 11.

im Sinne von Art. 12 Absatz 7 sein, wenn die niederländische Muttergesellschaft als Holdinggesellschaft ausländischer Tochtergesellschaften auftritt, die selbst ein Geschäft ausüben. Das Schachtelprivileg gilt also auch für Dividenden, die eine echte Holding geniesst.

Das Schachtelprivileg gilt auch für Beteiligungen an einer Holdinggesellschaft im Ausland. Kapitalanlage wird dann nicht angenommen, wenn eine ausländische Tochtergesellschaft als Holdinggesellschaft ebenfalls im Ausland ansässiger Tochtergesellschaften auftritt, deren Tätigkeiten auf der Linie der Geschäftsausübung der niederländischen Muttergesellschaft liegen. Falls erforderlich, muss also das Verhältnis zu den dahinterliegenden Gesellschaften untersucht werden[31].

Im allgemeinen kann vorausgesetzt werden, dass es sich nicht um ein Kapitalanlageinstitut handelt, falls die satzungsgemässen Ziele über Vermögensanlage hinausgehen oder die tatsächliche Tätigkeit mehr umfasst als Kapitalanlage, z.B. die Führung von Aktiengesellschaften oder falls eine der Bedingungen nicht erfüllt ist[32].

Im Gegensatz zur Regelung für Kapitalanlageinstitute ist für das Schachtelprivileg nicht erforderlich, dass die Holdinggesellschaft ausschliesslich als „Holding" auftritt. Der Gewinn aus der übrigen Geschäftstätigkeit wird normal besteuert.

4. *Das Schachtelprivileg und „base companies"*

Die Niederlande sind für ausländische Konzerne wegen des weitreichenden Schachtelprivilegs für die Gründung von Holdinggesellschaften günstig und umso mehr, als das niederländische Schachtelprivileg auch gilt, wenn die Holding ausserdem eigene Geschäftstätigkeiten hat, so dass sie keine echte „base company" ist.

Das internationale Schachtelprivileg macht im übrigen eine „base company" überflüssig, weil durch das Schachtelprivileg bereits eine Aussetzung der Dividendenbesteuerung erzielt wird. Doch besteht keine Ausschüttungserfordernis wie bei der niederländischen Regelung für Kapitalanlageinstitute. Einkünfte können also frei in der Gesellschaft thesauriert werden, die das Schachtelprivileg geniesst, sofern der ausländische Fiskus nicht eine „deemed dividend" annimmt, wie – angeblich – in den Vereinigten Staaten, falls die Holding keine eigenen Geschäftstätigkeit ausübt.

Die niederländische steuerliche Regelung für Holdinggesellschaften ist auch nicht für die Gründung von „base companies" geeignet, da die Steuerbefreiung auf Vorteile aus Beteiligungen – Dividenden und Kapitalgewinne auf die Beteiligungen – beschränkt ist und nicht für Zinsen, Royalties und andere Kapitalgewinne gilt.

IV. TECHNISCHE REGELUNG DES SCHACHTELPRIVILEGS IM KÖRPERSCHAFTSTEUERGESETZ 1969

1. *Subjekte des Schachtelprivilegs*

In der Verordnung war das Schachtelprivileg sowohl im Hinblick auf die Gruppe der Steuerpflichtigen als auch die Art der steuerfreien Gewinnbestandteile beschränkt.

Diese Beschränkungen ergaben sich vor allem aus der Vorstellung der Besatzungsmacht, dass Körperschaften und natürliche Personen auf eine Linie liegen müssten, wobei der Akzent auf den Ausnahmecharakter des Schachtelprivilegs gelegt wird. Eine derartig weit gezogene anthropomorphe Denkweise liegt der Gewinnbesteuerung von Körperschaften mit Sitz in den Niederlanden nicht zugrunde[33]. Diese weitreichende Zielsetzung des Schach-

31. Antwortnote Nr. 9, S. 24 und 25.
32. Zweite Antwortnote Nr. 22, S. 16.
33. Denkschrift Nr. 3, S. 13.

telprivilegs hat dazu geführt, dass sie auf alle der Körperschaftsteuer unterliegenden Steuerpflichtigen erweitert wurde und auf alle infolge einer Beteiligung genossenen Vorteile.

Alle der Körperschaftsteuer unterliegenden Unternehmen haben ein Anrecht auf das Schachtelprivileg: neben Aktiengesellschaften auch Genossenschaften und andere Vereine und Stiftungen; Kapitalanlageinstitute sind davon ausgenommen (Art. 12 Absatz 2). Die Steuerbefreiung ist auch ausgedehnt: neben Beteiligungen an Kapitalgesellschaften gilt sie auch für Beteiligungen an offene Investmentfonds auf gemeinsame Rechnung und die Mitgliedschaft in einer Genossenschaft. Der Grund für die Erweiterung ist, dass offene Investmentfonds auf gemeinsame Rechnung prinzipiell steuerpflichtig geworden sind und dass Mitgliedschaft in einer Genossenschaft im allgemeinen auf der Linie normaler Geschäftsausübung liegt.

Die Betriebstätte einer ausländischen Muttergesellschaft

Auch eine Muttergesellschaft mit Sitz im Ausland hat ein Anrecht auf das Schachtelprivileg, falls zu ihrer Betriebstätte in den Niederlanden Beteiligungen an niederländischen oder ausländischen Tochtergesellschaften gehören. Für die sog. „beschränkten Steuerpflichtigen" findet bei der Ermittlung des inländischen Einkommens Kapitel II des Gesetzes sinngemäss Anwendung (Art. 17 Absatz 1). In der Folge wird ausdrücklich bestimmt, dass der obengenannte Art. 12 zu beachten ist (Art. 17 Absatz 2).

Falls zur Betriebstätte in den Niederlanden Beteiligungen an niederländischen Tochtergesellschaften gehören, kommt das nationale Schachtelprivileg in Betracht und im Fall von Beteiligungen in ausländischen Tochtergesellschaften, das internationale Schachtelprivileg.

Diese letzte Konstellation wird wahrscheinlich häufiger vorkommen und ist mit der Situation zu vergleichen, dass eine ausländische Muttergesellschaft eine Tochtergesellschaft in den Niederlanden mit Beteiligungen ausserhalb der Niederlande hat.

Es bleibt aber ein Unterschied im Hinblick auf die Dividendensteuer, da die Betriebstätte in den Niederlanden im Gegensatz zur Tochtergesellschaft nicht der niederländischen Dividendensteuer unterliegt[34].

2. *Der Begriff Beteiligung*

Im Gesetz wurd von einer Beteiligung („deelneming") gesprochen, während in der Verordnung von einer sogenannten wesentlichen Beteiligung („aanmerkelijk belang") die Sprache war. Das Schachtelprivileg findet Anwendung, falls der Steuerpflichtige seit Anfang des Jahres ununterbrochen eine Beteiligung besass (Absatz 1), was bedeutet, dass er mindestens 5% des Aktienkapitals besitzen muss (Absatz 6).

Im Gesetz werden also drei Forderungen aufgestellt: Eigentum am Aktienkapital, Beteiligung und qualifizierten Besitzdauer.

a) Eigentum am Aktienkapital

Der Steuerpflichtige muss Anteilinhaber der gewinnausschüttenden Gesellschaft sein. Die Forderung der Nicht-Gegenseitigkeit ist ebenso wie die Forderung unmittelbaren Eigentums am Aktienkapital fortgefallen. Der Sinn ist u.E. aber nicht, dass mittelbares Eigentum am Aktienkapital bei der 5%-Klausel mitzählt, da Eigentum am Aktienkapital zivilrechtlich unmittelbares Eigentum impliziert.

Sollte mittelbares Eigentum am Aktienkapital doch bei der 5%-Klausel mitzählen, dann müsste etwas derartiges u.E. aus dem

34. Art. 1 Absatz 1 des Dividendensteuergesetzes 1965.

Text des Gesetzes ausdrücklich hervorgehen, wie das auch an anderen Stellen der Steuergesetze geschehen ist.
In Art. 19 Absatz 5 des Gesetzes, der Verlustausgleich bei sog. Mantelkauf verbietet, ist ausdrücklich unmittelbares und mittelbares Eigentum am Aktienkapital gemeint. Die gleiche Beschreibung kommt in der Definition der sog. wesentlichen Beteiligung in Art. 39 des Einkommensteuergesetzes 1964 vor.

b) Beteiligung

Das Gesetz unterscheidet zwischen Beteiligungen an Aktiengesellschaften, inländischen offenen Investmentfonds aus gemeinsame Rechnung und der Mitgliedschaft in einer in- oder ausländischen Genossenschaft.
Beteiligung in einer inländischen Gesellschaft liegt bei Eigentum von mindestens 5% des Grundkapitals vor (Absatz 6).
Für eine Beteiligung in einer ausländischen Gesellschaft gilt neben der 5%-Klausel die Bedingung, dass das Eigentum am Aktienkapital keine Kapitalanlage bilden darf (Absatz 7).
Bei dem internationalen Schachtelprivileg wird vorgesehen, dass die Muttergesellschaft ihren Sitz innerhalb und die Tochtergesellschaft den ihren ausserhalb der Niederlande hat (z.B. auch in den niederländischen Antillen oder Surinam).
Eine Beteiligung an einem inländischen offenen Investmentfonds liegt bei Eigentum von mindestens 5% der Teilhaberscheine (Absatz 6) vor.
Mitgliedschaft in einer Genossenschaft berechtigt für sich zur Steuerbefreiung (Absatz 1).
Die Verringerung des Mindestbeteiligungssatzes scheint eine Erweiterung des Schachtelprivilegs zu sein, doch ist in Wirklichkeit eine Bestätigung des gegenwärtig geltenden tatsächlichen Zustandes. Die bereits in der Vergangenheit in vielen Fällen gewährte Steuerbefreiung für Beteiligungen unter 25% wird jetzt nur im Gesetz verankert.
Bisher wurde das Schachtelprivileg in diesen Fällen durch den Minister gewährt, eine Kompetenz, die bereits 1945 an die Finanzämter delegiert wurde. In späteren Jahren ist von dieser Kompetenz sehr weitgehend Gebrauch gemacht worden, so dass die Grenze nicht von wesentlicher Bedeutung war. Diese Weisungsbefugnis ist jetzt für Beteiligungen unter 5% in das Gesetz aufgenommen worden, soweit diese auf der Linie normaler Geschäftstätigkeit („normale uitoefening van het bedrijf") liegen oder im allgemeinen Interesse eingegangen wurden (Absatz 8).
Wie gesagt, gilt dies u.E. sowohl für inländische als ausländische Beteiligungen.

c) Besitzdauer

Der Steuerpflichtige muss die Beteiligung ununterbrochen seit Jahresbeginn besitzen. Es handelt sich aber nicht um echtes Eigentum während des Jahres im Sinne von Besitz während des ganzen Geschäftsjahres. Die Aktien müssen nur von Jahresbeginn bis zum Eingang der Dividenden in seinem Besitz stehen und nicht noch danach bis zum Ende des Geschäftsjahres.
Diese Forderung steht im Zusammenhang mit der Vermeidung von „dividend stripping", da die miterworbene Dividende in den Anschaffungskosten (Steuerlichen Buchwert) der Beteiligung einbegriffen ist und nicht zu den Vorteilen infolge der Beteiligung gehört. Zu dieser Abbuchung zwingt aber schon steuerrechtlich guter Kaufmannsgebrauch, so dass die Forderung eigentlich überflussig ist. Dies lässt sich laut der Verordnung, doch ganz sicher laut dem Gesetz voraussetzen, jetzt wo Wertabbuchungen nicht mehr zu Last des steuerlichen Gewinns gehen.

Der Minister hat zugesagt, dass für eine wirkliche Erhöhung einer Beteiligung im Lauf des Jahres, z.B. von 75% auf 85%, das Schachtelprivileg auch für Dividenden auf diesen 10%igen Beteiligungszuwachs gewährt werden soll, obwohl er nicht ab 1. Januar in Besitz ist.[35] Aus dieser Billigung geht u.E. hervor, dass es bei dieser Bedingung tatsächlich um die Besitzdauer nach Genusz der Dividende geht, auch wenn diese Auslegung in Widerspruch zur formellen Forderung von Besitz vom Aktienkapital von Jahresbeginn an steht.

3. *Objekt des Schachtelprivilegs*

Im Gesetz ist das Objekt des Schachtelprivilegs sehr erweitert worden. Alle Vorteile (einschliesslich Verluste) infolge Beteiligung oder Mitgliedschaft bleiben bei der Gewinnermittlung ausser Betracht. Neben Dividenden sollen alle Wertveränderungen der Beteiligung selbst unter den Geltungsbereich fallen[36].

a) Der Begriff Vorteile

Der Begriff Vorteile bezieht sich laut Denkschrift auf den Saldo bestimmter positiver und negativer Bruttobeträge[37].

Das bedeutet einerseits, dass sowohl Wertsteigerungen als auch Wertminderungen nicht in Betracht kommen und andererseits, dass das Schachtelprivileg eine Bruttobefreiung geworden ist, so dass Kosten in Zusammenhang mit der Beteiligung künftig abzugsfähig sind.

Nach der Verordnung galt eine Nettobefreiung, da diese Kosten nicht abzugsfähig waren (Art. 15). Dass „negative Vorteile" (Verluste) ausgeschaltet sind, geht auch aus der Tatsache hervor, dass ausnahmsweise Liquidationsverluste doch vom Gewinn abzugsfähig sind (Art. 12 Absatz 5).

Als positive Beträge kommen in Betracht Dividendausschüttungen aus der Beteiligung und Ausschüttungen auf Gewinnscheine („winstbewijzen"), Gewinne aus dem Verkauf der Beteiligung („vermogenswinsten" oder „capital gains") oder aus der Liquidation der Tochtergesellschaft. Als negative Beträge gelten Abschreibungen auf den Buchwert der Beteiligung und Verlust bei Verkauf („vermogensverliezen" oder „capital losses") und im Prinzip Verlust bei Liquidation[38]. Die Steuerbefreiung gilt auch für verdeckte Gewinnausschüttungen – auch dann tritt ja immer Doppelbesteuerung ein – und für Gratisaktien aus Gewinnrücklagen („bonusaandelen")

b) Zielsetzung der Erweiterung des Schachtelprivilegs

Ziel des erweiterten Schachtelprivilegs ist laut Denkschrift, dass Gewinne und Verluste nur einmal für Körperschaftsteuer in Betracht kommen. Dieses konsequente System wird dadurch geschaffen, dass die Wertsteigerungen und- minderungen der Beteiligung bei der Gewinnermittlung für die beteiligte Gesellschaft ausser acht gelassen werden. Die Wertschwankungen einer Beteiligung sind im ganzen gesehen bei der beteiligten Gesellschaft ja die Reflexion von Gewinnen und Verlusten der Gesellschaft an der die Beteiligung besteht[39].

Das Schachtelprivileg zielt darauf ab, Doppelbesteuerung des gleichen Gewinns zu vermeiden, so dass eigentlich kein Grund dafür besteht, einen Unterschied zwischen Wertsteigerungen der Beteiligungen und Divi-

35. Bericht über die Beratung zwischen dem Minister und den Ständigen Finanzausschuss der Zweiten Kammer, Dokument 6000, Nr. 25, S. 22. Nachfolgend „Bericht über die Beratung Nr. 25" genannt.
36. Denkschrift Nr. 3, S. 14.
37. Denkschrift Nr. 3, S. 20.
38. Denkschrift Nr. 3, S. 20.
39. Denkschrift Nr. 3, S. 14.

denden zu machen. Die Wertsteigerung der Beteiligung ist ja eine Reflexion des Gewinns der Tochtergesellschaft, aber nicht nur des bereits versteuerten Gewinns der Tochtergesellschaft („offene Reserven"), sondern auch des noch zu versteuernden zukünftigen Gewinns (stille Rücklagen und Goodwill). Diese Erweiterung ist für Industrie und Handel von grosser Bedeutung, da bisher Steuerbefreiung des Verkaufsgewinns nur durch forcierte Dividendenausschüttungen in Form von Bargeld oder Gratisaktien möglich war. Dies lag aber nicht immer im Interesse der Tochtergesellschaft. Die Unternehmer haben auch grössere Freiheit gewonnen. Die Befreiung der Verkaufgewinne aus Beteiligungen kann dazu führen, dass ausländische Konzerne dazu übergehen, bestimmte Beteiligungen aus den Niederlanden in andere Konzernteile oder aber auch in die Niederlande zu verlagern.
Dass als Gegenstück der Befreiung von Wertsteigerungen über den Anschaffungspreis Verluste bis zum Anschaffungspreis ausser Betracht bleiben, scheint im Prinzip richtig, da diese Verluste auch eine Reflexion des Verlustes der Tochtergesellschaft sind. Diese Verluste können innerhalb der Grenzen des Verlustausgleichs bei der Tochtergesellschaft verrechnet werden und insofern gibt es keinen einzigen Grund, auch einen Ausgleich bei der Muttergesellschaft zu gewähren. Die Ausschaltung von Verlusten wird also mit der Vermeidung doppelten Verlustausgleichs motiviert. Dafür gibt es umso mehr Gründe, weil die Verluste als Gegenstück der – befreiten – Dividenden und Wertsteigerungen angesehen werden[40].
Das Ausschalten von Verlusten ist ein wirklicher Rückschritt für die Unternehmer. Bisher konnte der Gewinn der Muttergesellschaft über Abschreibungen auf die Beteiligung mit Verlusten belastet werden, sofern der Wert der Beteiligung unter den Anschaffungspreis sank. Als Ausnahme sind Verluste bei Liquidation doch abzugsfähig, was aber bedeutet, dass wirkliche Verluste viel später zum Abzug kommen als jetzt und nur, falls zur Liquidation geschritten wird.

4. *Verluste liquidierter Tochtergesellschaften*
Als Ausnahme kommen Verluste bei der Liquidation einer Tochtergesellschaft bei der Gewinnermittlung der Muttergesellschaft in Betracht (Art. 12 Absatz 5). Liquidationsverlust ist der Unterschied zwischen dem sog. „geopferten Betrag" und der Summe der erhaltenen Liquidationsausschüttungen.
Diese Ausnahme wird also derart begründet, dass die Regel befolgt wird, erlittene Verluste müssen bei Steuererhebung so weit wie möglich in Betracht gezogen werden[41].
Ein Liquidationsverlust ist steuerrechtlich ja nicht mehr bei der Tochtergesellschaft zu verrechnen – es gibt keinen oder nur einen zu beschränkten „carry-back" für Verluste –, während bei der Muttergesellschaft dieser Beteiligungsverlust auch nicht zum Steuerabzug führen sollte (Art. 12 Absatz 1).
Durch die Liquidation der Tochtergesellschaft geht definitiv die Möglichkeit verloren, Verlust der Tochtergesellschaft noch mit eigenen Gewinnen auszugleichen[42].
Dies ist, wie wir glauben, auch der Grund dafür, dass Verluste bei Verkauf einer Beteiligung nicht abzugsfähig sind. Im Prinzip müsste bei jedem Verkauf einer Beteiligung der eventuelle Verlust durch Belastung des Konzerngewinns zum Ausdruck kommen. Doch selbst in diesem Fall bleibt die Selbständigkeit der Tochtergesellschaft – die ja nicht liquidiert wird – primär.

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40. Antwortnote Nr. 9, S. 23.
41. Denkschrift Nr. 3, S. 14.
42. Denkschrift Nr. 3, S. 20.

Das Schachtelprivileg in dieser Form hat tatsächlich einen zweideutigen Karakter. Bei laufenden Gewinnen und Verlusten (und bei Liquidationsgewinn) geht man von der steuerlichen Selbständigkeit der Tochter aus, beim Liquidationsverlust findet jedoch der Konzerngedanke Anwendung, d.h. die Tochtergesellschaft gilt als Teil der Muttergesellschaft. Das Schachtelprivileg soll doppelten Verlustausgleich verhindern (Verluste nicht bei der Muttergesellschaft abzugsfähig) und einmaligen Verlustausgleich (Liquidationsverlust bei der Muttergesellschaft abzugsfähig) durchführen helfen.

Der Abzug eines Liquidationsverlustes läuft darauf hinaus, dass der eventuelle Verlust, der sich bei Liquidation der Tochtergesellschaft im Beteiligungseigentum der Muttergesellschaft niederschlägt, bei der Muttergesellschaft in dem Jahr in Betracht gezogen wird, in dem definitiv feststeht, wie gross dieser Verlust ist, d.h. in dem Jahr, in dem die Abwicklung abgeschlossen ist. Anstatt also den unverrechneten Verlust bei der Tochtergesellschaft selbst festzustellen und auf die Muttergesellschaft zu übertragen, was auf grosse praktische Schwierigkeiten stossen würde, wird beim Liquidationsverlust angeschlossen, der sich in der Buchführung der Muttergesellschaft zeigt[43]. Auf diese Weise wird der Verlust ziemlich grob und pauschal festgelegt. Es besteht also kein unmittelbarer Zusammenhang zwischen der Grösse des bei der Tochtergesellschaft unverrechnet gebliebenen Verlustes und dem bei der Muttergesellschaft für Abzug in Betracht kommenden Liquidationsverlust aus der Beteiligung[44].

In Situationen, die materiell der Liquidation gleichkommen, soll der Abzug von Verlusten auch gewährt werden. Mit Liquidation werden gleichgestellt: Verstaatlichung einer Beteiligung im Ausland, sofern angenommen werden kann, dass die Muttergesellschaft alle Verfügungsrechte verloren hat. Es ist aber auch möglich, dass bei Verstaatlichung die Investition doch weiterhin Vorteile bringt, z.B. durch eine Regelung im Hinblick auf ein „Gemeinschaftsunternehmen"[45].

Der „geopferte Betrag"

Der Betrag, der zum Erwerb einer Beteiligung geopfert wurde („opgeofferde bedrag") wird nicht allein vom Opfer zum Zeitpunkt des Erwerbs – den Anschaffungspreis – bestimmt, sondern durch alles, was die Muttergesellschaft für die Beteiligung bis zum Moment der Liquidation der Tochtergesellschaft geopfert hat. Der „geopferte Betrag" wird nämlich um Kapitaleinzahlungen der Muttergesellschaft und u.E. auch um die von der Tochtergesellschaft gewährten Gratisaktien erhöht, deren Nominalwert gewissermassen von der Muttergesellschaft zurücküberwiesen wurde. In der Denkschrift wird bemerkt, dass der „geopferte Betrag" niedriger sein kann als die Anschaffungskosten der Beteiligung, nämlich wenn nach dem Erwerb der Beteiligung Rücklagen, die die Anschaffungskosten beeinflussten, zur Ausschüttung kamen[46].

Die Ermittlung der miterworbenen Dividende kann schwierig sein, umso mehr, als die Anschaffungskosten neben den offenen Rücklagen in der Handelsbilanz, vor allem auch durch den in Zukunft noch zu versteuernden Gewinn (stille Rücklagen und Goodwill) der Tochtergesellschaft beeinflusst werden.

Der „geopferte Betrag" muss manchmal vielleicht ausserhalb der Steuerbilanz bestimmt werden, da der steuerliche Buchwert

43. Denkschrift Nr. 3, S. 20.
44. Zweite Antwortnote Nr. 22, S. 21.
45. Bericht über die Beratung Nr. 25, S. 23, Punkt 66.
46. Denkschrift Nr. 3, S. 20.

ihn nicht immer wiedergibt. Der Grund dafür ist, dass trotz früherer Abschreibung auf die Beteiligung infolge von Verlusten der Tochtergesellschaft doch die höheren Anschaffungskosten bestimmend für den Liquidationsverlust sind. Das ist angemessen, da die frühere Abschreibung nach dem Gesetz nicht zu einem abzugsfähigen Verlust führte, sondern erst jetzt bei der Liquidation berücksichtigt wird[47].

In einer Übergangsbestimmung wird der „geopferte Betrag" nicht höher angesetzt als der Buchwert am Ende des letzten Jahres, für das die Körperschaftsteuer nach der Verordnung erhoben wird, d.h. der Buchwert per 31. Dezember 1969 (Art. 29 Absatz 25). Nach der Verordnung ist der steuerliche Gewinn nämlich bereits mit Abschreibungen unter die Anschaffungskosten der Beteiligung belastet worden.

Eine nähere Erläuterung des Begriffes „geopferter Betrag" ist für Fälle nötig, in denen eine Beteiligung bei einer Transaktion mit einer zum Konzern behörenden Gesellschaft erworben wurde. Bei Erwerb einer Beteiligung im Konzernverband ist der „geopferte Betrag" der, der durch den Konzern als Ganzes, und nicht durch einen bestimmten Teil des Konzerns geopfert wurde (Ende Absatz 5)[48]. Diese besondere Massregel betrifft nicht nur Beteiligungen, die nach Inkrafttreten des Gesetzes erworben wurden, sondern auch bereits im Jahre 1969 als Eigentum besessene Beteiligungen. Nach der alten Regelung hat der Fiskus nämlich aus praktischen Gründen meistens von der Besteuerung der bei Beteiligungen errichteten Verkaufsgewinne abgesehen, sofern die erwerbende Gesellschaft die Beteiligung zum gleichen Buchwert wie bei der verkaufenden Gesellschaft verbuchte. In Fällen, in denen doch Steuer erhoben wurde, soll ein flexibler Standpunkt eingenommen werden[49].

5. *Bewertung von Beteiligungen*

Der steuerliche Gewinn muss gemäss steuerrechtlich guter Kaufmannsgebrauch unter Beachtung gleichbleibender Grundsätze ermittelt werden, die nur geändert werden dürfen, falls guter Kaufmansgebrauch dies rechtfertigt[50]. Da nach der Verordnung Wertänderungen der Beteiligung den steuerlichen Gewinn beeinflussten, wird der Bewertungsmasstab an steuerrechtlich guten Kaufmannsgebrauch gemessen. Dabei kamen als Bewertungsmasstäbe in Betracht: die Bewertung nach den Anschaffungskosten, den Anschaffungskosten oder sog. „niedrigerem Betriebswert" und dem inneren Wert. So war es nach der Verordnung nicht in Übereinstimmung mit steuerrechtlich gutem Kaufmannsgebrauch, die Beteiligung dauernd nach den Anschaffungskosten zu bewerten, wenn ihr Betriebswert wegen Verluste bei der Tochtergesellschaft dauernd unter die Anschaffungskosten sank[51]. Die Bewertung nach dem inneren Wert war nach der Verordnung schwierig, da Wertsteigerungen der Beteiligung durch den Gewinn der Tochtergesellschaft auch bei der Muttergesellschaft – sofort – besteuert wurden.

Diese Doppelbesteuerung ist nach dem Gesetz weggefallen, so dass dieser Bewertungsmasstab – der wirtschaftlich auch gerechter ist – steuerlich nicht mehr auf Hindernisse stösst. Jetzt, wo nach dem Gesetz die Wertschwankungen der Beteiligung bei

47. Antwortnote Nr. 9, S. 24.
48. Antwortnote Nr. 9, S. 24.
49. Zweite Antwortnote Nr. 22, S. 29 und 30.
50. Art. 7 Absatz 1 des Gesetzes erklärt, dass die Gewinnermittlung der Einkommensteuer Anwendung findet, nämlich auch Art. 9 des Gesetzes zur Einkommensteuer 1964 über guten Kaufmannsgebrauch.
51. Urteil des Obersten Gerichtshofs vom 25. Januar 1961, B.N.B. 1961/101 – Entscheidungen in Steuersachen.

der Gewinnermittlung ausser Betracht bleiben und die Bewertung also den steuerlichen Gewinn nicht mehr beeinflusst, müsste man voraussetzen können, dass diese Bewertung nicht mehr an steuerrechtlich guten Kaufmannsgebrauch gemessen werden muss und also tatsächlich im Hinblick auf die steuerliche Gewinnermittlung volkommen neutral wirkt. Man kann jeden der Bewertungsmassstäbe wählen und würde auch den Wert der Beteiligung ungeachtet tatsächlicher Wertschwankungen auf Niveau der Anschaffungskosten fixieren können. Dann bleiben die wirklichen Wertsteigerungen und -minderungen automatisch bei der steuerlichen Gewinnermittlung ausser Betracht, was eine für die Praxis einfache Methode sein würde. Selbst eine Angabe als Merkposten müsste möglich sein. Da eine Änderung des Bewertungsmasstabs von Beteiligungen nach dem Gesetz den steuerlichen Gewinn nicht mehr beeinflusst, ist es auch nicht notwendig, dass diese Änderung durch steuerrechtlich guten Kaufmannsgebrauch im Sinne von Art. 9 gerechtfertigt wird. In der Denkschrift zum Gesetzesentwurf wird diese Forderung aber doch noch gestellt[52].

Eine dauernde Bewertung nach Anschaffungskosten ist also nach dem Gesetz möglich, da eine Verpflichtung zur Abschreibung unter den Selbstkostenpreis wie nach der Verordnung jetzt nicht mehr besteht. Natürlich kann man freiwillig abschreiben, was vom gewählten Bewertungsmasstab abhängig ist, obwohl das nicht zu einem abzugsfähigen Verlust führt.

Die Ausnahmeregelung für den Liquidationsverlust ändert u.E. nichts an dieser Schlussfolgerung. Dieser Verlust kann nämlich ausserhalb der Buchführung ermittelt werden, sofern der Buchwert durch frühere Abschreibungen niedriger liegt als der „geopferte Betrag".

Steuerrechtlich guter Kaufmannsgebrauch spielt nach dem Gesetz wohl noch eine Rolle bei der Ermittlung des „geopferten Betrages", da der Liquidationsverlust bei einer Beteiligung doch Teil der steuerlichen Gewinnermittlung bei der Muttergesellschaft ausmacht. Steuerrechtlich guter Kaufmannsgebrauch entscheidet nämlich die Frage, ob Dividenden in den Anschaffungskosten einer Beteiligung enthalten sind und daher auch die Frage, bis zu welchem Betrag die Dividenden von den Anschaffungskosten abgebucht werden müssen[53]. Dies steht einer dauernden Bewertung auf Basis der Anschaffungskosten nicht im Weg, da die vom Grundsatz guten Kaufmannsgebrauchs beherrschte Frage der Abbuchung mit erworbener Dividende erst bei einer eventuellen Liquidation zur Diskussion stehen würde; wenn der steuerliche Liquidationsverlust ermittelt werden müsste. Die Abbuchung kann also ausserhalb der Buchführung geschehen.

Im übrigen wird der „geopferte Betrag" in jedem Fall ausserhalb der Buchführung ermittelt werden müssen, falls ein anderer Bewertungsmasstab als die Anschaffungskosten Anwendung findet.

Die Regelung für den Liquidationsverlust spricht also im Gegenteil deutlich für diesen neutralen Wert. Dazu kommt noch das praktische Argument, dass es wenig sinnvoll ist, regelmässig Änderungen am steuerlichen Wert aller Beteiligungen vorzunehmen, die den steuerlichen Gewinn doch nicht beeinflussen und auch nicht zur Ermittlung des eventuellen Verlustes bei einer eventuellen Liquidation in (ferner) Zukunft erforderlich sind. Es wäre aber theoretisch richtig, die miterworbene Dividende direkt im Zeitpunkt der Ausschüttung abzubuchen, da

52. Denkschrift Nr. 3, S. 20.
53. Antwortnote Nr. 9, S. 24.

diese Dividende eigentlich keinen Bestandteil der reinen Anschaffungskosten bildet.
Die Frage, wann eine Dividende abzubuchen ist, war nach der Verordnung von grosser Wichtigkeit, da Abbuchung auf die Beteiligung wegen der sogenannten Abbuchungsklausel dem Schachtelprivileg für Dividenden im Weg stand (Art. 10 Absatz 1). In Art 10 Absatz 1 der Verordnung würde bestimmt, dass auf Grund von Beteiligungen erhaltene Dividenden ausser Betracht bleiben, soweit sie nicht zu Lasten des Buchwertes des Eigentums am Aktienkapital gehen müsste. Es gab natürlich keinen einzigen Grund dafür, Dividenden bei der Muttergesellschaft steuerfrei zu stellen, wenn auf anderem Wege – durch Verringerung des Buchwertes der Beteiligung – bereits ein der Dividende gleicher Betrag zu Lasten des steuerlichen Gewinns gegangen war. Diese Abbuchungsklausel verhinderte also den zweimaligen Abzug der Dividende. Die Abbuchungsklausel wurde nicht in das Gesetz aufgenommen da neben allen Vorteilen auch alle Verluste ausser Betracht bleiben, wie z.B. die Abbuchung auf die Anschaffungskosten bei Ausschüttung miterworbener Dividende. Bei Dividenden ist dann keine Doppelbefreiung gegeben, so dass eine Abbuchungsklausel nicht erforderlich ist. Sie ist im Zusammenhang mit der Ermittlung des Liquidationsverlustes noch ebensowenig erforderlich, da dieser Verlust auch ausserhalb der Buchführung ermittelt werden kann.

6. *Kosten von Beteiligungen*

Kosten, die mit steuerfreien Gewinnbestandteilen im Zusammenhang stehen, werden nach der Verordnung nicht als abzugsfähige Kosten akzeptiert (Art. 15). In dem Gesetz ist eine derartige Bestimmung nicht mehr aufgenommen worden, was eine wichtige Verbesserung für die Unternehmer bedeutet. In Zukunft dürfen die mit der Beteiligung zusammenhängenden Kosten, z.B. Kosten einer Anleihe, mit der die Beteiligung finanziert wird und die sog. Verwaltungskosten, nicht mehr von den Steuerfreien Vorteilen in Abzug gebracht werden. Dadurch wird verhindert, dass diese Kosten – ebenso wie bisher – weder bei der Mutternoch bei der Tochtergesellschaft zu Lasten des Gewinns gehen können[54]. Dies gilt aber nur für Kosten von inländischen Beteiligungen; die Kosten von ausländischen Beteiligungen sind auch in Zukunft nicht abzugsfähig (Art. 12 Absatz 4).
Nach der Verordnung werden Zinsen auf Anleihen zur Beteiligungsfinanzierung als nicht abzugsfähige Kosten im Sinne von Art. 15 gekennzeichnet. Die eigenen Kosten der „Holding" waren aber doch steuerlich absetzbar, ebenso wie Gründungskosten und eigene Verwaltungskosten[55]. Die Bestimmung von Art. 15 führte dazu, insoweit die Muttergesellschaft die Kosten von Beteiligungen für eigene Rechnung nahm, dass das dem Abzug im Weg stand. Diese steuerliche Bestimmung zwang gewissermassen zur Kostenweitergabe. Für Beteiligungen im Ausland bleibt die Notwendigkeit dazu also auch bestehen, um diesen steuerlichen Nachteil zu vermeiden.
Bei Beteiligung einer inländischen Muttergesellschaft an einer Tochtergesellschaft im Ausland ist gemäss der Denkschrift Vorsicht wegen der Möglichkeit geboten, dass die Steuerpflichtigen den Gewinn der inländischen Muttergesellschaft wegen der Zinsen auf Ableihen, mit denen die Beteiligung an der Tochtergesellschaft im Ausland finanziert wurde, zu erheblichen Beträgen vermindern[56]. Dadurch, dass die Zinsen für

54. Denkschrift Nr. 3, S. 20.
55. Urteil des Obersten Gerichtshofes vom 20. Februar 1959, B.N.B. 1959/131.
56. Denkschrift Nr. 3, S. 20.

ausländische Beteiligungen nicht zum Abzug zugelassen werden, wird verhindert, dass ein Teil des von der Muttergesellschaft in den Niederlanden erzielten Gewinnes durch Abzug der Zinslast unversteuert bleibt. Diese Gefahr besteht bei inländischen Beteiligungen nicht, bei denen der volle in den Niederlanden erzielte Gewinn der Besteuerung unterliegt, so dass der Abzug von Kosten für die niederländische Tochtergesellschaft als gerechtfertigt angesehen werden kann.

Ausländische Konzerne könnten ohne diese Bestimmung gegen die Abzugsfähigkeit z.B. neue Aktiengesellschaften im Ausland durch eine niederländische Tochtergesellschaft (Betriebsgesellschaft) gründen lassen, die das Gründungskapital als Anleihe von der ausländischen Muttergesellschaft erhält. Die Zinsen gehen dann zu Lasten des niederländischen (Betriebs-) Gewinns, während die Dividenden der ausländischen Muttergesellschaft frei zufliessen[57].

In diesem Zusammenhang kann darauf hingewiesen werden, dass der Besitz von Beteiligungen an ausländischen Tochtergesellschaften in den Niederlanden günstig ist, da die Niederlande keinen Quellenabzug auf Zinsen kennen, auch nicht für Gebietsfremde. Ausserdem wird der Quellenabzug auf Schachteldividenden zugunsten der ausländischen Muttergesellschaft, durch Abkommen im allgemeinen auf den Wert Null zurückgeführt.

Kosten im Zusammenhang mit Beteiligung oder Mitgliedschaft kommen nur in Abzug, insofern und soweit anzunehmen ist, dass sie der Erzielung von innerhalb des Reiches steuerbaren Betriebsgewinnen mittelbar dienlich sind (Art. 12 Absatz 4). Das schliesst nicht nur den Fall aus, dass die inländische Muttergesellschaft unmittelbares Eigentum am Aktienkapital der ausländischen Tochtergesellschaft hat, sondern auch Fälle von mittelbarem Eigentum am Aktienkapital, z.B. über eine inländische Holdinggesellschaft[58]. Der Ausdruck „mittelbar dienlich" gibt den Zusammenhang zwischen den Kosten der Muttergesellschaft im Zusammenhang mit der Beteiligung und dem von der Tochtergesellschaft erzielten steuerbaren Gewinn wieder. Der Begriff bezieht sich also nicht auf die Vorteile die von der Muttergesellschaft infolge der Beteiligung genossen werden – diese bleiben ja bei der Gewinnermittlung der Muttergesellschaft ausser Betracht – sondern auf die Gewinne der Gesellschaft an der die Beteiligung besteht[59]. Unter Berücksichtigung dieser Auslegung spielt die dahinterliegende Finanzierung der Investition überhaupt keine Rolle[60].

In der Denkschrift zum Gesetzesentwurf wird die Verweigerung des Kostenabzugs für ausländische Beteiligungen ausführlich begründet. Es ist in diesem Zusammenhang wichtig, einmal zu verfolgen, wie die steuerliche Lage im Hinblick auf die Finanzierung der Beteiligung selbst ist, d.h. das in die Tochtergesellschaft eingebrachte Aktienkapital und das an die Tochtergesellschaft geliehene Kapital.

Ein eventueller Verlust bei Anteilen an der Tochtergesellschaft ist nicht steuerlich absetzbar, solange keine Liquidation erfolgt. Ein Verlust bei Darlehen an die Tochtergesellschaft ist dagegen wohl steuerlich absetzbar, da es hier um die Bewertung einer Forderung geht. In diesem Punkt ist das Gesetz nicht geändert worden, was also beinhaltet, dass die Forderung abgeschrieben

57. Bericht über die mündliche Beratung Nr. 25, S. 23, Punkt 64.
58. Antwortnote Nr. 9, S. 25.
59. Zweite Antwortnote Nr. 22, S. 19.
60. Bericht über die Beratung Nr. 25, S. 22, Punkt 64.

werden kann, sofern steuerrechtlich guter Kaufmanngebrauch das erfordert[61].

Über die steuerlichen Folgen dieser Darlehens-Finanzierung möchte ich in diesem Zusammenhang noch folgendes bemerken.

Im niederländischen Steuerrecht wird ein Darlehen an eine Tochtergesellschaft nie mit einer Beteiligung gleichgestellt: die Lehre des „Stammkapitals" findet in den Niederlanden keine Anwendung.

Die Finanzierung einer Tochtergesellschaft über ein Darleben führt zu einer Körperschaftsteuer auf Zinsen, die der Körperschaftsteuer auf Dividenden absolut entgegengesetzt ist: Die Zinsen werden bei der Muttergesellschaft versteuert und sind bei der Tochtergesellschaft steuerlich absetzbar.

Für ein Darlehen an eine Tochtergesellschaft im Ausland gilt im Prinzip auch, dass die Zinsen bei der Tochter steuerlich absetzbar sind, während ein Quellenabzug – soweit mit den Niederlanden abgeschlossene Abkommen Anwendung finden – auf Zinsen unterbleibt. Zinsen werden in den Niederlanden, im Gegensatz zu Dividenden, bei der Muttergesellschaft versteuert.

61. Bericht über die Beratung Nr. 25, S. 23, Punkt 65.

Rädler-Raupach

DEUTSCHE STEUERN BEI AUSLANDSBEZIEHUNGEN

Von Dr. Albert J. Rädler und Dr. Arndt Raupach
1966. XXXI, 678 Seiten 8°. In Leinen DM 78,—

„Das Buch ist besonders geeignet für inländische Unternehmen, die sich im Export betätigen oder Niederlassungen im Ausland unterhalten, für ausländische Unternehmungen mit Geschäftstätigkeit oder Niederlassungen in Deutschland, für Wirtschaftsverbände, Banken und Versicherungen, rechts- und steuerberatende Berufe und Notare."

Betriebswirtschaftliche Umschau

Korn-Dietz

DOPPELBESTEUERUNG

Sammlung der zwischen der Bundesrepublik Deutschland und dem Ausland bestehenden Abkommen über die Vermeidung der Doppelbesteuerung.

Loseblattkommentar von Ministerialrat Dr. Rudolf Korn und Rechtsanwalt Dr. Georg Dietz. Unter Mitwirkung von Rechtsanwalt Heinz Popp, Fachanwalt für Steuerrecht.
3. Auflage. Ergänzt bis Mai 1969. 2640 Seiten 8°. In Leinen Ordner DM 68,—

Der Allgemeine Teil dieses Werkes gibt in gedrängter Darstellung einen Überblick über die zwischenstaatlichen Verträge, über die Grundprobleme und Typen dieser Art von Vertragsrecht sowie über die Möglichkeit zur Vermeidung oder Milderung der Doppelbesteuerung beim Fehlen solcher Abkommen und schließlich eine Definition der auf diesem Rechtsgebiet gebräuchlichen Begriffe und Rechtsfiguren. Dann folgt der Besondere Teil mit den einzelnen Abkommen und entsprechende Erläuterungen dazu.

JURA EUROPAE

Das Recht der Länder der Europäischen Wirtschaftsgemeinschaft.
Zweispaltig in französischer und deutscher Sprache.

Band II: Steuerrecht
In Vorbereitung für Herbst 1969.

J. BOUWSMA:

UNILATERAL RELIEF FROM DOUBLE TAXATION IN THE NETHERLANDS

The complete text of the unilateral relief provisions has been published in the Supplement to this Bulletin issue

I. INTRODUCTION

Pursuant to the Dutch Individual Income Tax Act of 1964 and the Corporate Income Tax Decree of 1942[1], an individual or corporation resident in the Netherlands is liable to individual income tax or corporate income tax in respect of total income, whether derived from domestic or foreign sources. In addition an individual is liable to a net wealth tax, levied on his total property, no matter where this property is situated.

If no measures were to have been taken, the above-mentioned liability to tax would lead to double taxation, insofar as the foreign income or property would also be subject to a foreign tax. Double taxation relief measures have been in existence since 1893 in relation to the former Dutch colonies. In relation to foreign countries the Dutch government took the view that it was not advisable to make unilateral arrangements for the avoidance of double taxation as there was no certainty that foreign taxation laws would correspond to the Dutch regulations in this field. For this reason the Dutch government preferred to conclude treaties for the avoidance of double taxation, in order to ensure reciprocal treatment. However, as experience showed that concluding tax treaties was difficult and took considerable time, the Dutch legislature issued an Act[2], wherein the Minister of Finance was authorized to make special provisions for double taxation relief on account of foreign income and property *with regard to individuals*. Only in 1930, when a new Act for the avoidance of double taxation was promulgated[3], could corporations also claim double taxation relief. This act has since been replaced by articles 37-40 of the General Act relating to State Taxes[4].

The present provisions for unilateral double taxation relief, are based on article 38[5] of the above-mentioned General Act, and published in the Royal Decree of April 7, 1965[6] (hereinafter referred to as "the Decree").

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1. In all probability a new Corporate Income Tax Act will come into force as from January 1, 1970.
2. Act of April 16, 1920 (Government Gazette no. 192).
3. Act of June 14, 1930 (Government Gazette no. 244).
4. Act of July 2, 1959 (Government Gazette no. 301).
5. The English translation of this article reads as follows: So far as avoidance of double taxation is not otherwise provided, We will be authorized to grant unilaterally a total or a partial exemption from the State taxes on income, profit, property or games of chance in order to avoid double taxation, so far as the income, profit, property or prizes are subject to a tax levied by another territory of the Kingdom (i.e. the Netherlands Antilles and Surinam), a foreign State or an International Organization, and so far as the income or the profit has been derived outside the Netherlands, the property is situated outside the Netherlands and the prize has been gained abroad.
6. Government Gazette no. 145.

2. THE UNILATERAL RELIEF PROVISIONS IN RELATION TO TAX TREATIES

Article 1 of the Decree states that the unilateral relief provisions only apply in those cases for which avoidance of double taxation is not otherwise provided. Thus, if for a certain matter other Dutch statutory provisions[7] or tax treaties[8] provide a solution, the Decree is not applicable.

3. CONDITIONS FOR THE APPLICATION OF THE UNILATERAL RELIEF PROVISIONS

The unilateral relief provisions are only applicable to those categories of foreign income and property which are enumerated in the Decree. Such foreign income only qualifies for relief, however, if the income is subject to an income tax levied on behalf of the foreign State where it arises. The foreign property only qualifies for relief if either this property is subject to a net wealth tax or the income arising therefrom is subject to an income tax levied an behalf of a foreign State. It is sufficient that the foreign income or property is in principle subject to a foreign tax; it is not necessary that the foreign tax has in fact been levied and paid. Thus, if e.g. no tax would be imposed because the foreign income or property does not exceed a tax-free minimum, the relief is nevertheless granted.

4. INCOME AND PROPERTY TO WHICH THE UNILATERAL RELIEF PROVISIONS APPLY

As mentioned above the unilateral relief provisions are only applicable to those categories of foreign income and property enumerated in the Decree.

The categories of income are the following:
a. profit derived from a foreign enterprise insofar as such enterprise is carried on wholly or partial abroad either through a permanent establishment or a permanent agent;
b. net income from -
1. employment abroad;
2. real estate situated abroad;
3. outstanding debts secured by mortgage on real estate situated abroad, unless the debt is incorporated in a negotiable instrument;
4. title to a share in the profits of an enterprise whose seat of effective management is abroad, insofar as the title does not arise from stocks or employment;
5. title to periodical payments (salary included) paid by a foreign public body, unless the title is awarded on account of employment carried on on behalf of an enterprise.

The categories of property are the following:
a. property belonging to a foreign enterprise as mentioned under 4, a, above;
b. property from which income items mentioned under 4, b, 2, 3 and 4 arise.

Profit from foreign enterprise (4, a, above)

This category of foreign profit does not only relate to the profits derived by a Dutch enterprise on account of carrying on business abroad, but also to the profits derived by a Dutch individual on account of exercising an independent profession (e.g. as a doctor or a lawyer).

a. Permanent establishment

A condition for the claiming of the relief is that the activities are performed through a permanent establishment or a permanent agent abroad.

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7. The taxation regulation between the territories of the Kingdom of the Netherlands: the Netherlands, the Netherlands Antilles and Surinam (Act of the Kingdom of the Netherlands of October 28, 1964, Government Gazette no. 425).

8. At present the Netherlands have concluded tax treaties with the following States: Belgium, Canada, Denmark, Germany, Finland, France, Ireland (not yet in force), Italy, Luxembourg (not yet in force), Norway, Sweden, Switzerland, the U.K and the U.S.A.

In accordance with the Decree a permanent establishment is considered to be a continual place of business or profession through which the activities of the business or profession are wholly or partially carried on, including the seat of the management of the enterprise, land used for agricultural purposes as well as building sites the completion of which will last for more than twelve months. The Decree does not state in what cases a permanent agent is present. However, it is provided that a permanent agent is not considered to exist:

1. if business relations are maintained through a completely independent agent;
2. if an agent is employed without having authority to conclude contracts, irrespective whether he maintains a stock from which he fulfils orders;

   Further a permanent establishment or permanent agent is not considered to be present in the case where goods are only held in commission[9].

b. Computation of the foreign profit

In the former Decree for the unilateral relief from double taxation (Royal Decree of August 30, 1962) it was provided that in the case where an enterprise or a profession was exercised both in the Netherlands and abroad, the enterprise or profession exercised abroad was considered to be a separate enterprise or profession.

From this provision the conclusion could be drawn, that the Dutch taxation authorities held the view that the profits of the Dutch enterprise and its permanent establishment abroad had to be taxed as if these were two independent enterprises or professions (principle of split enterprises). In this connection it can be remarked that most of the tax treaties which the Netherlands concluded with foreign States and also the OECD-draft tax treaty hold the same view. The present Decree however does not contain this provision. From this change it can be concluded that the Dutch tax authorities also accept other methods for the computation of the profits of a permanent establishment, e.g. the method of splitting the profit of the whole enterprise by applying certain distributing-keys suiting the character of the relative enterprise or profession.

The methods of splitting profits in international relations has aroused a good deal of theoretical controversy in the Netherlands[10]. In practice, however, the developed theories have not resulted in fixed rules, which may be due to the fact that as yet relevant Court decisions are lacking in this area. Nevertheless the developed theories can be valuable expedients in cases where the "split enterprise" method does not result in reasonable solutions so that discussions follow between the tax administration and the taxpayer.

Income from employment abroad (4, b, 1, above)

In accordance with the Dutch income tax law the definition "employment" must be construed in a broad sense: not only the proceeds from present employment but also income from former employment (e.g. pensions) fall under the provisions of this Decree. It should be noted that for the application of

9. As concerns the development in the Netherlands of the Concept of a permanent establishment see pages 484/501 of Studies on international fiscal law, volume LII (the Dutch report of A. Nooteboom to the XXIst IFA-congress. See also the study "Het begrip vaste inrichting" (the definition of permanent establishment) of G. Overkamp in Maandblad voor Belastingrecht 1966, nrs. 10, 11 and 12 (a monthly periodical about Dutch taxation).

10. As concerns this subject reference can be made to the study of Mr. L. Lancee: "Fiscale winstsplitsing", FED's Fiscale Brochures I.B.:3,6, 1967 and to the commentary of the Fiscal Committee of the O.E.C.D. on art. 7 on its Draft Double Taxation Convention, 1963.

Dutch income tax law an employment is also considered to be present with regard to directors of corporations.
A condition to be fulfilled in order to claim double taxation relief is that the income from the employment or former employment must arise from work actually performed abroad. As to income from former employment it can be established that on this point the Decree deviates from the line of approach followed in the tax treaties, which leave the taxation of private pensions to the State of domicile.

Income from real estate and from outstanding debts secured by mortgage on real estate (4, b, 2 and 3, above)
In conformity with general international usage the Decree provides for double taxation relief on account of real estate situated abroad. It follows the same line of approach with regard to outstanding debts secured by mortgage on real estate situated abroad, though, as appears from the recent tax treaties which the Netherlands concluded with foreign States and the directives laid down in the OECD draft tax convention, the tendency seems to be that the taxation of interest received from mortgage debts is to be left in the hands of the State of domicile of the creditor.[11]
In this connection attention is called to a remarkable consequence which the application of the Decree gives rise to in cases where the real estate abroad, or an outstanding mortgage debt, belong to the assets of an enterprise situated in the Netherlands. The Decree does not provide that a sole real estate abroad, belonging to a Dutch enterprise, is to be considered a permanent establishment. The exception in this field is land used for agricultural purposes. In the system of Dutch income tax law all the income obtained by an enterprise is considered to be *profit*. The consequence is that in accordance with the letter of the Decree, income received by a Dutch enterprise from sources abroad can only be taken into account for double taxation relief, if the income has been obtained from business activities carried on through a permanent establishment or a permanent agent abroad. Hence, an enterprise situated in the Netherlands can not claim double taxation relief on account of income from real estate abroad or from outstanding mortgage debts abroad. As from a historical point of view it can be assumed that this consequence has not been pursued, it is my opinion that in special cases an appeal can be lodged with the Minister of Finance in order to obtain an "*ad hoc*" double taxation relief.

Income from title to a share in the profits of an enterprise not arising from stock or employment (4, b, 4, above)
As the Decree provides for double taxation relief with respect to the profits of an entrepreneur doing business through a permanent establishment or a permanent agent abroad and with respect to income from employment performed abroad, the question could arise as to what income falls under this clause. The category of taxpayers deriving income of this character is very limited. The following examples can be mentioned:
a. a share in the profit of an enterprise received by a person not participating in its capital, such as a moneylender who, in addition to a fixed interest, is entitled to a percentage of the trading profit;
b. a share in the profit of a partnership paid to the widow of a deceased partner, without participating in its capital.

11. This is the case in the tax treaties between the Netherlands and the U.S.A., Denmark, the U.K., Italy, Norway, Sweden and Switzerland.

Income from title to periodical payments paid by a foreign public body

With respect to this income double taxation relief is granted *whether or not the work is performed abroad.* However, an exception is made for employment carried on on behalf of a foreign public *enterprise.* As regards the income derived from such employment the Decree is only applicable if the work has been performed abroad.

Double taxation relief can also be granted for income other than salaries, e.g. pensions from public bodies or periodical payments received from foreign public social security institutions.

5. INCOME WITH RESPECT TO WHICH NO DOUBLE TAXATION RELIEF IS GRANTED

It should be noted that the Decree does not provide for relief with respect to dividends, interest[12] and royalties received from sources abroad. Thus, if a foreign tax is levied (in most cases these types of income are taxed at source) on these types of income double taxation is not avoided. This double taxation is only slightly mitigated in the Netherlands, the receiver of the income being allowed to deduct the foreign tax.[13]

However, as far as dividends are concerned, the Dutch Corporate Income Tax Decree of 1942, contains a special provision with regard to intercorporate dividends. Dividends received from the participation of a resident corporation in another corporation are exempt from corporate income tax if the participation is at least 25% of the paid-in share capital of the distributing corporation [14]. This exemption is also applicable if the distributing corporation is a non-resident corporation, under the condition that the latter is subject to a tax comparable with the Dutch corporate income tax.

6. THE SYSTEM OF DOUBLE TAXATION RELIEF GRANTED

Resident individuals are "exempt" from Dutch tax in respect of the above-mentioned categories of foreign profits and other income ("exemption" from income tax and, in so far employment income is concerned, wages tax) and foreign property ("exemption" from net wealth tax).

Resident corporations are "exempt" from corporate income tax in respect of foreign profits derived from a permanent establishment or a permanent agent abroad. Corporations are not liable to a net wealth tax.

"Exemption" from individual income tax

The "exemption" from individual income tax is qualified in that the foreign income will still affect the rate of tax on non-exempt income.

Before 1957 the following procedure was followed to find the amount of the "exemption" for individual income tax. The Dutch tax was first computed in respect of the *total* income, thus including foreign income. The tax so computed was reduced by the amount of the individual income tax that would be due if the taxpayer had only derived the foreign income. In addition the relief was a "country-per-country" allowance.

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12. Except interest on loans secured by mortgage on real estate situated abroad.

13. It should be noted that from recent tax treaties concluded by the Netherlands, it appears that the Netherlands is willing to reduce the tax on foreign dividends, interest and royalties by way of a credit of the foreign tax withheld.

14. The Corporate Income Tax Bill now before Parliament provides for the same exemption, however the condition that the participation must be 25% is mitigated to 5%. However participations in foreign portfolio-investment companies will not be considered for this exemption.

Schematic example

A Dutch entrepreneur, married with two children under the age of 16, resident of the Netherlands, has:

– a domestic profit of		Dfl. 40,000
– a profit from a permanent establishment in Spain of		Dfl. 90,000
– a loss from a permanent establishment in Austria of		Dfl. 10,000
	Gross income	Dfl. 120,000
Deductible personal expenses:		
– on account of illness	Dfl. 9,000	
– a contribution for a life annuity	Dfl. 5,000	Dfl. 14,000
	Taxable income	Dfl. 106,000
Individual income tax due:		Dfl. 53,353
Double taxation relief: income tax due on the Spanish profit of Dfl. 90,000 =	Dfl. 42,725	
Double taxation relief on loss in Austria	Dfl. 0	Dfl. 42,725
Tax payable in the Netherlands		Dfl. 10,628

In the year 1958 another system was introduced. As from the year 1957 the tax on total income is reduced by an amount which bears the same ratio to the total tax as the net foreign income (= the gross income after deduction of the costs—the foreign tax itself is not considered as a deductible cost—) bears to the total gross income (= the sum of the amounts of all net income items after deduction for the setting-off of losses but without deduction of personal expenses enumerated in the Dutch individual income tax law).

The Minister of Finance stated as the reason for this change that the new system would be more in agreement with the development of international usage, appearing from the recent double taxation conventions the Netherlands concluded with foreign states.[15] The new system also had the consequence that the "country-per-country" allowance became an "overall" allowance.

When introducing the new system in the above-mentioned example we find the following result:

Taxable income was	Dfl. 106,000
Individual income tax due was	Dfl. 53,353
Computation of the double taxation relief:	
$\frac{\text{foreign income}}{\text{gross income}} \times$ tax due on taxable income =	
$\frac{\text{90,000 less 10,000}}{\text{120,000}} \times$ Dfl. 53,353	Dfl. 35,569
Tax payable in the Netherlands	Dfl. 17,784

15. Reference is made to p. 19 and 20 of the Explanatory Memorandum to the General State Taxes Bill.

"Exemption" from individual net wealth tax

Before 1955 the following procedure was followed to find the amount of the "exemption" for the net wealth tax. The Dutch tax was first computed in respect of the total property, thus including the foreign property. The tax so computed was reduced by the amount of the net wealth tax that would have been paid if the taxpayer had only possessed the foreign property. In connection with the rather considerable amounts of personal allowances deductible from the property, this system did not lead to a reasonable result for the taxpayer. For that reason the Minister of Finance permitted the use of another system: the foreign property could be taken out of consideration for the calculation of the net wealth tax due. This approval was valid for the years 1955 and 1956. As from the year 1957 the net wealth tax due on the total property, after deduction of the so-called personal allowances, is reduced by an amount which bears the same ratio to the total tax as the value of the foreign property bears to the value of the total property.

Schematic example

The value of the property of the Dutch entrepreneur mentioned in the above example is:

– domestic property		Dfl. 200,000
– Spanish property		Dfl. 600,000
– Austrian property		Dfl. 100,000
	Total property	Dfl. 900,000
Personal allowances:		
– as a married person	Dfl. 55,000	
– for the two children	Dfl. 27,000	Dfl. 82,000
	Taxable property	Dfl. 818,000
Net wealth tax due		Dfl. 4,908
Double taxation relief:		
$\frac{600{,}000 + 100{,}000}{900{,}000} \times$ Dfl. 4,908		Dfl. 3,817
	Tax payable in the Netherlands	Dfl. 1,091

"Exemption" from corporate income tax

Before 1957 the following procedure was followed to find the amount of the "exemption" for corporate income tax. The Dutch tax was first computed on the total profit, thus including the foreign profit. The tax so computed was reduced by the amount of the corporate income tax that would be due if the corporation had only derived the foreign profit. In addition the relief was calculated "country-per-country".

In the year 1958 another system was introduced. As from the year 1957 the tax on the taxable amount (= the total profit less the setting-off of losses and the deductible gifts) is reduced by an amount which bears the same ratio to the total tax as the foreign profit bears to the taxable amount.

Schematic example:
A Dutch resident corporation has made the following profits:

– from its domestic enterprise		Dfl. 1,500,000
– from its permanent establishment in Greece		Dfl. 600,000
– from its permanent establishment in Israël		Dfl. 900,000
	Total profit	Dfl. 3,000,000
Setting-off of losses of domestic enterprise from previous years		Dfl. 100,000
	Taxable amount	Dfl. 2,900,000
Corporate income tax due 46% of Dfl. 2,900,000 =		Dfl. 1,334,000
Double taxation relief:		
$\frac{600{,}000 + 900{,}000}{2{,}900{,}000} \times$ Dfl. 1,334,000 =		Dfl. 690,000
	Tax payable in the Netherlands	Dfl. 644,000

Exemption from wages tax
The exemption from wages tax is a direct exemption, i.e. the resident employee who can show to the tax inspector that he is employed abroad by his Dutch employer and that the income from this employment is subject to a foreign state tax, will get a full exemption from the Dutch wages tax that normally would have to be withheld from his salary.

7. APPLICATION OF THE DOUBLE TAXATION RELIEF IN THE CASE WHERE FOREIGN INCOME IS NEGATIVE

The principle of the unilateral double taxation relief as described above requires that if the foreign income is negative, this negative income may be immediately set off against the positive domestic income. Up till 1953 this aspect was taken out of consideration when computing the double taxation relief.
The consequences can be shown in the following example.

First year	Dutch income (positive)	Dfl. 80,000
	Foreign income (negative)	Dfl. 40,000
	Taxable income	Dfl. 40,000
	No relief in first year.	
Second year	Dutch income (positive)	Dfl. 60,000
	Foreign income (positive)	Dfl. 40,000
	Taxable income	Dfl. 100,000

In the second year relief was given for Dfl. 40,000. The negative foreign income of the first year was not taken into account.

In 1953 an additional provision was introduced into the unilateral relief Decree, wherein it is provided for that a negative foreign

income from previous years must be carried forward before applying to such foreign income the relief available. This additional provision was introduced on the assumption that without this rule the relief provisions would give the taxpayer an unjustified advantage. When applying this rule in the example mentioned above, we find the following result:

First year	Dutch income (positive)	Dfl. 80,000
	Foreign income (negative)	Dfl. 40,000
	Taxable income	Dfl. 40,000
Second year	Dutch income (positive)	Dfl. 60,000
	Foreign income (positive)	Dfl. 40,000
	Taxable income	Dfl. 100,000

In the second year relief is only given for Dfl. 40,000 less the negative foreign income of the first year of Dfl. 40,000 = 0.

8. APPLICATION OF THE SYSTEM OF DOUBLE TAXATION RELIEF IN THE CASE WHERE FOREIGN INCOME EXCEEDS TOTAL INCOME

The system of the unilateral double taxation relief also requires that, if the domestic income is negative, the domestic income may be set off against the foreign income. Application of the relief provisions *without* a special rule for situations like this could incur an unjustified disadvantage for the taxpayer which can be clarified by the following schematic example:

First year	Domestic income (negative)	Dfl. 20,000
	Foreign income (positive)	Dfl. 50,000
	Taxable income (positive)	Dfl. 30,000

Relief by way of reduction: $\frac{50{,}000}{30{,}000} \times$ tax on Dfl. 30,000, however in accordance with the unilateral relief Decree the reduction can never be more than the amount of tax on taxable income.

Second year	Domestic income (negative)	Dfl. 40,000
	Foreign income (positive)	Dfl. 50,000
	Taxable income (positive)	Dfl. 10,000

Relief by way of reduction $\frac{50{,}000}{10{,}000} \times$ tax on Dfl. 10.000 but not more than this tax.

Third year	Domestic income (positive)	Dfl. 100,000
	Foreign income (positive)	Dfl. 60,000
		Dfl. 160,000

Relief by way of reduction $\frac{60{,}000}{160{,}000}$ × tax on Dfl. 160,000.

It follows that in the first year no relief could be obtained for an amount of Dfl. 50,000 less Dfl. 30,000 = (Dfl. 20,000) and in the second year no relief could be obtained for an amount of Dfl. 50,000 less Dfl. 10,000 = Dfl. 40,000.

In order to meet disadvantages such as this, an additional rule was introduced into the unilateral relief Decree as from the year 1957, providing that if, and in so far as, the amount of the foreign income exceeds the total income it is carried forward to one of the next six years, beginning with the oldest thereof, in the sense that in the year to which the carry forward takes place, for the computation of the reduction, an amount of the net yield not belonging to the foreign income equal to the amount carried forward, will be deemed to form part of the foreign income.

When applying this rule to the examples mentioned above, we find the following result:

First year	Domestic income (negative)	Dfl. 20,000
	Foreign income (positive)	Dfl. 50,000
	Taxable income (positive)	Dfl. 30,000

For double taxation relief Dfl. 50,000 less Dfl. 20,000 = Dfl. 30,000 can be taken into account. To be carried forward to next six years Dfl. 20,000. Dutch tax payable in first year: 0.

Second year	Domestic income (negative)	Dfl. 40,000
	Foreign income (positive)	Dfl. 50,000
	Taxable income (positive)	Dfl. 10,000

As double taxation relief can only be granted for Dfl. 10,000, a part of the foreign income, amounting to Dfl. 40,000 can be carried forward to the next six years. Dutch tax payable in second year: 0.

Third year	Domestic income (positive)	Dfl. 100,000
	Foreign income (positive)	Dfl. 60,000
	Taxable income (positive)	Dfl. 160,000

Without the special rule the relief would be $\frac{60{,}000}{160{,}000}$ × tax on taxable income of Dfl. 160,000

Application of the special rule results in the following computation:

Foreign income in third year	Dfl. 60,000

From the domestic income of Dfl. 100,000 in the third year the following amounts will be considered to be "foreign income"

a. the amount to be carried forward from the first year	Dfl. 20,000	
b. the amount to be carried forward from the second year	Dfl. 40,000	Dfl. 60,000
Total foreign income to be considered to exist in third year		Dfl. 120,000

Relief in the third year $\frac{120{,}000}{160{,}000} \times$ tax on taxable income of Dfl. 160,000.

J. BOUWSMA:

LES MESURES UNILATERALES DESTINEES A EVITER LA DOUBLE IMPOSITION DES REVENUS AUX PAYS-BAS

Le texte complet de la réglementation unilatérale en vue d'eviter les doubles impositions a été publié dans le Supplément de ce numéro du Bulletin

I. INTRODUCTION

Aux termes de la loi de 1964 relative à l'impôt sur le revenu des personnes physiques et du décret de 1942 sur l'impôt sur les sociétés[1], les personnes physiques et les personnes morales ayant leur domicile ou leur siège aux Pays-Bas sont imposables à l'impôt sur le revenu des personnes physiques ou à l'impôt sur les sociétés, sur la totalité de leurs revenus, ou de leurs bénéfices, que ceux-ci soient réalisés aux Pays-Bas ou à l'étranger. En outre, les personnes physiques sont assujetties à un impôt sur la richesse nette dont l'assiette est l'ensemble du patrimoine, quelle que soit la situation de ce dernier.

Si aucune mesure n'avait été prise, les dispositions mentionnées ci-dessus auraient conduit à une double imposition dans la mesure où les revenus ou les biens réalisés ou situés à l'étranger auraient également été soumis aux impôts étrangers. En ce qui concerne les anciennes colonies hollandaises, des mesures de cet ordre ont existé à partir de 1893.

Vis-à-vis des pays étrangers le gouvernement hollandais considéra qu'il n'était pas opportun de prendre des dispositions unilatérales en vue d'éviter la double imposition dans la mesure où il n'était pas certain que les lois fiscales étrangères correspondraient aux mesures prises par les Pays-Bas dans ce domaine. C'est pour cette raison que le gouvernement hollandais préféra signer des conventions de double imposition afin de s'assurer un traitement réciproque. Cependant, l'expérience montrant que la conclusion de ces conventions était délicate et prenait beaucoup de temps, le législateur hollandais autorisa[2] le Ministre des Finances à prendre des mesures particulières de dégrèvement en matière de double imposition *pour les personnes physiques*. Ce n'est qu'en 1930, par une nouvelle loi sur les doubles impositions[3], que les personnes morales purent prétendre à ce dégrèvement. Cette loi fut remplacée ensuite par les articles 37 à 40 de la loi générale sur les impôts d'Etat[4].

Les présentes mesures destinées à éviter les doubles impositions sont fondées sur l'article 38[5] de ladite loi générale et ont été publiées

1. Une nouvelle loi sur l'impôt sur les sociétés sera en vigueur à partir du 1er janvier 1970.
2. Loi du 16 avril 1920 (Journal officiel n° 192).
3. Loi du 14 juin 1930 (Journal officiel n° 244).
4. Loi du 2 juillet 1959 (Journal officiel n° 301).
5. La traduction française de cet article est la suivante:
Dans le cas où aucune autre disposition n'évite déjà la double imposition, des exonérations unilatérales, totales ou partielles d'impôts, sur le revenu, sur les bénéfices, le patrimoine, ou les gains de jeux de hasard seront accordées lorsque ces revenus, ces bénéfices ou ces gains sont eux-mêmes imposés dans un autre territoire du Royaume (c'est-à-dire les Antilles hollandaises et Surinam), un pays étranger ou une organisation internationale et dans la mesure où ces revenus ou ces bénéfices ont été réalisés hors des Pays-Bas lorsque le patrimoine est situé à l'étranger ou les gains réalisés hors des frontières.

par le décret Royal du 7 avril 1965[6] (que l'on appellera par la suite «le DECRET»).

2. LES MESURES UNILATERALES DE DEGREVEMENTS PRISES DANS LE CADRE DE CONVENTIONS FISCALES

Aux termes de l'article 1 du «Décret» ces mesures ne sont applicables que dans le cas où aucune autre disposition analogue, disposition statutaire hollandaise[7] ou conventions[8], n'évite déjà la double imposition.

3. CONDITIONS D'APPLICATION

Seules les catégories de revenus étrangers et les biens énumérés par le Décret sont visés par ces mesures. De plus, les revenus étrangers doivent être assujettis à un impôt sur le revenu pour le compte du pays étranger où ils sont réalisés, et le patrimoine doit être frappé par un impôt sur la richesse nette ou par un impôt sur les revenus des capitaux. Il suffit que ces revenus ou ces biens soient en principe imposables à l'étranger; il n'est donc pas nécessaire qu'ils aient été en fait imposés: Ainsi, lorsque les revenus sont inférieurs au minimum imposable à l'étranger, les dégrèvements sont néanmoins accordés.

4. LES REVENUS ET LES BIENS VISES PAR LE DECRET

Ainsi qu'il a été souligné ci-dessus, seuls les biens et les revenus énumérés par le DECRET sont susceptibles de bénéficier des mesures de dégrèvements.

Les catégories de revenus sont les suivantes:

a) les bénéfices provenant d'une société étrangère lorsque celle-ci exerce totalement ou partiellement son activité à l'étranger par l'intermédiaire d'un établissement stable ou d'un représentant permanent.

b) les revenus nets provenant:

1°) d'une activité salariée à l'étranger,

2°) de biens immobiliers situés à l'étranger,

3°) de créances garanties par des gages immobiliers situés à l'étranger, sauf si la dette est incorporée à un titre négociable,

4°) les participations aux bénéfices d'une entreprise dont le siège social est à l'étranger, dans la mesure où ces titres ne sont pas des revenus d'actions ou d'activité salariée,

5°) des versements périodiques (salaires compris) faits par un organisme public étranger, sauf s'ils sont versés dans le cadre d'une activité exercée pour le compte d'une entreprise.

Les catégories de biens sont les suivantes:

a) Les biens appartenant à une entreprise étrangère répondant à la définition IV-a ci-dessus.

b) Les biens qui sont la source des revenus mentionnés aux §§ IV b. 2, 3 et 4 ci-dessus.

Les bénéfices provenant d'une entreprise étrangère

Cette catégorie de bénéfices étrangers n'est pas limitée aux bénéfices réalisés par une entreprise hollandaise exerçant ses activités à l'étranger, mais s'étend également aux revenus des personnes physiques hollandaises exerçant une profession libérale (ex: docteurs ou juristes).

a) *un établissement permanent:* Les activités doivent être exercées par l'intermédiaire d'un établissement stable ou d'un agent permanent à l'étranger.

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6. Journal officiel n° 145.

7. La Réglementation des impositions entre les territoires du Royaume de Hollande: Les Pays-Bas, les Antilles, et Surinam. (loi du 22 octobre 1964 Journal officiel n° 425).

8. Jusqu'à présent les Pays-Bas ont signé des conventions fiscales avec les pays suivants: la Belgique, le Canada, le Danemark, la République Fédérale Allemande, la Finlande, la France, l'Irlande (non encore en vigueur) l'Italie, le Luxembourg (non encore en vigueur) la Suède, la Suisse, le Royaume-Uni et les Etats-Unis.

Selon le DECRET, est considéré comme établissement stable tout lieu où une activité commerciale ou professionnelle est partiellement ou totalement exercée de manière habituelle y compris le siège social d'une entreprise, les propriétés agricoles ou les chantiers dont le délai d'achèvement est supérieur à 12 mois.

Le DECRET ne définit pas le représentant permanent. On peut cependant dire qu'un représentant n'est pas permanent:

1°) S'il est totalement indépendant,

2°) S'il n'a pas le pouvoir de contracter, même s'il entretient un stock qui lui permet de répondre aux commandes.

Par ailleurs l'établissement ou l'agent ne sont pas considérés comme permanent lorsqu'ils ne sont que de simples commissionnaires[9].

b) *La détermination des bénéfices de sources étrangères*

Dans l'ancien décret sur les exonérations unilatérales en cas de double imposition, (Décret Royal du 30 août 1962) il était prévu que dans le cas d'une entreprise ou d'une profession, qui exerçait son activité simultanément aux Pays-Bas et à l'étranger, l'activité exercée à l'étranger était jugée comme étant indépendante. On pouvait conclure de cette disposition que l'administration fiscale hollandaise considérait que les bénéfices de l'entreprise nationale et de son établissement stable à l'étranger devaient être taxés séparément (Principe de la territorialité). Il faut remarquer dans le même ordre d'idées que la plupart des conventions fiscales signées par la Hollande, comme d'ailleurs la convention fiscale type de l'O.C.D.E., adoptent le même raisonnement. Le Décret actuel ne reprend pas cette disposition. On peut donc en conclure que l'Administration fiscale hollandaise accepte d'autres méthodes de calcul des bénéfices de l'établissement stable comme par exemple la ventilation des bénéfices de l'ensemble de l'entreprise au moyen d'une clef de répartition propre à chaque entreprise ou chaque profession.

Les méthodes de la répartition des bénéfices dans les relations internationales ont provoqué un grand nombre de controverses théoriques en Hollande[10].

En pratique cependant les théories développées n'ont pas pour résultat la fixation de règles déterminées, ce qui est probablement dû au fait qu'il n'existe encore aucune jurisprudence à cet égard. Cependant ces théories peuvent être des solutions valables dans le cas où «l'imposition séparée des entreprises» n'aboutirait pas à des solutions raisonnables, afin que des discussions s'instaurent entre l'administration fiscale et le redevable.

Revenus provenant d'une activité à l'étranger (§§ IV.b, 1er supra)

Conformément à la législation des impôts sur le revenu le terme «*Activité*» doit être compris dans son sens le plus large: C'est-à-dire que non seulement les produits d'une activité actuelle, mais également les revenus d'une ancienne activité (par exemple les pensions) sont visés par ce DECRET. Il faut noter qu'en application de la législation hollandaise des impôts sur le revenu les Administrateurs sont considérés comme des salariés.

Ces revenus d'une activité salariée ancienne

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9. Voir le développement de la notion de l'établissement permanent en Hollande pages 484 à 501 des Etudes sur les lois fiscales internationales volume LII (Rapport hollandais de A. Nooteboom du 21ème congrès I.F.A.) Voir également l'Etude Het begrip vaste inrichting (la définition de l'établissement permanent) de G. Overkamp dans Maandblad voor Belastingrecht 1966 n° 10-11 et 12 (un périodique mensuel sur la Fiscalité hollandaise).

10. A cet égard on pourra se référer à l'ouvrage de M.L. Lancee . . . 'FED's fiscale Brochures' J.B.: 3-6-67 et au commentaire de la Commission fiscale de l'O.C.D.E. sur l'art. 7 de son projet de convention fiscale sur la double imposition (1963).

ou actuelle ne peuvent prétendre aux exonérations en matière de double imposition que dans le cas où cette activité a été effectivement exercée à l'étranger. En ce qui concerne les pensions on peut noter que sur ce point le DECRET s'écarte de la ligne de conduite suivie par les Conventions fiscales selon laquelle les pensions sont imposées dans le pays de la résidence du bénéficiaire.

Les revenus des biens immobiliers et des créances garanties par des gages immobiliers (§§ IVb, 2ème et 3ème supra).

Conformément aux usages internationaux le DECRET vise en matière de double imposition, les biens immobiliers situés hors des Pays-Bas. Il adopte la même attitude vis-à-vis des créances garanties par gages immobiliers, bien que, ainsi qu'il ressort des conventions fiscales récemment signées par la Hollande et des directives données par la convention fiscale type de l'O.C.D.E., la tendance actuelle semble considérer que les intérêts provenant de ces créances doivent être imposables dans le pays de résidence du créditeur[11].

Dans ce domaine il faut noter la conséquence que peut avoir l'application du DECRET dans le cas où ces biens immobiliers étrangers et ces créances sont inscrits à l'actif d'une entreprise dont le siège est en Hollande. Le DECRET ne prévoit pas qu'un immeuble isolé situé à l'étranger et appartenant à une entreprise hollandaise puisse être considéré comme un établissement stable, exception faite des propriétés foncières à usage agricole. Dans le système hollandais d'imposition des revenus, tout revenu réalisé par une entreprise est considéré comme profit. En conséquence, si l'on applique le DECRET à la lettre, les revenus de sources étrangères d'une entreprise hollandaise ne peuvent bénéficier du régime d'exonérations destinées à éviter la double imposition que dans le cas où ils proviennent d'une activité commerciale réalisée par un établissement stable ou un représentant permanent. De ce fait une entreprise située aux Pays-Bas ne peut réclamer l'application de ces mesures pour les revenus de biens immobiliers étrangers ou de créances garanties par gages immobiliers. D'un point de vue historique on peut dire que cette conséquence n'a pas été recherchée, et je suis persuadé que dans certains cas particuliers on peut faire appel auprès du ministre des finances afin d'obtenir qu'il prenne des mesures «ad hoc» à cet égard.

Les revenus des participations aux bénéfices à l'exception des revenus de valeurs mobilières et des salaires

Comme le Décret prévoit par ailleurs le cas des bénéfices qu'un chef d'entreprise retire de l'activité commerciale d'un établissement stable ou d'un représentant permanent domicilié hors des Pays-Bas, et le cas des salaires provenant de l'étranger, on peut se demander quelle est la catégorie visée par cette dernière clause. Les exemples suivants peuvent être donnés:

a) La participation aux bénéfices qu'une personne reçoit d'une entreprise bien que ne participant pas au capital, comme, par exemple, un prêteur qui, outre l'intérêt fixe, reçoit un pourcentage sur les bénéfices d'exploitation;

b) Le pourcentage des bénéfices d'une société en nom collectif versé à la veuve d'un ancien associé, bien que celle-ci ne soit pas elle-même associée.

Les versements effectués par un organisme public étranger:

Pour ces revenus, les dégrèvements sont accordés *que la profession soit exercée ou non à*

11. C'est le cas des conventions fiscales signées par les Pays-Bas et les U.S.A., le Danemark, le Royaume-Uni, l'Italie, la Norvège, la Suède et la Suisse.

l'étranger, sauf lorsque l'emploi est exercé pour le compte d'une entreprise publique étrangère, car dans ce dernier cas le décret ne vise que les professions exercées à l'étranger. Ces mesures de dégrèvements peuvent également être accordées pour d'autres catégories de revenus que les salaires, comme les pensions versées par les organismes publics étrangers ou les versements réguliers effectués par les organismes étrangers de Sécurité Sociale.

5. LES REVENUS POUR LESQUELS AUCUNE MESURE DE DEGREVEMENT N'EST ACCORDEE –

Il serait bon de remarquer que le DECRET ne vise pas les dividendes, les intérêts[12] et les redevances de sources étrangères. Ainsi, lorsque ces catégories de revenus sont imposées à l'étranger (dans la plupart des cas, ces derniers sont taxés à la source) la double imposition ne peut être évitée.

En Hollande, cette double imposition n'est que légèrement atténuée par la possibilité pour le bénéficiaire d'imputer l'impôt perçu à l'étranger[13].

Toutefois, le Décret de 1942 sur l'impôt sur les sociétés contient une disposition particulière à l'égard des dividendes. En effet, les dividendes versés par une société à une autre société résidente sont exempts d'impôt dans la mesure où cette dernière possède au moins 25% du capital de la première[14].

Cette mesure est également applicable dans le cas où la société distribuant ces dividendes n'est pas située aux Pays-Bas, à la condition que celle-ci soit assujettie à un impôt comparable à l'impôt sur les sociétés en vigueur en Hollande.

6. LE SYSTEME D'EXONERATIONS TENDANT A EVITER LES DOUBLES IMPOSITIONS

Les personnes physiques résidentes sont «exonérées» d'impôt à l'égard des catégories de revenus énumérés plus haut: bénéfices de sources étrangères et autres revenus «(Exonération» d'impôt sur le revenu dans le cas de salaires: impôt sur les salaires) et revenus du patrimoine étranger («Exonération» d'impôt sur la richesse nette).

«Dégrèvement d'impôt sur le revenu des personnes physiques»

L'«exonération» de l'impôt sur le revenu des personnes physiques est accordée dans la mesure où le revenu de source étrangère vient modifier le taux d'imposition du revenu non exonéré.

Avant 1957 la procédure ci-dessous était suivie: pour déterminer le montant de l'«exonération» de l'impôt sur le revenu des personnes physiques, l'impôt hollandais était tout d'abord calculé sur le revenu *global,* comprenant le revenu de source étrangère. L'impôt ainsi déterminé était diminué du montant de l'impôt qui aurait été exigé si le redevable n'avait bénéficié que du revenu de source étrangère. De plus, les dégrèvements étaient calculés «Pays par Pays».

Exemple schématique:

Un entrepreneur hollandais, marié, ayant deux enfants âgés de moins de 16 ans résidant aux Pays-Bas reçoit:

12. A l'exception des intérêts des prêts garantis par des créances hypothécaires pour des immeubles situés à l'étanger.

13. Il faut noter qu'il ressort des conventions fiscales récemment signées que l'administration fiscale hollandaise semble vouloir réduire l'impôt sur les dividendes, les intérêts et les redevances en instituant un crédit d'impôt du montant de la retenue à la source perçue à l'étranger.

14. Le projet de loi sur l'impôt sur les sociétés actuellement devant le Parlement reprend les mêmes dispositions, cependant la participation exigée n'est plus de 25%, mais de 5%. Toutefois, les participations dans les sociétés d'investissement étrangères ne bénéficieront pas de ces exonérations.

– un revenu hollandais de Fl.:	40.000	
– un bénéfice provenant d'un établissement stable en Espagne de:	90.000	
– une perte d'un établissement stable en Autriche:	— 10.000	
Revenu brut		120.000 Fl.
Frais personnels déductibles:		
. Sécurité Sociale: 9.000		
. Prime d'assurance vie: 5.000	14.000	
Revenu imposable:	106.000	
Impôt à payer correspondant:	53.353 Fl.	

Dégrèvement: Impôt calculé sur le revenu espagnol de 90.000 Fl. = 42.725 Fl.
Impôt calculé sur la perte autrichienne:

0	42.725 Fl.
Impôt net à payer en Hollande:	10.628 Fl.

En 1958 un autre système fut introduit. A partir de 1957, l'impôt sur le revenu global est réduit d'un montant égal au produit du rapport du revenu net étranger (c'est-à-dire le revenu brut après déduction des frais – l'impôt dû à l'étranger n'est pas considéré comme frais déductibles) et du revenu brut global (c'est-à-dire la somme des différents revenus après déduction des pertes mais sans appliquer la déduction pour frais personnels énumérés par la législation fiscale hollandaise) par l'impôt sur le revenu global.
Le Ministère des Finances déclara au sujet de cette évolution que le nouveau système serait plus en harmonie avec le développement des usages internationaux résultant des conventions fiscales sur les doubles impositions récemment signées par les Pays-Bas[15].
Le nouveau système a également pour conséquence de remplacer un dégrèvement «pays par pays», par un dégrèvement «global».
En appliquant ce nouveau système à l'exemple ci-dessus nous aurons:
Le revenu imposable
était 106.000 Fl.
l'impôt sur le revenu correspondant 53.353 Fl.
Détermination de la déduction:

$$\frac{\text{Revenu étranger}}{\text{Revenu brut global}} \times \text{impôt brut global sur le revenu}$$

$$= \frac{90.000 - 10.000}{120.000} \times 53.353 = - \underline{35.569}$$

Impôt dû en Hollande 17.784 Fl.

«DEGREVEMENT» de l'impôt sur la richesse nette

Avant 1955, la détermination du montant du dégrèvement de l'impôt sur la richesse nette se faisait de la façon suivante: l'impôt hollandais étant calculé sur l'ensemble du patrimoine y compris le patrimoine situé à l'étranger, l'impôt ainsi déterminé était ensuite diminué du montant de l'impôt qui aurait été dû si le redevable n'avait possédé que le patrimoine situé à l'étranger. Du fait du nombre assez important d'abattements que l'on pouvait opérer sur le patrimoine, la conséquence de ce système n'était pas raisonnable pour le redevable. C'est la raison pour laquelle le Ministre des Finances autorisa un autre système: les biens étrangers purent ne pas être pris en compte pour la détermination de l'impôt. Cette mesure fut valable en 1955 et 1956. Depuis 1957 l'impôt calculé sur l'ensemble du patrimoine, après déduction desdits abattements, est diminué d'un montant égal au produit du rapport de la valeur des biens étrangers et du patrimoine hollandais par l'impôt brut global.

Exemple schématique:
La valeur du patrimoine du chef d'entreprise mentionné plus haut est:

15. Voir pages 19 et 20 de l'exposé des motifs de la loi susvisée.

patrimoine hollandais		200.000 Fl.
patrimoine espagnol		600.000 Fl.
patrimoine autrichien		100.000 Fl.
Patrimoine total		900.000 Fl.
Abattements		
. en tant que personne mariée	55.000	
. pour ses deux enfants:	27.000	
		82.000
Patrimoine imposable:		818.000 Fl.
Impôt correspondant		4.908

Déduction pour double imposition:

$$\frac{600.000+100.000}{900.000} \times 4.908 = - \ 3.817$$

Impôt net à payer	1.091 Fl.

DEGREVEMENTS d'impôt sur les sociétés:
Avant 1957 ces dégrèvements étaient déterminés de la façon suivante: L'impôt hollandais était calculé sur l'ensemble des bénéfices, y compris les bénéfices étrangers. L'impôt ainsi déterminé était réduit du montant de l'impôt qui aurait été dû si la société n'avait réalisé que des bénéfices étrangers. Ainsi la déduction était calculée «pays par pays».

En 1958, un autre système fut introduit:
Depuis 1957, l'impôt dû sur le montant imposable (c'est-à-dire l'ensemble des bénéfices diminué des pertes et des dons déductibles) est diminué d'un montant égal au produit du rapport des bénéfices réalisés à l'étranger et de l'ensemble des bénéfices par l'impôt brut global.

Exemple schématique:
Une société résidente a réalisé les bénéfices suivants:

au sein de son entreprise hollandaise	1.500.000 Fl.
au sein de ses établissements stables	
. en Gréce	600.000
. en Israël	900.000
Total:	3.000.000 Fl.
Pertes antérieures déductibles	– 100.000
Montant imposable:	2.900.000 Fl.

Impôt sur les sociétés:
46% de 2.900.000 = 1.334.000,–
Déduction pour double imposition:

$$\frac{600.000+900.000}{2.900.000} \times 1.334.000 = - \ 690.000$$

Impôt net à payer	644.000 Fl.

Exonération d'impôt sur les salaires:
Cette exonération s'opère directement, c'est-à-dire que le salarié résident qui peut prouver à son inspecteur qu'il est employé à l'étranger par un employeur hollandais et que son revenu est assujetti à un impôt à l'étranger obtiendra un dégrèvement total de l'impôt hollandais sur les salaires qui aurait été retenu.

7. APPLICATION DES MESURES TENDANT A EVITER LES DOUBLES IMPOSITIONS LORSQUE LE REVENU ETRANGER EST NEGATIF:

Le principe d'exonération unilatérale, décrit plus haut entraîne une imputation immédiate des pertes subies à l'étranger sur les gains réalisés aux Pays-Bas. Jusqu'en 1953, ce principe ne fut pas pris en considération pour le calcul des exonérations. La conséquence en était la suivante:
La première année:

Revenu hollandais (positif)	80.000 Fl.
Revenu étranger (négatif)	– 40.000 Fl.
Revenu imposable	40.000 Fl.

aucun dégrèvement la première année.
La deuxième année:

Revenu hollandais (positif)	60.000 Fl.
Revenu étranger (positif)	40.000 Fl.
Revenu imposable	100.000 Fl.

La deuxième année, le dégrèvement portait donc sur 40.000 Fl. Le revenu négatif du revenu étranger de la première année n'était pas pris en compte.
En 1953 une nouvelle mesure fut introduite dans le Décret sur les dégrèvements unilatéraux afin de prendre en considération les pertes subies sur les années antérieures avant de déterminer le montant du dégrèvement accordé sur le revenu étranger. Cette disposition avait pour objet d'éviter de donner au redevable un avantage injustifié.
L'application de ce principe à l'exemple ci-dessus donne le résultat suivant:

la première année:	
Revenu hollandais (positif)	80.000 Fl.
Revenu étranger (négatif)	– 40.000 Fl.
Revenu imposable	40.000 Fl.
La deuxième année:	
Revenu hollandais (positif)	60.000 Fl.
Revenu étranger (positif)	40.000 Fl.
Revenu imposable:	100.000 Fl.

La deuxième année, le dégrèvement portera uniquement sur les 40.000 Fl. moins le revenu étranger négatif de la première année, soit 40.000 Fl. – 40.000 = 0.

8. APPLICATION DES MESURES TENDANT A EVITER LES DOUBLES IMPOSITIONS DANS LE CAS OU LE REVENU ETRANGER EXCEDE LE REVENU GLOBAL

L'application de ces principes implique également que dans le cas où le revenu hollandais est négatif, celui-ci puisse s'imputer sur le revenu étranger, car en l'absence d'une telle disposition, le redevable serait injustement pénalisé, ce qui est prouvé par l'exemple suivant:

la première année:	
Revenu hollandais (négatif)	20.000 Fl.
Revenu étranger (positif)	50.000 Fl.
Revenu imposable (positif)	30.000 Fl.

Dégrèvement: $\frac{50.000}{30.000}$ × impôt sur 30.000 Fl.

Or, conformément au DECRET, la déduction ne peut jamais être supérieure au revenu imposable.

La deuxième année:	
Revenu hollandais (négatif)	40.000 Fl.
Revenu étranger (positif)	50.000 Fl.
Revenu imposable (positif)	10.000 Fl.

le dégrèvement est égal à: $\frac{50.000}{10.000}$ × impôt sur 10.000 Fl. (mais ne peut être supérieur à ce dernier impôt).

la troisième année:	
Revenu hollandais (positif)	100.000 Fl.
Revenu étranger (positif)	60.000 Fl.
Revenu imposable:	160.000 Fl.

le dégrèvement est égal à : $\frac{60.000}{160.000}$ × impôt sur 160.000 Fl.

Il ressort de ce qui précède que la première année, aucune déduction ne pouvait être obtenue pour le montant égal à 50.000 – 30.000 = 20.000 Fl. et la deuxième année pour le montant égal à 50.000 – 10.000 = 40.000 Fl. Afin de pallier ce désavantage, une nouvelle disposition fut introduite dans les textes du DECRET et depuis 1957, l'excédent, dans la mesure où il existe, du revenu étranger sur le revenu global demeure reportable sur les six années suivantes. Ce report affectant en premier lieu l'excédent le plus ancien. Ainsi, lorsque le report deviendra possible, le revenu étranger de l'année sera augmenté d'un montant du revenu net n'appartenant pas à ce

revenu étranger et égal au montant à reporter.
L'application de cette règle aux exemples ci-dessus donne les résultats suivants:

première année:

revenu hollandais (négatif)	20.000 Fl.
revenu étranger (positif)	50.000 Fl.
Revenu imposable (positif)	30.000 Fl.

Le montant qui peut être pris pour le calcul du dégrèvement est 50.000–20.000 Fl. = 30.000 Fl., et 20.000 Fl. peuvent être reportés sur les six années suivantes. Impôt hollandais dû la première année = 0.

Deuxième année:

Revenu hollandais (négatif)	40.000 Fl.
Revenu étranger (positif)	50.000 Fl.
Revenu imposable	10.000 Fl.

Le montant à prendre pour le calcul du dégrèvement est de 50.000—40.000 = 10.000 Fl. et 40.000 Fl. peuvent être reportés sur les six années suivantes. L'impôt hollandais dû la deuxième année est *nul*.

Troisième année:

Revenu hollandais (positif)	100.000 Fl.
Revenu étranger (positif)	60.000 Fl.
Revenu imposable (positif)	160.000 Fl.

Si la règle n'était pas appliquée, le dégrèvement serait de $\frac{60.000}{160.000}$ × impôt dû sur 160.000 Fl.

Or, en utilisant la règle particulière exposée ci-dessus nous aurons:

Revenu étranger de la troisième année		60.000 Fl.
une partie du revenu hollandais de 100.000 Fl. de la troisième année pourra être considérée comme revenu étranger, c'est-à-dire:		
a) Le montant de la première année pouvant être reporté est de:	20.000 Fl.	
b) Le montant de la deuxième année pouvant être reporté est de:	40.000 Fl.	60.000 Fl.
Total des revenus étrangers pouvant être considérés comme réalisés la troisième année:		120.000 Fl.

Le dégrèvement accordé la troisième année sera donc de $\frac{120.000}{160.000}$ × impôt dû sur un revenu imposable de 160.000 Fl.

J. BOUWSMA:

EINSEITIGE REGELUNG ZUR VERMEIDUNG DER DOPPELBESTEUERUNG IN DEN NIEDERLANDEN

Der vollständige Text der Regelung zur Vermeidung der Doppelbesteuerung ist in dem Supplement zu diesem Heft des Bulletins aufgenommen

I. EINLEITUNG

Nach den Vorschriften des niederländischen Einkommensteuergesetzes 1964 und der Körperschaftsteuerverordnung 1942[1] unterliegt eine natürliche Person oder eine Körperschaft (corporation) mit Wohnsitz bzw. Sitz in den Niederlanden der Einkommensteuer oder Körperschaftsteuer mit ihrem Gesamteinkommen, unabhängig davon, ob es aus in- oder ausländischen Quellen stammt. Außerdem unterliegt eine natürliche Person mit ihrem Gesamtvermögen einer Vermögensteuer, gleichgültig, wo dieses Vermögen belegen ist.

Wenn keine entsprechenden Maßnahmen ergriffen worden wären, würde die oben ausgeführte Regelung insoweit zur Doppelbesteuerung führen, als ausländisches Einkommen oder Vermögen außerdem noch einer ausländischen Steuer unterworfen wäre. Maßnahmen dieser Art existieren seit 1893 für die ehemaligen niederländischen Kolonien. Bezüglich des Auslandes war die niederländische Regierung der Ansicht, es sei nicht ratsam, einseitige Maßnahmen zur Vermeidung der Doppelbesteuerung zu treffen, da keine Sicherheit bestehe, daß die ausländischen Steuergesetze den diesbezüglichen niederländischen Maßnahmen entsprechen würden. Aus diesem Grund zog die niederländische Regierung es vor, Abkommen zur Vermeidung der Doppelbesteuerung abzuschließen, um die Gegenseitigkeit zu gewährleisten. Da jedoch die Erfahrung gezeigt hat, daß der Abschluß von steuerrechtlichen Abkommen sehr schwierig und zeitraubend ist, erließ der niederländische Gesetzgeber ein Gesetz,[2] das den Finanzminister ermächtigt, besondere Vorschriften zur Vermeidung der Doppelbesteuerung von ausländischem Einkommen und Vermögen *von natürlichen Personen* zu schaffen. Erst seit 1930, als ein neues Gesetz über die Vermeidung der Doppelbesteuerung erlassen wurde,[3] können auch Körperschaften eine Entlastung von der Doppelbesteuerung beanspruchen. Inzwischen ist dieses Gesetz durch die Artikel 37-40 des Allgemeinen Gesetzes über die Staatlichen Steuern[4] ersetzt worden. Rechtsgrundlage der gegenwärtigen Vorschriften über die einseitige Befreiung von der Doppelbesteuerung ist Artikel 38[5] des

1. Aller Wahrscheinlichkeit nach wird am 1. Januar 1970 ein neues Körperschaftsteuergesetz in Kraft treten.
2. Gesetz vom 16. April 1920 (Staatsblad Nr. 192).
3. Gesetz vom 14. Juni 1930 (Staatsblad Nr. 244).
4. Gesetz vom 2. Juli 1959 (Staatsblad Nr. 301).
5. Die deutsche Übersetzung dieses Artikels lautet wie folgt: Soweit die Vermeidung der Doppelbesteuerung nicht auf andere Weise möglich ist, sind Wir ermächtigt, eine einseitige vollständige oder partielle Befreiung von den staatlichen Steuern von Einkommen, Gewinnen, Vermögen oder Lotteriegewinnen zu gewähren, um eine Doppelbesteuerung zu vermeiden,

oben erwähnten Allgemeinen Gesetzes; sie wurden in der Königlichen Verordnung vom 7. April 1965 veröffentlicht[6] (im folgenden „die Verordnung" genannt).

2. VORSCHRIFTEN ÜBER DIE EINSEITIGE BEFREIUNG UND DOPPELBESTEUERUNGSABKOMMEN

Artikel 1 der Verordnung stellt fest, daß die Bestimmungen der einseitigen Regelung nur dann Anwendung finden, wenn die Doppelbesteuerung nicht auf Grund anderer Bestimmungen vermieden werden kann. Wenn also in einem bestimmten Fall andere niederländische Gesetzesbestimmungen[7] oder Doppelbesteuerungsabkommen[8] eine Lösung anbieten, ist die Verordnung nicht anwendbar.

3. VORAUSSETZUNGEN FÜR DIE ANWENDUNG DER BESTIMMUNGEN DER EINSEITIGEN REGELUNG

Die Bestimmungen für die einseitige Steuerbefreiung finden nur auf diejenigen Kategorien von ausländischen Einkünften und Vermögenswerten Anwendung, die in der Verordnung aufgezählt sind. Ausländische Einkünfte haben jedoch nur dann Anspruch auf Befreiung, wenn sie in dem ausländischen Staat, in dem sie entstehen, einer Einkommensteuer unterworfen sind. Ausländisches Vermögen hat nur dann Anspruch auf Befreiung, wenn es in dem Staat, in dem es belegen ist, vermögensteuerpflichtig ist, oder wenn die Einkünfte aus diesem Vermögen in dem betreffenden Staat einkommensteuerpflichtig sind. Es genügt, daß das ausländische Einkommen oder Vermögen grundsätzlich einer ausländischen Steuer unterliegt; es ist nicht erforderlich, daß die ausländische Steuer tatsächlich erhoben und entrichtet worden ist. Wenn also z.B. keine Steuer auferlegt wird, weil das ausländische Einkommen oder Vermögen den Steuerfreibetrag nicht überschreitet, wird die Befreiung in den Niederlanden trotzdem gewährt.

4. EINKOMMEN UND VERMÖGEN, AUF DAS DIE BESTIMMUNGEN DER EINSEITIGEN REGELUNG ANWENDUNG FINDEN

Wie oben bereits erwähnt, finden die Bestimmungen der einseitigen Befreiung von der Doppelbesteuerung auf diejenigen Kategorien von ausländischen Vermögensbestandteilen und Einkünften Anwendung, die in der Verordnung aufgeführt sind.
Diese Einkünfte sind folgende:
a) Einkünfte (Gewinne) aus einem Unternehmen, das entweder durch eine Betriebstätte oder durch einen ständigen Vertreter ganz oder teilweise im Ausland ausgeübt wird;
b) Netto-Einkünfte aus
1. einem außerhalb der Niederlande ausgeübten Dienstverhältnis

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soweit diese Einkünfte, Gewinne, Vermögenswerte oder Lotteriegewinne in einem anderen Teil des Königreichs (z.B. niederländische Antillen und Surinam), in einem ausländischen Staat oder durch eine internationale Organisation besteuert werden und soweit die Einkünfte oder Gewinne aus Quellen außerhalb der Niederlande stammen, das Vermögen außerhalb der Niederlande belegen ist und die Lotteriegewinne im Ausland erzielt wurden.

6. Staatsblad Nr. 145.

7. Die Steuerregelung zwischen den verschiedenen Teilen des Königreichs der Niederlande: Die Niederlande, die niederländischen Antillen und Surinam (Gesetz des Königreichs der Niederlande vom 28. Oktober 1964, Staatsblad Nr. 425).

8. Bisher haben die Niederlande Doppelbesteuerungsabkommen mit folgenden Staaten abgeschlossen: Belgien, Dänemark, Deutschland, Finnland, Frankreich, Irland (noch nicht in Kraft), Italien, Kanada, Luxemburg (noch nicht in Kraft), Norwegen, Schweden, Schweiz, USA und Vereinigtes Königreich.

2. im Ausland belegenen Grundstücken
3. Forderungen, die durch Hypothek auf ein im Ausland befindliches unbewegliches Gut gesichert sind, mit Ausnahme solcher Forderungen, die in Wertpapieren verkörpert sind
4. Rechten auf Anteile am Gewinn eines Unternehmens, dessen Leitung sich außerhalb der Niederlande befindet, soweit solche Einkünfte nicht aus Wertpapieren oder aus einem Dienstverhältnis hervorgehen
5. Rechten auf wiederkehrende Bezüge (einschließlich des Lohnes aus einem Dienstverhältnis), die von einer ausländischen öffentlich-rechtlichen Körperschaft gezahlt werden, sofern die Einkünfte nicht aus einer nicht-selbständigen Tätigkeit für ein Unternehmen bezogen werden.

Die Vermögenskategorien sind folgende:

a) Vermögen eines ausländischen Unternehmens gemäß 4, a oben
b) Vermögen, aus dem Einkünfte gemäß 4, b, 2e und 4e entstehen.

Einkünfte aus einem im Ausland ausgeübten Unternehmen (4, a oben)

Diese Kategorie von ausländischen Einkünften bezieht sich nicht nur auf die Gewinne eines niederländischen Unternehmens aus einem im Ausland ausgeübten Unternehmen, sondern auch auf die Einkünfte einer niederländischen natürlichen Person aus einem selbständig ausgeübten Beruf (z.B. als Arzt oder Rechtsanwalt).

a. Betriebstätte

Voraussetzung für den Anspruch auf Befreiung ist, daß die Tätigkeit durch eine Betriebstätte oder durch einen ständigen Vertreter im Ausland ausgeübt wird.

Laut Verordnung gilt als Betriebstätte eine ständige Einrichtung eines Unternehmens oder eines Berufs, mit deren Hilfe die Tätigkeiten im Rahmen des Unternehmens oder des Berufs ganz oder teilweise ausgeübt werden, darin inbegriffen der Sitz der Unternehmensleitung, landwirtschaftliche Grundstücke sowie Werke, deren Ausführung länger als 12 Monate dauert.

Die Verordnung definiert nicht, in welchen Fällen ein ständiger Vertreter angenommen wird. Es wird jedoch bestimmt, daß ein ständiger Vertreter in den folgenden Fällen nicht angenommen wird:

1. wenn die Geschäftsbeziehungen durch einen völlig unabhängigen Vertreter wahrgenommen werden;
2. wenn der Vertreter nicht zum Abschluß von Geschäften bevollmächtigt ist, ungeachtet der Tatsache, ob er ein Lager für Auslieferungen unterhält.

Ferner wird eine Betriebstätte oder ein ständiger Vertreter dann nicht angenommen, wenn die Güter nur in Kommission gehalten werden.[9]

b. Ermittlung der ausländischen Einkünfte

In der früheren Verordnung über die einseitige Befreiung von der Doppelbesteuerung (Königliche Verordnung vom 30. August 1962) wurde bestimmt, daß, wenn eine Unternehmenstätigkeit oder ein Beruf sowohl in den Niederlanden als auch im Ausland ausgeübt wird, die im Ausland ausgeübte Unternehmens- oder Berufstätigkeit als gesondertes Unternehmen oder gesonder-

9. Siehe über die Entwicklung des Begriffs der Betriebstätte in den Niederlanden auf den Seiten 484-501 in „Studies on International Fiscal Law", Band LII (niederländischer Bericht von A. Nooteboom auf dem 21. IFA-Kongreß). Siehe auch die Untersuchung „Het begrip vaste Inrichting" (Der Begriff der Betriebstätte) von G. Overkamp in Maandblad voor Belastingrecht 1966, Nr. 10, 11 und 12 (monatliche Fachzeitschrift für niederländisches Steuerrecht).

ter Beruf zu betrachten ist. Aus dieser Bestimmung konnte die Schlußfolgerung gezogen werden, daß die niederländischen Steuerbehörden der Ansicht waren, die Einkünfte eines niederländischen Unternehmens und seiner Betriebstätte im Ausland seien so zu besteuern, als ob es sich um zwei unabhängige Unternehmen oder Berufe handeln würde (Grundsatz des gespaltenen Unternehmens). In diesem Zusammenhang kann festgestellt werden, daß in den meisten der Doppelbesteuerungsabkommen, die die Niederlande mit ausländischen Staaten abgeschlossen haben, und ebenso in dem OECD-Entwurf eines Doppelbesteuerungsabkommens dieselbe Ansicht vertreten wird. Die gegenwärtige Verordnung jedoch enthält diese Bestimmung nicht. Aus dieser Änderung kann geschlossen werden, daß die niederländischen Steuerbehörden auch andere Verfahren zur Ermittlung der Gewinne aus einer Betriebstätte akzeptieren, z.B. das Verfahren der bruchweisen Aufteilung des Gesamtgewinns des Unternehmens nach bestimmten Schlüsseln, die der Art des betreffenden Unternehmens oder Berufs angepaßt sind.

Die Methode der Aufteilung der Gewinne hat in den Niederlanden zu zahlreichen theoretischen Kontroversen Anlaß gegeben.[10] In der Praxis haben jedoch die in diesem Zusammenhang entwickelten Theorien nicht zu festen Regeln geführt, was möglicherweise auf die Tatsache zurückzuführen ist, daß es bisher keine einschlägigen Gerichtsurteile gibt. Trotzdem können diese Theorien wertvolle Hilfsmittel in solchen Fällen sein, in denen die Methode des „gespaltenen Unternehmens" keine befriedigende Lösung bietet und zu Diskussionen zwischen der Steuerbehörde und den Steuerpflichtigen führt.

Einkünfte aus im Ausland ausgeübten Dienstverhältnissen (4, b, 1e oben)

Nach dem niederländischen Einkommensteuergesetz muß der Begriff des „Dienstverhältnisses" in einem weiten Sinne verstanden werden: Nicht nur die Einkünfte aus einem gegenwärtigen Dienstverhältnis, sondern auch solche aus einem früheren Dienstverhältnis (z.B. Pensionen) fallen unter die Bestimmungen dieser Verordnung. Es ist festzustellen, daß für die Zwecke des niederländischen Einkommensteuergesetzes ein Dienstverhältnis auch bei Vorstandsmitgliedern von Gesellschaften (corporations) angenommen wird. Eine Voraussetzung für die Inanspruchnahme der Befreiung von der Doppelbesteuerung ist, daß die Bezüge aus dem gegenwärtigen oder früheren Dienstverhältnis aus einer tatsächlich im Ausland ausgeübten Tätigkeit stammen müssen. Bei den Bezügen aus einem früheren Dienstverhältnis ist festzustellen, daß die Verordnung in diesem Punkt von der in den Doppelbesteuerungsabkommen verfolgten Linie abweicht; letztere überlassen die Besteuerung von privaten Pensionen dem Sitzstaat.

Einkünfte aus Grundstücken und Forderungen, die durch Hypothek auf ein unbewegliches Gut gesichert sind (4, b, 2e und 3e oben)

Gemäß allgemeinem internationalen Brauch sieht die Verordnung die Befreiung von der Doppelbesteuerung für im Ausland befindliche unbewegliche Güter vor. In dieselbe Richtung gehen ihre Bestimmungen bezüglich Forderungen, die durch Hypothek auf im Ausland befindliche unbewegliche Güter gesichert sind, obwohl aus den Dop-

10. Siehe zu diesem Thema die Untersuchung von L. Lancee: „Fiscale winstsplitsing", FED Fiscale Brochures I.B.: 3.6.1967, sowie Kommentar des OECD-Steuerausschusses zu Artikel 7 des Entwurfs eines Doppelbesteuerungsabkommens, 1963.

pelbesteuerungsabkommen, welche die Niederlande mit ausländischen Staaten in letzter Zeit abgeschlossen haben, sowie aus den Richtlinien in dem OECD-Entwurf eines Doppelbesteuerungsabkommens hervorgeht, daß der allgemeine Trend dahin zu gehen scheint, die Besteuerung der Zinsen von Hypothekenforderungen dem Staat zu überlassen, in dem der Gläubiger seinen Wohnsitz hat.[11]

In diesem Zusammenhang wird auf eine bemerkenswerte Konsequenz aufmerksam gemacht, welche die Anwendung der Verordnung in solchen Fällen hat, in denen das im Ausland befindliche unbewegliche Gut oder die Hypothekenforderung zu dem Vermögen eines in den Niederlanden gelegenen Unternehmens gehören. Nach den Vorschriften der Verordnung ist ein einzelnes im Ausland belegenes unbewegliches Gut, das einem niederländischen Unternehmen gehört, nicht als Betriebstätte anzusehen. Die Ausnahme auf diesem Gebiet bilden landwirtschaftliche Grundstücke. Unter dem niederländischen Einkommensteuergesetz gelten alle Einkünfte eines Unternehmens als *Gewinne*. Die Folge ist, daß nach dem Buchstaben der Verordnung Einkünfte eines niederländischen Unternehmens aus ausländischen Quellen nur dann von der Doppelbesteuerung befreit werden können, wenn die Einkünfte aus einer Geschäfts- oder Berufstätigkeit stammen, die mit Hilfe einer Betriebstätte oder eines ständigen Vertreters im Ausland ausgeübt wurde. Ein in den Niederlanden gelegenes Unternehmen kann also keine Befreiung von der Doppelbesteuerung für Einkünfte aus im Ausland befindlichen unbeweglichen Gütern oder aus ausländischen Hypothekenforderungen beanspruchen. Da man vom historischen Standpunkt annehmen kann, daß diese Folge nicht beabsichtigt war, bin ich der Ansicht, daß in Sonderfällen ein Antrag an den Finanzminister gerichtet werden kann, um eine Ad-hoc-Befreiung von der Doppelbesteuerung zu erlangen.

Einkünfte aus Rechten auf Anteile am Gewinn eines Unternehmens, soweit solche Einkünfte nicht aus Wertpapieren oder einem Dienstverhältnis hervorgehen (4, d, 4e oben)

Da die Verordnung eine Befreiung von der Doppelbesteuerung für Einkünfte eines Unternehmers aus einer Geschäfts- oder Berufstätigkeit, die im Ausland durch eine Betriebstätte oder einen ständigen Vertreter ausgeübt wird, sowie für Einkünfte aus einem im Ausland ausgeübten Dienstverhältnis vorsieht, könnte die Frage gestellt werden, welche Einkünfte unter diese Klausel fallen. Die Kategorie der Steuerpflichtigen mit Einkünften dieser Art ist sehr beschränkt. Folgende Beispiele sind zu erwähnen:

a) Anteil an den Gewinnen eines Unternehmens im Falle einer Person, die nicht an dem Gesellschaftskapital beteiligt ist, z.B. ein Geldgeber, der zusätzlich zu einem festen Zinssatz Anspruch auf einen bestimmten Prozentsatz an den Betriebsgewinnen hat;
b) Zahlung eines Anteils an den Gewinnen einer Personengesellschaft an die Witwe eines verstorbenen Partners, die nicht an dem Gesellschaftskapital beteiligt ist.

Einkünfte aus Rechten auf wiederkehrende Bezüge, die von einer ausländischen öffentlich-rechtlichen Körperschaft gezahlt werden

Diese Einkünfte werden von der Doppelbesteuerung befreit, *unabhängig davon, ob die Arbeit im Ausland durchgeführt wurde oder*

11. Dies ist der Fall in den Doppelbesteuerungsabkommen zwischen den Niederlanden und Dänemark, Italien, Norwegen, Schweden, der Schweiz, den USA und dem Vereinigten Königreich.

nicht. Eine Ausnahme bildet jedoch ein Dienstverhältnis, das im Auftrag eines Unternehmens einer ausländischen öffentlich-rechtlichen Körperschaft ausgeübt wird. Auf die Einkünfte aus einem solchen Dienstverhältnis ist die Verordnung nur dann anwendbar, wenn die Tätigkeit im Ausland ausgeübt wurde.

Von der Doppelbesteuerung können auch andere Einkünfte als nur Gehälter und Löhne befreit werden, so z.B. Pensionen von öffentlich-rechtlichen Körperschaften oder wiederkehrende Leistungen, die von ausländischen öffentlich-rechtlichen Institutionen der Sozialversicherung gezahlt werden.

5. EINKÜNFTE, FÜR DIE KEINE BEFREIUNG VON DER DOPPELBESTEUERUNG GEWÄHRT WIRD

Es ist zu beachten, daß die Verordnung eine Befreiung von Dividenden, Zinsen[12] und Lizenzgebühren aus ausländischen Quellen nicht vorsieht. Wenn also diese Einkommensbestandteile im Ausland besteuert werden (in den meisten Fällen werden sie an der Quelle besteuert), wird die Doppelbesteuerung nicht vermieden. Diese Doppelbesteuerung ist in den Niederlanden insofern leicht gemildert, als der Empfänger der Einkünfte die ausländische Steuer absetzen kann.[13]

Bezüglich der Dividenden enthält die niederländische Körperschaftsteuerverordnung 1942 jedoch eine Sonderbestimmung für zwischengesellschaftliche Dividenden. Dividenden aus Beteiligungen einer ansässigen Gesellschaft (corporation) an einer anderen Gesellschaft werden von der Körperschaftsteuer befreit, wenn die Beteiligung mindestens 25% des eingezahlten Kapitals der ausschüttenden Gesellschaft beträgt.[14] Das oben Gesagte gilt auch dann, wenn es sich bei der ausschüttenden Gesellschaft um eine nicht-ansässige Gesellschaft handelt, vorausgesetzt, daß letztere einer der niederländischen Körperschaftsteuer vergleichbaren Steuer unterworfen ist.

6. DAS SYSTEM DER BEFREIUNG VON DER DOPPELBESTEUERUNG

Ansässige natürliche Personen sind von der niederländischen Steuer „befreit" für die aufgezählten Kategorien von ausländischen Einkünften und sonstigem Einkommen („Befreiung" von der Einkommensteuer und, soweit Einkünfte aus einem Dienstverhältnis betroffen sind, von der Lohnsteuer) und ausländischem Vermögen („Befreiung" von der Vermögensteuer).

Ansässige Körperschaften sind „befreit" von der niederländischen Körperschaftsteuer für ihre ausländischen Gewinne aus einer Betriebstätte oder aus der Tätigkeit eines ständigen Vertreters im Ausland. Körperschaften unterliegen nicht der Vermögensteuer.

Befreiung von der Einkommensteuer

Die „Befreiung" von der Einkommensteuer ist insoweit gerechtfertigt, als die ausländischen Einkünfte noch den Steuersatz für das nichtbefreite Einkommen beeinflussen.

Bis 1957 wurde folgendes Verfahren ange-

12. Ausgenommen Zinsen für Darlehen, die durch Hypothek auf im Ausland befindliche unbewegliche Güter gesichert sind.

13. Es sollte festgehalten werden, daß es nach den in letzter Zeit von den Niederlanden abgeschlossenen Doppelbesteuerungsabkommen den Anschein hat, daß die Niederlande bereit sind, die Steuern von ausländischen Dividenden, Zinsen und Lizenzgebühren durch Anrechnung der ausländischen Steuer zu verringern.

14. Der gegenwärtig dem Parlament vorliegende Entwurf eines Körperschaftsteuergesetzes sieht dieselbe Befreiung vor, jedoch wurde die Forderung der 25%igen Beteiligung auf 5% herabgesetzt. Für Beteiligungen an ausländischen Portfolio-Investmentgesellschaften gilt diese Befreiung jedoch nicht.

wendet, um den für die Betreiung von der Einkommensteuer in Frage kommenden Betrag zu ermitteln: Die niederländische Steuer wurde zuerst nach dem Gesamteinkommen berechnet, d.h. also einschließlich der ausländischen Einkünfte. Von der so berechneten Steuer wurde der Einkommensteuerbetrag abgezogen, der fällig gewesen wäre, wenn der Steuerpflichtige nur die ausländischen Einkünfte gehabt hätte. Außerdem wurde die Entlastung nach der „Land-für Land"-Methode vorgenommen.

Schematisches Beispiel

Ein niederländischer Unternehmer, verheiratet, zwei Kinder unter 16 Jahren, ansässig in den Niederlanden, hat

– niederländische Einkünfte von	Dfl.	40.000
– Einkünfte aus einer Betriebstätte in Spanien von	„	90.000
– Verluste aus einer Betriebstätte in Österreich von	„	10.000
Bruttoeinkommen	Dfl.	120 000
Abzugsfähige persönliche Belastungen		
– für Krankheit Dfl. 9.000		
– Lebensversicherung „ 5.000	„	14.000
Steuerbares Einkommen	Dfl.	106.000
Fällige Einkommensteuer	Dfl.	53.353
Befreiung von der Doppelbesteuerung: Fällige Einkommensteuer von den spanischen Gewinnen von 90.000 = Dfl. 42.725		
Befreiung von der Doppelbesteuerung für Verluste in Österreich	„	0 „ 42.725
In den Niederlanden fällige Steuer	Dfl.	10.628

Im Jahre 1958 wurde ein anderes System eingeführt. Ab dem Jahr 1957 wird von der Steuer von dem Gesamteinkommen ein Betrag abgezogen, der zu der Gesamtsteuer in demselben Verhältnis steht wie das ausländische Netto-Einkommen (= Bruttoeinkommen nach Abzug der Kosten – die ausländische Steuer selbst wird nicht als abzugsfähige Kosten betrachtet –) zu dem Bruttogesamteinkommen (= Summe der Beträge aller Einkommensbestandteile nach Abzug der ausgleichsfähigen, jedoch ohne Abzug der im niederländischen Einkommensteuergesetz aufgezählten Sonderausgaben). Der Finanzminister gab als Grund für diese Änderung an, das neue System stehe mehr in Einklang mit dem sich entwickelnden internationalen Brauch, wie er aus den kürzlichen Doppelbesteuerungsabkommen der Niederlande mit anderen Staaten ersichtlich sei.[15] Das neue System hatte außerdem zur Folge, daß die „Land-für-Land"-Befreiung zu einer „Gesamt"-Befreiung wurde.

Wenn wir das neue System auf das oben angeführte Beispiel anwenden, erhalten wir folgendes Ergebnis:

Steuerpflichtiges Einkommen	Dfl.	106.000
Fällige Einkommensteuer	„	53.353

Befreiung von der Doppelbesteuerung:

$$\frac{\text{Ausländisches Einkommen}}{\text{Gesamtbetrag der Einkünfte}} \times \text{Einkommensteuerbetrag}$$

$$\frac{90.000-10.000}{120.000} \times \text{Dfl. } 53.353 = \text{Dfl. } 35.569$$

Dfl. 17.784

„Befreiung" von der Vermögensteuer

Bis 1955 wurde folgendes Verfahren angewandt, um den Betrag der „Befreiung" von der Vermögensteuer zu ermitteln. Die niederländische Steuer wurde zuerst für das

15. Es wird Bezug genommen auf die Seiten 19 und 20 des Erläuternden Memorandums zu dem Allgemeinen Gesetz über die Staatlichen Steuern.

Gesamtvermögen berechnet, d.h. also einschließlich des ausländischen Vermögens. Die so berechnete Steuer wurde vermindert um den Betrag der Vermögensteuer, der fällig gewesen wäre, hätte der Steuerpflichtige nur das ausländische Vermögen besessen. Angesichts der ziemlich hohen Beträge der vom Vermögen abzugsfähigen persönlichen Freibeträge führte dieses System für den Steuerpflichtigen nicht zu einem befriedigenden Ergebnis. Aus diesem Grund genehmigte der Finanzminister ein anderes System: Das ausländische Vermögen konnte bei der Berechnung der fälligen Vermögensteuer außer Ansatz gelassen werden. Diese Genehmigung galt für die Jahre 1955 und 1956. Seit dem Jahr 1957 wird die Vermögensteuer von dem Gesamtvermögen nach Abzug der sogenannten persönlichen Freibeträge um den Betrag vermindert, der sich zu der Gesamtsteuer verhält wie der Wert des ausländischen Vermögens zu dem Wert des Gesamtvermögens.

Schematisches Beispiel

Der Wert des Vermögens des in dem obigen Beispiel angeführten niederländischen Unternehmers ist:

– einheimisches Vermögen		Dfl. 200.000
– spanisches Vermögen		„ 600.000
– österreichisches Vermögen		„ 100.000
	Gesamtvermögen:	Dfl. 900.000
Persönliche Freibeträge:		
– als verheiratete Person	Dfl. 55.000	
– für die beiden Kinder	„ 27.000	„ 82.000
	Steuerbares Vermögen:	Dfl. 818.000
Fällige Vermögensteuer		Dfl. 4.908
Entlastung von der Doppelbesteuerung:		
$\frac{600.000-100.000}{900.000} \times$ Dfl. 4.908		„ 3.817
In den Niederlanden fällige Steuer:		Dfl. 1.091

„Befreiung" von der Körperschaftsteuer

Bis 1957 wurde das folgende Verfahren angewandt, um den Betrag der „Befreiung" von der Körperschaftsteuer zu ermitteln. Die niederländische Steuer wurde zuerst für die Gesamtgewinne berechnet, das heißt also einschließlich der ausländischen Gewinne. Die so berechnete Steuer wurde vermindert um den Betrag der Körperschaftsteuer, der zu entrichten gewesen wäre, wenn die Gesellschaft nur die ausländischen Gewinne erzielt hätte. Außerdem wurde die Entlastung nach der „Land-für-Land"-Methode vorgenommen.

Im Jahre 1958 wurde ein anderes System eingeführt. Ab dem Jahr 1957 wird die Steuer von dem steuerbaren Betrag (= Gesamtgewinne minus ausgleichsfähige Verluste und abzugsfähige Spenden) vermindert um einen Betrag, der sich zum Gesamtsteuerbetrag so verhält wie die ausländischen Gewinne zu dem steuerbaren Gesamtbetrag.

Schematisches Beispiel

Eine in den Niederlanden ansässige Gesellschaft hat folgende Gewinne erzielt:

– mit ihrem inländischen Unternehmen		Dfl. 1.500.000
– mit ihrer Betriebstätte im Griechenland		„ 600.000
– mit ihrer Betriebstätte im Israel		„ 900.000
	Gesamtgewinn:	Dfl. 3.000.000
Ausgleichsfähige Verluste des inländischen Unternehmens aus den Vorjahren		„ 100.000
	Steuerbare Gewinne:	Dfl. 2.900.000
Fällige Körperschaftsteuer 46% von Dfl. 2.900.000 =		Dfl. 1.334.000

Befreiung von der Doppelbesteuerung:		
600.000–900.000 ×		
2.900.000		
Dfl. 1.334.000 =	„	690.000
In den Niederlanden fällige Steuer:	Dfl.	644.000

Befreiung von der Lohnsteuer

Die Lohnsteuerbefreiung ist eine direkte Befreiung, d.h. der ansässige Arbeitnehmer, der dem Steuerbeamten beweisen kann, daß er im Ausland von seinem niederländischen Arbeitgeber beschäftigt wird, und daß das Einkommen aus seinem Dienstverhältnis der Besteuerung eines ausländischen Staates unterliegt, erhält die volle Befreiung von der niederländischen Lohnsteuer, die normalerweise von seinem Gehalt abzuziehen wäre.

7. ANWENDUNG DER BEFREIUNG VON DER DOPPELBESTEUERUNG, WENN DAS AUSLÄNDISCHE EINKOMMEN NEGATIV IST

Der Grundsatz der einseitigen Befreiung von der Doppelbesteuerung, wie oben beschrieben, bedeutet auch, daß, wenn das ausländische Einkommen negativ ist, dieses negative Einkommen unverzüglich auf das positive inländische Einkommen angerechnet werden kann. Bis 1953 wurde dieser Aspekt bei der Berechnung der Befreiung außer acht gelassen. Die Folgen sind aus nachstehendem Beispiel ersichtlich:

1. Jahr niederländisches Einkommen (positiv)	Dfl.	80.000
ausländisches Einkommen (negativ)	„	40.000
steuerbares Einkommen	Dfl.	40.000

Keine Befreiung im 1. Jahr.

2. Jahr niederländisches Einkommen (positiv)	Dfl.	60.000
ausländisches Einkommen (positiv)	„	40.000
steuerbares Einkommen	Dfl.	100.000

Im zweiten Jahr wurde eine Befreiung für Dfl. 40.000 gewährt. Das negative ausländische Einkommen des ersten Jahres wurde nicht berücksichtigt. 1953 wurde eine Zusatzbestimmung in die Verordnung über die einseitige Befreiung aufgenommen, die vorsieht, daß ein negatives ausländisches Einkommen aus den Vorjahren vorgetragen werden muß, bevor die Befreiung auf dieses ausländische Einkommen angewendet wird. Diese Zusatzbestimmung wurde in der Annahme eingeführt, daß die Befreiungsbestimmungen ohne diese Bestimmung dem Steuerpflichtigen einen ungerechtfertigten Vorteil verschaffen würden. Wenn wir diese Bestimmung auf das oben genannte Beispiel anwenden, ergibt sich folgendes Resultat:

1. Jahr niederländisches Einkommen (positiv)	Dfl.	80.000
ausländisches Einkommen (negativ)	„	40.000
steuerbares Einkommen	Dfl.	40.000
2. Jahr niederländisches Einkommen (positiv)	Dfl.	60.000
ausländisches Einkommen (positiv)	„	40.000
steuerbares Einkommen	Dfl.	100.000

Im zweiten Jahr wird nur eine Befreiung für Dfl. 40.000 minus das negative ausländische Einkommen des ersten Jahres von Dfl. 40.000 = 0 gewährt.

8. BEFREIUNG VON DER DOPPELBESTEUERUNG IN FÄLLEN, IN DENEN DIE AUSLÄNDISCHEN EINKÜNFTE HÖHER SIND ALS DAS GESAMTEINKOMMEN

Mit dem System der einseitigen Befreiung

von der Doppelbesteuerung ist auch die Regelung verbunden, daß das inländische Einkommen, wenn es negativ ist, auf das ausländische Einkommen angerechnet werden kann. Die Anwendung der Befreiungsbestimmungen ohne eine besondere Vorschrift für derartige Fälle könnte dem Steuerpflichtigen ungerechtfertigte Nachteile verursachen, was durch folgendes schematisches Beispiel dargestellt wird:

1. Jahr inländisches Einkommen (negativ)	Dfl.	20.000
ausländisches Einkommen (positiv)	„	50.000
steuerbares Einkommen (positiv)	Dfl.	30.000

Verminderung: $\frac{50.000}{30.000}$ × Steuer von Dfl. 30.000, jedoch kann die Verminderung nach den Bestimmungen der Verordnung über die einseitige Befreiung nie höher sein als der Betrag der Steuern von dem steuerbaren Einkommen.

2. Jahr inländisches Einkommen (negativ)	Dfl.	40.000
ausländisches Einkommen (positiv)	„	50.000
steuerbares Einkommen (positiv)	Dfl.	10.000

Verminderung: $\frac{50.000}{20.000}$ × Steuer von Dfl. 10.000, jedoch nicht mehr als der Betrag dieser Steuer.

3. Jahr inländisches Einkommen (positiv)	Dfl.	100.000
ausländisches Einkommen (positiv)	„	60.000
	Dfl.	160.000

Verminderung: $\frac{60.000}{160.000}$ × Steuer von Dfl. 160.000

Im ersten Jahr konnte also keine Befreiung erlangt werden für einen Betrag von Dfl. 50.000 minus 30.000 = Dfl. 20.000, während im zweiten Jahr keine Befreiung erlangt wurde für einen Betrag von Dfl. 50.000 minus Dfl. 10.000 = Dfl. 40.000.

Um Nachteile dieser Art auszugleichen, wurde ab 1957 in die Verordnung über die einseitige Befreiung eine Zusatzbestimmung aufgenommen, die vorsieht, daß der Betrag des ausländischen Einkommens, wenn und soweit er das Gesamteinkommen übersteigt, auf eines der nächsten sechs Jahre vorgetragen wird, und zwar beginnend mit dem ersten nachfolgenden Jahr, so daß in dem Jahr, auf das der Betrag vorgetragen wird, für die Berechnung der Ermäßigung ein Betrag des Netto-Einkommens, der nicht zu dem ausländischen Einkommen gehört und der so hoch ist wie der vorgetragene Betrag, als Teil des ausländischen Einkommens angesehen wird. Wenn wir diese Vorschrift auf die oben genannten Beispiele anwenden, erhalten wir folgendes Ergebnis:

1. Jahr inländisches Einkommen (negativ)	Dfl.	20.000
ausländisches Einkommen (positiv)	„	50.000
steuerbares Einkommen (positiv)	Dfl.	30.000

Die Befreiung von der Doppelbesteuerung kann gewährt werden für Dfl. 50.000 weniger Dfl. 20.000 = Dfl. 30.000. Auf die nächsten sechs Jahre sind vorzutragen Dfl. 20.000. Fällige niederländische Steuer im ersten Jahr: 0.

2. Jahr inländisches Einkommen (negativ)	Dfl.	40.000
ausländisches Einkommen (positiv)	„	50.000
steuerbares Einkommen (positiv)	Dfl.	10.000

Da eine Befreiung von der Doppelbesteuerung nur für Dfl. 10.000 gewährt werden kann, kann ein Teil des ausländischen Einkommens in Höhe von Dfl. 40.000 auf die nächsten sechs Jahre vorgetragen werden. Im zweiten Jahr fällige niederländische Steuer: 0.

3. Jahr inländisches Einkommen (positiv)	Dfl.	100.000
ausländisches Einkommen (positiv)	„	60.000
steuerbares Einkommen (positiv)	Dfl.	160.000

Ohne eine Sondervorschrift würde die Ermäßigung betragen:

$\frac{60.000}{160.000} \times$ Steuer von steuerbarem Einkommen von Dfl. 160.000.

Die Anwendung der Sonderbestimmung führt zu folgender Berechnung:

Ausländisches Einkommen im dritten Jahr	Dfl.	60.000

Von dem inländischen Einkommen von Dfl. 100.000 im dritten Jahr werden folgende Beträge als „ausländisches Einkommen" betrachtet:

a) der vom 1. Jahr vorzutragende Betrag	Dfl.	20.000
b) der vom 2. Jahr vorzutragende Betrag	„	40.000
	„	60.000

Ausländisches Gesamteinkommen, das im dritten Jahr angenommen wird: Dfl. 120.000

Befreiung im 3. Jahr: $\frac{120.000}{160.000} \times$ Steuer von steuerbarem Einkommen von Dfl. 160.000.

Erläuterungen zum deutsch-niederländischen Doppelbesteuerungsabkommen

bearbeitet von: A. Schulze-Brachmann und W. Dirksen

Ein Nachschlagewerk . . .

- das den Text des Abkommens – in den zwei Sprachen – sowie den Wortlaut der diesbezüglichen Durchführungsbestimmungen gibt;
- das nicht nur einen ausführlichen Kommentar zu den Bestimmungen des deutsch-niederländischen Doppelbesteuerungsabkommens enthält, sondern eingehend den Einfluss jeder einzelnen Bestimmung auf das nationale Steuerrecht der beiden Staaten behandelt;
- das ausserdem die für die Auslegung des Abkommens wichtigste Rechtsprechung enthält, auch wenn diese sich auf andere Abkommen bezieht, insbesondere auf das (fast gleichlautende) DBA mit Luxemburg.

Ein auf die Praxis abzielender Kommentar

- weil er erst zu einem Zeitpunkt erscheint, in dem das Abkommen schon 8 Jahre in Kraft ist, sodass eine Reihe von Zweifelsfragen inzwischen gelöst werden konnte;
- weil die Verfasser täglich die immer wechselnden Probleme des internationalen Wirtschaftsverkehrs vor Augen haben und mit deren Lösung beschäftigt sind;
- weil der Kommentar auch der im Wachsen begriffenen europäischen wirtschaftlichen Integration Rechnung trägt und somit dem steuerpflichtigen Unternehmen und seinem Berater einen Blick in die Zukunft einräumt.

- *Internationale Verträge verbinden nationale Rechtssysteme. Die Regelungen in internationalen Vereinbarungen schaffen neues Recht, das jedoch nur im Rahmen nationalen Rechts in Kraft treten kann. Das gilt auch und vor allem für die Rechtsetzung in Verträgen zur Vermeidung der Doppelbesteuerung.*

- Unter Beachtung dieser Rechtslage legt das Internationale Steuerdokumentationsbüro ein Erläuterungsbuch zum deutsch-niederländischen Doppelbesteuerungsabkommen vor, das gemeinsam von je einem Fachspezialisten der beiden beteiligten Nationen erarbeitet wurde. Beide Verfasser sind nicht nur bei den Verhandlungen über den Abschluss des genannten DBA beteiligt gewesen; sie verfügen beide darüber hinaus als langjährige Mitglieder des Steuerausschusses der OECD und der Arbeitsgruppe „Internationale Steuerfragen" innerhalb der EWG über besondere Erfahrungen auf dem schwierigen Gebiet der Doppelbesteuerung.
- Steuern haben die Neigung sich dauernd zu ändern. Wenn es nicht die Steuergesetze selbst sind, so sind es die Verwaltungen oder die Gerichte die, wegen veränderter Auffassungen oder im Hinblick auf das Bedürfnis nach Verfeinerungen, das Steuerrecht in Bewegung halten.
- Um den Entwicklungen Rechnung tragen zu können gibt es in der Steuerliteratur viele Loseblattausgaben, von vielen als die beste Lösung begrüsst, von vielen andern aber abgelehnt, weil sie das gebundene Buch vorziehen.

Den Wünschen beider Gruppen wird Rechnung getragen.

Kurze Inhaltsübersicht

VORWORT – von Dr. h. c. Wolfgang Mersmann, Präsident des Bundesfinanzhofs, München.

EINLEITUNG – I. Notwendigkeit eines deutsch-niederländischen Doppelbesteuerungsabkommens. II. Entstehung und Formalien des DBA. III. Kurzfassung des Inhalts des DBA. IV. Bearbeitungsplan.

Teil A Übersicht des deutschen Steuerrechts
(Einkommen-, Lohn- und Körperschaftsteuer; Ergänzungsabgabe; Gewerbe- und Vermögensteuer; Lastenausgleich; Grundsteuer; Rechtsmittel; Vergleichs- und Konkursverfahren).

Teil B Übersicht des niederländischen Steuerrechts
(Einkommen-, Lohn-, Körperschaft-, Dividenden-, Aufsichtsrat-, Vermögen- und Grundsteuer, sowie Gemeindesteuern; Einseitige Regelung zur Vermeidung der Doppelbesteuerung; Rechtsmittel; Konkursverfahren).

Teil C Der Einfluss des Abkommens auf das Steuerrecht der Bundesrepublik

Teil D Der Einfluss des Abkommens auf das niederländische Steuerrecht

Diese beiden Teile sind wie folgt gegliedert:

I. Sachlicher Geltungsbereich. II. Persönlicher Geltungsbereich. III. Räumlicher Geltungsbereich. IV. Zeitlicher Geltungsbereich.
V. Begriffsbestimmungen (u.a. Betriebstätte; Vertreter; Unternehmen und Betrieb; Ort der Leitung).
VI. Wohnsitz (natürliche und juristische Personen; Diplomaten; Schiffsleute; Personengesellschaften).
VII. Zuteilung des Besteuerungsrechts (Einkünfte; Vermögen).
VIII. Unbewegliches Vermögen.
IX. Gewerbliche Unternehmen (u.a. Gewinnermittlung nach der direkten und indirekten Methode; Übertragung von Wirtschaftsgütern in das Betriebstättenvermögen; Gewinnberichtigung).
X. Unternehmen der Schiffahrt und Luftfahrt. XI. Veräusserung von Beteiligungen.
XII. Selbständige Arbeit; Aufsichtsratsmitglieder. XIII. Nichtselbständige Arbeit.
XIV. Dividenden. Zinsen. Lizenzgebühren. XV. Hochschullehrer und Studenten.
XVI. Vermeidung der Doppelbesteuerung (Anrechnung; Freilassung; Progressionsvorbehalt; Verluste).
XVII. Diplomaten und Konsuln. XVIII. Die Doppelbesteuerungs-Beschwerde.
XIX. Verständigungsverfahren. XX. Amtshilfe. XXI. Verbot der Diskriminierung.

Teil E
Würdigung des deutsch-niederländischen DBA, insbesondere in internationaler Sicht

I. Das Abkommen als Teil des weltumspannenden Netzes von Doppelbesteuerungsabkommen.
II. Das DBA im Lichte der Mitgliedschaft beider Vertragstaaten zur OECD und zur EWG.
III. Fehlende Erbschaftsteuer-Vereinbarungen.
IV. Unilaterale Massnahmen zur Vermeidung der Doppelbesteuerung.
V. Weiterentwicklung des DBA.

Abkürzungsverzeichnis – Schrifttum – Verzeichnis der berücksichtigten Urteile – Sachregister.

Inhalt des 2. Bandes (Texte)

I. Text des DBA vom 16.6.1959 (zweisprachig). II. Schlussprotokoll (zweisprachig). III. Zusatzprotokoll (zweisprachig).
IV. Deutsches Ratifizierungsgesetz nebst Begründung. V. Deutsche Denkschrift zum DBA. VI. Deutsche Denkschrift zum Zusatzprotokoll.
VII. Deutsche Durchführungsbestimmungen. VIII. Deutsche unilaterale Bestimmungen.
IX. Brief des niederländischen Aussenministers mit Denkschrift. X. Niederländische Durchführungsbestimmungen (zweisprachig).
XI. Niederländische einseitige Regelungen zur Vermeidung der Doppelbesteuerung. XII. Musterabkommen der OECD: Kommentar zu Art. 5 über die Betriebstätte.

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Vol. XXIV 1969 No. 2

PUBLIC FINANCE AND SOCIAL SECURITY
FINANCES PUBLIQUES ET SECURITE SOCIALE

Papers and Proceedings of the XXIVth Session of the International Institute of Public Finance at Turin, September 10–13, 1968

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Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains.

SUPPLEMENT TO NO. 3 (B 1969)

Traité instituant l'Union Douanière et Economique de l'Afrique Centrale.

SUPPLEMENT TO NO. 5 (C 1969)

Convention du 29 octobre 1958 modifiée par l'avenant du 6 décembre 1965 entre la France et l'Italie pour éviter les doubles impositions et régler certaines autres questions en matière d'impôts directs sur les revenus et sur la fortune.

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TAX HAVENS

TAX HAVEN, PARADIS FISCAL, STEUEROASE, magic words for a troubled taxpayer.

The "Etablissement Général des Instituts Financiers" in Vaduz (Liechtenstein) has published a book providing basic information about fourteen tax havens.[1]

Geographically, the book covers in a consistent manner the following: Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Hong Kong, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Netherlands Antilles, Panama and Switzerland.

In fact, the tax havens are not homogeneous. They can be classified as follows:

a) the *traditional* tax havens e.g. Bahamas, Bermuda, with no taxes at all (recently the Cayman Islands entered this group[2]);
b) the havens with low taxation e.g. British Virgin Islands;
c) the havens which do not tax income from foreign sources e.g. Panama; and
d) the countries which allow special privileges e.g. Luxembourg.

All these groups are represented among the fourteen tax havens described in this book.

It is remarkable that the Netherlands is not included. The substantial holding privilege[3] is a feature which may make the Netherlands more attractive for an international holding company than a recognized tax haven[4]. This is due to the fact that the Netherlands is included in the network of tax treaties and these treaties are applicable to holding companies. The latter is not always the case as, for example, with Luxembourg's tax treaties.

The choice of a tax haven always depends on the special circumstances of each individual case. The problems do not arise in the tax havens, but in the foreign countries whose residents wish to make use of the fiscal advantages of the tax haven. These important questions are not dealt with in this book.

---

1. TAX HAVENS, edited by Milton Grundy, 1969, 133 pages, Swiss frs. 70. Library of the International Bureau of Fiscal Documentation no. 44 D29.
2. Compare Tax Haven Cayman Islands in Bulletin for International Fiscal Documentation, 1967, p. 486.
3. Compare Bulletin for International Fiscal Documentation, June/July/Aug. 1965, The Substantial Holding Privilege in the Netherlands.
4. Compare the dissertation of B. Schanzenbach: Steueroasen und wirtschaftspolitische Ziele, 1965, p. 57; Library of the International Bureau of Fiscal Documentation no.33 D29.

* * * * ARTICLES * * * *

JAN H. CHRISTIAANSE*:

CONVENTIONS FISCALES ENTRE PAYS DEVELOPPES ET PAYS EN VOIE DE DEVELOPPEMENT**

INTRODUCTION

L'Assemblée générale des Nations unies a désigné les années 60 de notre siècle comme constituant la Décennie de Développement des Nations unies. Nous nous trouvons maintenant au seuil de DD2, la deuxième Décennie, des Nations unies pour le développement. Le Comité de la planification du développement présidé par mon éminent compatriote et collègue, le Professeur Jan Tinbergen, procède dès maintenant à l'élaboration des dispositions techniques sur le développement en vue de DD2.

Il est fort heureux que, dans cette période de transition qui sépare DD1 de DD2, les travaux aient été entamés dans le cadre des Nations unies par un groupe d'experts *ad hoc* sur les conventions fiscales entre les pays développés et les pays en voie de développement. La première conférence de ce groupe a eu lieu à Genève du 2 au 13 décembre 1968. Entre temps, le document officiel de cette première réunion a été publié et il est possible de se le procurer[1]. Ce document ne contient pas seulement une étude fort intéressante des principales questions soulevées au cours de cette première réunion; il comprend également, dans sa partie II, un rapport préliminaire élaboré par le Secrétaire général des Nations unies pour le compte du groupe d'experts. Ce rapport fournit un excellent résumé des problèmes à examiner ainsi qu'un très grand nombre de renseignements précieux. Par exemple, il contient une comparaison fort utile des principales mesures d'aide, telles que la méthode d'exonération des revenus de source étrangère, l'imputation de l'impôt étranger («foreign tax credit»), l'imputation spéciale pour dégrèvement d'impôt («tax sparing credit») et le crédit pour investissement («investment credit»).

Il me paraît constituer un manuel très approprié non seulement pour les étudiants en droit fiscal international et pour les nouveaux membres de l'IFA, mais aussi pour les membres les plus anciens de notre association, en tant que contribution à leur formation continue. Un de nos membres, M. Henry J. Gumpel, de New-York, a contribué dans une très large mesure à l'élaboration de ce rapport préliminaire, en qualité de conseiller spécial. L'universitaire américaine, Elisabeth A. Owens, bien connue pour son ouvrage *The Foreign Tax Credit*[2], a également contribué à l'élaboration du rapport.[3]

---

* Professeur aux Facultés de Droit et des Sciences économiques de Rotterdam.

** Voir pour le texte anglais Cahiers de droit fiscal international, édités par l'International Fiscal Association, Volume LIVc (Congrès de Rotterdam).

1. Nations unies, Département des affaires économiques et sociales, *Conventions fiscales entre pays développés et pays en voie de développement.* (E/4614 - ST/ECA/110) Numéro de vente: 69.XVI.2. Ce rapport est cité sous le nom de Premier rapport du Groupe d'experts.

2. *A study of the Credit for Foreign Taxes under United States Income Tax Law* (Harvard Law School, International Program in Taxation), entre-temps, la deuxième édition est parue), c.f. également la contribution de M. Richard C. Loengard.

3. Rapport du Secrétaire Général au Groupe d'experts, *Questions relatives aux Conventions fiscales entre pays développés et pays en voie de développement,* est cité sous le nom de *Rapport Gumpel.*

Notre éminent président, le Dr. Mitchell B. Carroll, a déjà écrit, dans le style inimitable qui le caractérise, sur cette nouvelle initiative de l'ONU, un article sous le titre "The UN Re-enacts a Tax Drama".[4] Bien entendu, il situe les nouvelles études sur le développement dans le large contexte historique des travaux de la Société des Nations dans ce domaine, dans lesquels il a joué un rôle important.[5] Il établit également des comparaisons entre les études de l'OCDE dans le même domaine.

M. Carroll a déjà fait remarquer, dans son allocution d'ouverture, que j'avais assisté à la réunion de Genève de décembre dernier en tant qu'observateur de l'IFA et que je vous entretiendrais des résultats de cette réunion cet après-midi. Je préfererais dire que je m'efforcerai de clarifier certains aspects de ces résultats. Dans une intervention de trois-quarts d'heure, on ne peut aborder que quelques points essentiels. Cependant, je *ferai* certaines recommandations sur la méthode qui à mon avis devrait permettre à l'IFA d'apporter, en faveur du groupe d'experts *ad hoc*, une contribution utile aux études détaillées relatives aux problèmes rencontrés dans ce domaine. Pour le reste, mes autres activités m'ont empêché d'assister aux réunions, à l'exception de celles de la deuxième semaine. Fort heureusement, notre Vice-Président, M. Alun G. Davies, était présent au cours de la première semaine et, comme nous pouvions nous y attendre, il n'eut aucune peine à prendre sur ses larges épaules la tâche de représenter l'IFA ainsi que la Chambre Internationale de Commerce.

OBJECTIFS DE LA REUNION DE GENEVE

Il semble approprié de faire ici une distinction entre la manière dont ECOSOC considère la tâche du Groupe d'experts et celle dont le groupe lui-même interprète cette même tâche. Il ne faut pas qu'il y ait de doutes à ce sujet car, dans le cas contraire, nous pourrions être victimes d'un malentendu en ce qui concerne l'opinion que nous avons des travaux du groupe. La constitution du groupe par le Secrétaire Général a été la conséquence directe d'une résolution adoptée par le Conseil économique et social le 4 août 1967.[6] Elle était en outre fondée sur une résolution de l'Assemblée générale du 20 décembre 1965, qui se référait aux travaux de CNUCED I ainsi qu'à certaines recommandations antérieures sur l'encouragement à la circulation internationale des capitaux privés.[7]

La résolution d'ECOSOC indiquait que la tâche du Groupe d'experts à constituer était d'étudier les moyens et les méthodes les plus appropriées pour faciliter la conclusion de conventions fiscales entre les pays développés et les pays en voie de développement, y compris la formulation si nécessaire, de certaines lignes directrices et de certaines techniques pouvant être utilisées dans ces conventions fiscales et être acceptées par les

4. *Bulletin for International Fiscal Documentation* (April 1969).

5. Au sujet de l'historique, c.f. Mitchell B. Carroll, «International Tax Law», *The International Lawyer*, Volume 2, numéro 4 (juillet 1968), pages 692-721. c.f. également volume 3, numéro 1 (octobre 1968).

6. Résolution d'ECOSOC 1273 (XLIII), reprise dans l'annexe I du *Premier rapport du Groupe d'experts*.

7. Assemblée générale, Résolution 2087 (XX, reprise dans «*Foreign Investment in Developing Countries*», Annexe I, numéro 2, Publication des Nations unies, (E/4446) Sales no. 68.II.D.2.
En Annexe II figure une liste des Etudes et Rapports des Nations unies concernant les investissements étrangers dans les pays en voie de développement. Voir également le rapport du Comité fiscal de l'OCDE «*Fiscal Incentives for Private Investment in Developing Countries*» 1965 et «Development Assistance», 1968, Review OECD. Pour littérature, voir R. M. Bird: «Bibliography on Taxation in developing Countries», The Law School of Harvard University, Cambridge, 1968.

deux groupes de pays, en sauvegardant pleinement leurs intérêts respectifs sur le plan fiscal. Cette dernière phrase paraît très claire, mais la question se pose de savoir si les mots «sauvegardant pleinement» n'impliquent pas une restriction trop importante. Il ressort clairement du préambule de la résolution que l'objectif poursuivi est de trouver un modèle de convention entre les pays développés et les pays en voie de développement qui soit plus approprié, du fait que le modèle traditionnel des accords fiscaux internationaux était conçu dans la perspective des relations entre deux pays développés.

Dans ces conditions, faut-il considérer que le but est d'élaborer une convention qui puisse servir de modèle, parallèlement au projet de l'OCDE, mais cette fois dans la perspective de relations entre pays développés et pays en voie de développement? En d'autres termes: un projet «de Genève», parallèlement au projet de Mexico, au projet de Londres et au projet de Paris? Bien qu'ECOSOC ne l'ait pas exprimé de cette manière, ne sommes-nous pas autorisés à penser que cet organisme a en réalité envisagé cet objectif comme consistant à créer un tel modèle de convention. Le discours inaugural prononcé par M. Stanovnik, Secrétaire exécutif de la Commission économique pour l'Europe, au nom du Secrétaire général, fournit également une indication dans ce sens[8]. Le Groupe d'experts lui-même semble moins ambitieux dans ses objectifs. Tel semble être, du moins, l'état d'esprit de plusieurs de ses membres. Parmi les Considérations générales et Recommandations, nous pouvons lire dans le rapport:[9].

Les membres du Groupe d'experts ont jugé de leur devoir d'explorer et de définir les domaines dans lesquels, en regard aux relations particulières entre pays développés et pays en voie de développement, il fallait aborder les problèmes fiscaux sous un angle autre que celui de la structure conventionnelle établie entre pays développés. Dans plusieurs cas, ils sont arrivés à la conclusion qu'il était souhaitable, voire nécessaire, de s'écarter ainsi de la voie tracée. Ils ont également reconnu que les accords fiscaux bilatéraux entre pays développés et pays en voie de développement ne devaient pas nécessairement suivre un même modèle.

J'ai noté moi-même, dans les paroles qu'ont prononcé M. N. Gordon, des Etats-Unis, et M. K. Locher, de Suisse, qu'ils n'envisageaient pas, à ce stade des travaux, une convention type. Et cependant, à l'heure actuelle, les diversités que l'on rencontre dans les conventions conclues avec les pays en voie de développement sont déjà tellement différentes qu'il semble bien que les pays développés auraient grand intérêt à pouvoir disposer d'une convention type. En réalité, on peut dire, comme il est indiqué en différents endroits du rapport, que le groupe considère comme une tâche essentielle à ce stade des travaux d'étudier les raisons qui sont à la base des différences et d'examiner si un dénominateur commun peut être trouvé.[10] Et cependant, ici et là, le rapport contient (ce qui le rend si intéressant) l'ébauche d'une sorte de vaste négociation multilatérale et, dans certains cas (ce dont nous devons d'ailleurs nous féliciter) les lignes de démarcation ne coïncident pas avec celles qui séparent les pays développés des pays en voie de développement.

Il semble parfaitement compatible avec ce qui vient d'être exposé que le Groupe ait estimé que les résultats essentiels de ses discussions devaient être «de réaliser des progrès considérables à la fois en délimitant les domaines critiques et en recherchant les

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8. c.f. fin du point 8, *Premier rapport du Groupe d' experts*, point 8 (fin).
9. *Premier rapport du Groupe d'experts*, point 16.
10. Idem, point 32.

moyens de faciliter la conclusion de conventions fiscales bilatérales.»[11] Il n'avait aucune intention, à ce stade des travaux, d'adopter des positions définitives ni, en particulier, de prendre des décisions.[12] En outre, dans la conclusion du rapport, il a été souligné une fois de plus que l'on pouvait considérer comme plus important encore que les points sur lesquels un accord avait été réalisé, le fait que l'on ait pu constater l'existence d'une compréhension mutuelle et d'une juste appréciation des différents points de vue exprimés et que ceci ne pouvait que faciliter la conclusion dans l'avenir des conventions fiscales bilatérales.[13]

COMPOSITION DU GROUPE

Selon les termes de référence établis par ECOSOC, le Groupe d'experts devait être composé d'experts et de fonctionnaires des contributions des pays développés et des pays en voie de développement, représentant d'une manière adéquate des régions différentes et des systèmes fiscaux différents. Ils devaient être désignés par leurs gouvernements, mais agir en leur qualité personnelle. Sur les dix-huit pays qui étaient en mesure d'envoyer des représentants, huit étaient des pays développés et dix des pays en voie de développement, ainsi qu'il est indiqué ci-dessous.[14]

Pays développés	*Pays en voie de développement*
Etats-Unis	Argentine
Japon	Chili
Royaume-Uni	Ghana
Suisse	Soudan
Suède	Inde
Pays-Bas	Pakistan
France	Philippines
République fédérale d'Allemagne	Israël
	Tunisie
	Turquie

Au cours des discussions, d'importantes contributions ont été apportées par les pays en voie de développement, notamment par les représentants de l'Inde, du Pakistan et d'Israël. On en retrouve la trace dans les amendements déposés et concernant la convention type de l'OCDE, sur laquelle je reviendrai ultérieurement. Sans vouloir commettre d'injustice, je me permettrai de rappeler que le représentant néerlandais, M. W.H. Van den Berge, membre du Conseil d'Etat néerlandais et ancien Secrétaire d'Etat aux Finances, qui avait été désigné comme rapporteur par le Groupe, ainsi que le très efficace secrétariat et ses conseillers ont apporté une contribution si importante qu'il a été possible d'établir un rapport, lors des derniers jours de la conférence.

PAS D'AFFRONTEMENT ENTRE DEUX CAMPS OPPOSES

D'une manière générale, on peut dire que les pays en voie de développement ont formé un groupe relativement homogène[15], alors que les pays développés ont pris dans certains cas des positions très différentes.[16] Un des points de divergence les plus marqués entre les pays développés a été constaté au cours de la discussion sur le «Tax sparing credit». Cette question a d'ailleurs constitué un des sommets des discussion qui eurent lieu au cours de la deuxième semaine, notamment celle

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11. Idem, point 20.
12. Idem, point 18.
13. Idem, point 114.
14. Pour la définition de la notion de «pays en voie de développement», voir UN Statistical Office Publications, notamment le *Statistical Yearbook*. Voir aussi United Nations, *Trade Prospects and Capital Needs of Developing Countries* (TD/34, supp. 1); *World Bank Annual Report* 1968, p. 31; *Cahiers IFA XLVIIIb* (Paris, 1963).
15. c.f. *Premier rapport du Groupe d'experts*, point 58.
16. c.f. par exemple, idem, points 38 et 49.

qui a opposé le Professeur Surrey, des Etats-Unis, à M. H. Debatin, de la République fédérale d'Allemagne qui ont tous deux évoqué les avantages et les inconvénients du «Tax sparing credit» d'une manière très éloquente et convaincante. On peut trouver une allusion à ce sujet dans la partie VII du rapport — «Moyens d'éviter la double imposition et mesures d'encouragement aux investissements»[17]

Je me permettrai de rappeler ici l'opinion exprimé par le Professeur van den Tempel, président du Comité fiscal de l'OCDE, qui a dans le «tribut» publié en l'honneur de mon prédécesseur à la chaire de législation fiscale et financière de Rotterdam, le Professeur Bernard Schendstok, a rédigé en néerlandais un très intéressant article sur nos relations dans le domaine fiscal avec les pays en voie de développement. Le professeur van den Tempel écrivait ce qui suit au sujet du «Tax sparing credit»:

Cette différence de perspeccive - l'octroi de privilèges particuliers, par opposition à la reconnaissance pure et simple de la compétence de l'autre Etat en matière fiscale - conduit parfois dans les discussions à une confusion absolue dans les termes employés.[18]

On peut dire qu'au cours des discussions de Genève, cet écueil fut évité, ce qui peut être considéré en soi-même comme un succés. A mon avis, Van den Tempel a raison lorsqu'il fait remarquer que les objections les plus sérieuses des Etats-Unis à l'encontre du «Tax sparing credit» ne s'appliquent pas dans le cas des pays développés qui font usage de la méthode d'exemption (op. cit. p. 247).

LA CONVENTION TYPE DE L'OCDE, COMME POINT DE DEPART

Un des problèmes les plus importants rencontrés par le Groupe d'experts était bien entendu de décider sur quelle base les discussions devaient être poursuivies. Devait-on prendre pour base la convention type de l'OCDE de 1963, ou devait-on s'en écarter complètement? En fait, l'excellent Rapport Gumpel avait déjà pris le modèle de l'OCDE comme point de départ en ce qui concerne les différentes sources de revenus, mais il fournissait un grand nombre de renseignements en ce qui concerne les points sur lesquels on s'était écarté de ce modèle dans les conventions entre les pays industrialisés, entre les pays industrialisés et les pays en voie de développement et entre pays en voie de développement eux-mêmes. Grâce à l'attitude très constructive adoptée par les représentants des pays en voie de développement, l'opinion de la majorité a été que, pour reprendre les termes du rapport, le modèle de l'OCDE constituait le meilleur cadre disponible pour les discussions.[19] On disposait ainsi d'une base très solide pour les discussions et ceci a certainement contribué dans une large mesure au succès de la première réunion. Les pays en voie de développement auront sans doute compris qu'en faisant cette concession, ils ne se plaçaient pas au départ dans la situation la plus favorable. Il est donc fort compréhensible que le rapport fasse observer que:

Deux membres ont estimé, cependant qu'en dépit des mérites de la Convention type de l'OCDE, il fallait rechercher des solutions entièrement nouvelles reposant essentielle-

17. c.f. idem points 104 à 107 du premier rapport du Groupe d'experts. Au point 105, c'est bien entendu, un représentant des Etats-Unis qui s'exprime.

18. A.J. van den Tempel, «Onze fiscale betrekkingen met de ontwikkelingslanden», in *Fiscaal-economische opstellen, aangeboden aan Prof. Dr. B. Schendstok* (Alphen a/d Rijn, Holland, Samsom, 1966).

19. *Premier rapport du Groupe d'experts*, point 18. Voir rapport du Comité fiscal de l'OCDE: Projet de convention de double imposition concernant le revenu et la fortune, 1963.

ment sur le principe de l'imposition par le pays de la source. Ils ne pensaient pas que la tâche confiée au Groupe pourrait être accomplie de façon satisfaisante en revisant seulement la teneur de la Convention type.[20] Quiconque se souvient de ce qui s'est passé lors de la phase finale des travaux de la Société des Nations, lorsque les pays de l'Amérique du Sud optèrent pour le principe de l'imposition à la source, n'auront pas de difficulté à reconnaître, dans ces deux membres éloqûents, les représentants de l'Argentine et du Chili! Leur position se situe dans la logique du projet de Mexico. On peut même aller jusqu'à dire, avec Carroll

«Les experts des pays en voie de développement ont repris, pour l'essentiel, en 1968 les mêmes arguments que ceux que leurs prédécesseurs espagnols avaient fait valoir en 1928 en faveur de la reconnaissance du droit exclusif de ces gouvernements aux recettes fiscales produites sur leurs territoires ou, en tout cas, d'un droit de priorité dans ce sens».[21]

Avant de passer à l'examen plus approfondi de certaines sources de revenus, je voudrais formuler une ou deux critiques sur les problèmes de caractère général soulevés par l'important rapport de Genéve du Groupe *ad hoc* des Nations unies des experts fiscaux.

Première critique: les mesures unilatérales n'ont pas retenu suffisamment l'attention

Dès l'époque de la résolution d'ECOSOC établissant le Groupe d'experts, le rôle important que peuvent jouer les mesures unilatérales particulières pouvant être prises, a été, à mon avis, sous estimé. Le préambule exprime l'opinion

...que tous les gouvernements des Etats membres de l'Organisation des Nations unies ont un avantage réel à ce que les mesures unilatérales visant à remédier à la double imposition soient remplacées par des conventions bilatérales ou multilatérales.[22]

L'importance du rôle que peuvent jouer les mesures unilatérales, aussi longtemps qu'il n'existe pas de conventions, n'a pas été suffisamment soulignée. Dans le Rapport Gumpel, on a même été jusqu'à parler du caractère inadéquat des mesures unilatérales («ne suffisent pas») en ce qui concerne la protection contre la double imposition.[23] Quel que puisse être le bien fondé de certaines de ces observations, il convient de remarquer qu'elles ont été faites en se plaçant dans l'optique des pays qui pratiquent le système du crédit.

Van den Tempel a tout à fait raison de faire remarquer que pour les pays en voie de développement la raison de conclure des conventions réside précisément dans le traitement fiscal que l'autre partie, c'est-à-dire le pays industrialisé, leur accorde en ce qui concerne les recettes fiscales tirées des investissements effectués dans le pays en voie de développement. Les facilités qu'il concèdent en matière fiscale seront-elles honorées par le partenaire contractuel? Il estime au demeurant que les conventions ne font qu'entraîner pour ces pays la perte de fonds qui sont déjà modestes au départ.[24] Les buts que poursuit un pays en voie de développement en concluant une convention fiscale sont donc différents de ceux qui inspirent les pays industrialisés. En effet, le principe de la réciprocité ne joue pas non plus. Pour cette raison également, les mesures unilatérales adoptées par les pays développés, notamment dans la mesure où il n'existe pas généralement de dispositions unilatérales applicables à *tous*

20. *Idem*, point 19. Cette opinion est également exprimée aux points 27 et 33, par exemple.
21. c.f. Bulletin, avril 1969, page 164.
22. Résolution d'ECOSOC 1273 (XLIII) reprise dans l'Annexe I du premier rapport du Groupe d'experts.
23. c.f. note 3.
24. c.f. référence 18.

les revenus étrangers, revêtent une grande importance pour les pays en voie de développement. Les Pays-Bas, par exemple, pourraient apporter leur contribution en octroyant des crédits pour les impôts payés dans les pays en voie de développement sur les dividendes, les intérêts versés ou les royalties. En outre, un point important est soulevé par le traitement des pertes définitives sur les établissements permanents et les filiales étrangères.[25] Cette question du traitement international des pertes est extrêmement importante mais complexe. Le Groupe d'experts n'est pas allé plus loin dans l'étude de ce problème et s'est borné à le classer sous la rubrique «autres questions». (Le Groupe est convenu que cette question devait faire l'objet d'une nouvelle étude et d'une nouvelle discussion).[26] Permettez-moi à cet égard d'attirer votre attention sur la conférence donnée par Reinhard Offermann: «Fragen der Ertragsbesteuerung deutscher Direktinvestitionen in Entwicklungsländern», et publiée dans la *Fiscalité du Marché Commun* de décembre 1968. Offermann nous a informé qu'une enquête effectuée parmi les membres d'une fédération d'employeurs allemands a fait apparaître que les arrangements allemands unilatéraux avaient grand besoin d'être améliorés. De même que Van den Tempel, il suggère des moyens pour éviter de dévoiler tous ses atouts avant d'entamer les futures négociations sur les conventions:
a) Dans une loi traitant de l'imposition des revenus produits dans les pays en voie de développement, les mêmes concessions en matière fiscale devraient être fixées que celles qui sont accordées aux pays en voie de développement aux termes d'une convention; la loi serait applicable pendant une période déterminée.
b) La loi ne serait pas applicable à l'égard de certains pays en voie de développement nommément désignés, avec lesquels des conventions seraient conclues dès que possible.[27]
Offermann soulève également le problème des pertes. En outre, il convient de noter les arguments qu'il avance en faveur de l'augmentation du nombre des fonctionnaires dans les services des Ministères des Finances qui s'occupent des questions fiscales sur le plan international. Cette remarque vaut certainement pour les Pays-Bas.

Deuxième critique: coordination insuffisante avec la politique générale en matière d'aide économique

Il convient de remarquer qu'il existe une certain distinction entre l'étude
a) des systèmes fiscaux effectivement appliqués dans les pays en voie de développement
et
b) celle des problèmes de double imposition qui se posent entre pays développés et pays en voie de développement.
Bien entendu, il existe un lien entre ces deux questions, notamment en ce qui concerne le problème de l'encouragement aux investissements dans les pays en voie de développement. On peut dire que pour les économistes, les spécialistes du développement et beaucoup d'autres experts, les systèmes fiscaux en usage dans les pays en voie de développement revêtent un intérêt primordial. Un grand nombre d'études sont et ont été consacrées à ce problème. Elles soulévent un grand intérêt dans de nombreux milieux. Malheureusement, on ne peut en dire autant des problèmes qui concernent la double imposition. Le nombre de personnes qui s'intéressent à ce sujet est généralement limité. Ceci peut s'expliquer par le fait qu'il s'agit de problèmes revêtant un caractère hautement technique. Il n'en faut pas moins le regret-

25. c.f. référence 18.
26. *Premier rapport du Groupe d'experts*, point 112 (d).
27. c.f. *Rapport Gumpel*, points 31 et 42 (fin).

ter.[28] Aussi bien du point de vue scientifique que du point de vue politique, il est souhaitable que l'intérêt pour ces matières et la connaissance des problèmes concernant la double imposition se généralisent. Pour ma part, je ne suis pas tout à fait d'accord à ce sujet sur l'une des affirmations contenues dans le rapport général (qui est par ailleurs excellent et qui fera date dans ce domaine) préparé par M. Klimowsky pour le congrès de Jérusalem de 1961 et concernant les mesures unilatérales destinées à éviter la double imposition, notamment en ce qui concerne les aspects fiscaux des relations entre les pays exportateurs de capitaux et les pays en voie de développement. (*Cahiers* vol. XLIII) M. Klimowsky écrit ce qui suit (page 43):

«En élaborant le présent rapport, il est devenu de plus en plus évident qu'il fallait adopter une position résolue et exclure du traitement du sujet toutes délibérations et propositions qui risqueraient d'acquérir de l'importance pour motiver des opinions générales exprimées dans les débats publics à propos des privilèges et obligations des deux groupes de pays et les relations existant entre eux».

Si je comprends bien, l'idée qui prédomine dans ce domaine est que les problèmes ne peuvent être résolus que si on les situe dans un contexte plus large. A mon avis le premier rapport du Groupe *ad hoc* d'experts fiscaux n'offre pas encore de possibilités suffisantes à ce sujet. Les pays en voie de développement font valoir que les conventions fiscales devraient être incorporées dans les systèmes fiscaux des pays signataires et considérées dans le contexte de la politique générale en matière d'aide économique aux pays en voie de développement, mais les pays développés ne manifestent aucune réaction, ni dans un sens positif, ni dans un sens négatif.[29] Bien entendu, un accord général *a été* enregistré sur le fait que les objectifs et les termes des conventions fiscales entre les pays développés et les pays en voie de développement devraient être *examinés* dans le contexte des relations économiques particulières entre ces pays et en tenant compte de la nécessité d'encourager les investissements étrangers dans les pays en voie de développement.[30]

Un bon exemple récent qui prouve à quel point ce problème est lié à ces derniers aspects peut être trouvé dans le rapport élaboré par l'ancien Secrétaire Général de l'OTAN, le néerlandais Dirk U. Stikker, pour CNUCED II — *Le rôle de l'Entreprise privée dans les Investissements et dans l'Encouragement aux Exportations dans les Pays en voie de Développement.*[31]

Les problèmes en cause ne peuvent être tranchés à l'aide de considérations d'équité ou de concepts abstraits de justice.[32] Le concept de «partnership for progress» s'applique également ici.[33]

On peut se féliciter de retrouver un esprit pratique en parcourant le rapport du Groupe *ad hoc* des experts fiscaux. Examinons maintenant ce rapport brièvement en ce qui concerne les sources particulières de revenus.

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28. Lutz Köllner, «Grundfragen der Finanzpolitik in Entwicklungsländern», dans *Schmollers Jahrbuch*, volume 83, I (1963) et dans Bruno Fritsch (ed.), *Entwicklungsländer* (Köln/Berlin, Neue Wirtschaftliche Bibliothek, 1968) souligne l'importance des conventions sur la double imposition. Voir aussi R. Goode, «Taxation and Economic Development», *Proceedings of the 46th Annual Conference of the National Tax Association.* USA and in *Readings in Economic Development* (Belmont, 1963).

29. *Premier rapport du Groupe d'experts*, points 25 à 26 - c.f. point 105 (fin).

30. *Idem*, point 22.

31. Document de l'ONU (TD/35/Rev. 1) Sales no. 68.II.D.9 - Chapitre IV - «Taxation Aspects» est également publié dans le «*Bulletin for International Fiscal Documentation*» (septembre 1968).

32. *Rapport Gunpel*, point 53.

33. Voir Préface de Cabot Lodge à l'ouvrage de Pierre Uri, «*Partnership for Progress*» (1963).

REVENUS INDUSTRIELS ET COMMERCIAUX

La première semaine de travail du Groupe d'experts a été consacrée, pour l'essentiel, à l'étude des différents aspects des revenus industriels et commerciaux. Ici, nous devons mentionner un premier point important sur lequel un accord a été réalisé. A part les deux représentants sud-américains déjà mentionnés, il a été généralement convenu que seuls devaient être imposés les bénéfices obtenus par l'intermédiaire d'un établissement stable ou imputables de toute autre manière à un tel établissement.[34]

Bien entendu, cet accord sur un point fondamental ne signifie pas qu'un accord a été également réalisé sur la définition de la notion d'établissement stable ou sur le problème de l'attribution des bénéfices. Ce ne fut en aucune manière le cas. Comme beaucoup d'entre vous le savent, le paragraphe d'introduction de l'article 5 de la convention type de l'OCDE de 1963 définit le terme «établissement stable» d'une manière très large comme «une installation fixe d'affaires où l'entreprise exerce tout ou partie de son activité». Cette définition générale est complétée par une liste d'exemples destinés à l'illustrer. Cette liste ne doit pas être considérée comme exhaustive. En suivant le même processus, il y a une règle générale comportant des exemples décrivant des activités ou installations qui ne constituent pas un établissement stable.

L'ensemble de la question, avec l'historique du problème et un court résumé de la situation qui règne dans un certain nombre de pays, est exposé de manière concise dans le Rapport Gumpel (points 96 *et suivants*) qui passe également en revue les clauses que l'on peut rencontrer dans les conventions les plus récentes dans ce domaine.

A la réunion de Genève, les représentants des pays en voie de développement ont introduit un certain nombre d'amendements en vue d'élargir la notion d'établissement stable contenue dans la convention type de l'OCDE. Les représentants des pays développés les sont mis en garde contre la tendance à saper la notion d'établissement stable, mais ont reconnu qu'il convenait de réaliser un certain équilibre entre les différents points de vue.[35] La bonne volonté dont ils ont fait preuve en admettant ce point de vue—déjà exprimé par un grand nombre de ces pays dans les conventions conclues avec les pays en voie de développement—a fourni matière à une discussion animée sur les différents amendements à la convention type de l'OCDE. Je me bornerai ici à examiner un petit nombre de ces amendements et à relever les points les plus marquants des discussions.

Le premier amendement proposé par l'Inde avait trait au chantier de construction ou de montage et contenait deux suggestions. La première suggestion était de fixer un délai de six mois (au lieu des douze mois prévus par la convention type) en ce qui concerne la construction ou les projets de montage ainsi que les activités de direction dans ce domaine. La seconde suggestion était de reconnaître au pays dont provenaient les capitaux le droit d'imposer les bénéfices tirés de l'installation, de la mise en place ou de services du même genre, fournis à l'occasion de la vente des machines ou de l'équipement, de la même manière que si ces services constituaient un établissement stable, à condition que les frais d'installation soient supérieurs à 10 pour cent du prix de vente des machines ou de l'équipement livrées.

La première suggestion concernant un délai de six mois a rallié les suffrages (et ceci prouve un fois de plus d'une manière intéressante qu'il n'y avait pas deux camps distincts) de

34. *Premier rapport du Groupe d'experts*, point 31.
35. *Idem*, point 35 (fin).

certains des représentants des pays développés. Agissant dans l'esprit des termes employés par Cabot Lodge, que j'ai déjà cités, ils ont déclaré: «Comme aucune question de principe ne se posait, une attitude plus pragmatique semblait justifieé.[36]» Sur ce point, le Rapport Gumpel indique que ce délai a déjà été ramené à six mois dans onze conventions, et à trois dans quatre autres, alors que quatre autres conventions ne prévoient aucun délai. Cette question de délai me paraît constituer un de ces points sur lesquels un compromis peut être réalisé par voie de négociations bilatérales. La même observation s'applique à une clause contenue dans l'amendement israélien et selon laquelle «on peut considérer qu'il y a établissement stable si une entreprise détient un nombre important de machines ou d'importants équipements destinés à être utilisés sur le territoire de l'autre partie contractante. Cet amendement est d'ailleurs peu satisfaisant sur le plan rédactionnel.[37]

La deuxième proposition de l'Inde concernant le droit d'imposer les bénéfices tirés des travaux d'installation, si les frais d'installation dépassent un certain pourcentage du prix de vente de l'équipement, me paraît avoir une portée plus grande. En fait, cette proposition me paraît incompatible avec la notion d'établissement stable.[38] Dans ce même contexte, je voudrais attiter votre attention sur la déclaration faite par M.O.P. Vaish, de l'Inde, au cours de la discussion sur le second sujet, lors de notre congrès de Stockholm en 1967.[39]

D'autres amendements importants déposés par l'Inde, Israël et le Pakistan concernaient les paragraphes 3, 4 et 5 de l'article 5 de la convention type de l'OCDE. J'aimerais attirer votre attention sur deux points seulement. Le premier point concerne les agents et le second les compagnies d'assurance. Ces points sont également intéressants car, sur ces deux questions, les pays en voie de développement ont obtenu le soutien de pluseurs représentants des pays développés.

La convention type de l'OCDE exclut de la notion d'établissement stable tout agent salarié et non habilité à passer des contrats ainsi que tout agent non salarié agissant dans le cadre normal de ses activités. L'amendement le plus ambitieux a été déposé par le Pakistan et concernait le cas de l'agent, salarié ou non, dont la tâche habituelle ne consiste à recueillir des commandes que pour une entreprise ou pour un groupe d'entreprises associées.[40] Permettez-moi de rappeler la résolution du Congrès de Stockholm de 1967, qui ne contenait aucune observation concrète sur ce dernier point,[41] mais comprenait cependant le passage suivant à la section III:

«Le Congrès reconnait que l'imposition des entreprises ayant une activité dans plusieurs pays pose des problèmes particuliers aux pays en voie de développement en sorte qu'il conviendra d'apporter certains aménagements à la définition standard de l'établissement stable dans le cas de conventions conclues avec ces pays; estime toutefois qu'une harmonisation de la définition de l'établissement stable

36. *Idem*, point 38 (fin).

37. L'amendement se lit comme suit. L'expression «établissement stable» comprend:

(1) . . .

(2) Qui maintient d'importants équipement ou machines pour son usage dans l'autre Etat contractant. C.f. également la convention non ratifiée entre Israël et les Etats-Unis, signée en 1965 (*Rapport Gumpel*, point 137 (fin)).

38. *Premier rapport du Groupe d'experts*, point 42.

39. *Cahiers IFA, tome LIIa*, page 103.

40. A mon avis, l'amendement de l'Inde ne se rapporte qu'aux agents salariés. C.f. également la fin de II, paragraphe 1, de l'amendement du Pakistan.

41. Cahiers IFA, Tome LIIa, page 128. La section IV, point 1 de la résolution mentionne un autre amendement déposé à la fois par l'Inde et par le Pakistan (c.f. *Premier rapport du Groupe d'experts*, point 53 (fin).

est souhaitable dans ce cas également et exprime en conséquence le voeu que des travaux soient entrepris par un organisme international en vue de l'élaboration d'une définition uniforme, tenant équitablement compte des intérêts des Etats en présence tout en encourageant les relations économiques sur le plan international.»

J'estime que, précisément dans ce secteur des échanges, il serait tout à fait approprié que les pays en voie de développement fassent certaines réserves. Ce point devrait faire l'objet d'une nouvelle étude de la part de l'IFA et du Groupe d'experts (notamment la question de savoir si la définition devrait comprendre les agents qui travaillent pour une seule firme, qu'ils détiennent ou non un stock de marchandises).

Dans la définition qu'elle donne de l'établissement stable, la convention type de l'OCDE ne mentionne pas les compagnies d'assurance. En fait, dans un grand nombre de conventions, il existe des clauses concernant les compagnies d'assurance, même dans les conventions conclues entre pays développés. Un amendement soumis pas l'Inde contenait une proposition selon laquelle ces compagnies devraient être considérées au sein de l'Etat comme des établissements stables, si la compagnie considérée perçoit des primes sur le territoire de cet Etat au titre de l'assurance de risques situés sur ce territoire, par l'intermédiaire d'un employé ou d'un représentant possédant un statut de salarié, même s'il n'est pas normalement habilité à conclure des contrats. Cet amendement va plus loin que le texte du rapport pourrait le faire croire (point 48), car il y a également présomption d'établissement stable si la chose assurée se trouve sur le territoire de l'Etat, même si les primes sont payées autre part. Entre outre, les opérations de réassurance se trouveraient exclues.

Il convient de noter que, sur ce point, le rapport ne fait pas état des arguments formulés par ceux qui étaient opposés à cet amendement. Il est simplement indiqué qu'en ce qui concerne ce problème, les membres des pays développés ont adopté une position différente. Toutefois, certains d'entre eux n'étaient pas opposés au principe contenu dans cette proposition et seraient disposés à donner leur accord sur ce point si une méthode raisonnable pouvait être définie en ce qui concerne le problème de l'attribution des bénéfices (point 49). Bien qu'il s'agisse d'un problème de caractère technique, je crois qu'il devrait également faire l'objet d'une nouvelle étude.

En ce qui concerne l'attribution des bénéfices industriels et commerciaux à un établissement stable et la définition de ces bénéfices, on doit constater que le rapport du Groupe d'experts est peu loquace, compte tenu de l'importance de ces questions. Cependant, des amendements importants et détailles à l'article 7 de la Convention type de l'OCDE ont été déposés par l'Inde sur la table en fer à cheval de l'une des salles de conférence du Palais des Nations.

En ce qui concerne la définition des bénéfices industriels et commerciaux, le groupe s'est borné à déclarer qu'un accord avait été enregistré sur le fait que la notion de bénéfices industriels et commerciaux devait faire l'objet d'un nouvel examen.[42] Pratiquement, il en va de même en ce qui concerne la déduction des frais et la détermination des bénéfices. L'accord semble avoir été plus net en ce qui concerne le rejet de la doctrine de «la force d'attraction» en faveur de la règle du «lien effectif», telle qu'elle a été acceptée dans le projet de l'OCDE ainsi qu'aux Etats-Unis depuis l'entrée en vigueur de la loi sur les investissements étrangers de 1966. (La Foreign Investors Tax Act)[43].

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42. *Premier rapport du Groupe d'experts*, point 55 (fin).

43. Voir: «*The force of attraction doctrine in the US Tax Law today*» par Sidney J. Roberts (Bulletin

Si nous essayons de porter un jugement sur les résultats des discussions de Genève en ce qui concerne les bénéfices industriels et commerciaux, nous constatons qu'un accord, au sens strict du terme, ne semble avoir été réalisé plus ou moins que sur le principe, important en lui-même, selon lequel seuls doivent être imposés les bénéfices (et dans cette seule mesure) découlant des activités d'un établissement stable ou imputables de toute autre manière à un tel établissement, quelle qu'en soit la nature. Mais ce qui est dit dans les observations finales est tout aussi vrai:

«Le Groupe a examiné un grand nombre de questions et a accompli des progrès considérables pour ce qui était d'identifier les problèmes et d'analyser et de réduire les points de désaccord». (point 114)

Dans ce domaine, le Groupe d'experts devra faire preuve de beaucoup plus d'imagination et de résolution s'il veut parvenir à des résultats.

En revanche, et on peut s'en étonner, il en a été tout autrement à Genève en ce qui concerne l'imposition des services personnels.

SERVICES PERSONNELS

En ce qui concerne les services personnels indépendents (activités professionnelles) et après une discussion très approfondie, les points de vue divergents ont été réconciliés et incorporés dans un texte complètement nouveau qui remplace l'article 14 de la Convention type de l'OCDE. Cet accord a été facilement réalisé du fait que ce nouveau texte offre le choix entre deux solutions.

Bien que certains points puissent encore faire l'objet de discussions ultérieures, l'article 15 de la Convention type de l'OCDE a été accepté. Je vous demanderai de consulter le rapport pour ce qui concerne les discussions qui ont eu lieu relativement aux professeurs, étudiants et directeurs, qui sont certainement nombreux dans cette salle, ainsi que relativement aux artistes et aux athlètes qui —peut être convient-il de le regretter— sont trop faiblement représentés ici.

BENEFICES TRANSPORTS MARITIMES

Avant de passer à l'examen de la très importante question du revenu des investissements (intérêts, royalties et dividendes) je voudrais faire quelques observations sur les transports maritimes et les transports aériens, qui ont une telle importance pour les communications entre les peuples et les nations, comme nous pouvons le constater à nouveau à l'occasion de cette conférence.

Selon l'article 8 de la Convention type de l'OCDE, les bénéfices tirés des opérations des navires ou des aéronefs en trafic international ne seront imposés que par le pays sur le territoire duquel est situé le siège de la direction effective de l'entreprise. Les conventions conclues entre pays industrialisés suivent cette règle étroitement. En outre, dans la majorité des cas, les traités conclus entre les pays développés et les pays en voie de développement attribuent le droit exclusif d'imposer les bénéfices tirés des opérations des navires au pays dans lequel se situe le siège de la direction de l'entreprise. Dans un petit nombre de conventions, on a retenu le principe de l'imposition à la source, déduite de l'impôt perçu dans le pays d'origine de l'opérateur. Ce groupe comprend les conventions du Pakistan avec la République fédérale d'Allemagne de 1958, et avec la Suède, de la même année. Dans un autre type de convention, le pays réduit habituellement de moitié l'impôt qu'il perçoit sur les bénéfices tirés des transports maritimes internationaux. Cette méthode est suivie dans les conventions avec l'Inde et

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de la International Fiscal Documentation (novembre 1967). C.f. S.S. Surrey, «*Past and Prologue in tax policy*», Canadian Tax Journal (mars/avril 1969).

avec Ceylan. Comme l'indique le rapport du Groupe d'experts toutes ces solutions portent le reflet de considérations relatives à l'équilibre de la balance des paiements ou sont peut-être, pour certaines régions, la conséquence de compromis plutôt que la mise en application de certains principes, et aucune ne peut être considérée comme un précédent solide pour les conventions fiscales qui seront conclues dans l'avenir. (point 178)

Au cours de la discussion qui a eu lieu au sein du Groupe d'experts, un accord s'est fait jour pour retenir la règle de l'OCDE pour les transports aériens, mais non pour les transports maritimes. Seul un représentant d'un pays en voie de développement était disposé à accepter cette règle également pour les bénéfices tirés des transports maritimes. Les représentants de plusieurs autres pays en voie de développement ont déclaré qu'ils n'étaient pas en mesure de renoncer aux recettes, aussi faibles soient-elles, tirées de l'imposition des entreprises étrangères de transports maritime, aussi longtemps que leur propres activités dans ce domaine n'auront pas atteint un stade supérieur de développement. La proposition faite par un représentant d'un pays en voie de développement d'imposer ces bénéfices sur une base de moitié—moitié a été longuement discutée. Les représentants de plusieurs pays développés ont fermement soutenu la solution adoptée dans l'article 8, en expliquant que les entreprises de transports maritimes ne devraient pas être menacées de subir l'application de la législation fiscale des nombreux pays dans lesquels les opérations s'effectuent et que l'imposition au lieu de la direction effective de l'entreprise était également préférable du point de vue des différentes administrations fiscales. Si chaque pays se mettait à imposer un certain pourcentage des bénéfices d'une compagnie de navigation, calculé selon sa propre réglementation, le total de ces pourcentages pourrait fort bien dépasser le revenu total de l'entreprise. Il s'agit d'un problème grave, notamment du fait que, dans les pays en voie de développement, les impôts sont souvent très élevés et que, d'autre part, les bénéfices totaux des compagnies de navigation sont souvent très modestes. (point 66)

Dans cet ordre d'idées, on pourrait mentionner le rapport publié dans *Hansa* de juin 1969, selon lequel, d'après l'Association des armateurs allemands, les compagnies de navigation allemandes sont soumises, dans plus de vingt pays, à l'application de la législation fiscale qui y est en vigueur. Le rapport indique qu'il n'existe pas de convention de double imposition avec l'Australie, le Vénézuela et Hong Kong et que la clause des 50% figure dans les conventions avec Ceylan et l'Inde. Pour autant que je sache, on peut trouver les informations les plus récentes sur ce domaine particulier de la politique fiscale d'un grand nombre de pays dans «*Double Taxation of Non-resident Shipping*», une publication sous la forme de feuilles volantes de la Conférence maritime et baltique internationale, dont le siège est à Copenhague, communiquée aux membres de cette conférence en octobre 1968 avec la remarque qu' «aucune responsabilité n'est assumée quant à la rectitude des indications fournies».

J'examinerai maintenant seulement deux catégories de revenus des capitaux investis, les redevances et les dividendes.

REDEVANCES

Le rapport est entièrement bref sur la question des royalties. Un grand nombre de questions revêtant une réelle importance sur le plan pratique et concernant les redevances de brevets ne sont abordées qu'en surface. Or, on a pu constater une évolution rapide dans ce domaine. Il est incontestable que, pour certaines firmes importantes des pays développés, l'importance des royalties a beaucoup

augmenté au cours des dernières années. On enregistre, d'autre part, une tendance chez certaines firmes des pays en voie de développement, qui se bornaient jusqu'ici à acheter des produits auprès des pays développés et qui maintenant avec l'aide du know-how étranger entreprennent de les fabriquer elles-mêmes sous contrat. On peut se féliciter d'une telle évolution, mais elle signifie également que les importantes dépenses engagées au titre de la recherche par la firme exportatrice devront être compensées non seulement par le produit des ventes, mais aussi par les revenus découlant des contrats. Le Groupe d'experts devra certainement étudier d'une manière plus approfondie les aspects juridiques et économiques des royalties ainsi que des redevances dans le cas des accords de know-how.

Reste la question de savoir si le point 93 du rapport est entièrement exact: Il a généralement été reconnu que les principes de base applicables à l'imposition des redevances étaient semblables à ceux qui sont applicables pour les intérêts. A mon avis le problème des royalties doit être traité en fonction de ses particularités. Très judicieusement, le Groupe lui-même souligne un certain nombre de «facteurs particuliers». De même, il fait également remarquer que la firme fournissant des services sous contrat se trouve souvent dans une forte position. Elle peut exiger l'insertion dans le contrat d'une clause garantissant une rémunération nette. En conséquence l'imposition à la source serait supportée par le détenteur de la licence. Il s'en suivrait un désavantage pour la position de la firme dans le pays en voie de développement. Ainsi que M. Locher de Suisse, l'a fait observer au cours de la discussion, les bénéfices plus élevés que cette firme réaliserait du fait qu'elle a la possibilité de disposer du brevet ou du know-how pourraient être soumis au taux maximum d'imposition par le pays en voie de développement. Sur ce point particulier, les intérêts des pays développés et des pays en voie de développement semblent, dans une large mesure, cheminer parallèlement. Certains représentants des pays en voie de développement semblent donc partir d'un point de vue raisonnable lorsqu'ils expriment l'opinion que, compte tenu du fait que l'usage des brevets et d'une technologie avancée est indispensable pour le développement, une réduction du taux applicable aux royalties serait opportune, bien que l'on ne puisse faire abstraction des aspects de ce problème sur le plan de la technique fiscale. (point 95)

Toute aussi importante que la question du taux de l'impôt est celle de savoir si, dans le cas de l'imposition à la source, il sera tenu compte des frais devant être engagés par la firme qui fournit les services. Si l'on n'en tenait pas compte (ou si l'on n'en tenait que partiellement compte) et si le pays dont proviennent les capitaux était alors sollicité d'octroyer un crédit au titre de l'impôt étranger sur la redevance brute, ainsi que l'Inde l'a suggéré, ce serait, comme l'a fait remarquer M. Van den Berge, rapporteur du Groupe, vraiment trop demander du pays de résidence.

C'est en grande partie grâce à l'insistance du Professeur Surrey, des Etats-Unis, qu'une enquête minutieuse devra tout d'abord être effectuée sur ces faits. De là, les vagues résultats obtenus sur ce point.

Les observateurs auraient pu s'étonner de constater que les membres du Groupe n'étaient pas très forts en arithmétique élémentaire. Une tentative (qui a d'ailleurs échoué) de comparer l'impôt calculé sur une base brute et celui calculé sur une base nette a entraîné une amusante confusion. Il en est souvent ainsi dans les conférences internationales, lorsque la fatigue commence à se faire sentir chez les négociateurs.

DIVIDENDES

Malheureusement, la section du rapport consacrée aux dividendes n'offre qu'un pâle reflet des discussions qui ont eu lieu sur cette question qui revêt une importance capitale pour toute convention sur la double imposition[44]. Le Groupe fut loin de parvenir à un accord. Sur ce point, dans le rapport lui-même, l'article de la Convention type de l'OCDE concernant les dividendes n'est même pas mentionné.

De façon très catégorique et contrairement à la position qu'ils avaient adoptée en ce qui concerne le problème des royalties, les représentants des pays en voie de développement ont déclaré qu'en principe, les dividendes devaient être imposés uniquement par le pays dont proviennent les capitaux. Plusieurs représentants des pays développés ont exprimé l'opinion qu'en ce qui concerne les filiales de leurs sociétés, installées dans les pays en voie de développement, ces pays devraient se borner à imposer les bénéfices des filiales. Cependant, nous pouvons lire à la fin de cette section du rapport:

«Les experts de pays développés ont déclaré que, tout en restant fidèles à leur principe de base, ils n'en étaient pas moins disposés à accepter une retenue à la source, de montant limité, sur les dividendes qu'une société verse à une autre dans les pays en voie de développement.[45]

Ainsi, ils vont plus loin que la Chambre Internationale de Commerce qui a déclaré à plusieurs reprises que l'assujettissements à des impôts supplémentaires des dividendes que des sociétés versent à d'autres sociétés n'est jamais souhaitable, que les sociétés intéressées se trouvent dans le même pays ou dans les pays différents.[46]

J'estime pour ma part, qu'il est très important que cette question des dividendes entre sociétés soit réglée d'une manière relativement uniforme entre les pays développés et les pays en voie de développement. En vue de parvenir à un compromis sur ce point, et compte tenu également de l'attitude assez souple des représentants des pays en voie de développement sur la question des royalties, il semble raisonnable d'accepter un impôt limité, prélevé à la source sur les dividendes entre sociétés, ainsi que cela a été prévu dans un grand nombre de conventions. Cependant, nous ne devons pas oublier ce que la Chambre de commerce internationale a une fois déclaré:

«On ne peut forcer les capitaux privés à s'investir dans les pays moins développés; il faut que ceux-ci les attirent».[47]

A cet égard, je n'ai pas été en mesure de retrouver dans le rapport une observation qui avait été faite par le représentant du Pakistan, qui a invité les autres pays en voie de développement à ne pas imposer trop durement les dividendes entre sociétés et a fait remarquer que le Pakistan avait diminué cet impôt au cours des années. Dans une autre observation, faite cette fois par l'un des représentants des pays développés, il a été dit qui personne ne pouvait chiffrer le montant des capitaux que *ne sont pas* investis dans les pays en voie de développement, de crainte d'une charge fiscale éventuellement trop lourde.

Si nous considérons le revenu des investissements comme un tout, il apparaît très clairement que l'étude des diverses possibilités n'a pas donné jusqu'ici beaucoup de résultats. Il est également intéressant de noter qu'aucun amendement à la Convention type de l'OCDE n'a été proposé à ce sujet. D'autres

44. Voir: *Panel on foreign investment in developing countries*, Amsterdam, 16–20 février 1969, Document de l'ONU (E/4654 St/ECA/117), Sales No E69 II D12, point 111.

45. *Premier rapport du Groupe d'experts*, point 101.

46. *Rapport Gumpel*, point 76.

47. Chambre de commerce internationale, Elimination des doubles impositions - Nouvelles étapes, page 15.

études sur un grande nombre de points sont encore nécessaires, notamment sur la question de savoir si l'impôt doit être perçu sur les royalties (et intérêts) nets ou bruts. Néanmoins, en ce qui concerne (les intérêts) royalties et dividendes, on ne peut pas dire qu'il n'y ait aucun espoir de parvenir encore à des solutions de compromis.

CONCLUSIONS

Dans mon exposé sur les conventions fiscales entre pays développés et pays en voie de développement, j'ai dû nécessairement me limiter à l'examen de quelques-uns des principaux problèmes. J'espère cependant avoir réussi à attirer votre bienveillante attention sur les importants travaux entrepris par le Groupe d'experts des Nations unies sur les conventions fiscales. Un comité s'est réuni à Amsterdam du 16 au 20 février 1969, sous les auspices des Nations unies, pour examiner le problème des investissements étrangers dans les pays en voie de développement. Il était composé de personnalités dirigeantes des gouvernements des pays en voie de développement, de personnalités représentatives des milieux d'affaires des pays industrialisés et de fonctionnaires d'organisations internationales. Dans la déclaration approuvée par le Comité, le Groupe *ad hoc* d'experts fiscaux est désigné comme étant l'organisme qui devrait examiner les problèmes particuliers de caractère fiscal.[48] Quelle peut être la contribution de l'IFA dans ce domaine, pour lui permettre de jouer son rôle consultatif auprès des Nations unies? Selon une résolution du 6 juin 1969, adoptée par le 46ème session du Conseil d'ECOSOC, le Secrétaire général a été prié de convoquer une nouvelle réunion du Groupe d'experts pour le début de 1970.[49] Le groupe, lui-même, aurait souhaité pouvoir se réunir plus tôt, et l'avait même recommandé avec insistance. Néanmoins, ceci présente peut-être l'avantage de nous donner plus de temps pour préparer les travaux. A l'occasion du Congrès de Jérusalem de l'IFA, en 1961, un groupe d'étude spécial avait été constitué pour examiner ces problèmes, et la résolution du Congrès de Paris de 1963 y fait référence. Je me permettrais de suggérer que ce groupe soit ressuscité et invité à soumettre des documents sur un certain nombre de points particuliers au Groupe des Experts fiscaux d'ECOSOC.

Je voudrais conclure mon exposé par une citation de l'Acte finale de CNUCED I: «A une époque où les progrès scientifiques ont mis à la portée de l'homme une abondance sans précédent, il est indispensable que les courants d'échanges mondiaux contribuent à éliminer les disparités considérables qui existent encore entre les nations sur le plan économique.»

48. C.f. note 44.
49. Voir Annexe.

Annexe

Résolution de l'ECOSOC

1430 (XLVI) Conventions fiscales entre pays développés et pays en voie de développement

Le Conseil économique et social,
Rappelant sa résolution 1273 (XLIII) du 4 août 1967 concernant les conventions fiscales entre pays développés et pays en voie de développement,
Ayant examiné avec satisfaction le rapport intérimaire du Secrétaire général (E/4630) ainsi que le rapport du Groupe spécial d'experts des conventions fiscales entre pays développés et pays en voie de développement (E/4614) constitué par le Secrétaire général en application de la résolution susmentionnée,
Notant avec intérêt que le Groupe d'étude des Nations Unies des investissements étrangers dans les pays en voie de développement, qui s'est réuni à Amsterdam du 16 février au 20 février 1969, a recommandé que des questions fiscales particulières soient étudiées par le Groupe spécial d'experts des Nations Unies sur les conventions fiscales entre pays développés et pays en voie de développement,
Réaffirmant l'intérêt de conventions fiscales entre pays développés et pays en voie de développement en tant qu'instruments propres à faciliter le transfert de capitaux et de techniques et, de ce fait, à accélérer la croissance économique dans les pays en voie de développement,
Notant avec inquiétude que les progrès dans ce domaine sont cependant lents et marquent un retard par rapport à l'expansion du commerce international et à la nécessité d'assurer un taux de croissance plus régulier dans les pays en voie de développement,
Reconnaissant que la notion de réciprocité qui est appliquée dans les conventions fiscales entre pays développés n'est pas également valable lorsque les Etats contractants en sont à des stades très différents de développement économique et que les intérêts respectifs des Etats contractants en matière de recettes fiscales devraient être pris en considération dans les conventions fiscales,
Rappelant sa résolution 486 (XVI) où il est recommandé que le «principe du pays de la source» soit le fondement principal des conventions fiscales entre pays développés et pays en voie de développement,
Conscient de ce que le Groupe spécial de travail a constitué une occasion exceptionnelle d'échanger des opinions et d'étudier des formules nouvelles et plus appropriées,
Considerant que les travaux ont porté sur un domaine étendu et que des progrès sensibles ont été accomplis au cours de la première série de discussions sur les conventions fiscales en ce qui concerne la détermination, l'analyse et l'atténuation des divergences de vues,
Convaincu que l'esprit de compréhension et de coopération qui prévaut facilitera considérablement l'étude des questions non résolues, préparant ainsi la voie à une entente plus large et à des conventions fiscales mieux équilibrées,
1. *Prie* le Groupe de poursuivre ses travaux, tels qu'ils sont définis au paragraphe 1 de la résolution 1273 (XLIII);
2. *Prie* le Secrétaire général de convoquer le Groupe d'experts au début de 1970 et de prendre les dispositions financières voulues pour permettre au Groupe de poursuivre ses travaux;
3. *Invite* le Secrétaire général à rendre compte au Conseil des résultats de la prochaine réunion du Groupe spécial.

DR. E. W. KLIMOWSKY:

INTERNATIONAL ESTATE TAXATION

Israel as a case study within the general framework

A. INTRODUCTION

1. Double taxation originates from the clash of two or more taxation sovereignties. These sovereignties are usually original ones, viz. those of states, and not derivative ones, viz. bestowed upon municipal or similar authorities by the state.

Whilst in the Soviet sector the theory of the fundamentally "limited sovereignty", politically and otherwise, tries to get the upper hand, the Western oriented states cling to a concept of a basically equal and unlimited sovereignty according to which only the free decision of a state may limit or otherwise modify the exercise of its deliberations and activities. The application of this principle is not disproved but rather clearly evidenced by the conclusion of bilateral or multilateral treaties, including those for the avoidance of double taxation, by sovereign states.

2. The objects of taxation in all those cases may be:

(a) specific activities, such as the production of income or its receipt in the case of income or capital gains tax, or the amount of tax may be moderated by certain functional methods used in the production of profits as in the cases of laws for the encouragement of investment or in the application of selective employment tax;

(b) specific forms of property as in the net wealth tax or inheritance tax.

3. The chargeable persons, individuals or legal entities, may be connected with one or more of those objects of taxation in the most diversified ways, e.g. as owners, lessors, lessees, employers, employees in the cases of income and selective employment taxes, and as testator, donor or as heir or donee, legatee or other beneficiary in the case of gift or inheritance taxes.

4. The very foundation of chargeability, or sometimes only its extent, may be dependent upon a social or political connection between the person charged and the charging sovereignty, such as residence within its jurisdiction or, in the case of individuals only, on their allegiance based on nationality or citizenship. As a result, justifiably or not, the limits of most sovereignties are widely extended over the borders of their respective territories. This holds good for such different fields of the exercise of sovereignty as criminal law, where crimes against the security of a state may be punishable even if committed within another sovereign state, and the whole "residence system" of income tax, which is universally applied in the countries of Anglo-Saxon civilisation; even countries using, for purposes of income and capital gains tax, the territorial system make special efforts to enlarge the scope of chargeability of profitable functions carried out abroad by their residents. Israeli examples are: wholesalers' export profits including those from handling, assorting, packaging and transferring abroad (s. 4 ITO); profits from abroad if the management and control of the enterprise are situated in Israel (s. 5(1) ITO); and services rendered abroad by an Israel resident employee during four years since his leaving Israel if his employer is a resident of Israel, or during a longer period if the employer is the State of Israel or a public body or a national institution. (s. 5(3) ITO).

It is evident that the classic concept of tax

territoriality, as formulated e.g. by Bille: "Le principe de la territorialité des lois fiscales signifie que le territoire étatique constitue à la fois le cadre et la limite (!) de l'exercice de la souveraineté fiscale" (La Souveraineté, p. 19 note 31), is nowadays only qualifiedly correct. The same applies to his statement: "le pouvoir d'autonomie fiscale est le contenu juridique et la conséquence du pouvoir politique fiscal de l'Etat à l'intérieur de ses frontières" (Bille, l.c., p. 6).

Of special pertinence to our present subject is the Israeli estate tax.

B. INHERITANCE TAX

1. Following the general scheme drawn up in the introduction, we encounter no difficulty in defining the object of taxation mortis causa as the right to acquire property by the death of the previous owner coupled with—
(a) a specific law of inheritance (intestate succession), or—
(b) a will, making the beneficiary an heir or legatee.

2. The special features of inheritance tax arise from the fact that there are two principal forms of chargeable entities:
(a) the individual or corporate owner of inheritance or legacy rights, or—
(b) the "estate" which, not being a legal person at all, nevertheless fulfils the task of an assessee.

Whilst in most European states (e.g. Austria, Belgium, France, W-Germany, Netherlands, Norway, Portugal, Sweden) inheritance tax is levied, there is in Italy and Spain both estate and inheritance tax, and in the United Kingdom and the United States of America (as federal tax) estate tax only.

THE ISRAELI SYSTEM

1. *The quantitative extent*

The assessee is the estate as such quantified by the surplus of assets over liabilities, and styled by the Estate Duty Law as "balance of the estate".

The persons (individuals or legal persons) from whom estate tax is to be collected are:
1) the administrator of the estate for the whole estate duty;
2) the person (other than an heir) having possession of estate property—the amount to be collected should not exceed the value of that estate property in his possession;
3) the heirs up to the amount equal to their share in the estate duty, but not more than the value of estate property in their possession at the time of the death of the deceased. Should, however, the heir have had more than his share in his possession, the Director of Estate Duty may collect from him the respective estate duty.

To the heirs either of two facilities are granted:

A. Deduction

a) a general reduction of the first IL 10,000.- and an additional IL 15,000.- if the deceased died by injury sustained by hostile action against Israel.
b) to the surviving spouse (including a divorced spouse) or to an unmarried person deemed to be a spouse—IL 25,000.-.

If the deceased had (as it is the case with couples of mostly oriental countries) two legal wives, each of them is entitled as widow to a deduction of IL 25,000.-. Had the deceased not left a widow as his lawful wedded wife, but was (he or she) survived by a person who was known publicly as his or her cohabitee and who had lived with him or her at the time of his or her death, and neither of them had had another cohabitee at that time, that deduction will be allowed once only.
c) to each child (legitimate or adopted) up to his 22nd year—IL 15,000.-. and thereafter—IL 10,000.-, and an additional IL 17,500.- if the child is unable to support himself owing

to a physical or mental defect.
d) in the case where the deceased left one or more grandchildren whose father had died before the deceased, any such grandchild is entitled, if under 22 years, to a deduction of IL 15,000.- (amendment of 17.7.1969 in Book of Laws 565 p. 190).
e) IL 5,000.- to each of the surviving parents, if the deceased had been entitled to an allowance for them under the Income Tax Ordinance.
In order to protect the next-of-kin of the deceased and not to grant an undue advantage to a person with whom a deceased when still married had lived and left his whole estate or a greater part to that person, all these deductions are allowed for the next-of-kin of the deceased only, and only for an amount not exceeding the value of the respective share in the estate.

B. Exemptions
a) IL 50,000.- from the value of the apartment of the deceased not worth more than IL 150,000.- with a marginal relief up to IL 200,000.-.
b) the whole estate property of a soldier or police officer killed in active service.
c) gifts or contributions to state and local authorities; also to national, religious, social, sport, science and educational institutions determined by the Minister of Finance and approved by the Finance Committee of the Knesset (Parliament).
d) religious and cultural objects left to heirs and not sold within five years.
e) The shares of a non-resident in the capital of the recently established "Israel Corporation Ltd." ("Hachevra Lejisrael Be'Am"; Sefer Hachukim No. 561 of 3rd July, 1969, p. 150).
f) Under the Law for the Encouragement of Capital Investments the following are excluded from the computation of the value of the estate:
aa) those assets which the deceased, whether as non-resident or resident at his death, had acquired with foreign currency as an "approved investment" whilst still being a non-resident, or within seven years after having become resident in Israel;
bb) foreign currency transferred to Israel (or assets thereby acquired) whilst being a non-resident or within seven years from having become a resident;
cc) assets belonging to a person who became a resident after May 15th, 1948 (establishment of the State of Israel) and which were at his death situated abroad and had been his property when he still was a non-resident or were later acquired with assets he has previously held;
dd) assets acquired against foreign currency according to the decission of the competent Investment Authority under the foregoing provisions (sec. 55 Investment Law).
g) No estate duty is imposed on an estate which has been devolved upon a non-resident who is not an Israeli citizen provided that his state of residence exempts an individual of Israeli citizenship and residence or an Israeli company from estate duty including a gift from a dangerously ill person (Succession Law Amendment (Succession of Non-residents Law 1959) Book of Laws 284 of 15th July, 1959, p. 140).
h) The same principle and condition of reciprocity prevails in the exemption from Israeli estate tax regarding property bequeathed to a foreign state or a local authority or a religious, educational, cultural, welfare, health or other public institution in a foreign state, if and to the extent that such state grants the same relief to the similar Israeli beneficiaries (sec. 6 B Estate Duty Law).
i) In the case of a double taxation convention on estate duty on which the Israeli Minister of Finance has given notification, the states which are the convention parties or local

authorities, religious, educational, cultural, welfare, health or other public institutions in the states of the contracting parties are exempt (or enjoy a reduction) from Israeli estate duty (sec. 6 A of the Estate Duty Law).

2. *The territorial extent*

In this connection Israel adheres fully to the residence system. The estate of a resident comprises, for the purposes of estate tax, his whole property wherever situated, including immovable property. The estate of a non-resident is restricted to the property situated in Israel.

DOUBLE TAXATION AGREEMENTS

The basic limitation of the fiscal sovereignty to the territorial boundaries of the respective state has two important consequences:

a) the extraterritorial effect of fiscal duties remains restricted to the territory of the duty-imposing state;

b) the law-courts of a foreign state do not even admit as justiciable claims for taxes filed or otherwise raised by that sovereign state which has created an extraterritorial tax duty. This latter subject has been discussed very extensively in the judgment of Sir Raymond Evershed, M.R., in Re Delhi Electric Supply & Traction Co. Ltd. with the result that under English Law (which is in this respect applied also in Israel) the Courts would not be used as a means to collect taxes imposed by another State.

Double taxation with the same function or its economic results is, paradoxically enough, the direct consequence of the strict application of fiscal sovereignty in its extraterritorial extension coupled with the merely intraterritorial applicability of the same fiscal sovereignty.

It seems, therefore, that the real source of double taxation, and at the same time the remedy for its cure, is not so much the overlapping of several tax jurisdictions, as the Report on the Mexican Convention of 1943 had formulated it (Publications de la Société des Nations C 2 M 2 1945 II quoted by Bille, l.c., p. 23, note 58) but that fiscal sovereignty is not, but should be, restricted to its own territorial limits. Even should this goal be attained, which seems most unlikely, the developing countries would not lose thereby one of their most cherished means to attract foreign capital, viz. the exemption, complete or partial, from income tax or estate duty of non-resident investors, such as e.g. Israel has, for duty purposes, stipulated generally in sec. 55 of the Law for the Encouragement of Capital Investment, 1959 (with numerous amendments) and now in sec. 7 of the Law for the Israel Corporation, 1969, as regards the holding of shares in that corporation. It is, therefore, somewhat surprising that this feature has escaped attention of the O.E.C.D. Fiscal Committee in their Report on Fiscal Incentives for Private Investment in Developing Countries (Paris 1965).

PROPOSITIONS FOR THE AVOIDANCE OF DOUBLE ESTATE OR INHERITANCE TAXATION

The Draft Convention of 1966 approaches the problem by way of dividing the exercise of the fiscal sovereignty between the contracting states. It uses as criteria for that division pragmatically the various elements and applies them in a given order of precedence. The first and foremost is domicile which the deceased person has in one or both of the contracting states, such domicile to be determined according to the law of that or those states. Should the deceased be considered to have had his domicile in both such states, then should be decisive: (i) the state of his permanent home; (ii) next the state of his

closest personal and economic relations; (iii) next his habitual abode; (iv) his nationality; and finally (v) the mutual agreement between the states claiming equal rights to the chargeability of the estate. From this general rule, for special parts of the estate the right to tax is proposed to be given to the territorial principle: immovable property and the permanent establishment of an enterprise to be taxed in and by the state where they are situated, and ships, boats and aircraft according to the place of effective management of the enterprise.

Solutions in one or more of those lines are not to be found in the Israel Estate Tax Law itself but in the actual and preparatory double taxation agreements between Israel and other states.

BILATERAL AGREEMENTS WITH ISRAEL FOR THE AVOIDANCE OF DOUBLE ESTATE TAXATION

A. *Agreements in force*

(a) The only agreement of a general character was that concluded with Sweden. It has been in force since July 1st, 1961, and was published in Israel in Kitvé Amná No. 461, Vol. 13 pp. 391 seq. A commentary by Sten F.W. Bille and the present author was published in the Bulletin for International Fiscal Documentation Vol. XIX (1965) pp. 233—240. The agreement is based on the tax exemption method.

Immovable estate property is to be taxed in the state where it is situated. Assets employed in business, a profession, agriculture or forestry attributable to a permanent establishment situated in Sweden are to be taxed in Sweden only. Shares in a joint stock company are chargeable in the state where the company is incorporated. Other assets are dutiable in the state of residence of the deceased. Other cases are settled by arrangement between the two states, taking into consideration the personal and economic interests of the deceased and ultimately his nationality. A most favoured nation clause applies to bequests in favour of religious and educational institutions.

(b) An agreement with France in force since December 20th, 1963, published in Israel in Kitvé Amná No. 541, Vol. 15 pp. 329 seq., exempts from estate taxes legacies to charitable and cultural organisations and institutions.

(c) Since April 1st, 1966, an agreement has been in force with the Swiss canton of Basle with the exemption of public institutions.

B. *Agreements signed*

a) Agreement with Italy, signed on April 22nd, 1966, but not yet ratified.

b) Agreements are being negotiated with a number of states, such as Austria and the Federal Republic of Germany.

c) Negotiations about the signature of an agreement with the United States of America are being conducted.

The most important features from the Israeli point of view as a developing country, which it is seeking to secure in those agreements, are the recognition by the state of residence or nationality of the deceased of the Israeli estate tax exempted by the Israeli tax privileges, such procedure being known as "fictitious tax credit" or "tax sparing", and further, in the course of estate tax collection in Israel, the deduction of such tax in the cases of interest, dividend and royalties being due to the estate from Israeli sources.

CONCLUSION

It is obvious that the diversity between the systems of succession duties, viz. estate tax or inheritance tax, and perhaps still more the personal and territorial incidence of those taxes and their scope and extent, represent

to-day one of the most formidable sources of international double taxation. On the other hand, it appears that the number of agreements for the avoidance of such double taxation is small in comparison with the number of agreements relating to income taxes. This is evident from the Chart on the Conventions for the Avoidance of Double Taxation with respect to taxes on estate and inheritances between OECD-member countries, Finland and Liechtenstein as of February 1st, 1967, published in European Taxation 1967, pp. 60-61.

It might, therefore, be advisable to follow the advice given in 1965 by Wolfgang Mersman that the special problems of succession duties should be more intensively studied; this has been done in 1966 by the Fiscal Committee of the OECD, but the root of the trouble has not yet been treated, viz. the urgent necessity to work for a harmonisation of succession systems with the ultimate goal of their unification, as this has to a very considerable degree been achieved for turnover taxes by means of the more or less uniform tax on value added.

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ABBREVIATIONS

Israel Income Tax Ordinance, 1964 (with 13 amendments hitherto) - ITO
Israel Estate Tax Law - ETL

NIZAR RAFEI:

INCOME TAX IN SAUDI ARABIA

Saudi Arabia is one of the few developing countries that has left the door wide open for free enterprise.

Contrary to other developing countries in the Middle East, Africa and South America who went to the extreme in adopting guided economic systems and imposing rigid restrictions on the movement of foreign exchange, Saudi Arabia still considers free enterprise to be the best and ideal of economic systems. Increasing revenues from petroleum and political stability have made adoption of the free enterprise system not only feasible but also thriving.

Although foreigners and foreign investment are legally prohibited to engage in commercial activities, the inflow of foreign capital has recently been increasing to meet the requirements of the public sector. Due to the shortage of skilled manpower in the country, western technology and expertise have also been invited to participate in implementing various agricultural, water, communication and other developmental projetcs that require a high level of efficiency and technological know-how.

For all the above cited reasons, it is necessary and even imperative for foreign individuals and firms engaged in business activities in Saudi Arabia to acquaint themselves with the tax structure of the country. This would not only help verify their obligations, i.e. vis-à-vis the Kingdom of Saudi Arabia, but would also make them include the tax duties in their projections and cost calculations.

I. INCOME TAX REGULATIONS IN SAUDI ARABIA

Three kinds of income taxes are levied in Saudi Arabia:

1. Zakat—Only Saudi nationals and Saudi firms are subject to this type of income tax. Non-Saudis have no right to request substitution of this tax for other types of taxes, and Saudis are not entitled to request application of other types of taxation in lieu of this one. The Zakat is due on the total income and capital that have been retained for one year or over, and is charged at the rate of 2.5% of this total income. The details of this type of tax and its application are determined by the Shari'a law.

2. Additional income tax: This tax is levied on petroleum and hydrocarbon producing companies.

Additional income tax has its special regulations and as such, requires a special treatment.

3. Income tax: This tax is levied on the incomes of foreign individuals and firms, and it is the subject of this analysis.

II. INCOME TAX

(levied in accordance with the provisions of Royal Decree No. 3321 dated 21.1.1370 corresponding to 2.11.1950) and its amendments).

The Decree differentiates between three major types of income:

1. Income accruing from work i.e. wages, salaries etc. This type of income is known as personal income.

2. Individual income accruing from:

a. Capital investment.

b. Capital investment jointly with work.

This includes commercial, industrial, or agricultural income whether it was generated by individual work or from a partner's share in a joint venture.

c. Professional work, i.e. income accruing from the practice of professions that require

a certain level of skill such as carpentry, black-smith activity and professions that require certain qualifications such as auditing, and medicine.
The difference between the first and second types of income to my mind, is related to the legal status of the taxpayer i.e. employer or employee.
Income in the second case, is usually called professional and capital investment income.
3. Income accruing from financial firms. These are classified according to the existing regulations in Saudi Arabia into:
a. Joint-stock companies.
b. Joint ventures whether they are in the form of a limited partnership or limited by shares. Income in this case is called corporate profits.

III. CHARACTERISTISC OF INCOME TAX LEVIED ON FOREIGN INDIVIDUALS AND FOREIGN FIRMS

A comparison with existing tax systems in other countries reveals certain characteristics that are unique to the Saudi tax structure:

1. *The difference in the tax base according to the nationality of the taxpayer:*
The income tax as mentioned before, is levied on foreigners. A person is considered a foreigner if he is not a Saudi, (a Kuwaiti, a Qatari, Bahraini) or of any nationality that is entitled to the same privileges granted to Saudis. In other words realized profits are subject to income tax if made by a foreigner, and to Zakat if made by a Saudi. To my mind, the Saudi income tax is the most personal of taxes and could not be classified under corporeal taxes.

2. *Tax regionality:*
This principle is a by-product of the first one, and it means, that only incomes realized in the Kingdom of Saudi Arabia are subject to taxation. In other words, the income liable to taxation must accrue from a resource realized in the Kingdom or from a resource existing within the Kingdom, whether it is from a public or private source, or from works, services and capital invested within the Kingdom.

3. *The freedom to choose the financial year:*
Tax legislation in most countries of the world usually stipulates that the financial year should cover a specified period of time and in many cases suggests the adoption of the Solar Year.
In Saudi Arabia it is left for the person concerned to determine the beginning and the end of the financial year. The traditional procedure, with respect to capital investment, is to start the financial year concurrently with the beginning of operations. The first financial year may cover less than one calendar year provided it is adjusted to an annual basis later on.
Under all circumstances, the taxpayer must notify the financial authorities in advance of the financial year he has chosen.

4. *Impossibility of carrying losses forward to coming year:*
Many tax systems in the world approve of carrying losses forward and subtracting them from the realized profits of the next year so as to spread the losses between the taxpayer and the treasury. Other systems specify a number of years during which the taxpayer can carry his losses forward to consecutive years. This principle is not applied in Saudi Arabia. The taxpayer is not permitted to carry his losses forward, and they are considered as a taxpayer liability during the year in which they were incurred.

5. *Accepting accounts if they were audited by an international legal auditor:*
The Saudi Arabian tax system considers as valid all the accounts that have been audited by an international legal auditor.
Saudi Arabia, by approving auditing activities, has gone far in supporting international auditing firms and has in fact surpassed many of the advanced western countries that are still reluctant to accept this procedure. The Saudi tax system has as a result been able to overcome three problems:
a. The shortage in qualified and experienced auditors within its financial institutions. Legal auditors were therefore encouraged to assume a part of the responsibility.
b. The system held the legal auditors responsible for the accounts they approve of. This attitude had a great impact on the progress of the auditing profession in as much as it increased the responsibility of the auditing firms.
c. It promoted and spread interest in taxation and accountancy principles among taxpayers who started to ask auditors to organize their accounts and to verify their financial position.

6. *Differentiation between the incomes of natural and legal persons and the difference in tax rates applied to each:*
The Saudi tax system does not differentiate between the various types of personal income. All personal incomes whether accruing from work, professional services or capital investment or any other type of activity are charged at the same tax rates.
The tax base according to the Saudi system, includes all the taxpayer's sources of revenue. Revenues from various resources realized during the year are added and charged at the following tax rates:
5% on the portion of income over the exemption limit up to SR 20,000($=4.5 SR) per annum.
10% on the portion of income over SR 20,000 up to SR 50,000 per annum.
20% on the portion of income over SR 50,000.
Income accruing from legal persons (i.e. business profit) is charged at higher rates in the following manner:
20% on profits up to SR 100,000 per annum.
30% on the portion of profits over SR 100,000 and not exceeding SR 500,000 per annum.
35% on the portion of profits over SR 500,000 up to SR one million per annum.
40% on the portion of profits exceeding one million Riyals.
It is apparent from the above rates, that Saudi Arabia adopts a graduated tax system for both personal and corporate income.
Income accruing from a moral person is that income which is generated by one of the following three sources:
a. A non-Saudi financial company operating within the Kingdom or operating within and outside the Kingdom at the same time. In the latter case, only the income generated within Saudi Arabia is subject to taxation.
b. The total net profits of non-Saudi stock holders in Saudi financial firms.
c. The total net profits of non-Saudi partners in a joint venture.

7. *The importance of the taxpayer's entity in determining his tax liabilities and exemptions:*
As already mentioned, the Saudi Tax System takes into consideration the taxpayer entity (moral, or natural) and determines his tax liabilities according to the rates designed for each kind of person. This distinction is reflected in:
a. *The nationality of the taxpayer:* the tax base is determined according to the nationality of the taxpayer whether he was:
1. A natural person.
2. A Saudi moral entity having one or more

non-Saudi natural persons.
In this case, income of Saudi shareholders is isolated and non-Saudi income is taxed.
b. Tax rates—personal income is charged at rates different from those applied to moral persons.
c. In addition, natural persons are entitled to a minimum income exemption equal to SR 6000 Riyals. The exemption limit does not take into account the civil status of the taxpayer i.e. married or single.
Moral persons are not entitled to any exemption except one which applies also to natural persons. All profits made by moral and natural persons are exempted for five years after the beginning of investment operations if the operations are classified under developmental projects, and if they conform to the foreign investment regulations. Industrial projects, particularly those which are badly needed by the country, are considered developmental. Saudi partnership should not account for less than 25% of the capital.

8. *Annuity and proportional taxation:*
While the Saudi tax system approves of collecting taxes on a yearly basis, the minimum exempted income is calculated in proportion with the period of residence. Thus all the revenues of a taxpayer (moral or natural) realized during his stay in the Kingdom are taxed.
Should this income be realized in less than one year because of the expiration of the taxpayer's residence period or because he stopped his activities, it will be considered the taxpayer's annual income and will be taxed at the regular rates. The income bracket will not change in this case and will be taxed accordingly.
The minimum exempted income (SR 6000 for the natural person) is calculated proportionally with the period of residence.

TAX BASES:
The tax system differentiates between two kinds of income:
(i) Salaries and wages: These include the salary, wage, fees, allowances and other monetary or corporeal assets received by an individual, for works or services rendered to another individual, firm, or authority etc. within the Kingdom. For example:
a. income tax if paid by the employer. This tax is considered a privilege and as such subject to tax;
b. specialization allowance;
c. expatriation allowance; and
d. housing allowance, whether paid in cash or otherwise.
The tax base, however, does not include all the amounts paid to the employee for work purposes.
(ii) Commercial, industrial or agricultural profits realized by moral or natural persons within the Kingdom.
Net profits which constitute the tax base, are determined by one of two ways:
(a) Through normal accounting procedures. Although Saudi tax regulations are consistent with the common rules of accountancy, it is agreed that appropriation reserves are considered distributed profits and not debited to the profits account, and hence they are subject to taxation. Provision reserves on the other hand, which constitute the liabilities that have to be taken into account no matter what the net profits or losses are, are still disputed by the taxpayer and the financial authorities of the Government. Some of these reserves such as end of service indemnity are accepted and agreed to while others such as bad debt reserves are still disputed because approving them depends on the financial authorities belief in their legitimacy.
As for depreciation of fixed assets, the Saudi tax law accepts the reasonable rates calculated for this item.

(b) *Determining profits by estimation:*
This happens in cases where the taxpayer fails to convince the financial authorities of the validity of his records and accounts. In this instance the taxpayer's profits are estimated at 15% of his total revenues.
Approval of the principle of estimation is an exception to the general rule and was intended to serve as a facilitating and simplified procedure for taxpayers. To my mind this method is applied in particular to the income of taxpayers accruing from the investment of capital. Financial firms are usually asked to declare their profits according to the approved accountancy procedures.

ADMINISTRATIVE PROCEDURES
These include the methods used in taxation according to the provisions of the tax law, ministerial decisions, and the periodical circulars issued by the concerned authorities.

1. *Tax Collection:*
a. Personal income tax is charged to the original source, i.e. the employer, and is deducted from the employee's income. The employer is responsible for delivering the tax proceeds to the treasury as is the case with most tax laws.
b. Corporate profits tax—This tax is levied on companies, which are required to declare their profits. It is also levied on the incomes accruing from the practice of professions or the investment of capital. The taxpayer in the latter case should declare his income.
c. Contractor profits—Special regulations were prepared for this kind of income. Described in brief, the steps taken by the authority (public or private) for which the contractors works are as follows:
1. The authority first makes a rough estimation of the contractors profits at 15% of the contract value. These profits are then taxed in accordance with the rates and income brackets applied to individuals and business profits, and deducted proportionally from each instalment paid to the contractor.
Taxes levied on this basis are considered advance payments against the actual tax liabilities.
They are adjusted later on when the taxpayer (the contractor in this case) declares his actual realized profit. If it appeared that the estimated tax was in excess of the actual tax due the contractor would be entitled to regain the balance and vice versa.
2. Withholding payment of the last instalment due to the contractor, until he gets a clearance from the financial authorities stating that he has already settled his tax liabilities.

2. *Declaration and payments dates:*
a. Employers should declare the amounts of salaries and wages paid to their employees, and should pay the taxes deducted from the employees salaries within fifteen days after the end of the month. If the employer is a registered company, he may pay the taxes within fifteen days after every three months.
b. Taxpayers whose income is classified under professional or capital investment profits should declare their profits and settle their tax obligation within fifteen days from the end of their financial year.
c. Companies whether financial or joint ventures, can delay declaration of their profits and settlement of their tax liabilities until the fifteenth of the third month after the end of their financial year. Although the Saudi tax law does not provide for the request of additional delays, financial authorities usually grant delays exceeding the above period provided the taxpayer pays an amount equivalent to the estimated tax liabilities.
Should the taxpayer fail to settle his tax liabilities within five days of the specified dates he is fined at 10% of the realized tax. The fine

increases to 25% if the period of delay exceeds 15 days.

3. *Exemption and additions to the personal income tax:*
a. Exemption amount is deducted from the first bracket.
b. A 2% road tax is added to the personal income tax (i.e. tax on salaries and wages). The road tax is deducted from the basic salary, and the remaining amount is then taxed according to income tax rates. Contrary to the exempted amount, which must be deducted from the first bracket, road tax may be deducted from the last bracket.

TAX LEVYING:
Tax levying is carried out according to the following processes:
a. The financial authorities notify the taxpayer of his tax liabilities. If the taxpayer agrees to these liabilities the taxation processes will be considered final.
If on the other hand, the taxpayer objects to his liabilities he has the right to refer his case to the administrative committee within seven days of the date of receiving the tax authority's notification.
A taxpayer's objection to his liabilities suspends the collection process.
b. After the administrative committee gives its decision, both the taxpayer and the financial authority have the right to object to this decision and to refer the whole thing to the appellate committee within 15 days of the date of the administrative committee's verdict. The taxpayer's objection in this case does not lead to suspension of the collection process. Besides, his appeal will not be accepted unless he settles his tax liabilities according to the verdict of the first committee.
c. The appellate committee's decision is irrevocable and final.

DOUBLE TAXATION
Since Saudi profits accruing from resources outside the Kingdom are not subject to taxation, it is evident that double taxation only occurs in the case of foreign companies operating within the Kingdom.
Para. 2 of Article 13 of the Royal Decree on income tax considers as general revenues all the revenues accruing from any resource within the Kingdom to any firm established according to the laws of any country other than Saudi Arabia, and operating simultaneously inside and outside the country. This means that foreign companies operating inside Saudi Arabia should declare the profits realized on their income within the country. Thus incomes of foreign firms are only subject to taxation when these firms have a physical presence inside Saudi Arabia, be that a branch or an agency that has the status of independent establishment i.e. a legal representative who works for the company or in its name, or under its jurisdiction and guidance, or any commission agent who markets the foreign company's goods. The Company's agent or representative is responsible for delivering the tax proceeds to the treasury by deducting these taxes from the company's funds should it fail to settle its tax liabilities.

FRANK K. HASZARD★:

THE TAXATION OF CAPITAL GAINS IN PUERTO RICO

Puerto Rico's Income Tax Act of 1954, as amended, is basically patterned after the U.S Internal Revenue Code of 1939. There are several notable differences, however, one of which is the treatment of capital gains realized from the sale or exchange of capital assets. Prior to 1948, all capital gains, from whatever source, were treated as ordinary income. This created a problem which Puerto Rico was not prepared to cope with. That is, sales of capital assets, and particularly sales of real property, were made in such a way as to avoid the harsh effects of the law. In sales of real property involving considerable capital gains, the common practice was to understate the selling prices in all official records of the transactions. This practice naturally had to be repeated with each successive transaction, with the result that prices shown on deeds were almost wholly fictitious and meaningless.

On the other hand, transactions involving the exchange of securities were not likely to be reported at all.

In order to bring about a more realistic treatment of capital gains, a law was passed in 1948 liberalizing the provision with respect to real estate transactions. Under the new law only 25 per cent of the long-term capital gains resulting from the sale or exchange of real estate was considered as taxable income. "Long-term" capital gains were those realized in transactions involving property held for more than one year.

With the adoption of the new Income Tax Law of 1954, similar treatment was extended to capital gains of all classes. The 1954 law provided, in addition, that "long-term" capital gains were those resulting from the sale or exchange of property held for more than six months.

Thus, in the space of a few years, the taxation of capital gains had changed drastically. In the meantime, other more far-reaching changes were taking place in every phase of the Puerto Rican economy. The pace of industrialization quickened and the demand for real estate intensified.

Obviously, the combination of a strong demand and a limited supply had to exert an upward pressure on land values. Prices of urban land tended to rise sharply.

The last reassessment of real property was carried out in 1957-58. In succeeding years, all assessed valuations of real property remained wedded to the 1957-58 prices while, at the same time, only 25 per cent of the net capital gains from sales and exchanges of real estate was recognized as taxable income. Naturally, the lack of adequate tax measures only served to fan the fires of inflation and land prices began to spiral upward at unprecedented rates.

A reassessment of real property might have moderated the inflationary pressures to some degree. However, because of an variety of complex reasons, reassessment was out of the question.

Therefore, a more rigorous tax treatment of capital gains was proposed as the most expedient means of curbing the upward pressure on the prices of real property. To that end, in 1966 there was submitted to the Legislature a bill that would have changed the holding period from six month to two years for

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distinguishing short-term from long-term capital gains and would have subjected 75 per cent of the long-term capital gains to taxation as regular income.

Such a proposal was met with such determined opposition that it was found necessary to modify it substantially. After a series of hearings there emerged a bill that was finally enacted into law (Act No. 108 of June 23, 1966). Its primary target was land inflation. Under the provisions of the new law, which amends Section 117 of the Income Tax Act of 1954, there are two classes of short-term capital gains and five of long-term capital gains. The relevant features of the different terms are as follows:

(1) *Short-term capital gain* refers to the gain from the sale or exchange of a capital asset, other than land, held for six months or less.

(2) *Short-term capital gain class A* means the gain from the sale or exchange of land held for no more than two years.

(3) *Long-term capital gain* refers to the gain from the sale or exchange of a capital asset, other than land, held for more than six months.

(4) *Long-term capital gain class A* signifies the gain from the sale or exchange of land held for more than two years by a corporation or partnership.

(5) *Long-term capital gain class B* means the gain from the sale or exchange of land held by an individual for more than two but not more than seven years.

(6) *Long-term capital gain class C* means the gain from the sale or exchange of land held by an individual for more than seven years.

(7) *Long-term capital gain class D* refers to the gain from the sale or exchange of land held by a "bona fide farmer" for more than seven years.

The foregoing specifications, with the exception of number (7), are used inversely in defining capital losses. The capital losses are subtracted from the capital gains, according to a certain order, in determining the "net" capital gains.

For example, a "short-term capital loss" is substracted, first, from "short-term capital gains", second, from "long-term capital gains", third, from "long-term capital gains class B", etc. On the other hand, a "long-term capital loss class C" is subtracted, first, from "long-term capital gains class C", second, from "long-term capital gains class D" third, from "long-term capital gains class B", and so forth.

In general, net short-term capital gains and net short-term capital gains class A are fully includible in the gross income of the taxpayer, whether individual or corporate.

With respect to long-term capital gains, the treatment of corporations and partnerships is substantially different from that of individuals. The net long-term capital gains (and net long-term capital gains class A) of corporations and partnerships are fully includible as taxable income with the exception that the total tax upon such gains shall not exceed 25 per cent thereof.

As we have noted, the long-term capital gains of individuals are divided into four categories. The gross income shown on the taxpayer's return should include 40 per cent of "net long-term capital gains" as well as "net long-term capital gains class D"; 50 per cent of "net long-term capital gains class C"; and 75 per cent of "net long-term capital gains class B".

As an alternative, individuals pay a tax on capital gains which does not exceed 40 per cent of "net long-term capital gains class B" and 25 per cent of all other long-term capital gains.

It should be noted that no capital gain is recognized in the case of the sale of the taxpayer's residence as long as the entire proceeds of the sale are invested within a year in

the purchase or construction of a new residence. The provision already existed as Section 112(n) of the Law and was not affected by the 1966 amendment.

The complexity of the new treatment of capital gains becomes readily apparent in the application of the law. The long-term capital gain realized from the sale of a security is easily computed, as is the gain derived from the sale of a plot of land. But most sales of real property include structures as well as land. It is this type of transaction that presents the real problem because deeds to property do not usually separate the price of the structure from the price of the land and even if they did, they could not be relied upon as indicative of the real proportional values. However, all property is assessed for both land and structures. It is this assessed valuation that is used in computing the proportion of a sale represented by the structure and the proportion pertaining to the land.

The use of assessed values for allocating the capital gains between land and structure has the effect of neutralizing the basic intent of the law. In the sale of any property consisting of both land and structure, at least 100 per cent of the gain can usually be attributed to land since the structure logically depreciates in value. Nevertheless, the assessed valuation (based on 1957-58 prices) is used to distribute the gain.

Thus, in particularly choice locations it would not be unusual to find examples of property sales where the assessed valuation of the structure even exceeds the assessed valuation of the land and yet, after the sale, the structure is razed to make way for another, far more costly edifice. For purposes of the law, the capital gain is distributed between land and building in accordance with the assessed valuation in spite of the fact that the land is responsible for the entire gain.

In any event, it is evident that the treatment of capital gains in Puerto Rico is quite intricate, a condition which stems from the decision to use such a mechanism as a principal weapon to discourage land speculation. Whether or not the new amendment accomplished its purpose may never be known. It is true that the upward pressure on land prices in Puerto Rico has slackened, to some extent, since 1966. But how much, if any, of the moderation can be attributed to the new capital gains tax is highly conjectural, since so many other factors may influence land values. In particular, the scarcity of credit during the last three years unquestionably has played a leading role in abating the speculative fever.

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SUPPLEMENT to this issue (Supplement F 1969). Agreement between the Government of Malaysia and the government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

T.V.A. AND E.E.C.

The E.E.C. Commission has proposed that the entry into force of the tax on value added in all E.E.C. countries should be postponed by one year to 1 January 1971 and that at the same time a timetable for the harmonization of TVA rates should be adopted. These proposals are contained in a draft directive which it has laid before the Council of the European Communities.

On 11 April 1967, the Council adopted unanimously a directive relating to the harmonization amongst Member States of turnover tax legislation. Under this directive all the Member States undertook to abolish not later than *1 January 1970* the old cumulative turnover tax systems and to replace them by a common TVA system, the structure and other details of which were described in a second directive adopted on the same date.

On 14 July and 12 September 1969 respectively, the Italian and Belgian Governments advised the Commission that they were not in a position to comply with the 1 January 1970 deadline. Mainly for reasons connected with the current state of business and the budget situation, the Belgian Government requested a *one-year extension*. The Italian Government asked for a *two-year extension*, pointing out that introduction of the TVA was bound up with the scheme for a general overhaul of taxation in Italy.

In view of the present circumstances, the Commission has taken the view that only one additional year can be allowed. Distortion of competition through the turnover taxes, however, is to be avoided. This can only be done by exact refunds on exports and exact equivalent levies on imports. This exactness is impossibile under the existing cumulative systems. To reduce these drawbacks, the proposed direction lays down that these countries not introducing a TVA on 1.1.1970 shall avoid increases in the average rates applied at 1 October 1969 and that from 1 January 1970 they shall reduce these rates by fixed amounts.

As the delay in introducing TVA in certain countries could compromise the adoption at the appropriate time of the further measures of tax harmonization that are necessary if intra-Community trade is to be rid of levies on imports and refunds on exports, the Commission has reached the conclusion that a timetable for the introduction of certain of these measures by all the Member States must be adopted now. Under the Commission's proposal, the sphere of application of TVA would be extended to include retail trade not later than 1 January 1971. In addition, the Member States are to take all the steps necessary to ensure that there shall be no more than two rates of tax in their TVA systems.

The Commission would submit to the Council any proposals needed to ensure that by 1 January 1974 levies on imports and refunds on exports have been abolished in trade between Member States.

ARTICLES

M.K. MATHAI:*

INCENTIVES FOR INVESTMENT IN MALAYSIA

BACKGROUND

1. Malaysia came into being in September, 1963 by the addition to the former Federation of Malaya (now known as West Malaysia), which obtained independence from the United Kingdom in August, 1957, the states of Sabah and Sarawak in Borneo (the territories comprised in those states being collectively referred to as East Malaysia) and Singapore. Singapore left the new Federation in August, 1965 to become the independent Republic of Singapore.

2. Prior to independence in 1957, the economy of the country was based primarily on the tin and rubber industries (and they still provide the bulk of her foreign exchange earnings) and commerce was largely confined to the traditional fields, e.g. import, export, wholesale and retail trades and finance. Almost all consumer goods were imported from abroad and the manufacturing sector made an insignificant contribution to the G.N.P.

3. Commercial activity was concentrated in townships and to a certain extent on plantations and around mining areas. The bulk of the population was unconcerned with such activities, were largely ignored and left to eke out a substandard existence in the rural areas from farming and fishing. They had little contact with the urban areas, had none of the facilities or amenities of the urban population and were almost completely at the mercy of merchants, middlemen and moneylenders.

4. Soon after independence, the government embarked on the very challenging and ambitious projects of developing the rural areas and of providing education to a wider section of the population, including free primary education. The expansion in education soon outstripped every other field of development since the young form almost half the population of the country.

With education came a dissatisfaction with the rural way of life and a consequent migration of the young from the rural to the urban areas. In the urban areas, there has been a growing urge in the youth for change from the traditional occupations and pursuits of their fathers.

5. The government soon faced another major problem—that of providing employment opportunities for the school leavers. There was a limit to which government and existing commercial organisations could absorb them and other areas had to be found. The prices of rubber and tin were steadily declining and therefore the need to diversify became urgent. The largest potential area for meeting these objectives was the undeveloped manufacturing sector.

6. Government policy initially, and influenced very much by expatriate officials, was to allow undirected development of the manufacturing sector by private enterprise. Industrialists carried out their own market surveys for the products they wished to "manufacture" and were free to determine the size of the undertakings to be established and the capital labour ratios. The Govern-

* Tax consultant for Malaysia, for the firm Cooper Brothers and Co., Chartered Accountants. Formerly with the Inland Revenue Department, Malaysia.

ment set up industrial estates, adequate infrastructure facilities and gave relief from taxation in the form of tax holidays for periods varying from two to five years under what is commonly referred to as the Pioneer Ordinance. The industries which were set up, produced goods for domestic consumption and they were primarily import substitutes.

7. When Malaysia was formed, the new Federation inherited four separate income tax legislations as well as four separate legislations providing incentives for the encouragement of investments in commercial and industrial enterprises. West Malaysia provided better facilities than East Malaysia and has a much larger population, spread over a smaller area with concentrations in the larger towns and therefore attracted a much greater volume of investment in the manufacturing sector than East Malaysia. Since the incentives were in the form of exemption from income tax in respect of profits made, there was little encouragement to large scale enterprises which would take several years to become profitable and as "manufacturing" concerns were set up by enterprises which previously imported finished products into the country, very little use was made of local raw materials in those concerns.

8. It was recognised from the very start that to continue to operate separate legislation providing for different systems and rates of taxation and differing forms of investment incentives would cause chaos in administration, uneven location of industries and therefore unbalanced development of various parts of the nation.

9. Concurrently with the commencement of the exercise to harmonise the income tax legislation which culminated in the Income Tax Act, 1967,[1] a committee of officials, under the chairmanship of Raja Tan Sri Mohar b. Raja Badiozaman, the Permanent Secretary to the Ministry of Commerce and Industry, was appointed to review the adequacy of existing incentives for investment and to make recommendations for the acceleration of the pace of industrial development as well as diversification in the type and location of industries. The Raja Tan Sri Mohar Committee examined the various incentives provided by other countries and took into consideration responsible opinions and suggestions submitted by individuals and various organisations in the country. The Investment Incentives Act, 1968, is a fulfilment of the recommendations made by the Raja Tan Sri Mohar Committee.

10. The chapter on "Taxation Aspects"[2], in the report by D.U. Stikker on "The role of private enterprise in investment and promotion of exports in developing countries", points out the drawbacks in the kinds of tax incentives offered by developing countries for industrial investments. The Raja Tan Sri Mohar Committee appears to have been aware of these drawbacks in the Pioneer Ordinance and the Investment Incentives Act, 1968, and appears to have taken a bold step forward in overcoming the obstacles.

THE INVESTMENT INCENTIVES ACT, 1968

11. In introducing the Investment Incentives Bill in the House of Representatives, Tan Sri (Dr.) Lim Swee Aun, the then Minister for Commerce and Industry said,

"Our immediate objectives are to provide greater employment opportunities for our increasing population, to widen and strengthen the base of our economy, to diversify the sources of our foreign exchange earnings and to increase our export income . . . The

1. Discussed in "Tax Changes in Malaysia" (Bulletin: Vol. XXII November 1968).
2. Bulletin: Vol. XXII September 1968.

Bill provides a variety of incentives to induce a greater and more rapid flow of investments not only in the manufacturing and agricultural based industries but also other enterprises and to encourage the expansion of export in manufactures."[3]

12. The Act provides for—

(a) exemption from income tax and payroll tax for companies declared to be pioneer companies;

(b) income tax relief for companies which either do not qualify to be declared pioneer companies or which would not derive much or any benefit by being declared to be pioneer; and

(c) incentives to encourage exports of manufactured goods.

EXEMPTION FROM INCOME TAX AND PAYROLL TAX

Pioneer Industries

13. Before a company can be granted a pioneer certificate, the products to be manufactured by it must fall within an industry declared to be a pioneer industry. Such a declaration is made by the Minister of Commerce and Industry if he is satisfied that an industry is not being carried on in Malaysia on a commercial scale suitable to the economic requirements or development of Malaysia or at all, and that there are favourable prospects of development or further development of the industry or development for export and that it is expedient in the public interest to encourage the development or establishment of the industry in Malaysia, after considering representations made to him on the matter.

Procedure for obtaining Pioneer Certificates

14. Any company or persons proposing to form a company with a view to participating in an industry declared to be a pioneer industry may apply to the Minister for a pioneer certificate and where the Minister is satisfied that it is expedient in the public interest to do so, he will issue a pioneer certificate. Before he issues a pioneer certificate to any company, the Minister is required to take into account—

(a) the number of pioneer companies already established or about to be established for the production of the product or products and to the production and anticipated production of those pioneer companies;

(b) the favourable prospects of further development of the industry, including development for export; and

(c) the persons who are directors of the company and the description of persons who are members of the company.

15. Prior to 1968, the Minister could only grant pioneer certificates to manufacturing undertakings. Under the Investment Incentives Act, the scope has been enlarged and agricultural concerns and servicing and processing industries can also qualify for pioneer status.

Pioneer Status

16. (1) A pioneer certificate will specify the dates on which the construction of the factory and the manufacture of the product are to commence. These dates are referred to as "Construction Day" and "Production Day" respectively. If the specified time table is not kept, the pioneer certificate may be withdrawn unless the Minister is satisfied that there were valid reasons for the delay. In that event the two dates will be changed.

(2) Every pioneer company will initially enjoy a tax relief period of two years from its Production Day. This means that the profits made by the company from the

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3. Speech by the Minister for Commerce and Industry in the House of Representatives on 29th February, 1968.

manufacture and sale of its pioneer product or products during those two years will not be chargeable to income tax.

(3) A pioneer company can obtain extension of its tax relief period and the number of years for which extension will be granted will depend on certain conditions being satisfied.

(4) Where by the end of the third year from its Production Day, a pioneer company has incurred fixed capital expenditure (i.e. capital expenditure on its factory, plant and machinery or other apparatus for the purpose of the factory or the pioneer business) amounting to

(a) not less than $250,000;

(b) not less than $500,000;

(c) not less than $1,000,000;

an extension of 1, 2 and 3 years respectively will be granted.

(5) Where it has been granted extension of one year and by the end of the fourth year from Production Day it has incurred fixed capital expenditure of not less than $500,000 or $1,000,000 a further extension of 1 year or 2 years respectively will be allowed.

(6) Where it has had 4 years relief and by the end of the fifth year from Production Day it has incurred not less than $1,000,000 it will be granted a further year's tax relief.

(7) In order to encourage priority industries, the use of local raw materials and the location of industries in less developed areas, extensions of tax relief periods can be obtained if the pioneer company—

(a) has a pioneer factory in operation in an area declared to be a development area; or

(b) produces any product or products declared to be a priority product or priority products; or

(c) incorporates in its manufactured product the required percentage of Malaysian content.

For each condition satisfied an extension of one year will be granted. All applications for extension are to be made to the Minister of Finance.

The areas declared as development areas, an initial list of products classified as priority products and the percentage of local content to be incorporated, are set out in the Appen dix (see page 515).

Computation of income or loss during tax relief period

17. The income or loss of a pioneer company during its tax relief period is ascertained in accordance with the provisions of the Income Tax Act, 1967. For that purpose, any period for which the accounts of the company are made up is treated as if it were a basis period. From the gross income from sales of the pioneer product, deductions are allowed in respect of expenses wholly and exclusively incurred during the accounting period. The deductions allowed are the same as those which would be allowed in calculating the adjusted income or adjusted loss for the period, if the company were chargeable to income tax. No deduction is however made for depreciation.

18. Where there is adjusted income, the amount of that income is exempt from income tax and development tax. The Income Tax Department will issue a certificate showing the amount of the income so exempted for each accounting period.

Dividends

19. A pioneer company is required to keep an account to which the amount of the income exempted is to be credited. Where the account is in credit, a pioneer company can declare exempt dividends up to the amount of the credit. There is no requirement that the full amount of the exempt profit should be paid out during a company's tax relief

period and therefore even after the tax relief period has ceased, the company can continue to pay exempt dividends if this special account is in credit.

20. Where the company has suffered a loss during any accounting period, that loss is not deducted from the profit made in a previous or subsequent accounting period for the purposes of determining the amount which can be distributed as exempt dividends. Therefore, if the company had suffered losses amounting to $500,000 during the first two years and in the next three had made profits totalling $600,000, the company can still declare exempt dividends up to $600,000.

Losses suffered during tax relief period

21. Where a pioneer company has, during its tax relief period, suffered an overall loss, the amount of that loss can be carried forward and deducted from profits arising after its tax relief period. However, if the total of the profits for some of the years during the tax relief period exceeds the total of the losses in the remainder of the years during the tax relief period, no part of the loss can be carried forward.

Miscellaneous

22. A pioneer company is not permitted to carry on a non-pioneer business during its tax relief period without the prior approval of the Minister of Finance. If it does, it could have its pioneer certificate withdrawn.

23. Where a company is permitted to carry on a non-pioneer business during its tax relief period, losses suffered in the pioneer business may be deducted from the profits of the non-pioneer business.

24. A company, whether it be pioneer or non-pioneer, receiving exempt dividends from a pioneer company may re-distribute the exempt dividends received to its own shareholders as exempt dividends. Under the former pioneer legislation, this could be done only by companies which held the whole or a specified percentage of the shares in the pioneer company throughout the tax relief period of the pioneer company.

25. At the end of the tax relief period, the company is deemed to have ceased to carry on its pioneer business and to have commenced a new business. Capital expenditure incurred up to the end of the tax relief period is deemed to have been incurred on the day following the end of the tax relief period and initial and annual allowances can be claimed on that expenditure. This is the normal rule.

26. However, where a company has made an overall loss during its tax relief period, capital allowances are calculated notionally for each year of the tax relief period and the aggregate of the notional allowances is deducted from income arising after the tax relief period.

27. Where a company is allowed to carry on a non-pioneer business during the tax relief period, capital allowances which appear to be reasonably attributable to the non-pioneer business are deductible from the profits from the non-pioneer business.

28. In either of the cases referred to above, initial allowances will not be granted after the end of the tax relief period in respect of those assets in relation to which allowances were granted during the tax relief period.

29. A pioneer company is exempt throughout its tax relief period from paying payroll tax on the remuneration of such of its employees as are engaged in the production of the pioneer product. This exemption does not apply in respect of remuneration paid to staff engaged in administration or distribution.

SUMMARY OF RELIEFS RELATING TO COMPANIES GRANTED PIONEER CERTIFICATES

30. (1) A company granted a pioneer certificate will enjoy an initial tax relief

period of 2 years and during that period its profits from the pioneer enterprise (i.e. production and sale of pioneer products) will be exempt from tax.

(2) Depending on the capital expenditure incurred by the company, extensions of the tax relief period to 3, 4 or 5 years will be granted.

(3) For locating the factory in a development area, manufacturing a priority product or incorporating a specified Malaysian content in the product, a further extension of one year will be granted in respect of each condition satisfied.

(4) In calculating the income exempt from tax no deduction is to be made for depreciation. The capital expenditure incurred by the end of the tax relief period is treated as incurred on the day following the end of its tax relief period.

(5) Where a pioneer company has been allowed to carry on a non-pioneer business, depreciation allowances will be allowed against the income from the non-pioneer business. The total capital expenditure incurred less the depreciation granted will be treated as the amount of the capital expenditure incurred after the end of the tax relief period.

(6) Where a company has a loss in its pioneer business and income from its non-pioneer business, the loss is to be deducted from the non-pioneer income.

(7) Where a company has suffered a loss for the whole of its tax relief period, that loss may be carried forward and set off against income arising after the tax relief period.

(8) A pioneer company is exempt from payroll tax on the remuneration paid to employees engaged in the production of the pioneer product.

(9) Dividends paid by a pioneer company out of income exempt from tax will be exempt in the hands of shareholders.

(10) If the shareholder is a company, then it in turn can distribute exempt dividends to its own shareholders out of the dividends received from the pioneer company.

INVESTMENT TAX CREDIT

31. The Investment Tax Credit is intended to induce investment in projects which would not enjoy any benefits as pioneer enterprises or which are not considered suitable for grant of pioneer status. For example, a company which does not expect to become profitable for the first few years of operation will get little benefit out of a pioneer certificate.

32. In order to be eligible for the Investment Tax Credit, a company (other than a pioneer company) should have incurred capital expenditure on a factory, plant and machinery or other apparatus to be used in Malaysia for the purposes of a project approved by the Minister of Commerce and Industry with the concurrence of the Minister of Finance.

33. The investment tax credit is an allowance in respect of the capital expenditure incurred, calculated at a rate to be specified by the Minister of Finance in each case. In no case will the rate be lower than 25%.

34. The investment tax credit is given over and above the depreciation allowances normally due and in effect means that for every $100 incurred, allowances of not less than $125 will be granted.

35. Where

(a) the company's factory is situated in an area declared to be a development area; or

(b) the company produces a priority product; or

(c) the company incorporates a specified percentage of Malaysian content in its product,

an additional tax credit of 5% will be granted for each condition satisfied (See Appendix).

36. The investment tax credit is calculated by reference to capital expenditure incurred in the basis period for a year of assessment. All capital expenditure incurred on the factory, plant and machinery or other apparatus before the end of the fifth year from the beginning of the year in which the company's project is approved qualifies for the investment tax credit.

37. The amount of the investment tax credit calculated for each year of assessment is deducted from the adjusted income for the basis period for that year. Where the Investment Tax Credit exceeds the adjusted income or there is an adjusted loss, the excess or as the case may be, the amount of the Investment Tax Credit is carried forward to the next following year of assessment and deducted from the adjusted income, if any, for that following year and so on.

Example:

	Capital Expenditure	*Profit*
1st year	100,000	20,000
2nd year	150,000	50,000
3rd year	100,000	60,000
4th year	50,000	70,000
5th year	50,000	80,000
6th year	200,000	150,000

Assume rate of Investment Tax Credit 25%, rate of initial allowance 20% and rate of annual allowance 10%.

1st year		
Profit		20,000
Investment Tax Credit		25,000
Investment Tax Credit c/f		5,000
Capital allowances c/f		30,000
2nd year		
Profit		50,000
Investment Tax Credit	37,500	
Investment Tax Credit b/f	5,000	42,500
		7,500
Capital allowances	52,000	
Capital allowances b/f	30,000	82,000
Capital allowances c/f		74,500
3rd year		
Profit		60,000
Investment Tax Credit		25,000
		35,000
Capital allowances	46,800	
Capital allowances b/f	74,500	121,300
Capital allowances c/f		86,300
4th year		
Profit		70,000
Investment Tax Credit		12,500
		57,500
Capital allowances	37,120	
Capital allowances b/f	86,300	123,420
Capital allowances c/f		65,920
5th year		
Profit		80,000
Investment Tax Credit		12,500
		67,500
Capital allowances	38,408	
Capital allowances b/f	65,920	104,328
Capital allowances c/f		36,828
6th year		
Profit		150,000
Capital allowances	84,567	
Capital allowances b/f	36,828	121,395
Chargeable income		28,605

N.B.: The expenditure of $200,000 does not qualify for the Investment Tax Credit because it was incurred after the end of the 5th year.

38. Dividends paid out of income from which Investment Tax Credit has been deducted will be exempt in the hands of the shareholders. For instance, in the above example, the company could declare in the first year, dividends up to $20,000 and in the second year up to $42,500 as exempt dividends.

39. Where another company is a shareholder in that company, that other company can in turn re-distribute the dividends received to its own shareholders as exempt dividends.

40. Only companies which are resident in Malaysia are eligible for Investment Tax Credit.

EXPORT INCENTIVES

41. In order to encourage exports, the Act provides for four kinds of incentives viz.:
(i) double deduction for certain expenses incurred in promoting exports;
(ii) accelerated depreciation allowances on expenditure incurred in modernising production techniques at an existing factory or to set up a modernised factory;
(iii) an export allowance which is a deduction from gross receipts;
(iv) payroll tax relief.

(a) *Double Deductions*

The Schedule to the Act sets out the rules prescribing the deductions in respect of expenses incurred for the promotion of exports. The rules do not apply in relation to exports of primary commodities.

A company which desires to avail itself of the extra deduction must apply to the Minister of Commerce and Industry for approval, under paragraph 3 of the rules, to be treated as a company eligible for the deductions. The application is to be made annually. Only companies which are resident in Malaysia (i.e. the control and management of whose business are exercised in Malaysia) are eligible to apply.

The expenses (which must fall into one of the categories listed in the next paragraph) which qualify for the extra deductions are those which are primarily and principally incurred for the purpose of—
(i) seeking opportunities or
(ii) creating or increasing demand,
for the export of goods manufactured, produced, assembled, processed, packed, graded or sorted in Malaysia by the company.

The categories of expenses which qualify are:
(i) advertising expenses paid to persons who are not resident in Malaysia in respect of advertisements placed in newspapers, trade journals and similar publications outside Malaysia;
(ii) expenses attributable to the provision of samples, without charge, to prospective customers outside Malaysia, including the cost of delivery of the samples;
(iii) expenses directly attributable to carrying export market research or the obtaining of export marketing information;
(iv) expenses relating to the preparation of tenders for the supply of goods to prospective customers outside Malaysia (excluding such expenses in respect of goods of the same kind and specifications as those regularly manufactured or supplied by the company);
(v) fares in respect of travel to a country outside Malaysia by an employee of the company necessarily undertaken for the purpose of negotiating and concluding contracts for sale of goods on behalf of the company and a sum not exceeding $500 for accommodation and subsistence for the whole period he is out of Malaysia on each journey;

(vi) expenses of supplying technical information to persons outside Malaysia relating generally to goods of the company offered for sale including expenses on supplying such information after the sales have been made.
Where the approved company is a pioneer company the extra deduction for expenses, falling into the above categories and incurred during its tax relief period, will be made after the end of its tax relief period.

(b) *Accelerated Depreciation*
Accelerated depreciation allowances are given to companies approved under section 28 (1) of the Act by the Minister of Finance with the concurrence of the Minister of Commerce and Industry.
The accelerated depreciation allowances, which is calculated at 40% of the tax written down value of expenditure incurred on the provision of plant and machinery in order to modernise the company's production technique at an existing factory or to set up a modernised factory, is given in lieu of any annual allowance due in respect of the expenditure incurred. The allowance will, however, be made for a year of assessment only if–
(i) the company is resident in Malaysia;
(ii) the plant and machinery is used for the purposes of the company's business; and
(iii) the company has exported in its financial year preceding the year of assessment more than 20% (by value) of its total production during that year.
The allowance is not due–
(i) to a pioneer company during its tax relief period; or
(ii) if the company uses the assets in the business of exporting any primary commodity; or
(iii) if the company is eligible for an Investment Tax Credit under the Act.
In (a) and (b) above the references to "primary commodities" mean commodities produced or bred in Malaysia which, although they may have been processed, have not been manufactured.

(c) *Export Allowance*
Where a company's business includes the production of manufactured products, a deduction (calculated by reference to the formula mentioned below) is made from the gross income of the company. The amount of the deduction for any year is calculated as follows:
First, there is to be ascertained–
(i) the wages paid in money for that year to employees whose basic wage does not exceed $500 per month; and
(ii) the cost of Malaysian materials purchased in that year for the production of any manufactured product and not resold.
(The reference to "Malaysian materials" is to any goods or materials produced in Malaysia and includes power or water supplied in Malaysia and transport provided in Malaysia. Goods, materials, power, water or transport are deemed to be produced, supplied or provided (as the case may be) in Malaysia if more than 50% thereof by value was produced or provided in Malaysia or in the case of power or water, was supplied by an undertaking established in Malaysia and the reference to "Cost of Malaysian materials" is to the cost of purchase or where they are not purchased, their market value when they became available for use in the manufacture).
Secondly, 20% of the total of the wages and cost of Malaysian materials ascertained under (i) and (ii) above is to be calculated.
Thirdly, there is to be ascertained–
(i) the gross income (i.e. the gross proceeds of sales, other than exports of primary commodities, less the cost of carriage, insurance, freight and handling charges paid

and any trade discounts given by the company) for the year from the export of manufactured products; and
(ii) the average gross income (as defined above) from such exports for the three immediately preceding years.
The deduction which will be given is calculated by applying the formula:

$$\frac{\text{20\% of specified expenses (a)} \times \text{excess of exports (b)}}{\text{Total gross income}} = \text{export allowance}$$

(a) *Specified expenses* means the aggregate of the wages and costs of Malaysian materials.
(b) *Excess of exports* means the excess of the gross income from exports for the year over the average gross income from exports for the three preceding years.
Only companies resident in Malaysia are eligible. There is no requirement that prior approval should be obtained before the company can obtain the deductions.

(d) *Payroll Tax Relief*
For the purposes of qualifying for the relief, a company (not being a pioneer company) must be registered by the Minister of Commerce and Industry under section 30 of the Act as an "export manufacturing company" and any product manufactured by it as a "registered manufactured product."
Where the company exports more than 20% (by value) of its total production of that product during any calendar year, it will be eligible for a refund of a part of the payroll tax paid in that year calculated by reference to the formula—

$$\frac{\text{Payroll tax paid} \times \text{value of export of registered product}}{\text{Total turnover for the year}}$$

The payroll tax refund is calculated by reference to the calendar year and not the financial year of a company.

ROLE OF GOVERNMENT AND ITS AGENCIES

42. The present role of the Government in industrial development was spelt out by Tun Abdul Razak, the Deputy Prime Minister and Director of the National Operations Council as follows:—
"In the past, we relied on the initiative of the private sector to carry out investment and establish industries. Now the Government is taking a positive and aggressive approach to industrialisation. The Government will identify feasible projects and mount a promotion drive to mobilise local as well as foreign capital. The Government will take the initiative in industrialisation and, if necessary, will participate in the establishment of industries either by itself or in joint venture with the private sector, both local and foreign."[4]

43. In pursuance of the above, the Government set up a Capital Investment Committee composed of ministers and senior government officials with the following terms of reference:
"(i) To review current policies and programmes of industrial development, both at Central Government and State levels, with a view to co-ordinating them into an integrated programme of accelerated industrial development, particularly of labour intensive industries and those with strong export potential;
(ii) To identify development priorities, and formulate policy guidelines and incentives for the effective implementation of such industries;
(iii) To streamline present procedures for processing applications in order to speed up decision-making on industrial development matters;

4. Malaysia: A New Industrial Development Strategy—booklet published by the Federal Industrial Development Authority in July, 1969.

(iv) To redeploy existing staff of different organisations into a more cohesive force to achieve these objectives;
(v) To direct the implementation of the Committee's policies and decisions in collaboration with State Governments and Departments concerned."

44. The establishment of the Capital Investment Committee has given new emphasis to the Government's industrialisation policy and is born out of the realisation that procedures of the past were "very time consuming and led to unnecessary delays and caused frustration to the entrepreneurs concerned." The Chairman of the Committee, Tun Tan Siew Sin, has declared that the Government will now—

"...do its homework and identify the industries which it regards as viable and at the same time announce also the concessions, both tax and tariff and/or other incentives, which it is prepared to offer in order to encourage the establishment of such industries. Once such an announcement has been made, an entrepreneur who is interested can readily make a decision as to whether it is worth his while to go in or not. Such a procedure will cut out the protracted negotiations which had to be undergone in the past and the delays which such negotiations inevitably entailed.
Although protective tariff measures will be announced simultaneously with the identification of a particular industry, it may be that such measures require minor revisions here and there in the light of experience gained. It should be made clear however, that the broad lines of assistance will still remain and so intending investors and industrialists will know exactly where they stand."[5]

45. Action appears to be the keynote. The list of priority products and development areas and what would constitute the required percentages of local content in manufactured products for the purposes of the Investment Incentives Act, 1968, were announced within one month of the establishment of that Committee whereas the Committee which was appointed for the specific purpose of studying the matter more than a year ago appears to have been bogged down at the committee level.

46. The central executive force operating under the Capital Investment Committee is the Federal Industrial Development Authority (F.I.D.A.). This Authority which was set up to advise the government on industrialisation policies and areas of development, has now been given the additional responsibility of actively participating in the setting up of industrial enterprises by preparing pre-investment studies on investment projects and project reports on industries and making these available to potential investors. F.I.D.A. also serves as an information centre for interested persons and is responsible for processing applications for incentives under the Investment Incentives Act or to set up other enterprises.

47. Other incentives offered to industrialists are:—
(a) exemption from import duty for machinery and, in some cases, raw materials used in manufacture;
(b) drawback of import duty on imported components used in, and exicise duty paid in respect of, products manufactured in Malaysia and exported from Malaysia;
(c) free transfer of capital and earnings within the Sterling Area and minimum control in respect of such transfers to and from other countries;

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5. Malaysia: A New Industrial Development Strategy—booklet published by the Federal Industrial Development Authority in July, 1969.

(d) tariff protection for deserving local industries;
(e) protection against dumping by foreign exporters;
(f) preferential government purchase of locally manufactured products provided that their prices do not exceed the prices of equivalent imported products by more than 10%.

48. The Government is negotiating Double Taxation Agreements with several countries and has concluded Foreign Investment Guarantee Agreements (against expropriation) with the United States and West Germany. The government has declared its willingness to enter into similar agreements with other countries. Malaysia is also a member of the "Convention on the Settlement of Investment Disputes."

49. Malaysia recognises that she faces extremely stiff competition from other countries in the region in attracting both foreign and local capital into industrial enterprises which require substantial capital commitment, technical and technological know-how, expertise in production, managerial and marketing techniques and an abundance of courage to venture into relatively unexplored areas. The Government at the same time believes that if the harvest promised offers a more than satisfactory rate of return as well as security of investment, industrialists will put their money into the country and it is to this end that government's energies are now being directed with a vigour and dedication unparalleled in the history of the nation.

APPENDIX

1. DEVELOPMENT AREAS

(1) The States of Kedah, Perlis, Pahang, Kelantan, Trengganu, Malacca, Sabah and Sarawak.

(2) The industrial estates of Senawang in Negri Sembilan and Kamunting in Perak.

In addition the Minister of Commerce and Industry is empowered to declare any specific area in the States of Selangor, Johore, Perak, Penang and Negri Sembilan as development areas.

2. PRIORITY PRODUCTS

(1) *Manufacture of food products*

Fruit canning excluding pineapple canning
Vegetable canning
Meat canning including meat, poultry, game and preparations thereof but excluding chicken and mutton curries.

(2) *Manufacture of animal feedstuffs*

Pineapple waste and bran

(3) *Manufacture of wood products*

Fibre board
Chip board
Soft board
Hard board

(4) *Manufacture of toys, wooden, metal, plastic, rubber and textiles*

(5) *Manufactures from padi husks and straw*

(6) *Manufacture of rubber products*

Rubberised fabrics
Conveyor belts, transmission belts, V-type belts

(7) *Manufacture of chemicals and chemical products*

Titanium dioxide

(8) *Manufacture of hardware tools*

Axes
Pliers
Screw drivers
Spanners
Riveting tools

(9) *Manufacture of industrial machinery and parts*

Ball bearings
Machine tools
Industrial machinery, all types

(10) *Manufacture of transport equipment*

Outboard motors
Pleasure craft

(11) *Manufacture of components, accessories, spare parts, supplies, fittings and garage equipment for motor vehicles*

Accessories, all types
Bus and motorcar seat frames
Components, accessories, spare parts, supplies and fittings for tractors and other earth-moving plants
Parts for spring assembly
Parts for engine assembly
Parts for suspension assembly
Parts for steering assembly
Parts for transmission assembly
Automotive tune up equipment
Battery charges
Cylinder block crack repairing materials
Front end alignment equipment
Static and electronic wheel balancers
Tension wrenches
Valve seat inserts
Valve seating equipment

(12) *Assembly/Manufacture of electronic components*

(13) *Manufacture of electrical machinery*

Telephone switching equipment

3. MALAYSIAN CONTENT REQUIRED IN MANUFACTURED PRODUCTS

The manufactured products should incorporate at least 50% by value of Malaysian raw materials and/or parts and components manufactured in Malaysia, excluding wages, salaries and other domestic inputs.

H.W.T. PEPPER AND DR. J.C.L. HUISKAMP:

GUILT AND INNOCENCE OF TAXPAYERS

—including some small notes on tax collection practices in certain countries—

Most countries with orthodox income tax systems encounter at some time or other objections to the widely-employed technique of making estimated assessments where the taxpayer does not render his declaration of taxable income or where the income he does declare is obviously understated.

The tax official in these circumstances has to make an estimate of taxable income to the best of his ability, giving the taxpayer the right (for the second time) of making a full and true declaration of income to support his appeal against the assessment and thus enable it to be adjusted from an estimated to an actual figure.

The pressure thus placed on a taxpayer is sometimes criticised as a negation of the principle of criminal law that a citizen is innocent until proved guilty. To assess a taxpayer as taxable on a certain sum and leave it to him to prove he is not so taxable is, it is argued, an oppressive practice contrary to the liberal spirit of the law.

This sort of special pleading is not infrequently encountered in developing countries where a tax system may have been inherited from a "colonial" or non-independent past when the system, based on that prevailing in their home country, was introduced by expatriate offices of the former governing or protecting power. It may thus be of some general interest briefly to examine what is involved in this issue.

A common ingredient of all income tax laws is the requirement that the taxpayer should render a declaration of his income. This requirement is based on the not unreasonable assumption that a taxpayer knows better than anyone else the sources and amount of his own income. Accordingly the initial onus is on the taxpayer to provide the materials to make an accurate tax assessment possible. If he does so no difficulty arises.

If a taxpayer does not supply the necessary information his position has to be considered in relation to all the other taxpayers who have fulfilled their obligations and paid their tax timeously. Obviously the assessment and collection of income tax cannot be allowed to remain indefinitely suspended until the delinquent taxpayer decides to conform.

INTEREST ON OVERDUE TAX

Various remedies, effective in countries with a high level of tax conformity may be less effective in developing countries. Adding interest to the tax due has two limitations: in a developing country interest rates are often very high and a business man may be content to "borrow" his tax money and let the interest run. Secondly the interest cannot be calculated until the tax is assessed and so has no impact unless there are ways of enforcing assessments in the absence of income declarations.

LATE FILING PENALTIES

The other remedy which springs to mind is that of a penalty for not rendering a tax declaration. Various devices can be used once the statutory period (extended according to circumstances by grace periods where reasonable extensions have been requested) has expired. Either a fixed penalty becomes due, or one which is calculated on a per diem basis for each day that the offence continues. There are two difficulties, that of enforcing

payment, and that of fixing a level of penalty which will be a real deterrent to the more serious delinquent without bankrupting the small taxpayer. The latter may be late with his declaration because he is unable to cope with his accounts and yet on investigation be found to have no tax liability. This remedy also, therefore, does not prove very satisfactory in practice in developing countries.

ESTIMATED ASSESSMENTS

Dealing next with the method of entering estimated assessments to force the taxpayer into action it is important to realise the following points—

(a) not to do this means yielding to the anarchy of letting taxpayers please themselves as to when to render their tax declarations;

(b) that such assessments are only made after a taxpayer has committed the offence of not rendering an accurate declaration of income;

(c) having failed to produce information regarding his income the taxpayer is given a second opportunity to do so by the appeal procedure provided in connection with the estimated assessment;

(d) if there is to be equality between taxpayers this equality must include payment of tax by all at the same due dates—to achieve this there is no choice but to insert estimated figures for those taxpayers who do not provide actual figures.

APPEAL PROCEDURES

As indicated the power to proceed with estimated assessments is almost universally adopted, not only for income tax but for taxes in general. Provided there are opportunities for appeal either initially or at later stages to independent tribunals the practice cannot be regarded as an oppressive one. Some tax laws make the first objection, one by the taxpayer to the Commissioner(s) against the assessment made by his (their) staff. This provision gives an opportunity for the matter to be reviewed by tax officials senior to those who made the assessment and enables many cases to be settled without further formality. Normally the Commissioner(s) ruling, if adverse may be appealed to an independent tribunal or Court. Where the objection or appeal to the Commissioner(s) does not exist as a formal, statutory, procedure the review by senior officials normally takes place informally where the first appeal is to an independent tribunal so that most cases may still be settled "out of court" by agreement, but the effect is broadly the same.

Two important questions should be discussed at this stage. Does the making of a too-large estimated assessment constitute an "oppressive" practice? What should be the procedure for payment of tax pending settlement of the appeal?

COMPUTATION OF ESTIMATE

Administrative experience in many countries indicates that some taxpayers, particularly where their incomes are rising rapidly, deliberately delay the submission of tax declarations. This is sometimes because in the case of an expanding business working (circulating) capital may be inadequate, and unpaid tax money can be utilised temporarily as capital. In such cases estimated assessments are often inadequate and are accepted without appeal. Accordingly the traditional administrative practice, in cases where taxpayers omit to render tax declarations and do not appeal against estimated assessments, is for the estimates to be increased year by year until the point is reached where the taxpayer in this category finds the assessment higher than this profit.

Usually a tax official employs whatever information is available when making his estimated assessment. It may be that he will merely "round up" the figure for the last year for which an agreed assessment was made. If there is no information except that increasing estimates of profits have been accepted year by year, that fact in itself is prima facie evidence that profits actually are increasing. If there is evidence in the taxpayer's file of increasing wealth e.g. the purchase of property or investments out of keeping with the size of the last-declared income then there is good reason to increase the assessment proportionately.

In all these cases, however, the taxpayer has had one chance before the assessment, and has another afterwards to provide correct details of his income. This practice of tax administrations is thus a reasonable one and to argue that the general principle of criminal law is infringed is, as a Judge once said in another instance, "mere rhetoric".

INDICIA OF WEALTH

Some countries' laws permit the increase of income tax assessments on the basis of external evidence or "indicia" of wealth per se. In Spain, for example, the acquisition of a motor-car above a certain value must be reported in connection with income tax liability, and the criterion, e.g., of occupying a luxurious dwelling is taken into account also in the tax systems of France and of several countries of Latin America. In some countries e.g. Guyana, there is specific authority in the tax law for the income tax assessment to be calculated where necessary, on a "growth of wealth" basis. Virtually all tax authorities make administrative use of evidence of the taxpayer's wealth in making income assessments. The power to obtain such information is usually implicit in the law but may be explicit as for example in Malaysia and Singapore where there is specific statutory authority to call for statements of assets or wealth.

PAYMENT OF TAX ON DISPUTED ASSESSMENTS

Power to make estimated assessments where the taxpayer neglects or refuses to act is not of itself enough to ensure that the delinquent taxpayer can be compelled to make his reasonable contribution in taxation at about the time that the general body of taxpayers does so. It is usual to provide that the collection of tax should be suspended when an assessment is under appeal, the exception being that tax should be payable on that part of the tax which is not in dispute. Provisions of this kind are commonly abused in developing countries e.g. by the delinquent taxpayer refusing to agree to anything. Even in more sophisticated countries such provisions do not always work smoothly—it is necessary, for example, to take cases where the taxpayer will agree to nothing, or only a nominal payment, to a tribunal to determine what can reasonably be collected. This results in cumbersome administration—another hearing of a tribunal may subsequently be necessary to determine the appeal itself. In a developing country, chronically short of good-calibre staff, especially in the early post independence period a serious arrears position may swiftly develop with the less public-spirited taxpayers more or less pleasing themselves about when or even whether to pay.

In some countries a new, inexperienced government may be lobbied by commercial interests not to pursue the collection of arrears with determination because of the shortage of circulating capital. It can never be right to yield to such pressures. The inequity of incidence of taxation where some taxpayers are able to flout their obligations

while others pay is obviously increased if action to eliminate arrears diminishes. Any reliefs from taxation should be available to all taxpayers equally rather than to the least deserving of them.

Remedies for delaying tactics employed by delinquent taxpayers include the setting of fixed dates for assessment and payment by all taxpayers where no P.A.Y.E. or other withholding scheme operates. Although this seems a commonplace provision there are a number of countries where no such fixed dates exist and actual dates of assessment and payment of the same year's tax vary very widely between different taxpayers. Having fixed the dates when payment ought to be made, ideally so that tax on all classes of income is payable about the same time, the next task is to secure that tax is paid timeously.

PRIORITY OF TAX DEBTS

It is curious that some countries, although providing that tax debts rank preferentially in bankruptcy, liquidation, or on death, have comparatively weak collection powers in general everyday cases. More effective pressure is in practice exerted to collect commercial debts with the result that tax debts to Government are the last to be paid. The interest burden borne by Government to finance late or lost revenue is a factor in increasing the amount charged in taxation. Unpaid tax is in effect used as additional finance by those who succeed in deferring payment.

A more sensible arrangement is to provide that taxes are always a priority debt. The logic in the case of sales taxes, which the trader has already collected from his customer and of which he is merely custodian for the government, is obvious. It is equally obvious with income tax that where this is a priority or first charge debt on a large section of the community because of the operation of PAYE or withholding scheme there can be no equity unless businesses and professions have also to pay their tax as a first rather than last commitment. This means, for example, priority treatment in the timetables of Law Courts for cases on tax collection, especially where there is overcrowding in the list of cases for hearing.

For a taxpayer, other than the well-organised business man who coolly takes commercial advantage of any payment latitude he is given, it is not really a kindness to allow him to accumulate a bill for several years' taxes. It is not unknown in some countries for a business to be sold to pay back taxes, an event which does not make the government or its tax administration popular. Such events may be avoided by resolute action to collect taxes so that arrears are not allowed to accumulate and the business or professional man has to apply the self-discipline required to provide properly for tax payments from the outset.

ENFORCEMENT OF ESTIMATED TAX ASSESSMENTS

The Gordian knot of the conflict of taxpayers' rights, where assessments are under appeal, and the state's need to collect the tax in fairness to other taxpayers and its own revenue requirements, has been cut, e.g., in *Australia,* by a provision that assessed income tax is to be paid even where an appeal has been made. This legislation was also adopted in 1961 in *Malaysia* and *Singapore* with notable effects on the reduction of tax arrears. Obviously such a provision is a powerful tool in the hands of the tax administration but in the countries concerned it has not in practice been used oppressively. In practice tax is held over if there is good reason for suspension but this is done administratively without recourse to a tribunal for a

determination of provisional payments. A parallel to this kind of treatment for income tax may be found in the Customs administration of various countries where it is normal practice, where there is a dispute as to the rate of customs duty on certain goods, to collect (or obtain a guarantee for) duty at the higher rate pending settlement.

In *Eire* the problem of collecting sales tax in the absence of a tax declaration from the taxpayer is dealt with neatly. Only an initial appeal on the grounds that a taxpayer is not accountable at all may result in tax assessed being suspended pending settlement of the appeal. Once liability is established, absence of a declaration of tax payable in subsequent months does not impede the tax collection process. Estimated assessments are based on the tax due in the corresponding month of the previous year (or on the figure for any higher month in the current year) with an addition of 25%. The *only* valid appeal against such an assessment is one accompanied by the statutory declaration of sales tax liability which ought to have been made in the first place. If failure to render monthly declarations of sales tax continues (e.g. it may suit the taxpayer to 'drag his feet' when sales are climbing at a rapid rate) the estimated assessments are increased successively until the delinquent taxpayer is compelled to comply with the requirements of the tax law.

In *Britain* collection of income tax in the absence of tax declarations by businessmen is achieved by making assessments by a fixed date, whether declarations have been rendered or not, and using a tribunal to determine amounts to be paid of the tax where estimated assessments are subject to appeal. In the case of sales taxation (purchase tax) delay in declarations and payment (which are statutorily due on a quarterly basis) is countered by insisting on a deposit or bond for the tax probably due and/or by collecting the tax at more frequent intervals, e.g., monthly or weekly.

BENEFITS OF PROMPT ASSESSMENT AND COLLECTION

If a government can transfer its tax scene so that assessment and collection proceed timeously and effectively, tax revenues inevitably are boosted. There is scope for reductions in tax rates or increases in reliefs and exemptions. Taxpayers are not ultimately worse off by learning to pay taxes promptly rather than in a dilatory way and causes of governmental unpopularity are removed. A recent example may be found in Brazil where the federal government has in recent years been bringing income tax payments more up to date, and the state governments, notably that of Sao Paulo, have been tightening up sales tax collection. In the latter case the increased revenue has recently permitted both an increase in exemptions and a re-scheduling, in the taxpayer's favour, of the fixed dates for general payment of sales taxes. Effective use has been made of the banks as a mechanism for collecting sales tax, leaving the administration freer to concentrate on delinquent taxpayers.

LEONARD STOLK:*

TAXATION OF INTERNATIONAL CONSOLIDATIONS INTO A "EUROPEAN CORPORATION"**

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1. INTRODUCTION

11. Terminology

The terminology generally used in connection with corporate reorganizations is confusing. The word "reorganization" as used by American lawyers denotes "any arrange-

* Hochschule St. Gallen (lic. oec. 1968).

** Submitted to Professor Oliver Oldman in satisfaction of the requirements of the International Tax Program 1968/69 of Harvard Law School.

ment by which the business formerly conducted by two or more companies becomes the business of a single company."[1] It covers mergers as well as consolidations. "A merger occurs where one or more corporations transfer their assets to another existing corporation—as where corporation X merges into existing corporation Y. A consolidation occurs where two or more corporations transfer their assets to a newly created corporation—as where corporation X and corporation Y consolidate into new corporation Z."[2] The subject of this paper is limited to consolidations, but the word merger may be used when the problems of the first are the same as of the latter.

12. International concentration

The European Common Market has a population of 183 million. With this number of consumers it ranks next to the United States in the list of markets in the world. The gross national product per capita is $ 1572, much lower than the $ 3520 of the United States, but still high compared to other big markets.[3] A market of this potential calls for big concerns as the example of the United States shows where the supermarkets in California sell the same products as in New York. This does not mean that big corporations have the highest grade of earning-capacity.[4] Many authors doubt the need of large-scale firms,[5] but others[6] regard them necessary in big markets. Generally, big companies have an advantage in industries with strong competition. Therefore, the legal means for international concentration have to be available, and obstacles must be removed.

International concentration can be achieved by many ways. It starts with cooperation whereby all kinds of contracts between independent companies are used. Exchange of know-how, licencing of patents, and cartels are common forms. A joint venture is the next step whereby a mutual subsidiary is set up.[7] Real concentration takes place where the cooperating companies lose their independency. A holding company can be established owning those cooperating companies located in different countries. This

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1. Conard, Corporate Fusion in the Common Market, 14 Am. J. of Comp. Law 573, footnote 2 (1966).
2. World Tax Series, Taxation in the United States 808, 809 (1963).
3. World Bank Atlas, International Bank for Reconstruction and Development (1968).
4. The Common Market's Giants, The Economist 68, 69 (October 12, 1968).
5. H.W. de Jong, Concentration in the Common Market—A Comment on a Memorandum of the E.E.C. Commission, 4 C.M.L.Rev. 166 (1966-67). Size Is Not Everything, The Economist 67 (October 12, 1968). Serge Dassault, president of Electronique Dassault (France), Discussion—Europe Ponders Ways to Meet U.S. Challenge, The New York Times (January 13, 1969).
6. "The potential danger of unhealthy competition due to the often larger size of the American enterprises and their research has to be matched through larger European production units." E. van der Beugel, Doctoral Thesis, Rotterdam (1966), as cited by Antonie T. Knoppers, The Transatlantic Technological Gap and U.S. Investment in Europe, 3 Progress, The Unilever Quarterly 20, 23 (1968). Guido Colonna di Paliano, Why Europe Needs Continental-Scale Firms, 116 European Community 3 (1968). "The merger trend in Europe is likely to grow further in years ahead. We must make even greater efforts in the field of industrial concentration to strengthen our competitive position especially in sectors where the cost of research and investment is high . . . In these sectors also Europe will eventually have no choice but to create multinational enterprises." Alfred Schaefer, president, Union Bank of Switzerland, as cited in U.S. News & World Report 76 (April 29, 1968).
7. Bivens et al., Joint Ventures with Foreign Partners, National Industrial Conference Board (July, 1966).

form of concentration is only one step before international mergers and consolidations. Many examples[8] show that mutual capital participation or the establishment of a holding company is the way for international concentration. At a meeting[9] in 1961 an Italian lawyer[10] listed nine reasons why a holding company should be preferred to an international consolidation. One of these refers to taxation. A tax law may provide for a beneficial treatment of a company that carries on only certain activities. If the entity is a subsidiary of a holding company, the latter benefits from that tax law. If the entity were a branch of a concern, no special tax treatment could be obtained.[11] On the contrary, more convincing reasons of taxation would support international consolidations, establishing corporations that operate through foreign branches instead of through subsidiaries. The net loss of a branch is normally[12] deductible from the "parent's" taxable income. Dividends distributed by a subsidiary are taxed with a withholding tax causing an economic double taxation which in many countries is not eliminated by a foreign tax credit.

13. International consolidations

The reason why international concentration takes place in the form of holding companies rather than international consolidations is that practically no legal means for international consolidations is available.[13] Belgium, France, Italy, and Luxembourg allow their corporations to absorb foreign companies. But only the Italian law allows a domestic corporation to be absorbed by a foreign company, and then still under certain conditions.[14]

Article 220 of the Treaty of Rome[15] states: Member states shall, insofar as necessary, engage in negotiations with each other with a view to ensuring for their nationals: . . . the possibility for companies subject to the municipal law of different member states to form mergers . . .

The proposed statute of a "European Corporation"[16] would enable existing corpora-

8. In 1968 in Europe: Fiat (Italy) and Citroen (France), Hoechst (Germany) and Roussel-Uclaf (France), Pennaroya (France) and Prussag (Germany), Demag (Germany) and Richier (France), further ASEA, KONE, Thrige-Titan, involving all Scandinavian countries. See, Europe's Merger Boom Thunders a Lot Louder, Business Week 53, 54 (November 23, 1968). (However, these examples are no mergers). And, Konzentrationstendenzen in der Europäischen Automobilindustrie, 11 Börsen-Bulletin, Schweiz. Volksbank (November, 1968).

9. Colloque International de Droit Européen, Brussels (1961). Reports published by Association Belge pour le Droit Européen, Brussels (1962).

10. Pietro Guerra, Rapport Italien, id. at 100, 101.

11. id. at 101.

12. At present such a loss is not deductible in the Common Market, because the income (positive and negative) of a foreign permanent establishment is exempted from taxation in the country of the "parent company". However, the EEC Commission recently proposed a new system whereby losses are deductible. See below, section 24, Taxation of Foreign Branches.

13. An analysis of the French and Italian laws, and a description of the laws in the Common Market, is given by Ciriello, Prospects for International Merger in the European Economic Community, Student Paper Harvard Law School (April 30, 1963) unpublished.

14. EEC, Das Problem der Unternehmenskonzentration im Gemeinsamen Markt, Kollektion Studien Reihe Wettbewerb Nr. 3, Brussels, at 15 (1966).

15. Treaty Establishing the European Economic Community, Rome (March 25, 1957).

16. P. Sanders, Europäische Aktiengesellschaft, Vorentwurf eines Statuts für eine europäische Aktiengesellschaft, EEC Commission (December, 1966). For an introduction, see, A European-Type Company, Memorandum of the Commission of the EEC, CCH Common Market Reports, No. 33, part I (June 21, 1966).

tions of different countries to consolidate into a new "European Corporation". The proposed statute is the first step towards international mergers and consolidations.

14. Taxation

Enacting a statute of a "European Corporation" is only useful when the related tax problems are considered at the same time.

The authors writing on the subject of the European Corporation agree that the taxation of latent invisible reserves, the difference between the market and the book value of an asset, is the main tax problem. This paper will only consider that problem. Other questions of direct taxation, and those relating to indirect taxes as registration fees for incorporation or transfer tax on real property are left beside. Such taxes are certainly important in case of international consolidations, but the problems relating to them seem easier to solve than the question of hidden reserves.

2. THE "EUROPEAN CORPORATION"

In 1965 the French government suggested in a note to the Commission of the European Economic Community (EEC) the creation of a "European-type commercial company".[17] The idea of such a company was not new since many authors[18] brought up this subject before. The EEC Commission favored the idea very much, and published a memorandum[19] on this subject in 1966. In that memorandum the Commission saw the creation of European commercial companies as part of the realization of the Common Market[20]. It asked some leading European lawyers[21] to work out a proposal.

The main work was done by Professor Sanders[22] whose inaugurational lecture[23] at the Netherlands Graduate School of Economics, Rotterdam, in 1959 concerned the European Corporation. Professor Sanders submitted the proposal[24] for a European Corporation statute in 1966. The following description of the European Corporation is based mainly on Professor Sanders' proposal. This European Corporation is called "Societas Europaea" or S.E.

The study of an additional corporation form, one for all Common Market countries, is an effort to develop the field of corporation law; an effort which is called for by the economic development of the Common Market. The S.E. statute would have advantages over the present available means of incorporation.[25] It makes international mergers and consolidations within the Common Market possible, and it provides a unified law for the whole EEC, so that the laborious studies of all different national corporate laws become superfluous for people related to an S.E. The enthusiasm for a European Corporation is, however, not shared by everyone. Some industrialists[26] think the use of a holding company or a mutual capital participation suffices for international concentration, and there is no need for

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17. A European-Type Company, supra footnote 16, at 9.
18. The idea was first discussed in the European Consultative Assembly in 1949. Y. Scholten, The European Company, 5 C.M.L. Rev. 9, 20. For the early authors, see bibliography in: M. Wang, Die europäische Aktiengesellschaft in der E.W.G., Freiburg, Switzerland, 1964.
19. Supra note 17.
20. Supra note 17, at 9.
21. E. Arendt, E. von Caemmerer, L. Dabin, G. Marty, G. Minervini, and P. Sanders.
22. Dean of the Law Faculty, Neth. Grad. School of Ecs., Rotterdam.
23. P. Sanders, Naar een Europese N.V.? (October 22, 1959).
24. Supra note 16.
25. Sanders, supra note 16, at IV, XXVIII.
26. Adm. Ellery W. Stone, vice chairman, I.T.T. Europe, Discussion: Europe Ponders Ways to Meet U.S. Challenge, supra note 5.

international consolidations. In this paper no standpoint will be taken in favor or against the S.E. The only purpose is, after a description of the S.E., to focus on the main tax problem of international consolidations into an S.E.

The advantage of the S.E. plan over a unification of national corporation laws is that with the S.E. a corporation still has the option to incorporate under the national corporation laws or under the S.E. statute whereas under the unification program—which wants to harmonize the national corporation laws—a corporation has but one law to incorporate under. The proposal therefore stands apart from the coordinating work based on article 54.3 g of the Treaty of Rome[27] that requires a coordination or harmonization of the national legal systems[28] of the EEC countries, as it does not ask for any incision into the national laws.

21. The Societas Europaea

The incorporators of an S.E. must be corporations that have been existing and in operation for at least three years. An S.E. can incorporate another S.E. while the first has not been in existence nor in operation for three years. No individual can incorporate an S.E. because it is hard to judge an individual's economic capacities. But an individual can have a corporation like a bank establish an S.E. for him so that the bank is the official incorporator that is liable for the incorporation.[29] The charter of the S.E., granted by the European Court, will be on file in a European Registry.

The S.E. proposal contains five ways of incorporation[30] of which only the establishment of an S.E. by way of consolidating two or more corporations into an S.E. is relevant for this paper. In case of a consolidation, the founding corporations must be incorporated in Common Market countries because the S.E. proposal solves only the problems of international mergers and consolidations within the Common Market. The assets of the founding corporations will be transferred totally to the S.E. The stockholders of the establishing corporations receive shares in the S.E. After the incorporation of the S.E. the founding corporations no longer exist.

An S.E. will have its registered office in a particular EEC country, but it can remove its registered office to any other EEC member state without any difficulty of corporation law. The S.E. will have the same rights and competences as a national corporation in any EEC country. The Competition Directorate[31] of the EEC favors an S.E. under European law instead of under uniform national laws, because it presumes the S.E. has a European personality in that case, rather than a nationality. Thus, under European law, there would be no question of the final nationality of a merged or transferred S.E.[32] As pointed out before, there is not that certainty if the practical results of having the S.E. under European or national law really make a great difference.

The S.E. must have a rather high minimum capital because it is a corporation designed for large business purposes, and abuses should be avoided. On the other hand, the minimum capital is not so high that medium size corporations could not use the S.E. for international expansion.

An S.E. can be transformed into a national corporation of a Common Market country after having been in existence for at least

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27. Supra note 15.
28. Sanders, supra note 16, at XXIX.
29. Sanders, supra note 16, at IX.
30. Id. at 3.
31. General Directorate for Competition.
32. CCH Common Market Rep. par. 9034, at 8067.

three years. An S.E. can also merge with another S.E., or consolidate with another S.E. into a new S.E. without difficulties of corporation law.

To reach a uniform interpretation of the S.E. statute the European Court shall have exclusive jurisdiction over the S.E.

22. Taxation

Professor Sanders' proposal for the S.E. omits rules for taxation. Some authors[33] have mentioned the tax problems that could arise upon creation of a European Corporation, but none has worked out any detailed solution. The greatest problem seems to be the taxation of capital gains upon the deemed liquidation of the founding corporations in case of an international consolidation or the deemed liquidation of the acquired corporation in case of an international merger. This problem will be reviewed in chapter 4.

A condition more than once emphasized in Professor Sanders' proposal is the non-preference treatment of the S.E. A national corporation shall not be discriminated as against an S.E. The S.E. therefore, may not have any special privileges. On the other hand, the S.E. will be created to reach special advantages of corporate law which are not given by the present national corporation laws, such as the possibility of international merger, and transfer of the registered office to another EEC country. Perhaps those advantages are not regarded as special privileges of the S.E., but a special favorable tax treatment will always be a privilege that can be interpreted as discriminatory as against national corporations. No obstacle hinders the creation of a European Corporation more than the present tax laws. Removal of these barriers leads to changes in the tax laws giving a European Corporation a special tax treatment. In the opinion of Professor Sanders a special tax treatment of the S.E. is acceptable if that is a step towards a general tax harmonization which eventually benefits all corporations in the Common Market.[34] Since Professor Sanders and other authors oppose discrimination of national corporations, the aforesaid opinion seems a contradiction because a general harmonization of direct taxes will take a much longer time than the creation of a European Corporation. This will cause a significant time gap during which the European Corporation benefits from privileges, including special tax treatment, that national corporations lack. The S.E. proposal anticipates a tax harmonization, and will, during the time lag before the harmonization is effective, take a privileged position as against national corporations.

23. The S.E. taxed like a national corporation

The S.E. is designed for large business purposes within the Common Market. Therefore, an S.E. will have subsidiaries or branches in different EEC countries. This paper will discuss only the S.E. incorporated by means of an international consolidation. In many cases the founding corporations that will no longer exist as such after consolidating into the S.E. will remain in their respective countries as branches of the new S.E. Such a branch is a permanent establishment in the sense of article 5 of the OECD Draft Convention.[35] According to a principle in

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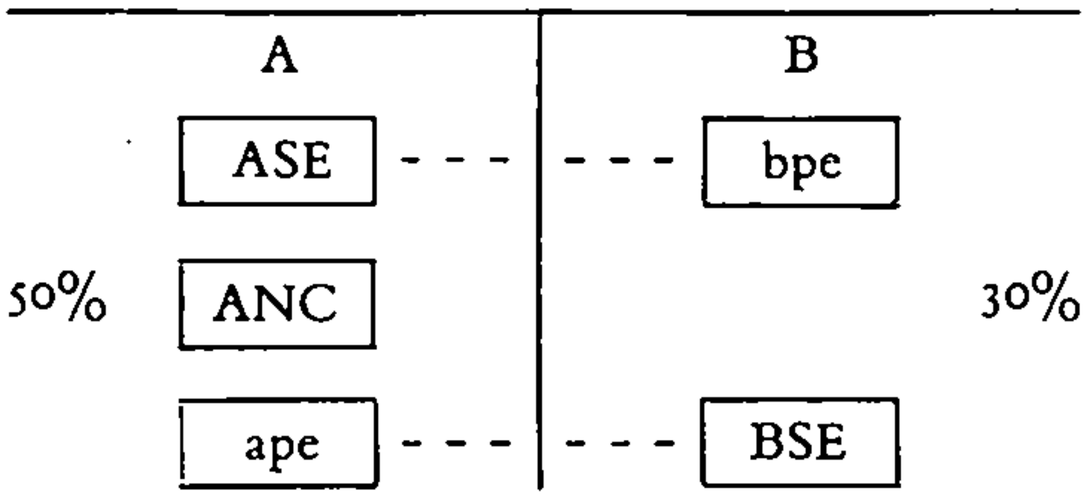
33. Sanders, supra note 16, Titel XII at 121, 122. Rapport Général sur la Fusion des Sociétés, supra R. Houin, note 9, at 23. P.M. Storm, Statute of an S.E., 5 C.M.L. Rev. 265, 288 (1967-8). And others.

34. Sanders, id.

35. Draft Double Taxation Convention on Income and Capital, Report of the Organization for Economic Cooperation and Development, Fiscal Committee 1963.

international taxation[36] the income of permanent establishments is taxed by the country of its location. All EEC countries except Germany allow their taxpayers an exemption for the income of foreign permanent establishments since that income is taxed by the foreign country. Germany allows only an exemption when stipulated in a tax treaty; it has such treaties with all EEC member states.

Example



ASE is a Societas Europaea with its registered office in country A and a branch (bpe) in country B. ANC is a national corporation located in A. BSE is a Societas Europaea in B with a branch (ape) in A. Both countries are in the EEC. The proportional income tax rate for corporations in A is 50%, and in B 30%.

Assuming that the S.E. will be taxed like a national corporation, there is no discrimination between ASE and ANC since the domestic income of both is taxed by A at 50%. ASE's foreign income, generated by bpe, is taxed in B at 30%. If ANC had a branch in B, its foreign income would also be taxed at 30%. The reverse applies to BSE, whose domestic income is taxed at 30%, whereas its foreign income is taxed at 50%. A comparison of ASE with BSE shows a discrimination between these two European Corporations, as one's income is taxed at 50%, and the other's at 30%, just because they have different locations within the Common Market.

A detailed comparison of the real situation in the Common Market would not give these simple results and might finally show a less significant difference between the tax burden in the six member states with the exception of Belgium, where the tax burden lies somewhat below the average.[37] A detailed analysis should include the effect of different accounting principles, and should also cover the indirect taxes to obtain a real survey, although the harmonization program of indirect taxes is progressing.

Before bpe became a branch of ASE in 1969, it was a national corporation in country B, called BNC. BNC merged with ASE, and the stockholders of BNC exchanged their shares for ASE stock. The earnings of BNC in 1968 were $ 100, and net after tax $ 70. Half of this amount was distributed as a dividend, so that the stockholders received $ 35. Assuming that the average individual income tax rate for these stockholders in country B is the same as the corporate tax (30%) the net result after tax was $ *24.50*.

The earnings of ASE were $ 100 in 1968, and this company followed the same policy as described for BNC. With a tax rate of 50% in A, this means that the stockholders received a dividend of $ 25. Since the general tax level in A is higher than in B, we can assume that the average individual income tax rate for the ASE stockholders is 50%. The net result after tax was $ 12.50.

Many countries impose a withholding tax on dividends paid to non-residents up to 30%. If there is a tax treaty between the country where the dividend is paid, and the residence country of the stockholder, the withholding tax is lower or even zero. Article 10 (2) of the OECD Model Treaty[38] provides for a with-

36. O. Bühler, Prinzipien des Internationalen Steuerrechts, 175 (International Bureau of Fiscal Documentation, Amsterdam 1964).
37. A.J. Rädler, Corporate Taxation in the Common Market, Guides to European Taxation Volume II, V: 4 (loose-leaf service).
38. Supra note 35.

holding tax of 15%; most EEC countries have adopted this rule in their treaties.
The countries A and B have concluded a tax treaty according to the OECD Model.
In 1969, after merging with BNC, the earnings of ASE are $ 200, including $ 100 earnings of the foreign branch bpe (the former BNC). The latter amount is exempted from tax in A, and taxed in B at 30%. ASE's domestic income ($ 100) is taxed at 50%. The total income after tax is $ 120. Half of this amount is distributed as a dividend ($ 60). Since ASE merged with BNC it doubled its outstanding shares, and it has now coincidently as many stockholders living in A as in B, each group owning half of ASE's stock. The stockholders in B receive a dividend of $ 30 on which A levies a withholding tax of 15% ($ 4.50). B allows no foreign tax credit, but its tax law provides for a deduction of foreign taxes, so that the net amount that the stockholders retain after tax (30%) is $ *17.85* which is $ 6.65 less than in 1968. If there would be no withholding tax, the net result were $ 21, which is still $ 3.50 less than in 1968.

24. Taxation of foreign branches

As pointed out before the EEC countries allow an exemption for the income of permanent establishments in a foreign country because that income is taxed by the country were the branch is located. If the foreign branch operates at a loss, the "parent" cannot deduct this loss from its own income, because the exemption includes positive as well as negative income of the foreign branch.
In a recent memorandum[39] the EEC Commission proposes a new tax system for foreign permanent establishments. According to this system a corporation has the option to include in its own taxable income the income of all its permanent establishments in other EEC countries, so that losses can be offset. The countries where the branches are located will still tax the income of these branches, but the "parent" obtains a foreign tax credit for the taxes imposed by the other EEC countries on the income of the permanent establishments.
A system like this is well-known in the United States where the rule of taxing world-wide income and allowing a foreign tax credit governs. The proposal in the EEC memorandum is advantageous for concerns with branches operating at a loss. The problem of different tax rates as described in the previous example, however, would intensify. The bpe income would be taxed by A at 50%, while only a credit for the 30% tax paid to B would be allowed, so that the general tax burden would be heavier.
In this example all circumstances remained constant except for the international merger. The stockholders in B would be in a better position if they had not approved the merger, for they received less dividends by doing so. The example illustrates the situation in which the S.E. statute is operative and therefore the problems of corporate law and the obstacle of taxing hidden reserves in case of international mergers and consolidations are removed. There would be still a tax problem; the BNC stockholders would not have given their approval. Therefore, the international merger of ASE and BNC could not have taken place because there is a difference between the tax rates of A and B.
The directors of ASE could adjust their dividend policy to the situation in the different countries. At the time of the merger ASE could have created a special

39. EEC Commission, Proposition de Directive concernant le régime fiscal commun applicable aux sociétés mères et filiales d'Etats membres différents, COM(69) 6 final, Brussels January 15, 1969.

class of stock and issued this to the BNC stockholders for their BNC shares. Then, ASE could pay a higher dividend to the owners of this special class of stock to eliminate the difference between the tax rates. The question would arise if the other stockholders of ASE would agree with such a differentiated dividend policy whereby some stockholders receive more dividend than others.

In reality the BNC stockholders might have expected a growth in earnings by the merged corporations because of the concentration, so that they would have passed over the lower dividends, anticipating a higher income in the future, and therefore have given their approval to the merger.

In the next section (25) the description follows the present system whereby income of foreign branches is exempted in the country of the "parent".

25. The S.E. taxed by the EEC

Instead of having the S.E.'s income taxed by the country where the registered office is located, the EEC authorities could levy a S.E. income tax. Since the S.E. is a European Corporation which is probably governed by European law and is chartered by a European authority, it is rather realistic to assume that it will be taxed by the EEC. There are several ways for the EEC to tax the S.E.

1. The EEC can levy an S.E. income tax, distribute it to the countries where the headquarters and branches of the S.E. are located in proportion to the income part generated in those countries. The advantage of having the S.E. taxed by the EEC is that the allocation of income to the respective countries will occur according to a uniform accounting system. If every country follows its own accounting principles there could be a double taxation of the income allocated by country A to the branch there, and by country B to the permanent establishment or to the headquarters in country B.

Assuming that the EEC tax rate is 50% and the rate for national corporations in country B is 30%, similar problems arise as in the previous example. All S.E.s will be taxed at a 50% rate, but a national corporation in country B will be taxed at 30%. In this case national corporations are not being discriminated against, as long as no country levies a tax higher than 50%, but an S.E. in country B is discriminated as against national corporations in the same country. However, as mentioned above, the promoters of a European Corporation are only concerned about special privileges granted to an S.E. that discriminate against national corporations. In a country with low tax rates there will be reluctance to establish S.E.s when those will be taxed at a higher EEC tax rate.

2. Imagine the same situation, with the exception that the EEC tax rate depends on the national tax rates. All S.E.s are taxed by the EEC. For S.E.s in country A the EEC tax rate is 50%; for those in B an EEC rate of 30% applies. In this case the S.E. is taxed at the same rate as a national corporation in the same country. The income from a foreign branch is taxed by the country in which it is located at the domestic rate. The advantage of this system is that there is no discrimination between S.E.s and national corporations, but the disadvantage is that some S.E.s are taxed at a higher rate than others, depending on their location, so that a country with low tax rates could attract more S.E.s, but it is doubtful that the choice of a corporation's location is governed by tax rates.[40]

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40. John F. Due, Studies of State-Local Tax Influences on Location of Industry, 14 Nat'l Tax J. 163 (June 1961).

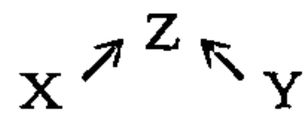
3. Other methods of taxation which will not be elaborated upon here include a small European income tax on S.E.s on top of the national tax, as a sort of yearly excise tax for the privilege of having a European charter; or a European income tax on all corporations in the Common Market, like a federal tax besides a state tax. The purpose of the first method would be to stress that the privileges of corporate and tax law with regard to international mergers and consolidations into an S.E. are offset against the disadvantage of an extra tax, so that national corporations are not discriminated against. The purpose of the second method would be to provide the EEC with a revenue from direct taxes; the desirability or necessity of such a revenue is here out of order. Both methods seem unrealistic and not under discussion at present.

26. Conclusion

The promoters of a European Corporation emphasize that national corporations will not be discriminated against. A general principle of equity would be served if all S.E.s were taxed at the same rate independent of their location within the Common Market. If these two requirements are met, an S.E. in a country with low tax rates would be taxed at a higher rate than a national corporation in the same country. It would be disadvantageous to establish S.E.s there. Stockholders of national corporations would object to mergers or consolidations into an S.E. of a country with higher tax rates, as we have seen in the previous example. As long as a harmonization of direct taxes in the Common Market has not been attained, there is no place for a European Corporation. The authors promoting such a corporation attach much attention to the tax problems of hidden reserves in case of international mergers, but seem to ignore the different tax climates in the EEC countries which prohibit the development of a just method of income taxation for the European Corporation.

3. TAXATION OF DOMESTIC CONSOLIDATIONS IN THE COMMON MARKET

Example



The corporations X and Y consolidate into corporation Z. The last balance sheets of X and Y show under the assets among others marketable securities and investments in unconsolidated subsidiaries at cost; the market value of these assets is higher than the amounts of the balance sheet. Under the item Property, Plant, and Equipment there is land that has a present market value which is higher than the book value, and buildings that are depreciated, but could be sold at a higher price than the book value shown in the balance sheets.

The total assets of corporation X have a market value of $ 2 million, the balance sheet of X shows a book value of these assets of $ 1 million. The assets are taken over by Z; Z is willing to pay for these assets as much as $ 2 million. If Z pays this amount, it will insert the assets in its own accounting books for $ 2 million which is the cost to Z. For X this transaction would be a realization of its assets; the realized profit would be $ 1 million (the difference between the book value and the market value). This profit would be taxable for corporate income tax purposes.

There is a way to defer this corporate tax liability. If Z inserts the same book values of X's assets in its own books as X had valuated them in X's balance sheet, there would be a continuation of the book value, and no profit would appear for corporate tax purposes. Only after Z sells the assets at market value, or if Z would be liquidated, a taxable gain is realized. The tax authorities

will have no objections to this method, because the situation remains the same after Z has taken over X's assets; the gain on the appreciated assets will be realized once in the future, and at that time a tax will be imposed.
In the case where Z would have taken over X's assets at $ 2 million, the shareholders of X would have received that amount, because X will be liquidated after transferring its assets to Z. Assuming that the stockholders originally had paid $ 1 million for their stock, they now would realize a taxable gain of $ 1 million.
In the case where Z takes over X's assets and uses the same book value in its own accounting system, it is to be assumed that Z issues its stock to the X shareholders instead of a cash payment. The result is the same when Z issues its stock in exchange for X stock, because X will end its existence after transferring its assets to Z; in both cases the X stock is worthless after the "liquidation" of X, whether the X shares are held by the X stockholders or by Z. The fact that Z will give stock instead of cash for the assets it acquires is even more likely, when X and Y consolidate into a new company Z, for in that case Z has no assets of its own to distribute to the X and Y stockholders.
In fact, this series of transactions occurs in one single step—a statutory merger. There is no actual transfer of assets compensated for by cash or stock, nor an actual liquidation of corporations. The only difference after the consolidation is that now Z is substituted for X and Y, and the stockholders now have Z stock instead of X or Y stock.
If an Y stockholder receives Z shares with the same par value as his exchanged X shares this exchange may have no income tax consequences. The cost of the Z shares could be deemed to be the same as the original cost of the X shares, so that the basis for capital gains tax purposes remains the same. The exchange will not be regarded as a realization, thus the transaction is tax-free.
Although the par value of the exchanged shares might be the same, stockholders' equity accounts such as Capital Surplus and Accumulated Retained Earnings can cause problems. If these accounts before the consolidation compared to afterwards differ, the accounting value of the exchanged shares is not the same.

Stockholders' Equity	*Shs.*	*Par Value*	*X*		*Y*		*Z*
Common Stock	400 ×	0.50	200	100 × 1	100	300 × 1	300
Capital Surplus			300		600		900
Accum. Ret. Earnings			300		300		600
Book Value per Share			2		10		6

If an X stockholder would exchange 2 X shares (par value $ 0.50 per share) for 1 Z share (par value $ 1) he would receive the same par value. One X share has a book value of $ 2, while one Z share represents $ 6, so that the X shareholder would receive a value of $ 6 (one Z share) in exchange for $ 4 (two X shares given to Z). Thus, the book value of his stock would increase after the consolidation.
If the cost of the Z shares to the former X stockholder is deemed to be the same as the cost of his original X shares, his basis for capital gains tax purposes would be the same. However, the Treasury would probably not accept a tax deferment in this case and would regard the transaction as a realization, so that the gain would be taxable.
Moreover, this transaction would not occur in reality. A Y shareholder who exchanges

one Y share with a book value of $ 10 for one Z share with a value of $ 6 would never accept this transaction. The value he loses would be transferred to the former X shareholders, a quite unrealistic assumption. Normally the X and Y stockholders will receive a number of Z shares representing the same book value as their former stock, or even representing the same market value.

A tax law[41] can nevertheless take the par value of exchanged stock into account to compute the taxable gain; in such cases a very careful planning of the consolidation is necessary to avoid tax consequences for the stockholders.

Generally speaking, the tax laws in the Common Market countries provide for a tax-free consolidation where corporate income tax is concerned, under the condition that the book values of the assets are continued. The treatment of stockholders, however, is different and depends on each individual case; in many countries only individual stockholders with a substantial interest in a corporation are liable for capital gains tax.

The following short characterization of the rules in each EEC country is based mainly on the description in "Corporate Taxation in the Common Market".[42]

Belgium[43]

A tax-free consolidation of corporations is allowed if:

1. the consolidation is performed solely through an exchange of stock in the newly created corporation;
2. no tax-free repayment of capital has taken place; and
3. book values are carried over and continued.

France[44]

Capital gains arising on a consolidation are granted some special advantages:

1. Capital gains realized with respect to fixed assets and certain reserves will not be immediately subject to corporate tax.
2. For consolidations effected before 1971 an exemption is granted with respect to capital gains realized on stock held by the absorbed company in the absorbing company or on treasury stock of the absorbed company.
3. No tax is levied on the stock of the absorbed company.
4. No tax is levied on the stock distributed by the absorbing company to the stockholders of the absorbed company, replacing the stock held in the latter company.

The following conditions must be met, however:

1. carry over of the book values of the reserves of the absorbed company;
2. carry over of the book values of the non-depreciable assets of the absorbed company; and
3. inclusion of one-tenth of the capital gains realized on the depreciable assets in the taxable income of the ten subsequent years.

Germany[45]

A statutory merger is tax-free if all assets of a corporation are transferred to another resident corporation under the terms of a merger permitted by commercial law, so long as the assets are taken over at book value and it remains certain that the hidden reserves will ultimately be taxed. The official view of the tax administration is that this

41. E.g. in the Netherlands, see, M.V.M. van Leeuwe, Fiscale Problemen bij Fusies van Naamloze Vennootschappen, 16 Fiscale Monografieën 58 (Kluwer, Deventer, Netherlands, no year).
42. Rädler, supra note 37.
43. Id., I-A: 28a.
44. Id., I-B: 26.
45. Id., I-C: 46.

provision does not apply when a subsidiary is merged into its parent corporation. It is generally accepted that the incorporation of a resident business in exchange for stock in the new corporation does not result in the recognition of profits provided that:

1. a whole business or a distinct part thereof is transferred rather than isolated assets;
2. the transferor receives a substantial interest (25% or more) of the acquiring, newly formed corporation; and
3. the book values of the assets are assumed.

Italy[46]

Under general rules, as expressed in Italian case law, the companies engaged in a merger are not taxed on capital gains, insofar as these neither appear in the financial statements nor are distributed. The Italian tax code contains no provision on mergers other than a clause which obliges the absorbing party to ensure that the closing financial statements and tax returns of the absorbed enterprise are duly prepared.

Luxembourg[47]

Mergers of domestic corporations do not give rise to corporate income tax if the assets are transferred to the remaining corporation at their book value for tax purposes and no compensation in the form of cash or assets is paid. The merger of parent and subsidiary is also governed by this provision. Gains realized on the sale of a substantial holding in a corporation in which the seller, together with his relatives, has owned more than 25 percent of the capital at any time within the preceding five years are subject to individual or corporate income tax. This liability also extends to such gains realized by non-residents.

Netherlands[48]

A consolidation is tax-free for the acquiring corporation if the ultimate tax of the gain is secured. The book value of the assets must be carried over by the recipient corporation, but the newly acquired shares may be valued at their market value. If liquidation follows immediately upon the contribution of assets (in this case probably by a distribution of the newly acquired shares), there will be no tax consequences at the corporate level. This is so because the new shares will have been valued at the fair market value, as opposed to the book value, of the contributed assets. The former shareholders of the acquired corporation, now shareholders of the acquiring corporation, will be taxed according to the rules of a liquidating distribution. There is no capital gains tax for individuals having not a substantial interest in a corporation. Thus, if the shares constitute neither business assets nor substantial interest shares, there will be no tax consequences.

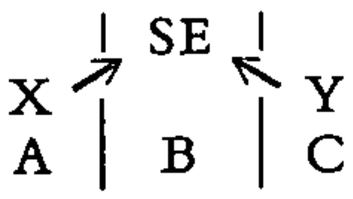
For individuals holding substantial interest shares, the exchange of their original shares for shares in the acquiring corporation can be a contribution to the capital of the latter. The taxpayer may elect to defer tax. The cost price of the new shares is deemed to equal that of the original. In the hands of the acquiring corporation the acquired shares will be valued at cost. Thus, in many cases, no tax will be imposed immediately on the gain realized if shares are contributed to a corporation solely in exchange for shares in connection with a merger. The shares acquired by the contributor must be valued at the original book value of the contributed shares.

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46. Id., I-D:30.
47. Id., I-E:21.
48. Id., I-F:35-38.

4. TAXATION OF INTERNATIONAL CONSOLIDATIONS

Example 1



Corporation X in country A and corporation Y in country C consolidate into a new corporation SE in country B. All three countries are members of the EEC.

41. Taxation of corporations

The market value of the assets of X and Y is higher than the book value. The EEC member states allow tax-free consolidations within the same country if the book values are continued, so that the taxation of invisible latent reserves in the case of future realization is secured. The corporation laws of the Common Market countries do not provide for statutory mergers into foreign corporations.[49] The consolidation in above example means that the corporations X and Y are deemed to be liquidated. The difference between the market value and the book value of the assets is taxable for corporate tax purposes. This tax probably prohibits the consolidation, because it is unlikely that the corporations dispose of sufficient cash to meet that tax liability, or that they could liquidate other assets which are not needed for continuing their businesses.

Although X and Y consolidate into SE, they may continue their businesses in the countries A and C as permanent establishments of SE. In this case A and C could expect to be able to tax the capital gains on the assets of the former corporations X and Y in the future, because these assets remain under their jurisdictions. If SE continues the same book value of these assets in its own books, the situation after the consolidation is similar as before. When assets of X are really transferred to B or C, or to still another country, these assets are no longer under A's jurisdiction, and the future taxation of a realized gain by A is not secured.

The provisions of domestic statutory mergers could be extended and applied to international mergers, if a solution for the tax problems is found. The statute of the S.E. will contain provisions for international mergers as far as the S.E. is concerned. It is likely that the usual way of international mergers or consolidations whereby an S.E. is involved will leave an absorbed corporation in its original country as a permanent establishment of the S.E. It is presumable that most of the assets of the absorbed company remain in the original country as assets of the permanent establishment. As far as a taxation by the original country of future realized capital gains on these assets is secured, there should be no tax problem. As long as the assets are not transferred abroad, the original country can tax a gain when this will be realized in the future. A consolidation is a reorganization of corporations. The internal organization structure of the companies involved will probably be reformed to achieve a higher grade of efficiency. Therefore, some assets may be transferred from one place of business to another or even totally abandoned. If they are sold at market value while the book value is lower, a gain is realized. This gain will be taxed like any other taxable realized profit. The sale supplies cash out of which the tax can be paid; no problem arises. Assets transferred to a foreign entity of the same concern are not realized. The country of its original location is not able to tax the gain when the asset eventually will be sold. Therefore, it will regard the asset deemed to be realized at the transfer, and impose a tax on the difference

49. Except in Italy under certain conditions. See, Ciriello, supra note 13.

between market and book value. This tax must be paid with cash which is perhaps not available in a sufficient amount whereas increasing liabilities producing more cash might cause financial difficulties.

In 1967 the EEC Commission issued a Harmonization Program for direct taxes.[50] This program proposed a different treatment for several classes of assets belonging to corporations acquired in an international consolidation:[51]

1. *Depreciable assets*

A tax imposed on the gain deemed to be realized will be spread over a period of ten years.

2. Land and other *non-depreciable assets*

The taxpayer may choose between two treatments:

a. No gain is deemed to be realized. The assets are taken over in the books of the new corporation at the same book value. The tax is deferred and a procedure should be developed whereby the country of the original location can later still exercise its right to tax the gain realized in the other country.

b. A gain is deemed to be realized, but will be taxed at a reduced rate. The assets now can be taken over in the books of the new corporation at market value.

3. *Participations*

A gain is deemed to be realized, and the taxpayer may choose between:

a. A tax spread over ten years.

b. A tax at a reduced rate.

4. *Inventories*

No special treatment is proposed. If there is a deemed gain, it will be taxed immediately at the usual rate.

This program does not distinguish between assets belonging to a permanent establishment and assets transferred to the acquiring corporation. It assumes that a gain may be realized on all assets at the time of the consolidation, whether they remain in the original country or are transferred abroad. The program of 1967 is no solution in itself for the main problems. How can the original country enforce its tax claim after the assets have been transferred abroad? The program does not answer this question; it only shows a way how different classes of assets could be taxed. Under the first item (depreciable assets) the tax will be spread over ten years.

Example 2

X in country A has a machine that is fully depreciated, and therefore has no book value. It still has a market value of $ 100, and a useful life of 10 years. X consolidates into SE in country B. A taxes the deemed gain on the machine, but spreads the tax out over a period of 10 years. The new book value is $ 100. Th machine now may be depreciated with $ 10 per year. Assume the tax rate is 50%. Spread over 10 years, the tax on the gain is $ 5 per year.

The advantage of the $ 10 depreciation per year has to be paid for with a tax of only $ 5 per year, so that the Treasury "subsidies" the asset with 50%. This "subsidy" is not intended by the program, it is a loophole. If the asset is transferred to SE in country B, A has no longer the juridical means to enforce its tax claim. The same is true for item 2(a) where the tax claim is deferred to the future realization abroad. The suggestion under 2(b) and 3(b) is more realistic, for there the tax will be levied at the time of transfer. The taxation of a deemed gain at a reduced rate is not necessarily a loss of revenue for the taxing country.[52] Present money

50. EEC Commission, Supplement au Bulletin No. 8 - 1967.

51. Id., 18.

52. J. Kauffman, Die Besteuerung der internationalen Kooperation und Konzentration, (I), 29 Europäische Steuerzeitung 79, 87 (August 1968). Also publ. in French: La Fiscalité du Marché Commun.

is worth more than future money. A bill of exchange due in the future but cashed at a discount now has still the same value while the risk of non-payment is eliminated and the cash can be used to produce an amount of interest equal to the discount rate. For the companies involved in the consolidation the payment of a reduced tax has the advantage that now the assets can be inserted in the books at market value, so that the basis for capital gains tax purposes is increased, and the assets can be depreciated with higher amounts or during a longer period.

Example 3

The assets of X in country A are transferred to SE in country B. A gain is deemed to be realized. Since the transfer takes place in connection with an international consolidation, country A taxes the gain at a *reduced* rate. Corporation SE inserts the assets in its books at market value, because the difference between the book value used by X and the market value has been taxed by A, so that the latter value can be regarded as the cost of the assets to SE. SE sells the assets immediately after the transfer. Since the market value equals the cost (book value for SE) no gain is realized by SE; this sale has no tax consequences.

This example shows a way of partial tax avoidance, taking advantage of the difference between the reduced and the normal rate imposed on a taxable gain. Rules to curb this tax avoidance, e.g. by forbidding a sale of the transferred assets within a certain period unless an additional tax is paid, will be difficult to enforce by the original country. If there are some assets left in the original country, these could be seized to exercise the tax claim om the gain realized abroad. Otherwise the only way for enforcement is with the collaboration of the foreign country. The procedure for such collaboration could be established in a multilateral treaty between the Common Market countries or by way of European law. If a rule governing application of reduced tax rates and prevention of abuses in case of international consolidations has to be coupled with an international treaty or with European law the establishment of that rule is not easier than a procedure for tax deferment as meant under item 2(a) of the Harmonization Program. Both methods ask for an international agreement between the EEC countries.

The tax treatment of international mergers and consolidations as described in the Harmonization Program of 1967 has no special advantages over a simpler treatment by way of tax deferment, as this exists for domestic mergers and consolidations. The EEC experts felt these shortcomings and in 1968 a tendency towards a uniform treatment of all classes of assets by way of tax deferment came into being.[53] In January 1969 the EEC Commission published a memorandum[54] containing a proposal for an EEC directive concerning common rules for international mergers within the Common Market. When this proposal is accepted these rules are European law.

The proposed directive applies only to assets attributable to a permanent establishment. The Commission justifies this limitation with the statement[55] that the definition of a permanent establishment is so broad that every asset with significant capital gains can be maintained in the original country as part

53. H. von der Groeben, Die Bedeutung der Steuerangleichung für die europäische Integration, 89 Institut Finanzen und Steuern 14, 15 (Bonn 1968), as cited by Ernst Hoehn, Die Steuerharmonisierung in der EWG und ihre Bedeutung für das schweiz. Steuerrecht, speech for the Zurich Lawyers Society, 13, (Nov. 14, 1968) unpubl.

54. EEC Commission, Proposition de Directive, COM (69) 5 final, Brussels (January 15, 1969). Unoff. translation: CCH Comm. Market Rep. par. 3313 at 2527.

55. CCH, supra note 54, at 2530.

of a permanent establishment. The Commission bases itself on the principle that a merger in itself should not give rise to any tax at all.[56] In the Commission's opinion the tax-free treatment of assets belonging to a permanent establishment is able to cover the whole procedure of an international consolidation.

The approach of the Memorandum of 1969 is quite different from that of the Harmonization Program of 1967; the Commission regards the methods of the latter too complex.[57] The new Memorandum proposes only one method of taxation, a tax deferment for assets attributable to a permanent establishment, and it distinguishes between only two classes of assets, (a) immovables and intangibles, and (b) other assets. The treatment of these assets is governed by article 4 of the proposed directive:[58]

In the event of a merger . . ., the Member States shall refrain from taxing the capital gains relating to the acquired assets. This includes the amounts corresponding to the difference between the true value of such assets and their value as stated on the tax return of the acquired company, in so far as:

(a) the real property, securities and interests, the goodwill, and the industrial and intellectual property rights included in the acquisition are carried on the books of the establishments of the acquiring company that are in the State of the acquired company;

(b) the other capital assets are carried on the books of the establishments and are not transferred to the State of the acquiring company or to the establishment of such company located in a State other than the State of the acquired company;

(c) for such establishments, the acquiring company uses as a basis for the new depreciation deductions and subsequent capital gains or losses relating to the acquired assets the value as stated on the tax return of the acquired company.

The classification of the assets in article 4 looks a little awkward, as the intangibles are designated specifically whereas the other assets (b) are generalized, and only these others are limited by the condition of non-transferability abroad. The memorandum gives no reason for this classification, but it does state the basic principle of article 4.[59] First, the member states have only the obligation to defer tax on deemed gains of assets attributable to a permanent establishment while the book value after the merger remains unchanged. The eventual realization of a gain will be taxed by the state where the permanent establishment is located. Second, inventories and most depreciable assets (as meant in article 4 (b)) may not be transferred abroad without paying a tax on the deemed gain. Since those assets, especially merchandise, remaining in the books of the permanent establishment, are difficult to check, a transfer could hurt the interests of the state where the permanent establishment is located, because a transferred asset might still be depreciated by the permanent establishment while it no longer contributes any benefits to the country of that establishment.

It is difficult to guess the reason for the awkward classification mentioned above. Probably the experts who drafted the directive could not agree on a specific classification of the assets with usual accounting definitions, and omitted the reason for that classification in order to leave the discussion about the final form of the directive open.

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56. Id., 2528.
57. Id., 2529.
58. Id., 2535, 2536.
59. Id., 2529. For this paper the original text (supra note 54) is used. The CCH translation differs sometimes from the official text.

The distinction between paragraphs (a) and (b) of article 4 is not that of depreciable and non-depreciable assets, for buildings and some intangibles are depreciable. If no distinction between the assets were made, paragraphs (a) and (b) could be condensed as follows:

. . . the assets are carried on the books of the establishments of the acquiring company that are in the State of the acquired company, and are not transferred to the State of the acquiring company nor attributed to an establishment of the acquiring company, located in another State than that of the acquired company;

With this text no confusion caused by an awkward classification of assets would arise, while the results would be exactly the same. In other words, the distinction is superfluous. Probably the reason why article 4 distinguishes between the assets of (a) and those of (b) is that, in fact, it makes no difference whether the assets of (a) are transferred abroad. Real property is not movable from one country to another, but the ownership is transferable. If X (in example 1 of this chapter) owns land in country B, the gain from the alienation of the land is taxable by B.[60] A loses no revenue in case of realization, whether the ownership of the land is held by X or transferred to SE, as the gain is not taxable by A anyhow.

Example 4

(Assume the same facts as in example 1). Before the consolidation of X into SE takes place, X owns a patent registered in country B. X licenses independent company Z in country B to use the patent. The royalty paid to X is taxed in A.[61] After the consolidation X and Z terminate the contract, and SE starts to use the patent not paying royalties to X that is now a permanent establishment of SE. The patent is still carried on the books of X and the amortization continues.

Amortizable patents and know-how cause problems in the case of international consolidations. Example 4 may cause A to allocate income to X for the use of X's patent by SE comparable to allocations described in section 482 of the Internal Revenue Code.[62] If the patent were not used by Z before the consolidation, but SE started to use it after the consolidation, it might be difficult for A to determine a reasonable royalty. In the case of know-how, that is not registered but can be an amortizable asset in X's books, it may be impossible for A to know whether X, or SE, or both are using the know-how. Moreover, it is extremely difficult to determine the market value of patents and know-how[63]. If such assets are transferred to B, it will be difficult for A to impose a tax on the deemed gain, since the market value is not known. Article 4 escapes this problem by classifying amortizable patents and know-how under paragraph (a).

Example 5

(Assume the same facts as in example 1). X sells goods to customers in B, but has no permanent establishment in B. The goods are delivered by X's own truck. While the truck is in B, X consolidates into SE. Henceforth, the truck is used by SE in B, but is still carried on X's books, and X continues to depreciate it.

The truck in this example is not actually transferred to B at the time of the consolidation. It no longer contributes to A's revenue, but X is still depreciating it.[64] This is a

60. OECD Draft, supra note 35, art. 13 (1).
61. Id., art. 12 (1).
62. Int. Rev. Code of 1954.
63. Helmut Knoppe, Die Besteuerung der Lizenz- und know-how-Verträge 80 (Verlag Dr. Otto Schmidt KG, Köln, Germany, 1964).
64. However, A's Treasury might reallocate income and deductions, comparable to section 482 of the Int. Rev. Code of 1954.

loophole in article 4(b), unless the paragraph is interpreted in a sense that the use of the truck by SE equals a transfer abroad. To prevent questions of interpretation the following paragraph could be inserted between paragraphs (b) and (c):

. . . the assets carried on the books of the acquired company which are located in the State of the acquiring company or in a State where the acquiring company has an establishment other than the State of the acquired company, and which are not returned to the State of the acquired company before or at the time of the merger, are treated as having been transferred to the State of their location; . . .

Example 6

Assume similar facts as in the examples 1 and 5, but now the truck is transferred to a third country, C, where it is used by SE. SE has no permanent establishment in C.

Applying paragraph (b) and the proposed next paragraph (see right before Example 6), transfer of the truck has no tax consequences for X, apart from a possible reallocation of income and deductions by A's Treasury. The truck does no longer contribute any benefits to A's revenue but is still depreciated by X. These paragraphs still contain a loophole.

To prevent abuses, the word "transfer" should be extended, so that it includes "use" of the assets by the acquiring company or its establishments other than the acquired company, and that provision should also apply to patents and know-how. Therefore, no new paragraph must be inserted between (b) and (c), but the earlier proposed paragraph (p. 538) condensing (a) and (b) should be changed into the following paragraph, replacing (a) and (b):

. . . the assets are carried on the books of the establishments of the acquiring company in the State of the acquired company, and are neither transferred to, nor used by the acquiring company or any of its establishments other than those in the State of the acquired company; . . .

The EEC Memorandum of 1969 is a useful basis for discussions in and between the member states about the taxation of international mergers and consolidations. It omits precise details; these could be worked out during the discussions. The method of taxation proposed by the memorandum should be acceptable in every member state. It is based on a principle that already generally has been accepted—taxing permanent establishments in the country of their location. The formal transformation of a business from corporation into permanent establishment has no influence on the revenue of the country where that business is located. The question whether the acceptance of this method solves the tax problem of international consolidations remains unanswered. The EEC Commission asserts that the main procedure of an international consolidation fits into its proposed tax method.[65] It should be clarified whether the remaining tax on unrealized gains on assets transferred abroad will be an obstacle for international consolidations. As pointed out before, an international reorganization of corporations for achieving a higher degree of efficiency calls for international transfer of assets. Such transfer is no realization, and the tax on a deemed gain can cause financial difficulties. The best solution for this problem is a tax deferment rather than a reduced or a spread tax. The tax deferment gives the original country a claim on a foreign corporation, which it can execute only through the foreign country that has jurisdiction over that corporation. Having no means of in-

65. CCH, supra note 54, at 2530.

spection the original country cannot control the time of realization, and thus it does not know when to call on the foreign country for executing its claim. The foreign country has to assume this task of inspection. Yet instead of calling on the foreign country or transferring the claim to that country, the procedure could also be taken over by the EEC authorities. In that case the EEC is likely to interfere in a national jurisdiction which might be felt as a renunciation of a part of the national sovereignty. If the foreign corporation is an S.E., chartered by European authorities, this procedure seems more feasible. In any case the whole operation would call for a paramount collaboration between the Common Market countries which only will be reached in the very far future.

Moreover, the tax problem of international transfer of assets in connection with a corporate reorganization is not only related to mergers or consolidations. An existing concern reorganizing its business for efficiency purposes, can face the same problem. If such transfers are tax-free when connected with a merger, but taxable in case of a reorganization without legal transformations, a principle of equity might be offended. This reorganization problem and the question how relevant a transfer of assets is to an international consolidation enter the field of business administration.

42. Taxation of shareholders

According to the present tax laws of the Common Market countries international consolidations would cause tax problems for stockholders. A tax deferment for deemed gains on stock is only allowed to the extent that a tax deferment for invisible latent reserves of the absorbed corporation for corporate tax purposes is allowed.[66] The present tax laws do not provide for the latter deferment; therefore neither the stockholders are treated tax-free.

The Fiscal Commission of the UNICE[67] has reviewed the problem of the taxation of shareholders involved in an international consolidation, and has reported its opinion.[68] It recommends a treatment of non-discrimination between domestic and international consolidations. This means that if a domestic consolidation is tax-free for stockholders, an international consolidation should be tax-free too. Thus, when the problems on corporate level are solved, and international consolidations become feasible, the stockholders should be treated as if the consolidation were domestic.

The Harmonization Program of 1967 states a similar opinion.[69] The exchange of stock in the absorbed corporation for stock in the new corporation is no enrichment for the stockholders. For capital gains tax purposes the new stock is deemed to have the same basis as the old stock.

The proposed EEC directive of 1969 does not mention the taxation of shareholders. The general opinion, however, is that a consolidation should have no tax consequences for the shareholders[70]. This is in accordance with the principle that a merger itself should not give rise to any tax, as expressed by the EEC Commission in its memorandum to the proposed directive.[71]

The UNICE recommendation of non-discrimination between domestic and international consolidations seems to be acceptable. There may be tax laws that continue to tax shareholders in some cases of do-

66. Kauffman, supra note 52.
67. Union des Industries de la Communauté Européenne.
68. Kauffman, supra note 52.
69. EEC Commission, supra note 52, 18.
70. Hoehn, supra note 53, 12.
71. CCH, supra note 54, 2528.

mestic consolidations; in similar cases of international consolidations these shareholders would be taxed too. All cases of domestic consolidations should be tax-free for shareholders in all EEC countries, so that the taxation of shareholders would be no obstacle for domestic as well as international consolidations.

43. Opposition to tax-free treatment of international consolidations

International consolidations should have no tax consequences at least when no assets are transferred abroad. The proposed EEC directive of 1969 providing for tax-free treatment of assets attributable to permanent establishments is based on that opinion. Nevertheless a strong opposition against the directive may be expected from some EEC member states. That opposition will not be based upon the fear of less revenue, because the proposed treatment involves no loss of revenue, as shown above. The basis will be the fear that in the long run important industries may move from countries with high tax rates to countries that have more agreeable tax climates or favorable business conditions. This fear is unmotivated since the EEC goal is to remove all competitive obstacles through several harmonization programs. That fear, however, is not based on provable facts, but on a psychological instability that comes into appearance when well-known businessmen and industrialists leave the country on the recommendation of their tax advisers.[72] The Netherlands is one of such countries. On the one side it has political reasons for encouraging the development of the Common Market towards a federation. On the other hand, it fears the national consequences of a further integration. The under-secretary of the Treasury[73] stated in May 1968 his opinion[74] about the taxation of international consolidations, which later was sustained by a leading professor of tax law.[75] In the view of the under-secretary a tax-free treatment of international consolidations may eventually lead to the emigration of industries of national interest, because it is the first step towards a free transferability of legal persons within the Common Market. Therefore, no general rules of European law should be accepted, but each intended international consolidation should be discussed among the national authorities and approved by each of them on a case by case basis.[76]

The above opinion is only cited to show the difficulties that the proposed EEC directive may face when submitted for consideration and approval to the EEC member states. A critic would go beyond the scope of this paper.

5. USE OF THE "EUROPEAN CORPORATION" BY AMERICANS

The expansion of United States corporations beyond the nation's borders has been a common phenomenon of the past twenty years.[77] In Europe, for example, the disproportion existing between the United

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72. Some countries publish an annual statistic with the number of wealthy people moving to Switzerland, France, Spain and other countries. Sensational newspaper stories describe the motives of famous people among those emigrants.

73. Dr. F.H.M. Grapperhaus.

74. Id., Fiscale Problemen van Fusies in EEG-verband, 4901 Weekblad voor Fiscaal Recht 529 (May 30, 1968, Deventer, Netherlands).

75. M.V.M. v. Leeuwe, Fiscale Problemen en Fusies in E.E.G.-verband, 6 Belastingbeschouwingen 113 (June 1968, Leiden, Netherlands).

76. Grapperhaus, supra notes 73 and 74, 536.

77. For a discussion concerning the multinational corporation, see, Vernon, Multinational Enterprises & National Sovereignty, 45 Harv. Bus. Rev. 156 (March 1967).

States dollar and the European currencies —continuing under the system of practically fixed rates of exchange, with the exception of revaluations and devaluations—impedes exports to Europe but makes the purchasing power of the dollar there high enough so that European corporations are often unable to compete effectively with their American counterparts in the race for acquisitions in Europe. An American corporation whose exports are not competitive in Europe may invest in Europe and manufacture its products there, at costs much lower than those prevailing in the United States. As a result, the corporation becomes very competitive indeed. Another reason makes Americans directly invest in the European Common Market. The tariff barriers between the member states diminish, but at the outside borders a tariff wall is built against imports from other countries. Therefore, Americans would rather dispose of plants in Europe, taking advantage of the free trade within the Common Market. American investments in Europe have reached enormous proportions,[78] and they are, in fact, regarded by many as a menace to the sovereignty of the European states.[79]

By expanding its business into Europe the American investor can choose between a branch and a subsidiary. A subsidiary is a corporation with the nationality of its country of incorporation. A branch is a permanent establishment without a legal personality. The income of a branch is included in the taxable income of its American owner, a loss is deductible. A subsidiary's income is normally[80] not included in its owner's taxable income, but dividends distributed to the parent company are of course part of the American taxpayer's income. Those dividends are taxed by the European state where the subsidiary is located with a withholding tax.[81] The United States has tax treaties with all Common Market countries providing for a reduced withholding tax. The Internal Revenue Code[82] provides for a foreign tax credit that eliminates an economic double taxation. Generally speaking, the advantage of a branch is that its losses are deductible from the "parent's" income. A subsidiary has the advantage that the liability of its stockholders is limited and that it has the same rights as any corporation incorporated in the same country.

It becomes more and more disputable whether an American-owned corporation in the Common Market in the future will maintain the same rights as an European-owned corporation in the EEC. According to the Treaty of Rome[83] and its interpreta-

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78. Triffin, The Balance of Payments and the Foreign Investment Position of the United States (Essays in Internat'l Finance No. 55, September 1966).
79. J.-J. Servan-Schreiber, The American Challenge (1968).
80. The Int. Rev. Code contains exceptions to this rule. The undistributed income of a foreign personal holding company is taxed by the U.S. as if this income had been distributed to the U.S. shareholders as dividends. Int. Rev. Code of 1954, sections 551 (a), 555 (b). Subpart F income received by controlled foreign corporations is included in the U.S. shareholder's taxable income. Int. Rev. Code of 1954, sections 951-972.
81. The Luxembourg tax law exempts holding companies from all direct taxes. No withholding tax is levied on dividends distributed to their shareholders. Rädler, supra note 37, I-E:19. The tax treaty between the U.S. and Luxembourg does not apply to Luxembourg holding companies. Tax Treaty with Luxembourg Dec. 18, 1962, art. XV, 15 U.S.T. 2355, T.I.A.S. No. 5726. Americans make an extensive use of Luxembourg holding companies for issuing Eurobonds. R. Beardwood, Sophistication Comes to the Tax Havens, Fortune 94, 168 (February 1969).
82. Int. Rev. Code of 1954, sections 901-905.
83. Treaty, supra note 15.

tion[84] any corporation legally established in the Common Market must be treated as being a legal person of the Community regardless of its ownership. The massive inflow of American capital into the Common Market began after the Treaty of Rome was drawn up.[85] Recently a discriminatory movement has come into being. Companies owned by non-Europeans have been discriminated against in the granting of subsidies and the assignment of government contracts.[86] At the request of the EEC Commission, France has stated its official investment control policy whereby it authorizes all investments from EEC members. But it further stated that "investments from third countries, passing through other members of the Common Market, might be refused."[87] This discriminatory tendency might gain further importance and could even influence the final form of the Societas Europaea statute.[88] Americans considering the use of the S.E. have to be prepared for a discriminatory policy against them. Such discrimination violates the Treaty of Rome, and it could be set aside by litigation, but the EEC members could eventually amend the Treaty to legalize discrimination.

Apart from that discrimination, the S.E. would be useful for American investors in Europe. It allows them to coordinate their operations in the whole Common Market through one subsidiary, the S.E. It facilitates the acquisition of companies grouping them as permanent establishments under the S.E., while the S.E. could also be used for joint ventures with Europeans or as a European holding company.

The EEC Commission plans a multilateral tax treaty between the member states that would replace the present bilateral treaties. The United States could conclude a tax treaty with the EEC, replacing the present treaties with the Common Market countries. A next step would be to allow American taxpayers operating through an S.E. to apply the rules of the foreign tax credit to the S.E. in the extent that the "per-country" limitation[89] could be used for the Common Market, regarding it as one country. In some cases the use of the S.E. by Americans then could have an advantage over the use of a national corporation in Europe.

6. CONCLUSION

There appear to be two tendencies within the field of international trade. One is a progressive idea for an international mechanism of incorporation to develop truly multinational corporations with worldwide ownership.[90] The proposal for a European Corporation is the first concrete step in this direction. It is coupled with proposals for removing the tax obstacles to achieving the creation of such corporations. The optimal solution to the tax problems has not yet been found; the different tax system in each country would cause friction

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84. Commerce in France 27 (October 15, 1968).
85. Id.
86. H. Bruns, Probleme der Niederlassungs- und Dienstleistungsfreiheit von Drittlandgesellschaften in der EWG, speech for St. Gall Graduate School, see, Das EWG-Niederlassungsrecht für Versicherungsgesellschaften, 69 Neue Zürcher Zeitung 36 (Feb. 2, 1969).
87. Commerce in France, supra note 84.
88. Bruns, supra note 86.
89. Int. Rev. Code of 1954, section 904.
90. "Donald M. Kendall, president of PepsiCo, Inc., and newly appointed chairman of the National Alliance of Businessmen, . . . added his voice to those who advocate development of truly multinational corporations through worldwide ownership. Proposing an international mechanism of incorporation through some multinational organization such as the International Monetary Fund, World Bank, or United Nations, he also advocated an international stock exchange." Business Week 80 (March 22, 1969).

when the methods of international incorporation and consolidation were operative. The three advances, the European Corporation, international consolidation, and tax harmonization, are so interrelated that they must proceed together.

The second tendency is regressive—the conceit of protectionism. Discrimination against American-owned companies could ultimately lead to the Common Market's downfall. No country with a modern economic system can be autarchic. A progressing world trade is necessary to an increasing standard of living, and eventually to the increment of the personality of all people.

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* * * * ARTICLES * * * *

SHERWIN S. ZEITLIN* AND DAVID J. ROSSO*:

UNITED STATES TAXATION OF FOREIGN ENTERPRISES — STRUCTURES FOR DOING BUSINESS IN THE UNITED STATES AND THE WESTERN HEMISPHERE

INTRODUCTION

During the past decade the United States has experienced a remarkable inflow of venture capital from abroad. The primary source of this direct investment lies in Western Europe, where entrepreneurs have come to recognize the profit potential in exploitation of the American market by means of local manufacturing operations, or by creation of local sales organizations, offices and warehouses. What began as export trade through local commission agents—and to a substantial extent continues as such—has lead to investment in manufacturing plants or sales facilities. The reasons for this trend are many. Manufacturing in the United States eliminates several of the expenses incurred in export trade (*e.g.*, cost of shipping, insurance, customs duties and tariffs). These savings must, of course, be weighed against increased labor costs and the like incurred upon direct United States operations. Most significantly, creation of a local sales organization, promotional office, or warehouse achieves the marketing advantage of flexibility and the ability of immediate response to potential sales opportunities and consumer trends. This permits the entrepreneur to control his own business destiny rather than depend on local commission agents or brokers. Furthermore, the United States may serve as base for sales of goods in the Western Hemisphere, thus permitting penetration of markets too distant to supply directly from the home plant.

We propose to discuss the available business structures for the foreign businessman who contemplates United States manufacturing or sales activities, and the tax implications of each structure. Taxation of securities transactions will be treated only insofar as they are related to contemporarious business operations. The latter portion of our paper will deal with the possibilities of using the United States as a base of operations in the Western Hemisphere.

Before turning to a discussion of available business structures, we wish to make some general observations as to the United States taxation of the business income of foreign enterprises. Three years have passed since enactment of the Foreign Investors Tax Act of 1966,[1] which comprehensively revised the tax laws relating to foreign investment or business activities within the United States. A central feature of the FITA was elimination of the "force of attraction" doctrine, thereby encouraging foreign business enterprise to make direct investments. This development has, we believe, played some small part in stimulating the inflow of venture capital. We must also note in passing that another feature of the FITA, the broad exemption from income taxation accorded foreign individuals and companies on income derived from trading in United States securities, has significantly encouraged foreign investment in the United States

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1. Public Law 89-809, 80 Stat. 1539 (1966).

securities markets, especially by investment companies employing local discretionary agents.

EFFECT OF THE FITA

For purposes of United States income taxation, foreigners are now separated into two categories: those engaged in a United States trade or business, and those not so engaged. The general pattern of taxation under pre-1966 law and under the FITA has been recited elsewhere and will not be repeated here.[2] However, what is most important is an understanding of two key concepts under the United States Internal Revenue Code as amended by the FITA: (a) the "engaged in trade or business" concept, and (b) the "effectively connected" concept.

Aside from the statutory withholding tax of 30 percent[3] collected at source on the gross amount of certain passive income (dividends, interest, rents and other fixed or determinable, annual or periodic income), a foreign enterprise must be *engaged in a United States trade or business* during the year of receipt of income *effectively connected* with that business in order that such income be taxed at all. Stated another way, a foreign enterprise which is not engaged in trade or business pays no tax (and thus crucially no tax on gains from sale of securities or other property) except for the withholding tax on enumerated types of passive income. The enterprise which is in fact engaged in a trade or business pays tax at normal rates on income effectively connected with that business, and no tax (except withholding if applicable) on income not effectively connected with the business.

It is a difficult task to concisely give meaning to the "engaged in trade or business" concept. While the concept has been utilized in our domestic tax law since at least 1936, there is no statutory definition.[4] What can be inferred from the position of the courts is that continuity and regularity of activity are required, and that a single or sporadic transaction is not enough.[5] Yet, the Internal Revenue Service, perhaps with a view of preserving the revenue, has taken a much stricter stand, holding that a single business venture within the year may be enough to constitute engaging in a United States trade or business.[6] All will concede that the concept is not synonymous with the treaty concept of "permanent establishment",[7] and that much less in the way of business activity is required to show a trade or business than to constitute a permanent establishment. We refer the reader to the several fine articles in this Bulletin, and

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2. Hodes & Feder, An Introduction to Doing Business in the United States under the Foreign Investors Tax Act of 1966, February 1967 Bulletin for International Fiscal Documentation.
3. I.R.C. §§871, 881.
4. Revenue Act of 1936 §231. See, Garelik, What Constitutes Doing Business Within the United States by a Non-Resident Alien Individual or a Foreign Corporation, 18 Tax Law Rev. 423 (1963); Roberts & Goldberg, Engaged in Trade or Business and H.R. 13103, 24 J. Taxation 364 (1966); Ekman, Tax Problems of Non-Resident Aliens, 18 N.Y.U. Institute on Federal Taxation 845, 857, (1960); Saunders, "Trade or Business"—Its Meaning Under the Internal Revenue Code, U.S.C. 12th Annual Institute on Federal Taxes 693 (1960); Comment, U. Chicago L. Rev. III (1955).
5. European Naval Stores Co., S.A., II T.C. 127 (1948), Acq. 1948-2. C.B.2; Continental Trading, Inc., 16 TCM 724 (1957), aff'd 265 F. 2d 40 (9th Cir. 1959); Jorge Pasquel, 12 TCM 1431 (1953); Spermacet Whaling & Shipping Co., S/A, 30 T.C. 618 (1958), aff'd 281 F. 2d 646 (6th Cir. 1960).
6. Rev. Rul. 58-63, 1958-I C.B. 624 (racehorse entered in a single race), modified on another issue, Rev. Rul 60-249, 1960-2 C.B. 264.
7. Inez de Amodio, 34 T.C. 894, 909 (1960), affirmed 299 F. 2d 623 (3rd Cir. 1962).

elsewhere, which discuss the concept in depth.[8]

We assume for purposes of this paper, that the foreign enterprise is *doing business* in the United States, *e.g.*, has opened a factory to manufacture or an office to sell consumer goods. From that assumption, several observations flow.

The test of "*trade or business*" for determining the status of a foreign taxpayer implies a time factor. The foreigner must be engaged in trade or business at some point during the taxable year. If the foreign entrepreneur is at no time during the taxable year engaged in a United States trade or business, no income for that year shall be deemed "effectively connected" and taxed as business income at the ordinary United States tax rates. This gives rise to interesting possibilities. The foreign enterprise might, during a year in which it is engaged in a United States business, make instalment sales deferring receipt of its income until future years when it is not so engaged in United States trade or business. Upon receipt, that income will be free of all United States tax. Or a contractor which performs technical services such as engineering or architectural work on a prolonged construction contract might consider entering into an arrangement by which it receives only reimbursement of costs, deferring receipt of profits until a year following the year in which it has severed contact with this country.[9]

The Code now provides that a nonresident alien individual or foreign corporation shall be deemed engaged in trade or business in the United States if (a) a partnership of which such individual or corporation is a member is so engaged, or (b) a trust of which such individual or corporation is a beneficiary is so engaged.[10] A partnership is defined to include syndicates, pools, joint ventures and other unincorporated associations, and the foreign enterprise which becomes joint venturer in a United States venture should plan to pay ordinary United States income tax on its share of the profits.

Turning then to the "*effectively connected*" concept, as we have already noted, the enterprise engaged in a United States business is liable for income tax at the ordinary rates applicable to domestic taxpayers only upon income effectively connected with that trade or business, and received during a year in which business is being conducted. The intention of the FITA was to eliminate the "force of attraction" doctrine applicable to taxation of foreigners under pre-1966 law. Again, we direct the reader to extensive discussion of this concept in the literature,[11] and pause only to make brief comment.

The "effectively connected" concept is used in the Internal Revenue Code in different contexts, and thus determines (a) when United States source income is taxed as business income at ordinary rates, and (b) when foreign source income is attributed to a United States operation and hence taxed by the United States.[12]

The concept does not entirely eliminate the force of attraction doctrine. Under the

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8. Note 4 above.

9. I.R.C. §864(C)(1)(B). We must point out that where the gain, or profit, is paid in periodic instalments, the U.S. tax authorities may take the position that such payments are subject to withholding tax as fixed or determinable annual or periodic income. If so, the effective rate of tax on the postponed income is reduced from slightly in excess of 50% to 30%.

10. I.R.C. §875.

11. See articles cited in notes 2 and 4 above. Also, Sitrick, The Effectively Connected Concept in the Foreign Investors Tax Act of 1966, 45 Taxes 2 (1967); Comment, 52 Minnesota L. Rev. 1261.

12. I.R.C. §864.

Code, if the foreigner is engaged in a United States trade or business during the taxable year, all income earned in the United States is taxed at ordinary rates, unless the item of income is not in fact connected to the business and in addition falls within the category of items subject to withholding tax.[13] An example from the proposed Regulations under Section 864 of the Code makes this point clear:

> Example (1). M, a foreign corporation which uses the calendar year as the taxable year, is engaged in the business of manufacturing machine tools in a foreign country. It establishes a branch office in the United States during 1968 which solicits orders from customers in the United States for the machine tools manufactured by that corporation. All negotiations with respect to such sales are carried on in the United States. By reason of its activity in the United States M is engaged in business in the United States during 1968. The income or loss from sources within the United States from such sales during 1968 is treated as effectively connected for that year with the conduct of a business in the United States by M. Occasionally, during 1968 the customers in the United States write directly to the home office of M, and the home office makes sales directly to such customers without routing the transactions through its branch office in the United States. The income or loss from sources within the United States for 1968 from these occasional direct sales by the home office is also treated as effectively connected for that year with the conduct of a business in the United States by M.

Assuming, therefore, that the foreign enterprise is engaged in a United States business, the question of taxation of its United States source income is not whether such income is subject to tax, but instead how, and at what rate, such income will be taxed. As we will discuss below, certain items of foreign source income are now subject to United States tax.

Of course, such pitfalls can be avoided through the relatively simple device of using separate legal entities to conduct differing activities. In the quoted example above, M might create a separate foreign subsidiary to conduct its mail order business. Direct sales by the mail order subsidiary would not be subject to United States taxation.

The effectively connected concept is derived from the approach of the OECD model treaty and the more recent United States tax treaties, *e.g.*, that with Germany. While the use of the concept accords with international practice, there is a paucity of administrative or judicial rulings on the concept within or without the United States. We should point out that the Code does attempt to make the concept applicable to *all* existing treaties by providing in Section 894(b) that in imposing reduced treaty rates on passive income, the fact that the taxpayer has a United States permanent establishment is disregarded provided that the items of income are not business connected.

STRUCTURE FOR UNITED STATES COMMERCIAL OPERATIONS

The initial question faced by the foreign enterprise conducting, or contemplating, a United States commercial venture is how to structure its United States operations. An example will illustrate this problem. Suppose that a German corporation desires to sell scientific instruments manufactured in Germany to customers within the United States. Suppose further that the manufacturer desires to create a United States sales and promotion office and open a United States warehouse, this being enough to establish both the requisite "United States trade or business" and a "permanent establishment" under the applicable tax treaty. The business could be operated in one of three ways:

1. as a branch of the German manufacturer;

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13. I.R.C. §864(c)(3).

2. as a United States corporate subsidiary of the German manufacturer; or
3. as a branch of a subsidiary of the German manufacturer organized outside the United States.

Branch. If United States operations are conducted through an unincorporated. branch of the German company, the United States imposes a tax upon the German company's income effectively connected with the United States trade or business. At the present rates of taxation, income effectively connected with the trade or business will be taxed at 22% of the first $25,000 of taxable income and 48% of such income in excess of $25,000. In addition, there is currently a surtax of 10% of the tax so computed. If the German company has any passive income from United States sources which are not effectively connected with the conduct of its business (*e.g.*, dividend income on portfolio investments) the withholding tax rate will be determined under the United States-German Income Tax Treaty. There is no United States tax on remission of funds by a United States branch to its foreign parent company.

Subsidiary. If the United States operations are by way of a subsidiary corporation organized in the United States, that subsidiary will pay United States taxes on its worldwide income at the rate of 22% on the first $25,000 of taxable income and 48% of the excess. The surtax of 10% is applicable. Dividends paid by the subsidiary to its parent will be subject to a 15% withholding tax based on the gross amount of the dividend distributed.[14]

A foreign subsidiary of the German manufacturer which is organized to conduct United States operations will be taxable on its United States source income effectively connected to the business in the same manner as a United States subsidiary, but it will not be subject to tax on any income from sources outside the United States with the exception of certain types of income to be discussed below. Its dividend distributions will be subject to the same withholding rates as dividends from a United States subsidiary to a foreign parent—to the extent that such dividends are considered to be from United States sources. In general, dividends of a foreign corporation doing business in the United States are deemed to be derived from United States sources in the same ratio as the foreign corporation's gross income effectively connected with the conduct of the United States trade or business is to its total gross income.[15] At first blush, therefore, there would appear to be little difference tax-wise in opting between a domestic or a foreign subsidiary. However, in choosing between a subsidiary domiciled in the United States and one domiciled elsewhere, other factors come into play. If all of the income of the sales subsidiary is generated through United States sales, it probably makes little difference where the subsidiary is incorporated. If, on the other hand, the subsidiary will also sell in other countries in the Western Hemisphere, the decision as to place of incorporation may turn on the availability of the Western Hemisphere Trade Corporation,[16] or the possibility of use of a foreign corporation to avoid United States tax on the items of foreign source income.

Branch v. Subsidiary. The immediately discernable difference between use of a branch vis-a-vis a subsidiary is that a branch may remit its earnings free of withholding

14. Germany-United States Tax Convention, Article VI.
15. I.R.C. §861. It is to be noted that several tax conventions modify this result.
16. I.R.C. §§921, 922, discussed below.

tax. But the German manufacturer's decision will be influenced by other significant tax differences. For example, under the Internal Revenue Code, use of a branch *may* require allocation to the United States (and taxation of) a portion of the profit generated in the manufacturing process, as distinguished from the sales profit. Thus, if the German company regularly sells part of its scientific equipment to wholly independent persons within or without the U.S., uses a selling agency or otherwise establishes an independent factory price, that wholesale price will be used to segregate the manufacturing profit from the selling profit, and only the selling profit will be subject to United States taxation. On the other hand, where there is no independently established wholesale price, net profit allocable to the United States is determined as follows:[17]

1. One-half of the net profit is apportioned on the basis of the ratio of the value of taxpayer's property within the United States to the total value of the taxpayer's property within the United States and Germany, the country of manufacture. Only that property held or used to produce the income from the sale is taken into account. Accounts receivable are considered property within the United States when the debtor resides in the United States.

2. The remaining one-half of taxable income is apportioned in accordance with the ratio of taxpayer's sales for the taxable year within the United States to all of taxpayer's sales within and without the United States.

Under long standing regulations, the place where title passes determines the place of sale.[18] In recent years, however, the Internal Revenue Service, our Congress and the courts have begun to recognize a different test premised on the fact that the title-passage rule has little or no relationship to where income is earned.[19] Under this more modern view, the "destination" test is utilized, and the source of income is deemed to be in the country of destination regardless of location of passage of title. Therefore, it is likely that the full portion of this income will be deemed to have its source within the United States.

From the foregoing, it appears likely that more than 50 percent of the net profit generated by branch operations in our example will be subject to United States taxation. Of course, if a United States subsidiary were used, its full profits would be subject to United States tax, but the German parent could, to a great extent, control the level of the subsidiary's profit margin through the transfer price. Even here the foreign enterprise must be forewarned that the United States tax law permits the Internal Revenue Service to reallocate income between related companies to properly reflect the income of each.[20]

In choosing between a United States branch operation and a subsidiary (wherever domiciled), several other factors are worthy of note. First, use of a branch will expose the German parent to suit in the United States, as the German parent will be liable for the debts and obligations of its unincorporated branch. A subsidiary corporation insulates the parent from such liabilities. Similarly, use of an unincorporated branch may open the door to examination of the parent's books and records by United States tax officials, especially when allocation of income and expense is in issue.

Second, some local jurisdictions impose

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17. Regulation §1.863-3.
18. Regulation §861-7(c). G.C.M. 25131, 1947-2 Cum. Bull. 85.
19. See Roberts & Warren, U.S. Income Taxation of Foreign Corporations and Non-Resident Aliens, Chap. VI/3F(3).
20. I.R.C. §482.

commercial or licensing restrictions on aliens or foreign corporations. Thus in some states a foreign corporation may not take title to real property. There are, in some industries, such as domestic radio communications, inland shipping, air transport, banking and mining, federal or state laws which prohibit or limit the percentage of foreign ownership. And, in general, the qualifications or requirements for licenses to engage in other businesses may be less rigorous in the case of a domestic corporation.

Third, it should facilitate financing of the United States business to operate by way of a domestic subsidiary. As a general matter, most European businessmen are amazed at the large capital investment required to enter the U.S. market. A local subsidiary will have more facility in securing United States financing, especially on accounts receivable or inventory, whereas the parent may not be able to readily borrow in the United States capital markets because United States lenders would bear the burden of the United States Interest Equalization Tax on such loans. And, use of a domestic subsidiary leaves open the possibility that the United States business might someday go "public" and offer equity or debt participations in the United States securities market.

Where a United States subsidiary is selected as a method of doing business, the foreign parent is well advised to create and own two classes of stock rather than one class, perhaps equal in all rights, one class constituting 21 percent of the capital and the other class 79 percent of the capital thereof. This will permit the parent to achieve a taxable liquidation at some future point in time, the consequences of the liquidation resulting in a "stepped-up basis" in the United States assets.[21] Such a course of action requires that the 21 percent block of stock be sold to a third party outside the United States prior to the liquidation. Of course, while the liquidation is technically taxable, the foreign shareholders will pay no tax on the liquidation distribution as it is not subject to withholding tax.[22]

Along these lines, sale of a business carried on as a branch will result in fragmentation of the gain and allocation thereof to the separate assets sold.[23] Thus, some portion of the gain will be from sale of inventory and taxed as ordinary income, while the remainder of the gain may be from sale of capital assets and taxed at favorable capital gains rates.

UNITED STATES AS BASE FOR WESTERN HEMISPHERE OPERATIONS

The German manufacturer of scientific instruments we have postulated may also desire to establish a place of business in the United States to exploit the rapidly expanding markets in the remainder of the Western Hemisphere. The manufacturer should therefore plan its corporate structure only after a careful weighing of the tax benefits available under the laws of the various hemisphere countries. Special attention should be given to the possibilities offered by the so-called "tax-haven" countries, such as Panama, Curaçao and Martinique. It may well be that incorporation of a subsidiary in one of these countries to perform the function of a

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21. By virtue of the ownership arrangement, I.R.C. §332 is not applicable. Under these circumstances, the liquidation is technically taxable. However, the withholding tax is not applicable, and the shareholders escape United States taxation of the liquidation gain.

22. The withholding provisions apply only to "fixed or determinable annual or periodic income." Liquidation distributions are not deemed to be such income.

23. Williams v. McGowan, 152 F. 2d 570 (2d Cir. 1945).

Western Hemisphere headquarters will result in the lowest effective worldwide tax rate and offer the greatest opportunity for accumulation of capital free of taxation by the subsidiary's country of incorporation. Subsidiaries or branches of the "tax-haven" subsidiary (depending on which is most appropriate under the laws of the various countries in which they will operate) could then be created to do business in the other countries of the hemisphere, including the United States. Income from each country should then be subject to tax only in the country from which it is derived[24] and distributions from these branches or subsidiaries to the tax-haven subsidiary would, for the most part, be tax free in the tax-haven country.[25] (Of course, if subsidiaries are utilized for operations in the other hemisphere countries, distributions to the tax-haven subsidiary may be subject to withholding tax in the income source countries.) Although such an arrangement would not be of much help with regard to income in high tax rate countries, substantial tax savings could result on income derived from low tax rate countries, thus lowering the average worldwide effective tax rate.

The number of variables that must be considered in making such a decision are far too extensive to be considered here. Legal counsel must be consulted to evaluate all of the various alternatives and make recommendations as to those which will offer the greatest tax savings in the given circumstances.

We propose only to review the alternatives available for reducing the effective overall tax rate of a company which has decided to use the United States as its base for Western Hemisphere operations. This decision may be dictated by any of several business reasons, such as the fact that a United States operation has already been established and it would not be feasible to move hemisphere headquarters elsewhere due to cost, executive availability or other internal reasons, or the desire to have ready access to the U.S. capital markets. Whatever the reason, we shall assume that the decision has been made and that the problem is now one of organizing operations so as to achieve the lowest possible effective worldwide rate of taxation.

BRANCHES AND SUBSIDIARIES: FOREIGN AND DOMESTIC

We have assumed that the United States headquarters is already operational as either a branch, a domestic subsidiary, or a foreign subsidiary of (a) the German parent or (b) another foreign subsidiary of that parent. The decision as to the mode of operation in the United States may have been made prior to contemplation of expansion of operations into the rest of the Western Hemisphere and, if so, it should be reviewed with an eye toward possible change in view of this development. The organizational possibilities for doing business in the rest of the hemisphere are numerous. Any of the following might prove to be feasible and desirable in a given case:

1) The U.S. subsidiary might opt to establish subsidiaries in foreign countries;

2) It might decide to establish branch offices in foreign countries;

3) If the U.S. office is a branch, that office may organize or establish other branches (of the German company) in foreign coun-

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24. This assumes that such income will not be "foreign source" income attributable to the United States operation under I.R.C. §864, and taxable in the United States.

25. Some "tax havens" impose an income tax, albeit modest in rate, on income not taxed in the country of source. For example, the Netherlands Antilles (Curaçao) would impose its corporate income tax—maximum rate of 30%—on foreign source income not taxed by the source country.

tries, which offices will be responsible to the U.S. branch office;
4) A U.S. branch may serve as executive headquarters for subsidiaries of the German parent in other hemisphere countries;
5) A "Western Hemisphere Trade Corporation" may be utilized;
6) A "Possessions Corporation" may be utilized;
7) Operation under the "Export Trade Company" or "Minimum Distribution Company" provisions may prove desirable; or
8) Operation under the "Less Developed Country Corporation" provisions may be beneficial.

If U.S. operations are conducted through a U.S. domestic subsidiary, and if this subsidiary conducts all hemisphere operations, either through foreign branches or directly from the U.S. office, then the U.S. subsidiary will be taxed as a U.S. resident on all of its income, including income derived from foreign sources. That is, the regular U.S. income tax rate (48%, plus a 10% surcharge for a total effective rate of 52.8%)[26] will be imposed on all taxable income, including that, from foreign sources,[27] but a foreign tax credit will probably be allowed against the U.S. tax on the foreign source income. Any distributions from a U.S. subsidiary to a foreign parent will also be subject to a dividend withholding tax of 30%, unless this rate has been modified by treaty.[28] This results in an effective tax rate of 52.8% on all income plus the 30% dividend withholding tax on distributions of income to the foreign parent, for a total effective tax rate, assuming distribution of all after-tax income of approximately 67%. In the case of the German parent company, the effective overall rate will be approximately 60%, as the withholding rate is reduced by treaty to 15%.

The German parent may be tempted to avoid U.S. income taxes on Western Hemisphere sales generated or arranged by the U.S. subsidiary by selling directly to the customer in, for example, Brazil. However, the allocation rules of Section 482 of the U.S. Internal Revenue Code would permit the Internal Revenue Service to allocate to the U.S. subsidiary income which is properly attributable to it for such sales. Thus, a sale by the German parent direct to the Brazilian customer, with title passing in Brazil and the goods never physically passing through the United States, may result in U.S. income taxes being imposed on a U.S. subsidiary which participated in arranging or making the sale.

If the U.S. subsidiary is conducting operations in the rest of the hemisphere through wholly-owned second tier foreign subsidiaries, it may be subject to U.S. income tax on the income of these controlled foreign subsidiaries pursuant to provisions of subpart F of the Internal Revenue Code.[29]

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26. See text at note 14. We should point out that the surtax charge of 10% is due to expire on December 31, 1969, unless renewed by Congress.
27. The emphasis here should be on recognition of the factor that foreign source income bears an effective tax rate of 67%, or 60%, depending on the applicable withholding rate.
28. Under the German-United States Income Tax Convention Article VI, the rate will be no more than 15%.
29. I.R.C. §951 *et. seq.* It is not within the scope of this paper to cover fully the subject of controlled foreign corporations. A number of exceptions are discussed below. In general, a CFC is any foreign corporation of which more than 50% of the total voting power of all classes of stock entitled to vote is owned by U.S. persons on any day of the taxable year of such foreign corporation. I.R.C. §957(a). If a foreign corporation is a CFC for a period of 30 days or more during a taxable year, every person who is a "United States shareholder" on the last day of

Where, however, those wholly-owned second tier foreign subsidiaries are incorporated within the countries in which they respectively operate, there will be no attribution of income back to the U.S. parent under subpart F. This type of structure permits indefinite accumulation of earnings in the operating subsidiaries and consequent deferral of U.S. income tax on that income until the subsidiaries distribute dividends to the parent.

If the German parent is operating in the United States through a branch office, a quite different problem is presented. The taxation of income generated by the branch from foreign sources is governed by the provisions of the FITA, as noted above. Because of the branch operation, the German manufacturer would be treated as a foreign corporation engaged in trade or business in the United States by virtue of an office or other fixed place of business. Such foreign taxpayers are taxed by the United States on certain types of foreign source income "effectively connected" with the U.S. place of business.[30] Tax is imposed at corporate rates on three classes of foreign source income which may be deemed to be "effectively connected" to the U.S. place of business:

1) Rents and royalties from intangibles (patent or trademark licenses, franchise agreements, knowhow licenses, etc.);

2) Income from the conduct of a banking, financing, or similar business or from trading in securities; and

3) Gains from the sale of personal property.[31]

Such income will be deemed effectively connected and subject to U.S. tax only when the income is actually attributable to the U.S. fixed place of business.[32] The attribution standards are: first, the U.S. place of business must be "a material factor" in generating the income;[33] and, second, the income is derived from an activity of the type regularly carried on by the fixed place of business.[34] The "material factor" element will be satisfied if the activity of the U.S. fixed place of business provides a "significant contribution" to the production of the foreign income, and constitutes an "essential economic element" in the generation of the income.[35] This activity, however, need not necessarily be "a major factor" in the generation of the income.

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such year, must include in his income his pro rata share of "Foreign base company income". I.R.C. §951. For this purpose, "United States shareholders" are only those persons who own 10 percent or more of the total combined voting power of the subsidiary. There are broad attribution rules. "Foreign base company income" includes for any taxable year the sum of (1) foreign personal holding company income with certain minor adjustments, (2) foreign base company sales income, and (3) foreign base company service income. Where foreign base company income is less than 30 percent of gross income of the foreign corporation, none of that corporation's income is to be included in the gross income of a United States shareholder.

FPHC income includes generally dividends, rents, royalties and other passive income. Base company sales income means income (whether profits, commissions or fees) derived from the purchase and sale of personal property, if the property is purchased from or sold to a related person and is manufactured (or produced, grown or extracted) outside, and is sold for use outside, the country of incorporation of the controlled foreign corporation. Note most significantly that there is no "tainted" income where the CFC is incorporated in its country of operations. If a CFC performs services for a related party and the services are performed outside the country of incorporation, its income is base company service income.

30. See text at note 12 above.

31. I.R.C. §864(c)(4).

32. *Ibid.*

33. I.R.C. §864(c)(5)(B). Proposed Regulation § 1.864-6(b).

34. *Ibid.*

35. Senate Report No. 1707, 89th Cong., 2d Sess. 21 (1966). Proposed Regulations § 1.864-6(b).

The application of the second standard can probably best be illustrated by two examples. If a foreign corporation conducts only manufacturing activities in the United States, an occasional sale to a foreign customer directly from the U.S. factory will probably not be subject to tax, since the U.S. fixed place of business does not ordinarily engage in selling activities. However, if the foreign parent has established a U.S. sales office to market goods in the Western Hemisphere, the income from an occasional sale to European or Asian customers will be taxable since the fixed place of business regularly engages in selling activities.

The difficult problems arise in determining how much of the foreign source income is attributable to the United States operation where it is evident that at least part of the income is so attributable. The statutory provisions offer little guidance on this problem. They provide only that the income attributable is the income "properly allocable"[36] to the U.S. office. Proposed Treasury Regulation Section 1.864-6(c) interprets this statute as requiring an all or nothing approach with respect to royalties and financial income, asserting that each such item "shall be considered to be allocated in its entirety to that office or other fixed place of business". The proposed regulation then recognizes that as to income from sales of personal property, the income attributable to the U.S. office shall not exceed the income which would be derived from U.S. sources if the sale were made in the United States.[37] Thus, where the manufacturing facilities are conducted abroad, perhaps by the foreign parent, and the U.S. office serves only as a sales outlet, some part of the manufacturing income may be subject to U.S. tax, as we have discussed above in contrasting branch versus subsidiary operation in this country.

In the case of income from the sale of personal property, the Code expressly provides that, in addition to the standards previously mentioned, before foreign source income will be subject to U.S. tax, such income must be deemed to be derived from sales effected "through" the U.S. place of business.[38] The corresponding Code provision regarding rents and royalties from intangible property does not impose this requirement,[39] but the legislative history of this provision indicates that such foreign source income should not be attributed to the U.S. fixed place of business unless the lease or license giving rise to that income is made by or through the U.S. place of business.[40] No such requirement exists with regard to foreign source income derived from the conduct of a banking, financing, or similar business or from trading in securities.[41]

The provision that sales not effected "through" the U.S. place of business are free of U.S. income tax means that the U.S. office must play some active role in making the sale. Generally, sales made as a result of orders received by the U.S. office will be considered to be made through that office unless the order is an unsolicited one and the office is not held out to potential customers as a place where orders should be sent.[42] Of course, where title to the property passes to the foreign customer in the United States, then the income is considered U.S. source income and is taxable in the United States, without reference to the "effectively

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36. I.R.C. §864(c)(5)(C).
37. *Ibid.*
38. I.R.C. §864(c)(4)(B)(iii).
39. I.R.C. §864(c)(4)(B)(i).
40. House Report No. 1450, 89th Cong. 2d Sess. 64 (1966).
41. I.R.C. §864(c)(4)(B)(ii).
42. H. Rep. No. 1450, 89th Cong. 2d Sess. 66 (1966). Proposed Regulation §1.864-6(b)(2)(iii).

connected" test applicable to foreign source income.[43]

Income from the sale of personal property, even though the sale is made through the U.S. office, will not be taxable by the United States in a case where the property is sold for use, consumption or disposition outside the United States, and a fixed place of business or office outside the United States "participated materially" in the sale.[44] Material participation by a foreign fixed place of business will be established where the foreign office solicits the order for the sale, negotiates the contract of sale, or performs significant services incident to the sale, which services are necessary to the consummation of the sale and were not the subject of a separate agreement between the seller and buyer.[45] The following activities on the part of the foreign office would not be sufficient to constitute a material participation: a merely formal "final approval" from the foreign office as a prerequisite to accepting the customer's order; the inventorying in, and distribution from, the foreign office of the property sold; the use of the foreign office to effectuate merely formal passage of title outside the United States; and the mere performance of clerical functions incident to the sale by the foreign office.[46] It is important to note that the fixed place of business outside the United States may be the office of an agent of the foreign parent (not an independent agent) who has authority to negotiate and conclude contracts in the name of the foreign parent and who regularly exercises that authority.[47]

Therefore, the previously mentioned German manufacturer of scientific instruments could utilize his U.S. office as a headquarters for all Western Hemisphere operations and still avoid U.S. tax on foreign income if he operated his U.S. office as a branch and set up another office as a branch, a subsidiary or a dependent agent in any other foreign country, and this latter office performed functions with regard to Western Hemisphere sales sufficient to qualify as material participation. If this second office is set up as a subsidiary of the German parent and incorporated in a tax-haven country, such as Panama or Curaçao, it will be possible to avoid U.S. tax and to accumulate capital in the subsidiary substantially free of income taxes other than those which may be imposed by the countries which are the source of the income—generally the country for which the goods are destined.

THE WESTERN HEMISPHERE TRADE CORPORATION

As previously noted, United States tax law provides certain vehicles which may be used by U.S. taxpayers to reduce the effective rate of U.S. income taxes, and which may be of help to the German parent corporation if it decides to operate through U.S. subsidiaries. One of the most important of such vehicles is the Western Hemisphere Trade Corporation—an artificial creature of the U.S. tax law. A Western Hemisphere Trade Corporation ("WHTC") is a U.S. domestic corporation which carries on its entire business, with the exception of incidental purchases, in the Western Hemisphere, and which derives 95% or more of its gross income from sources outside the United States for the three-year period immediately preceding the close of the taxable year (or such shorter time as the corporation is in existence) and 90% or more of its gross

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43. See note 18 and accompanying text.
44. I.R.C. §864(c)(4)(iii).
45. House Report No. 1450, 89th Cong. 2d Sess. 67 (1966). Proposed Regulation §1.864-6 (b)(2)(iii).
46. *Ibid.*
47. *Cf.* 864(c)(5)(A).

income for such period from the active conduct of a trade or business.[48] A WHTC is allowed a special deduction which results in its being subject to an effective tax rate which is 14 percentage points less than the normal tax and surtax rates on domestic corporations.[49] The business of the WHTC may be conducted either within or without the United States,[50] although it is preferable that commercial and administrative activities be conducted mainly outside the United States to avoid any contention of the Internal Revenue Service that a portion of the corporation's income is earned from sources within the United States. It may engage in a multitude of activities, such as manufacturing, mining, selling and acting as a commission agent or as a service company.[51] In most instances, WHTC's are utilized as export sales companies or commission agents. In such instances, it is essential that title to the goods sold by the WHTC pass outside of the United States (but within the Western Hemisphere) in order to avoid the possibility that income from such sales will be treated as United States source income. One of the problems inherent in the use of a WHTC is that, if it should fail to satisfy the percentage requirements as to source and character of its income in one year, it will, as a result, fail to qualify for WHTC treatment in the following two years, and, consequently, will be subject to the full U.S. tax rate for three years.

"Incidental purchases" outside the Western Hemisphere will not preclude a corporation from qualifying as a WHTC. The Treasury regulations provide that "incidental purchases" are those of any kind and for any purpose which are minor in relation to the entire business of the company, or are nonrecurring or unusual in character.[52] The regulations further provide that if the aggregate of the corporation's purchases outside the hemisphere does not exceed 5% of the corporation's gross receipts from all sources for the taxable year, the purchases will be treated as incidental.[53]

If a decision has been made that the WHTC is the appropriate form for conducting Western Hemisphere operations, the next question is how many WHTC's to use. It may be that division of hemisphere operations into more than one WHTC subsidiary may prove beneficial if there is some danger that the requirements for qualification as a WHTC may not be met for some taxable years. Disqualification of a corporation as a WHTC would affect the taxable rate on all of its income—increasing the rate by 14 percentage points. The use of, for example, two WHTC subsidiaries would permit insulation of the income of one of them from the effects of such disqualification by the simple expedient of attempting to allocate transactions which could result in disqualification to only one of the two subsidiaries. Such an allocation could be made along functional or territorial lines.

In a case where the property to be sold in the Western Hemisphere is to be produced in the United States, the problem arises of

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48. I.R.C. §921.
49. I.R.C. §922.
50. Although the WHTC provisions were originally intended to encourage investment by U.S. corporations in the Western Hemisphere countries, the provisions were drafted in such a way that they do not require such an investment, and the chief beneficiaries of the WHTC provisions today are U.S. corporations engaged in the export trade.
51. Section 921 does not restrict the type of business which a WHTC may engage in. It requires only that a WHTC engage in the active conduct of trade or business in the Western Hemisphere and that its gross income be derived almost solely from outside the United States.
52. Regulations §1.921-1(a)(1).
53. *Ibid.*

whether a part of the sales income of the producer will be treated as derived from United States sources, even though the sale is made outside the United States. That is, an allocation of the income may be made so as to reflect income from the production activity, which will be treated as U.S. source income. Therefore, as a general proposition, it is inadvisable for a WHTC to produce property in the United States. On the other hand, property produced by the WHTC outside the United States, but within the Western Hemisphere, and resold outside the United States in the hemisphere will be subject only to the reduced rate of U.S. income tax.

Turning again to the German manufacturer of scientific instruments who desires to sell his instruments in the United States and other Western Hemisphere countries, it can make use of the WHTC vehicle in either of two ways. It can sell all goods destined for the Western Hemisphere and produced in Germany to U.S. subsidiary A. This subsidiary can resell a portion of the goods to domestic customers, and the balance to another U.S. subsidiary which is operated as a WHTC. The WHTC can then resell these goods in other hemisphere countries. The WHTC's income from the hemisphere sales will be subject only to any income taxes which might be imposed by the countries in which the sales are made and the reduced rate of U.S. income tax. A credit will probably be allowed against the reduced rate U.S. income tax for foreign taxes paid. Subsidiary A will incur U.S. income taxes on its income from sales to both U.S. customers and the WHTC. Of course, since the effective tax rate on income earned by the WHTC will be less than that on income earned by subsidiary A, it would appear worthwhile to have subsidiary A sell the property to the WHTC at a low price so that the WHTC can maximize its profits on resale. However, if two or more organizations (in this case, subsidiary A and the WHTC) are owned or controlled by the same interests (in this case, the German manufacturer), the tax authorities have the right, as already noted, to reallocate gross income, deductions, or credits among corporations if a reallocation is necessary to prevent tax evasion.[54] The U.S. tax officials will act to reallocate income between subsidiary A and the WHTC in cases where they do not deal at arm's length, that is, where the sale price to the WHTC is abnormally low.

It is also important to note that, in order to effectuate a remittance of accrued earnings, the WHTC must declare a dividend to its parent. These dividends are subject to the U.S. corporate income tax if distributed to another U.S. corporation. (This would be the case where subsidiary A is the parent of the WHTC.) The effective tax rate for intercorporate dividends is now about 7½%. With regard to some types of "qualifying dividends", it is possible to elect a 100% dividends-received deduction for affiliated corporate groups, thus reducing the effective rate to zero, but at the cost of surrendering some flexibility due to restrictions such as the treatment of all members of the group as one person for purposes of the foreign tax credit.[55]

Should the WHTC be operated as a second wholly-owned subsidiary of the foreign parent, rather than as a subsidiary of A, then distributions to the foreign parent would be subject to the 30% dividend withholding tax, unless modified by treaty.

The second way in which the German manufacturer can use a WHTC is to con-

54. I.R.C. §482.
55. I.R.C. §243(b)(2).

duct both manufacturing and selling activities in the United States through subsidiary A and to have the U.S. produced products sold to the WHTC by subsidiary A for resale in the rest of the hemisphere. The tax result would be the same as in the first alternative, except that manufacturing profits would also be subject to the full rate U.S. income tax.

ALTERNATIVES TO THE USE OF A WESTERN HEMISPHERE TRADE CORPORATION

Some alternatives to the use of a WHTC have already been discussed. The use of a WHTC does not result in the most favorable U.S. tax treatment in every situation and each case must be analyzed to determine whether use of a WHTC is advisable. Business considerations, completely aside from tax effects, will often dictate whether an active subsidiary in Panama or Curaçao is feasible or whether goods should be manufactured or assembled by or pass through a U.S. base office prior to distribution to other Western Hemisphere countries. At any rate, assuming a decision to use a U.S. subsidiary as a base for operations in the entire hemisphere, there are several alternatives to the use of a WHTC. One obvious alternative is the use of foreign subsidiaries of subsidiary A. Prior to passage of the 1962 Revenue Act, use of foreign subsidiaries by a U.S. corporation enabled the U.S. corporation to defer U.S. taxes on all foreign source income indefinitely. This Act eliminated many of the advantages of using non-resident foreign corporations by passing through their passive foreign income and certain other income ("subpart F income") to certain U.S. shareholders.

One exception to the subpart F pass-through provisions is a very limited and narrowly defined category of foreign corporations controlled by U.S. taxpayers which are commonly referred to as "Export Trade Corporations"[56] or "Subpart G Corporations." Subpart G generally permits a "controlled foreign corporation"[57] to reduce its "foreign base company income,"[58] which must be passed-through, by the amount of its "export trade" income, up to certain maximum limits. There are certain disadvantages to the use of the Export Trade Corporation concept which arise from the restrictions on the type of income that such a corporation may have, and from the limitations on the amount of foreign base company income which it may exclude in any given taxable year.[59] The restrictions on the proper types of income generally require that the controlled foreign corporation derive 75% or more of its gross income from (1) the sale of property *produced* in the U.S. to unrelated persons for use outside the U.S., (2) the performance of certain services outside the U.S. for unrelated persons, (3) the use of export property by unrelated persons, and (4) the receipt of interest on obligations which qualify as export trade assets.[60] The limitations on the amount of foreign base company income which it may exclude in any given taxable year are as follows:

1. The excludable export trade income may not exceed the lesser of (a) an amount equal to 1½ times the export promotion expenses allocable to the export trade income, and, (b), generally, 10% of gross income from the permitted export activities; and
2. The exclusion from foreign base company income for any year cannot exceed an overall limitation based on the increase in investments in export trade assets (export in-

56. I.R.C. §§970–972.
57. See note 29.
58. *Ibid.*
59. I.R.C. §§970(a)(2), 971(b).
60. I.R.C. §§ 971(a)(1), 971(b).

ventory, storage, packing and transportation equipment etc.).

It is evident that the Export Trade Corporation concept is of little benefit to our German manufacturer of scientific instruments, unless he manufactures in the United States for export to the rest of the hemisphere. Even then, it is of extremely limited usefulness.

Another mechanism available to the U.S. taxpayer for reducing the effective tax rate on income from foreign operations is that of causing foreign subsidiaries to make a "minimum distribution."[61] Generally speaking, subpart F income will not be passed-through and taxed to the U.S. parent of controlled foreign subsidiaries if certain minimum distributions are actually made by these subsidiaries to the U.S. parent. The requirements regarding what minimum distributions are necessary for qualification vary according to the foreign tax rate applicable to the controlled subsidiaries. The aim of the minimum distribution mechanism is to provide a means whereby foreign corporations which either pay substantial foreign taxes on their income or make a substantial enough distribution to their U.S. parent (so that the combined foreign tax on their total income and U.S. tax on the distributed income is not substantially below the U.S. corporate tax rate) can reduce their total effective tax rate by approximately 5% percentage points from about 48% to about 43% (excluding the current 10% surtax), and to even less where the controlled foreign corporations are less developed country corporations. The U.S. corporation carrying on business operations in the Western Hemisphere (or elsewhere) through foreign subsidiaries would be entitled to make a "group" election to average high and low effective foreign tax rates in the foreign countries in which its subsidiaries operate.[62] This would permit the U.S. parent to add to the effective foreign tax rate of one controlled foreign corporation which has an effective tax rate of below 43%, the excess over 43% of the effective tax rate of another controlled foreign corporation, thus preventing the total effective tax rate on either corporation from exceeding 43%.

The minimum distribution mechanism can be useful to our German manufacturer in reducing his effective tax rate somewhat. Its most useful application may be in conjunction with a WHTC. A drawback of the WHTC is that where the tax rate in a given country of operation is higher than the WHTC tax rate, the benefit of this reduced U.S. tax rate will be minimized or lost. It may prove feasible, therefore, to operate in low tax rate countries via a WHTC and in high tax rate countries, where the tax rate approximates the U.S. corporate tax rate, by making use of the minimum distribution mechanism. Again, this question cannot be decided in the abstract and computations should be made of resulting taxes under the various organizational alternatives.

Some comments regarding the provisions for so-called "Possessions Corporations" are also in order. U.S. tax law permits a U.S. corporation to exclude from its gross income all income derived from sources outside the United States in cases where, for the three-year period prior to the close of the taxable year (or for such part of that period as the corporation may have been in existence) it derived 80% or more of its gross income from sources within a U.S. possession and 50% or more of such gross income from the active conduct of a trade or business with a U.S. possession.[63] It would, therefore, be

61. See definition in §963.
62. I.R.C. §963(a)(3).
63. I.R.C. §931.

possible to conduct the business of selling scientific instruments to Western Hemisphere countries, other than the United States, through a Puerto Rican corporation, thus avoiding U.S. tax. Although Puerto Rico does impose an income tax, it is possible to qualify for a tax holiday under the Puerto Rico Industrial Incentive Act of 1963[64] for periods of 10, 12 or 17 years, depending on the location within Puerto Rico of the facility, where new manufacturing or hotel facilities are established in Puerto Rico. An exempted business is exempted not only from income tax, but from all property tax (real and personal) and municipal taxes. The tax holiday can be deferred for up to two years after commencement of operations so that it will not be wasted during any loss years which may follow start-up. Agencies of the Puerto Rican government also may make available cash grants to defray certain start-up expenses, and loans for the purchase of buildings, machinery and equipment. They may also build and lease factory buildings to new industries.

In order to assure that income will be treated as Puerto Rican source income exempt from U.S. tax, care must be taken to assure that title to the property sold passes in Puerto Rico. The effect of the use of a Puerto Rican corporation would be to have the advantages of operating out of a tax-haven for the period of the tax holiday. Subsequently, a Puerto Rican income tax would have to be paid, which under current rates, results in a maximum effective tax rate of about 36%,[65] still substantially below the U.S. tax rate and close to the WHTC tax rate.

One other mechanism created by U.S. tax law should be mentioned here—the "Less Developed Country Corporation" ("LDCC"). As previously discussed (see note 29 and accompanying text), if foreign subsidiaries of a U.S. parent are utilized to conduct operations in their country of incorporation, their undistributed earnings will not be attributed back to the U.S. parent under subpart F. However, where the parent company is engaged in operations throughout the hemisphere or the world, it will undoubtedly find it desirable to have the earnings of a Brazilian subsidiary, for example, available for investment in other foreign countries where it is operating or intending to commence operations. However, any distribution of the Brazilian subsidiary's earnings to the U.S. parent or to an intermediate foreign subsidiary which acts as a holding company of the foreign operating subsidiaries, for the purpose of using the earnings in other foreign countries, will result in subjecting the distributed earnings to U.S. tax. A distribution to the U.S. parent will result in income to it which is taxable when received, and a distribution to the intermediate foreign holding company subsidiary will result in attribution of those distributed earnings back to the U.S. parent under subpart F. It is in this latter situation that the LDCC concept comes into play and affords another exception to the pass-through provisions of subpart F. The LDCC rules provide, among other things, that foreign operating subsidiaries which

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64. Laws of Puerto Rico Annotated, Title 13, §§253-53.

65. The current rate of Puerto Rican Income Tax on corporate ordinary income is computed as follows:
(1) A normal tax of 20% on "normal tax net income", which is net income less certain credits; plus
(2) A surtax on "surtax net income", which is normal tax net income less the sum of the normal tax and 5% of the normal tax net income, and which is levied on a graduated scale—no surtax on the first $25,000 of surtax net income and, thereafter, rates ranging from 5% to 20%; plus
(3) An additional tax in the amount of 5% of the total of the normal tax and surtax.

qualify as LDCC's may distribute earnings to the foreign intermediate holding company subsidiary without subjecting the distributed earnings to U.S. tax under the subpart F attribution rules, provided these distributed earnings are reinvested in less developed countries.

An LDCC may be either (a) a qualifying shipping company, or (b) any foreign corporation engaged in the active conduct of at least one trade or business during the taxable year, which derives 80% or more of its gross income for such taxable year from sources within less developed countries and has 80% or more in value of its assets on each day of the taxable year in property used in a trade or business in less developed countries and in certain other types of associated property.[66] All of the countries of the Western Hemisphere except the United States, Canada and Cuba have been designated as less developed countries.[67] The purpose of the LDCC concept is to encourage reinvestment of earnings derived from less developed countries in such countries. It accomplishes this objective, in part, by excepting LDCC earnings distributed to a foreign intermediate holding company subsidiary from subpart F, thus permitting deferral of U.S. taxes on the earnings, if the distributed earnings are reinvested in a less developed country.

Income derived from the sale of tangible personal property is treated as income from sources within less developed countries only if the property is produced within less developed countries or is sold for use, consumption, or disposition within such countries, and the selling corporation is engaged within less developed countries in continuous operational activities which are substantial in relation to such sales.[68] Substantial operational activities would probably include maintenance of substantial sales or service organizations or substantial facilities for transportation, storage, servicing, etc., of property within less developed countries in connection with the business of selling the tangible personal property in such countries.

If a corporation qualifies as an LDCC, the following benefits result: (1) Dividends and interest paid by it and net gains from the sale of its stock may be received by an intermediate controlled foreign corporation and reinvested in less developed countries without causing U.S. shareholders of the inter-intermediate foreign corporation to be taxed on its undistributed profits from such interest, dividends, and gains;[69] (2) Gains from the sale of its stock, or from its liquidation, will enjoy capital gains treatment (a 25% tax rate instead of the approximately 52% tax rate for ordinary income) with respect to earnings and profits accumulated during the years of qualification for LDCC status, if the stock has been held for at least ten years;[70] and (3) Certain other exemptions, all designed to encourage investment in less developed countries, which may prove beneficial, are conferred under the provisions regarding the foreign tax credit (dividends paid by it to the domestic parent are exempted from the "grossing-up" requirement), the minimum distribution mechanism (its earnings and profits may be excluded in making the determination) and the interest equalization tax (the tax does not apply to acquisition by a U.S. person of its stock or debt obligations).[71]

In summary, our German manufacturer of

66. I.R.C. §955(c)(1)(2).
67. Executive Order No. 11071 of December 28, 1962 and I.R.C. §955(c)(3).
68. Regulations §1.955-6(d)(1).
69. I.R.C. §954(b)(1).
70. I.R.C. §1248(d)(3).
71. I.R.C. §§902(a)(2), 902(d), 963(c)(4), 4916.

scientific instruments could employ the LDCC mechanism by setting up a controlled foreign corporation as a holding company for foreign operating subsidiaries which qualify as LDCC's.[72] So long as the German parent is willing to permit the reinvestment of non-U.S. (and non-Canadian and Cuban) hemisphere earnings in less developed countries, it can defer U.S. tax on such earnings. Of course, earnings which are not reinvested or which are withdrawn from reinvestment in less developed countries will be passed through and taxed by the United States at regular corporate rates. The mechanism could be a useful one, but it is, after all, only a deferral mechanism and does not permit distribution of profits at a lower effective rate of taxation, except in the case of the extraction of earnings by liquidation or sale of the subsidiary after ten years. Such a liquidation or sale would result in the taxation of accumulated reinvested profits at the lower 25% tax rate, but at the cost of what may be an undesirable termination of operations.

We wish to point out that we have not discussed the possible impact of the U.S. program to restrict foreign investment (the Foreign Direct Investment Regulations) on the ability of a U.S. corporation to establish operating subsidiaries in the Western Hemisphere countries. Generally speaking, given the large amount of permissible foreign investment under the regulations, as well as the favorable treatment of Western Hemisphere and less developed countries, there ought to be no difficulty in establishing operating companies.

CONCLUSION

Many of the concepts reviewed herein have merely been touched upon in passing. Lengthy articles, and even books, can and have been written on virtually every one of them. It has been our purpose only to point out some of the alternatives which should be considered and to sufficiently describe them so that the reader will have a general understanding of their purposes, the organizational structures which they require for implementation and the benefits which they afford. Our hypothetical German scientific instruments manufacturer, as well as any other foreign enterprise, would do well to consider these alternatives when he decides to enter the United States market, or to expand operations into the Western Hemisphere. Careful tax planning based on an evaluation of all alternatives can be the best investment that foreign entrepreneurs will make in this venture.

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72. The LDCC concept also affords some benefits where an intermediate foreign holding company subsidiary is not utilized. In the case of an LDCC which is operated in its country of incorporation, the U.S. parent may obtain capital gains treatment of undistributed earnings accumulated during years in which the subsidiary qualified as an LDCC upon liquidation of the subsidiary or sale of its stock if the stock has been held for at least ten years. For first-tier subsidiary LDCC's which either conduct their operations in their country of incorporation or conduct substantial operations outside their country of incorporation, the benefits mentioned above in Note 71 and the accompanying text are available.

R.V. GIDDY*:

AN OUTLINE OF TAXES UNDER THE HONG KONG INLAND REVENUE ORDINANCE

1. INTRODUCTION

Of the total estimated Government revenue for the year ended 31st March 1970 amounting to $2,171,610,400, it is anticipated that Earnings & Profits taxes under the Inland Revenue Ordinance will account for $578,000,000[1]. This source of revenue has been remarkably buoyant and has increased substantially in both absolute and relative terms. As the table below will show, over a period of seven years it has more than doubled and expressed as a percentage of total revenue has increased from 19.3% to 26.6%.

	Profits & Earnings Tax	Total Government Revenue		Profits & Earnings Tax expressed as % of Total Revenue
	$[1]	$[1]		
1963/64	268,534,400	1,393,871,322	=	19.3
1964/65	319,718,012	1,518,286,825	=	21.1
1965/66	372,474,184	1,631,701,213	=	22.8
1966/67	445,954,804	1,817,761,552	=	24.5
1967/68	489,295,819	1,899,527,499	=	25.8
† 1968/69	523,000,000	2,050,576,800	=	25.5
† 1969/70	578,000,000	2,171,610,400	=	26.6

† Estimated

This is only partly accounted for by the increase in the standard rate of tax which took place during the year ended 31/3/67 (from 12½% to 15%). By 31/7/69 the Consumer Price Index had risen by approximately 20% since 1963/64 so that most of the increase in tax may be attributed to the phenomenal real growth of the Colony's economy. Other principal items of Revenue are:—

(1)	†† Estate Duty	(estimated yield 1969/70 — $ 18,000,000)
(2)	†† Stamp Duty	(,, ,, ,, — $ 53,000,000)
(3)	†† Entertainment Tax	(,, ,, ,, — $ 32,000,000)
(4)	†† Bets & Sweeps Tax	(,, ,, ,, — $ 24,000,000)
(5)	Rates	(,, ,, ,, — $300,000,000)
(6)	Import Duties & License Duties	(,, ,, ,, — $345,500,000)

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1. All amounts given in this article represent Hong Kong Dollars. At 30th September 1969 the rate of exchange was 6.06 H.K. Dollars = 1 U.S. Dollar; 14.60 H.K. Dollars = 1 Pound Sterling.

(7)	Licenses & Franchises	(estimated yield	1969/70	—	$ 99,908,400)
(8)	Crown Rents & Interest	(,,	,,	—	$205,939,400)
(9)	Water Revenue	(,,	,,	—	$ 79,358,000)
(10)	Post Office Services	(,,	,,	—	$122,513,000)
(11)	Land Sales	(,,	,,	—	$ 55,230,000)
(12)	Airport & Air Services	(,,	,,	—	$ 47,820,800)
(13)	Motor Vehicle Taxes	(,,	,,	—	$ 13,900,000)

†† Taxes for which the Commissioner of Inland Revenue is responsible.

2. BASIC STRUCTURE

Before proceeding to a more detailed study of the various taxes imposed by the Ordinance, it is necessary to stress that there is no tax on total income. There are separate taxes on:

(a) Business Profits (derived by both corporate and non-corporate enterprises)
(b) Salaries, pensions.
(c) Profits from fixed property.
(d) Interest and Annuities.

The nearest approach to a "Sweeping Up" provision is contained in Section 9(4) of the part of the Ordinance relating to Salaries Tax; however, this Section was never intended to convert the Ordinance into a conventional Income Tax measure and has never been invoked by the Commissioner of Inland Revenue for that purpose and it has been recommended that the provision be repealed.

In addition to the four separate taxes mentioned above, a form of reduced rate relief known as "Personal Assessment" may be elected. Under this procedure the taxpayer makes a return of his income liable to the separate taxes and is charged tax on a sliding scale and at the same time granted personal allowances. Credit is given for the schedular taxes already paid.

All the schedular taxes have one important feature in common and that is that they are imposed on items of income *arising in or derived from Hong Kong.*

Another feature peculiar to the Hong Kong Ordinance which will strike any student of comparative Taxation is that there is no tax at all on Dividends apart from the underlying Corporation Profits Tax of 15%.

Prior to the Report of the 1954 Inland Revenue Ordinance Committee, companies were entitled to deduct tax from dividends paid and the gross dividends were included in the income of individuals who elected Personal Assessment. The 1954 Committee recommended that this system be abolished and that dividends be looked upon as payments out of a taxed fund not subject to further tax in the hands of the recipient.

3. HISTORICAL BACKGROUND

In common with so many tax measures, an Earnings & Profits Tax was first imposed in 1940 as a "War Revenue Ordinance". After the Japanese Occupation came to an end it was amended and reintroduced as the Inland Revenue Ordinance. Since then its basic structure has remained unchanged. Both the current Ordinance and its predecessor appear to have relied heavily on the so-called "Model Income Tax Ordinance"[2] for some of its provisions, whilst others were drafted specifically for local conditions. The Schedular system of Taxes which is such a feature of the Inland Revenue Ordinance obviously had its origins in United Kingdom Legisla-

2. See "Report of the Inter-Departmental Committee on Income Tax in the Colonies not possessing responsible Government"—presented to the U.K. Parliament in December 1922.

tion, similarly the provisions relating to Basis Periods are derived from the United Kingdom Legislation.

It is interesting to note that when the War Revenue Ordinance was introduced in 1940 and again when the Inland Revenue Ordinance was introduced in 1947 the reaction in the United Kingdom at the time of Addisons Income Tax Act of 1803 found an echo in Hong Kong. The local community strongly resisted the introduction of a full Income Tax on the grounds that this would enforce the compulsory disclosure of private affairs which, it was claimed, was so contrary to Chinese tradition. It was for this reason that the Schedular System of Taxation was adopted and still remains in force.

Originally this desire for secrecy was even carried a stage further. To obviate the need to obtain any returns of income on a personal basis, the charge to tax was directed at the various sources of income rather than at the persons deriving the income. This however proved impracticable, particularly after the introduction of Personal Assessment and the various charges are now placed on the persons deriving the scheduled types of income. The returns submitted however only show the income charged under the particular head of charge, except in the case of a return for the purposes of Personal Assessment, which is of course dependent on an election being made by the taxpayer.

4. ADMINISTRATION

The Ordinance is administered by the Commissioner of Inland Revenue who is assisted by a Deputy Commissioner and three Assistant Commissioners as well as Assessors, Assistant Assessors and supporting staff.

Powers given to the Commissioner under the Ordinance may be delegated except for those which have to be performed by him personally.

Assessments are made by Assessors with the taxpayer having the right of appeal to the Commissioner and then to the Board of Review and ultimately, on questions of law, to the Courts.

Provision also exists for amending assessments where the taxpayer can show that an error or omission has taken place.

The Assessor has wide powers to obtain information in regard to any matter affecting the liability or responsibility of any person under the Ordinance. Recent amendments to the Ordinance have given the Commissioner powers to search for, examine, take possession of and temporarily retain books, records, documents and accounts. These powers are subject to fairly stringent procedural safeguards against abuse. The Commissioner has also been given powers to obtain from a taxpayer statements of Assets and Liabilities, statements of personal expenditure, and statements of total income where there is evidence that income chargeable to tax has been understated. Again safeguards against abuse have been laid down.

Apart from the right to prosecute in respect of offences against the Inland Revenue Ordinance and to compound those offences, the Commissioner has been given power to administratively impose additional tax of up to 100% of the tax evaded where a taxpayer has, without reasonable excuse, understated income chargeable to tax. A right of appeal lies to the Board of Review against the imposition of such additional tax.

5. PROFITS TAX

Scope of Charge

A Profits Tax is imposed on businesses carried on in the Colony in respect of profits arising in or derived from the Colony. Cases which have come before the Courts on the question of whether profits arose in

or were derived from the Colony have been:
C.I.R. v. Karsten Larssen & Co (H.K.) Ltd.
(Supreme Court of Hong Kong—Inland Revenue Appeal No. 1 of 1950)
The Hong Kong & Whampoa Dock Co. Ltd. v. C.I.R.
(Supreme Court of Hong Kong (Appellate Jurisdiction—Appeal No. 1 of 1960)
The charge on corporate concerns is known as "Corporation Profits Tax" and that on unincorporated concerns as "Business Profits Tax".
Special provisions apply to Shipping, Aircraft operations, Insurance Companies, Clubs and Trade Associations, and Banks. Special rules also exist to determine the profits of a Hong Kong branch of a concern whose head office is outside the Colony. This may be by one of three ways:—
(a) By reference to the accounts kept if the true Hong Kong profits can be ascertained therefrom.
(b) By applying to the total profits the percentage of turnover in the Colony to total turnover.
(c) By applying a "fair percentage" to the turnover in the Colony.
Sums received after cessation of the business are brought to charge and related back to the date of cessation.
No tax is imposed on Capital Gains.

6. BASIS PERIODS

The charge to tax is for a Year of Assessment which runs from the 1st April to the 31st March. The first Year of Assessment is based on the profits from the date of commencement in the Colony of the business to the end of the Year of Assessment. For the second year the charge is on the profits for a period of 12 months following the date of commencement; for the third and subsequent years of Assessment the charge is on the profits for the period of 12 months preceding the Year of Assessment. On cessation the final assessment will be based on profits for the period from the 1st day of the Year of Assessment to the date of cessation of the business. It will be seen that in the opening years there will be overlapping charges on profits and in the terminal period a slice of the profits will escape charge.
There is provision for adjustment of these basis periods during the opening years in the case of falling profits and during the closing years in the case of rising profits. Provision also exists for accepting accounts which are usually prepared to some day other than the 31st March in lieu of accounts to the 31st March.

7. DEDUCTIONS

Expenses, other than capital expenses, incurred in the production of profits chargeable to tax are allowed as a deduction. In addition to this general provision, provision exists for the specific deduction, inter alia, of:—
(1) Depreciation allowances.
(2) Cost of Registration of Trade Marks, Designs and Patents.
(3) Capital Contributions to Approved Retirement Schemes. (Allowed over 5 years)
(4) Payments to Approved Research Institutions for Scientific Research related to that trade or business.
(5) Payments to be used for the purposes of technical education related to that trade at an Institution approved by the Director of Education.
(6) Payments made after the cessation of the business. These are related back to the date of cessation.

8. DEPRECIATION ALLOWANCES

Buildings
Allowances on expenditure on Industrial Buildings (as defined) are granted. An

initial allowance of 20% is available to the person who incurred the expenditure on construction of the building. Thereafter an annual allowance of 4% of the cost (or "residue after sale" in the case of subsequent owners) is granted until it is written off. These provisions are similar in many respects to Chapter 1 of the United Kingdom Capital Allowances Act 1968. Balancing allowances and/or charges are made on the taxpayer's interest coming to an end.

Buildings which do not fall within the definition of Industrial Buildings qualify for an allowance of ¾ of 1% of the cost of construction of the building. No balancing allowances or charges are made on termination of the taxpayer's interest and relief is not restricted to the cost of the building.

It should be noted that there is no relief available for expenditure on either land or lease premia.

9. PLANT & MACHINERY

An Initial Allowance of 20% on the cost of plant and machinery is granted, whether new or second-hand. Annual allowances on the reducing balance are granted at varying rates until the asset is written off. Balancing charges or allowances are made on disposal. The rates of the annual allowances vary from 5% to 30%. Some of the more frequently used are as follows:—

Furniture	10%
Petrol Driven Motor Vehicles	25%
Plastic Manufacturing Machinery & Plant	15%
Machinery not specifically itemised	10%
Aircraft	30%
Ships (Steel)	5%

Separate provision exists for a replacement allowance for utensils and implements.

10. LOSSES

Losses incurred during a Year of Assessment are set off as far as possible against profits for the preceding year and any balance available is then carried forward for set off against subsequent profits. There is no restriction on the number of years a loss can be carried forward.

11. RATES OF TAX

Tax is charged on assessable profits after deduction of expenses and losses. Tax is levied at the standard rate of 15%. In the case of corporations there is no exemption limit; however, in the case of unincorporated businesses, there is an exemption limit of $7,000 and marginal relief up to an amount of $10,000. Thereafter tax is levied at the full standard rate on the total assessable profits. Provision exists for aggregating the profits of businesses where there is common control, before applying the $7,000 exemption limit.

Where Property Tax has been paid on property used for business purposes or where the rent from property is brought to charge for profits tax purposes, a set-off and where appropriate a refund of that Property Tax is granted.

Interest cannot be subject to a similar double charge because in the case of Corporations it is exempt from Interest Tax and in the case of non-corporate businesses is either brought to charge to Profits Tax as part of the business profits in the case of banks, pawnbrokers or moneylenders or alternatively is charged with Interest Tax.

12. SALARIES TAX

Scope of Charge

Salaries Tax is imposed on income arising in or derived from the Colony from:

(a) Any office or employment of profit

(b) Any pension

An extension of the Salaries Tax charge exists in Section 13B of the Ordinance

whereby, notwithstanding the fact that no income arises in or is derived from the Colony, income derived from *services rendered in the Colony* is nevertheless subject to Salaries Tax.

Among the specific exemptions are:—

(1) Official emoluments of Consular Staff.
(2) Commutations of Pension.
(3) Withdrawals from Approved Retirement Schemes.
(4) Official emoluments of persons in the permanent employ of Commonwealth or United Kingdom Governments. This has recently also been extended to certain classes of persons in the temporary service of the United Kingdom Government.
(5) Passage Allowances.

Income from an office or employment includes all allowances and perquisites but does not include benefits in kind unless they are convertable into money.[3] One exception to this rule is the addition of an amount, not exceeding 7½% of the income (after expenses), representing the value of quarters provided by the employer, either free of rent or at a less than economic rent.

13. HUSBAND & WIFE

For Salaries Tax purposes the income of a wife living with her husband is deemed to be that of her husband. There is no provision for separate assessments on husband and wife, although the Commissioner has the power to recover a proportionate part of the tax from the wife.

14. BASIS PERIODS

Tax is assessed for a Year of Assessment which begins on the 1st April and ends on the 31st March.

In respect of the first year of *each particular employment* of the taxpayer (or his wife) the Year of Assessment is based on his income for the period from commencement of that employment in the Colony in that year of assessment to the following 31st March.

The second year is based on the actual income for the year of Assessment and for the 3rd and subsequent years of Assessment, the taxpayer is assessed on his income for the preceding year of assessment.

The final year of Assessment is based on his income from the 1st April to the date of cessation of employment. As with Profits Tax there is an overlap on the initial years and a slice of income is omitted in the final years. In the same way there is provision for adjustment in the case of falling income in the opening years and rising income in the closing years.

15. DEDUCTIONS

Expenses wholly exclusively and necessarily incurred in the production of assessable income are deducted in arriving at net chargeable income. It will be seen that like the rules relating to Schedule E of the United Kingdom Income Tax Act, the relief available to Salaries Taxpayers for expenses incurred is far more restrictive than that available to businessmen. (See paras. 129–143 of the Final Report of the Royal Commission on the Taxation of Profits and Income—presented to the United Kingdom Parliament in June 1955).

Further specific deductions consist of Capital Allowances (calculated in the same way as for Profits Tax purposes but only granted where the use is essential to the production of assessable income).

Any deficit can be carried forward for set-off against assessable income for subsequent years.

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3. See *Tennant v. Smith* (3 TC 158) and *Heaton v. Bell* (House of Lords 1969).

16. PERSONAL ALLOWANCES

The following personal allowances are deducted in arriving at Net Chargeable Income:

(1) An allowance of $7,000 for unmarried persons.

(2) An allowance of $14,000 for married persons.

(3) Allowances for children ranging from $2,000 for the first child to $500 for the 9th child. (Maximum allowances—$9,500)

(4) Subject to certain restrictions—

(a) Life Insurance Premia.

(b) Contributions to widows and orphans pension schemes.

17. RATES OF TAX

Tax at the following rates is imposed on net chargeable income *subject to a maximum average rate of 15% on income before personal allowances.* This means that the personal allowances listed in Para. 16 fall away at certain levels.

Chargeable Income		Rate	Tax
On the First	$ 5,000	2¾%	$ 137.50
On the Next	5,000	5½%	275.00
On the First	10,000		412.50
On the Next	5,000	8¼%	412.50
On the First	15,000		825.00
On the Next	5,000	11 %	550.00
On the First	20,000		1,375.00
On the Next	5,000	14 %	700.00
On the First	25,000		2,075.00
On the Next	5,000	17 %	850.00
On the First	30,000		2,925.00
On the Next	5,000	20 %	1,000.00
On the First	35,000		3,925.00
On the Next	5,000	23 %	1,150.00
On the First	40,000		5,075.00
On the Next	5,000	26 %	1,300.00
On the First	45,000		6,375.00
On the Balance		30 %	(But see opening remarks)

18. PROPERTY TAX

Originally this was a tax on the value of fixed property owned by the taxpayer. Gradually the charge has been so restricted by exemptions[4] and set-offs against other taxes that it is now virtually a residual charge only on those properties from which owners other than Corporations are deriving rent. Tax is at the standard rate of tax (15%) on the rateable value of the property less an allowance for repairs and outgoings of 20%.

The rateable value is determined by the Commissioner of Rating & Valuation and is based on the rent at which the property could be rented, landlord and tenant assuming the usual obligations.

4. Including an exemption in respect of property occupied by the owner for residential purposes.

The Property Tax assesment is based on the actual Rateable Value for the Year of Assessment.

Properties in what are known as the New Territories, with the exception of New Kowloon, are exempted. These are territories which were leased by the Hong Kong Government from the Chinese Government in 1898 for a period of 99 years.

The tax is chargeable on the owner but may be collected by the Commissioner from the person paying the rates (very often the tenant), in which case that person has the right of recovering from the owner.

19. INTEREST TAX

Tax is charged at the standard rate of 15% on interest arising in or derived from Hong Kong during the Year of Assessment. The charge is on the recipient but is deducted in the first instance at source by the person paying the interest. There is no provision for deducting expenses of collection or bad debts.

Exemptions are granted to:—

(a) Corporations carrying on business in Hong Kong (tax thereon will be accounted for under Profits Tax).

(b) Banks, Moneylenders and Pawn Brokers (again tax will be accounted for under Profits Tax)

(c) Interest paid by Government or Banks at a rate not exceeding 3½%.

This head of charge is also used to charge Annuities, a deduction being granted in respect of so much of the annuity as represents the capital portion. This capital portion is ascertained by dividing the consideration for the annuity by the appropriate factor relating to the age of the annuitant. The excess is charged to Interest Tax and the proportion so charged remains constant till the total capital portions equal the consideration, thereafter the entire annuity is deemed to represent interest.

20. PERSONAL ASSESSMENT

As already indicated, this is a form of relief which may be elected by a taxpayer whereby income subjected to the four separate taxes is aggregated; personal allowances deducted (at the same rate as those available for Salaries Tax purposes) and graduated rates of tax on the balance are paid (at the same rates as for Salaries Tax), credit being given for the tax already paid on those items of income. The election is only available to individuals who are ordinarily resident in the Colony and does not include persons under the age of 18 or women living with their husbands. The election must be made within 3 years of the Year of Assessment to which the election relates.

The amount to be aggregated in respect of Property Tax is the same amount as was charged to property tax, i.e. the Net Rateable Value. As regards amounts on which Profits Tax has been charged, the question only has relevance as far as non-corporate businesses are concerned because Corporation Profits Tax is a once-and-for-all tax. The portion to be included in respect of Profits Tax is therefore either the profit accruing to the sole proprietor of a business or in the case of a partner, the assessable profits for the Year of Assessment of the partnership apportioned in the ratio in which the profits for that year were divided. It will be noted that whereas the profits "for that year of Assessment" may be based on the profits for the 12 months preceding the year of Assessment, they have to be divided in accordance with the profit sharing ratio of the actual year of Assessment. Losses under the various headings cannot be aggregated for Personal Assessment purposes.

21. PAYMENT

Tax is payable on or before the date shown on the Notice of Assessment. In the case of Salaries Tax or Profits Tax this tends to be between the beginning of December and the end of February during the year of Assessment of which the notice relates and is payable in one instalment. Tax in default is subject to a surcharge of 5%.

Tax Reserve Certificates bearing tax free interest of 4.2% can be purchased and utilised for payment of tax.

The Commissioner has powers to prevent defaulting taxpayers from leaving the Colony. Employers are obliged to freeze any amounts due to employees about to leave the Colony for a period of one month.

22. ARTIFICIAL TRANSACTIONS

The Commissioner is given powers under Section 61 of the Ordinance to disregard any transactions which are artificial or fictitious or not given effect to, if the transactions would tend to reduce the amount of tax payable by the parties thereto. A case where the local courts upheld the application by the Commissioner of this anti avoidance provision was *Kum Hing Land Investment Co. Ltd. v. C.I.R.* (Supreme Court of Hong Kong – Inland Revenue Appeal No. 1 of 1967).

23. RELIEF FROM DOUBLE TAXATION

No Double Taxation Agreements have been entered into by the Hong Kong Government nor is there any form of Unilateral relief available to taxpayers suffering double taxation on Hong Kong income. The reason for this is threefold:—

(1) The very limited nature of the charge to Hong Kong tax. Only income arising in or derived from Hong Kong is assessed.

(2) The difficulty in equating the schedular system of Hong Kong Tax with conventional income tax legislation.

(3) The comparatively low rate of Hong Kong tax.

Provision does however exist in the Ordinance for the multilateral form of relief known as Commonwealth Income Tax Relief. The relief is available against taxes under the Ordinance and taxes imposed by reciprocating members of the Commonwealth (but *not* the United Kingdom) on the same income. The net effect of this form of relief is that the taxpayer ultimately pays the higher of the two rates of tax and relief is sometimes given partially by the one country and partially by the other or sometimes entirely by the country of residence.

24. RECENT DEVELOPMENTS

A Review Committee was appointed by the Governor in 1966 to consider and advise on certain matters connected with the Inland Revenue Ordinance. Alteration of the basic structure of the Ordinance which provides separate charges for Property Tax, Salaries Tax, Profits Tax and Interest Tax was outside its terms of reference. The interim report of the Committee was submitted to the Governor on 25.8.67 and the final report[5] on 14.3.68.

Certain of the changes recommended by the Committee have already been implemented. These were largely aimed at giving the Commissioner increased powers to combat evasion. The other recommendations of the Committee are still under consideration. In spite of the limited terms of reference of the Committee, these are extensive and involve, inter alia:

(1) the replacement of the existing system of varying basis periods for years of Assess-

5. "Report of the Inland Revenue Ordinance Review Committee" (Parts I & II)—Published by the Government Printer, Hong Kong.

ment by a uniform charge for a year of assessment based on the actual income of that year. Coupled with this would be a system of provisional assessments based on the data for the preceding year. Transitional relief would be provided for certain classes of existing taxpayers.

(2) the removal of uncertainties relating to the charge to Salaries Tax (similar views were expressed by the 1955 United Kingdom Royal Commission on Taxation of Profits and Income). It has been recommended that the charge should be on income derived from services rendered in the Colony with special provisions for persons employed in ships and aircraft, Government Officers serving outside the Colony and Directors of resident Corporations.

(3) the introduction for Profits Tax purposes of special provisions in regard to transactions between resident persons and non-resident associates.

(4) the introduction of special provisions relating to the apportionment of profits in the case of sales outside the Colony by resident manufacturers.

(5) the introduction for Profits Tax purposes of "Deeming provisions" in relation to special items such as royalties from films, patents, designs and copyrights.

(6) relief for terminal losses incurred by Corporations going into liquidation.

(7) the removal of the $7,000 exemption limit for Business Profits Tax.

(8) provision for losses incurred by sole proprietors and partners for Profits Tax purposes to be taken into account where Personal Assessment is elected.

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INTERNATIONAL FISCAL ASSOCIATION (I.F.A.)

RESOLUTION ON THE FIRST SUBJECT OF THE XXIIIrd I.F.A. CONGRESS HELD IN ROTTERDAM FROM 8th TO 12th SEPTEMBER 1969

Subject: „Vermeidung der Doppelbesteuerung bei Nichtanerkennung von Dienstleistungen und Überlassung immaterieller Werte zwischen Muttergesellschaften und ihren Tochtergesellschaften im Ausland durch die Steuerbehörde"

I. Der Kongreß ist von dem Fall ausgegangen, daß eine Tochtergesellschaft an ihre ausländische Muttergesellschaft Lizenzgebühren bezahlt und daß der Staat der Tochtergesellschaft einen Teil dieser Zahlung nach seinem nationalen Recht und im Rahmen der Artikel 9 und 12 Absatz 4 des OECD-Musterabkommens als verdeckte Gewinnausschüttung (Dividende) ansieht, demgemäß dem Gewinn der Tochtergesellschaft hinzurechnet und einen Steuerabzug vom Kapitalertrag erhebt.

II. Folgt der Staat der Muttergesellschaft dieser Umqualifizierung, so muß er die entsprechenden Folgerungen bei Anwendung des bestehenden Abkommens ziehen, insbesondere den Steuerabzug vom Kapitalertrag anrechnen und, vorausgesetzt daß das Schachtelprivileg über die Grenze gilt, den Gewinn der Muttergesellschaft herabsetzen.

III. Bestreitet der Staat der Muttergesellschaft die Umqualifizierung, so besteht die Gefahr einer steuerlichen Doppelbelastung. Der Kongreß hält es für notwendig, daß diese doppelte Steuerbelastung vermieden wird und gibt folgende Empfehlungen an die beteiligten Staaten:

1) *Vorgängige Konsultation:*

a) Wenn der Staat der Tochtergesellschaft beabsichtigt, eine Lizenzgebühr der Tochtergesellschaft an die ausländische Muttergesellschaft ganz oder teilweise nicht anzuerkennen, muß er auf Veranlassung der Tochtergesellschaft diese Absicht schon vor der Veranlagung dem Staat der Muttergesellschaft mitteilen.

b) Die beiden Staaten sollen sich bemühen, kurzfristig zu einer Einigung zu gelangen.

2) *Verständigungsverfahren:*

a) In allen Fällen, in denen die Gewinne einer oder mehrerer verbundener Gesellschaften in einem Staat in Anwendung der Artikel 9 und 12 Absatz 4 des OECD-Musterabkommens oder analoger Bestimmungen korrigiert worden sind, ist das Verständigungsverfahren gemäß Artikel 25 des OECD-Musterabkommens oder gemäß einer analogen Bestimmung anwendbar.

b) Das Verständigungsverfahren kann von den beteiligten Steuerpflichtigen oder von amtswegen veranlaßt werden, und zwar schon bevor eine Veranlagung durchgeführt ist.

Die interessierten Steuerpflichtigen können am Verständigungsverfahren teilnehmen, um ihre Auffassungen geltend zu machen.

c) Wenn sich die beteiligten Staaten in ihren Standpunkten nicht einigen können, so sind sie gehalten, wenn ein internationales Verfahren, wie nachstehend unter Ziffer 3 behandelt, nicht vorgesehen ist, eine Billigkeitslösung anzustreben, die die Doppelbelastung im Wege des gegenseitigen Nachgebens beseitigt.

d) Es muß sichergestellt sein, daß die Maßnahmen, die im Verständigungsverfahren getroffen werden, sich ohne Rücksicht auf die Rechtskraft schon erlassener Veranlagungsbescheide voll auswirken.

3) *Internationales Schieds- und Gerichtsverfahren:*

Die Einrichtung eines internationalen Schiedsverfahrens oder eines internationalen gerichtlichen Verfahrens ist überaus wünschenswert. Das Schiedsgericht oder der Gerichtshof, dessen Zuständigkeit zwischen den in Betracht kommenden Staaten für Zweifelsfälle dieser Art vereinbart worden ist, muß in der Lage sein, die streitigen Rechtsfragen für beide Staaten bindend zu entscheiden.

In diesem Zusammenhang ist auf die Entschließungen auf den IFA-Kongressen 1951 und 1960 zu verweisen.

IV. Der Kongreß empfiehlt, daß auf die Steuer des Staates der Muttergesellschaft zumindest die Steuer angerechnet wird, die im Staate der Tochtergesellschaft gemäß den nach der Umqualifizierung anwendbaren Abkommensbestimmungen erhoben wird.

Diese Empfehlung beeinträchtigt nicht die Anwendung der im vorstehenden Abschnitt III vorgesehenen Verfahren.

V. Die vorstehenden Empfehlungen sollen über den hier behandelten Fall hinaus in allen Fällen beachtet werden, in denen zwischen verbundenen Unternehmen gezahlte Lizenzgebühren oder Entgelte für Dienstleistungen seitens eines der beiden beteiligten Staaten umqualifiziert werden.

RESOLUTION ON THE SECOND SUBJECT OF THE XXIIIrd I.F.A. CONGRESS HELD IN ROTTERDAM FROM 8th TO 12th SEPTEMBER 1969

Subject: The possibilities and disadvantages of extending national tax reduction measures, if any, to foreign scientific, educational or charitable institutions.

The Congress

I. Considering that in most national tax legislation relief provisions exist for the benefit of scientific, educational and charitable institutions,

Considering further that the same relief is not generally granted in the case of foreign institutions, and

Considering, on the other hand, that activities in the field of science, education and charities are becoming more and more international and can no longer in many instances be confined to national borders;

Is of the opinion

II. that as a matter of principle national and foreign institutions pursuing the same or similar activities of a scientific, educational or charitable nature should be subject to equal tax treatment,

that these institutions should be given the benefit of tax conventions irrespective of the fact that they are not subjected to tax in their own countries,

that as a matter of principle grants and donations should be given equal treatment for income, gift and estate taxes whether made to national or foreign institutions at least as regards such foreign institutions which have as their aim activities of a genuine international character;

III. Expresses the hope that the above objectives be achieved by changes in national laws and/or by means of international conventions,

Recommends that as long as such changes have not been made, declarations of reciprocity between governments should be used wherever possible;

IV. Realises, however, that exceptions to the principle of equality of treatment for grants and donations to foreign institutions may be required in the case of developing countries;

V. Appreciates the need for supervision of the use made of funds which have benefitted from a favourable tax treatment in the country concerned, and suggests that there are in general sufficient possibilities of establishing adequate means of supervision.

Rotterdam, October 1969

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SUPPLEMENT TO NO. 1 (A 1969)

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains.

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Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXIII, No. 1, January/janvier 1969

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

On December 7, 1967, a new income tax treaty between the United Kingdom and Australia was signed. The treaty was given the force of law in both States and is in effect according to the rules of Article 23. It replaced the treaty signed in London on October 29, 1946.

TEXT

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia,

Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains,

Have agreed as follows:

Article 1

(1) The taxes which are the subject of this Agreement are—

(*a*) in the United Kingdom of Great Britain and Northern Ireland:
the income tax (including surtax), the corporation tax and the capital gains tax;

(*b*) in Australia:
the Commonwealth income tax, including the additional tax upon the undistributed amount of the distributable income of a private company.

(2) This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of,

the existing taxes by either Government or by the Government of any territory to which the present Agreement is extended under Article 22.

Article 2

(1) In this Agreement, unless the context otherwise requires—

(*a*) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea-bed and sub-soil and their natural resources may be exercised;

(*b*) the term "the Commonwealth" means the Commonwealth of Australia;

(*c*) the term "Australia" means the whole of the Commonwealth and includes—

(i) the Territory of Norfolk Island;

(ii) the Territory of Christmas Island;

(iii) the Territory of Cocos (Keeliig) Islands;

(iv) the Territory of Ashmore and Cartier Islands; and

(v) any area outside the territorial limits of the Commonwealth and the said Territories in respect of which there is for the time being in force a law of the Commonwealth or of a State or part of the Commonwealth or of a Territory aforesaid dealing with the exploitation of any of the natural resources of the sea-bed and sub-soil of the Continental Shelf;

(*d*) the terms "territory", "one of the territories" and "the other territory" mean the United Kingdom or Australia as the context requires;

(*e*) the term "taxation authority" means, in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorised representative; in the case of Australia, the Commissioner of Taxation or his authorised representative;

(*f*) the term "United Kingdom tax" means tax imposed by the United Kingdom being tax to which this Agreement applies by virtue of Article 1; the term "Australian tax" means tax imposed by the Commonwealth being tax to which this Agreement applies by virtue of Article 1;

(*g*) the term "tax" means United Kingdom tax or Australian tax as the context requires;

(*h*) the term "person" includes any body of persons corporate or not corporate;

(*i*) the term "company" means any body corporate;

(*j*) the term "resident in the United Kingdom" has the meaning which it has under the laws of the United Kingdom relating to United Kingdom tax;

(*k*) the term "resident of Australia" has the meaning which it has under the laws of Australia relating to Australian tax;

(*l*) words in the singular include the plural, and words in the plural include the singular.

(2) The terms "Australian tax" and "United Kingdom tax" do not include any amount which represents a penalty or interest imposed under the law of either territory relating to the taxes which are the subject of the present Agreement.

(3) Where under this Agreement income is relieved from tax in one of the territories and, under the law in force in the other territory an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other territory and not by reference to the full amount thereof, then the relief to be allowed under this Agreement in

the first-mentioned territory shall apply only to so much of the income as is remitted to or received in the other territory.

(4) In the application of the provisions of this Agreement by one of the Contracting Governments any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Government relating to the taxes which are the subject of this Agreement.

Article 3

(1) For the purposes of this Agreement—
(*a*) the term "Australian company" means any company which being a resident of Australia—
(i) is incorporated in Australia and has its centre of administrative or practical management in Australia whether or not any person outside Australia exercises or is capable of exercising any overriding control or direction of the company or of its policy or affairs in any way whatsoever; or
(ii) is managed and controlled in Australia;
(*b*) the term "United Kingdom company" means any company which is managed and controlled in the United Kingdom and which is not an Australian company;
(*c*) the term "United Kingdom resident" means any United Kingdom company and any person (other than a company) who is resident in the United Kingdom but the term does not include any individual, not being ordinarily resident in the United Kingdom, who is liable to tax in the United Kingdom only if he derives income from sources therein; and
(*d*) the term "Australian resident" means any Australian company and any other person (other than a United Kingdom company) who is a resident of Australia but the term does not include any individual, not being ordinarily resident in Australia, who is liable to tax in Australia only if he derives income from sources therein.

(2) Where by reason of the provisions of paragraph (1) of this Article an individual is both a United Kingdom resident and an Australian resident—
(*a*) he shall be treated solely as a United Kingdom resident—
(i) if he has a permanent home available to him in the United Kingdom and has not a permanent home available to him in Australia;
(ii) if Sub-paragraph (*a*) (i) of this paragraph is not applicable but he has an habitual abode in the United Kingdom and has not an habitual abode in Australia;
(iii) if neither sub-paragraph (*a*) (i) nor sub-paragraph (*a*) (ii) of this paragraph is applicable but the territory with which his personal and economic relations are closest is the United Kingdom;
(*b*) he shall be treated solely as an Australian resident—
(i) if he has a permanent home available to him in Australia and has not a permanent home available to him in the United Kingdom;
(ii) if sub-paragraph (*b*) (i) of this paragraph is not applicable but he has an habitual abode in Australia and has not an habitual abode in the United Kingdom;
(iii) if neither sub-paragraph (*b*) (i) nor sub-paragraph (*b*) (ii) of this paragraph is applicable but the territory with which his personal and economic relations are closest is Australia.

(3) Where by reason of the provisions of paragraph (1) of this Article a person other

than an individual is both a United Kingdom resident and an Australian resident—
(*a*) it shall be treated solely as a United Kingdom resident if it is managed and controlled in the United Kingdom;
(*b*) it shall be treated solely as an Australian resident if it is managed and controlled in Australia.

(4) The terms "resident of one of the territories" and "resident of the other territory" mean a person who is a United Kingdom resident or a person who is an Australian resident as the context requires.

(5) The terms "United Kingdom enterprise" and "Australian enterprise" mean respectively an industrial or commercial enterprise or undertaking carried on by a United Kingdom resident and an industrial or commercial enterprise or undertaking carried on by an Australian resident, and the terms "enterprise of one of the territories" and "enterprise of the other territory" mean a United Kingdom enterprise or an Australian enterprise, as the context requires.

Article 4

(1) For the purposes of this Agreement the term "permanent establishment" means a fixed place of trade or business in which the trade or business of the enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes—
(*a*) a management;
(*b*) a branch;
(*c*) an office;
(*d*) a factory;
(*e*) a workshop;
(*f*) a mine, quarry or other place of extraction of natural resources;
(*g*) an agricultural, pastoral or forestry property;
(*h*) a building site or a construction, 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 activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

(4) An enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on supervisory activities in that other territory for more than six months in connection with a building site, or a construction, installation or assembly project which is being undertaken, in that other territory.

(5) A person acting in one of the territories on behalf of an enterprise of the other territory (other than an agent of independent status to whom paragraph (6) of this Article applies) shall be deemed to be a permanent

establishment of that enterprise in the first-mentioned territory—
(*a*) if he has, and habitually exercises in that first-mentioned territory, an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
(*b*) if he habitually fills orders from a stock of goods or merchandise maintained in that first-mentioned territory; or
(*c*) if in so acting he manufactures or processes in that first-mentioned territory any goods for the enterprise.

(6) An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on trade or business in that other territory through a broker, a general commission agent or any other agent of independent status, where such a person is acting in the ordinary course of his business as a broker, a general commission agent or other agent of independent status.

(7) The fact that a company which is a resident of one of the territories controls or is controlled by a company which is a resident of the other territory, or which carries on trade or business in that other territory whether through a permanent establishment or otherwise, shall not of itself constitute either company a permanent establishment of the other.

(8) Where an enterprise of one of the territories sells to a person in the other territory goods manufactured, assembled, processed, packed or distributed in the other territory by an industrial or commercial enterprise for, or at, or to the order of, that first-mentioned enterprise and—
(*a*) either enterprise participates directly or indirectly in the management, control or capital of the other enterprise; or
(*b*) the same persons participate directly or indirectly in the management, control or capital of both enterprises,
then for the purposes of this Agreement that first-mentioned enterprise shall be deemed to have a permanent establishment in the other territory and to carry on trade or business in the other territory through that permanent establishment.

Article 5

(1) Industrial or commercial profits of a United Kingdom enterprise shall be exempt from Australian tax unless the enterprise carries on trade or business in Australia through a permanent establishment situated therein. If the enterprise carries on trade or business as aforesaid, Australian tax may be imposed on the industrial or commercial profits of the enterprise but only on so much of them as is attributable to that permanent establishment.

(2) Industrial or commercial profits of an Australian enterprise shall be exempt from United Kingdom tax unless the enterprise carries on trade or business in the United Kingdom through a permanent establishment situated therein. If the enterprise carries on trade or business as aforesaid, United Kingdom tax may be imposed on the industrial or commercial profits of the enterprise but only on so much of them as is attributable to that permanent establishment.

(3) Where an enterprise of one of the territories carries on trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be

expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities and its dealings with the enterprise of which it is a permanent establishment were dealings at arm's length with that enterprise or an independent enterprise; and the profits so attributed shall be deemed to be income derived from sources in that other territory.

(4) In determining the industrial or commercial profits of an enterprise of one of the territories which are taxable in the other territory in accordance with the previous paragraphs of this Article, there shall be allowed as deductions all expenses of the enterprise (including executive and general administrative expenses) which would be deductible if the permanent establishment were an independent enterprise and which are reasonably connected with the profits so taxable, whether incurred in the territory in which the permanent establishment is situated or elsewhere, but where goods manufactured out of the other territory by the enterprise are imported into that territory, and the goods are, either before or after importation, sold in that territory by the enterprise, the profits of the enterprise taxable in that territory may be determined by deducting from the sale prise of the goods the amount for which, at the date the goods were shipped to that territory, goods of the same nature and quality could be purchased by a wholesale buyer in the country of manufacture, and the expenses incurred in transporting them to and selling them in that territory.

(5) If the information available to the taxation authority concerned is inadequate to determine the profits to be attributed to the permanent establishment, nothing in this Article shall affect the application of the law of either territory in relation to the liability of the permanent establishment to pay tax on an amount determined by the exercise of a discretion or the making of an estimate by the taxation authority of that territory. Provided that such discretion shall be exercised or such estimate shall be made, so far as the information available to the taxation authority permits, in accordance with the principle stated in this Article.

(6) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(7) The term "industrial or commercial profits" means income derived by an enterprise from the conduct of a trade or business, including income derived by an enterprise from the furnishing of services of employees or other personnel, but it does not include—

(*a*) dividends, interest, royalties (as defined in Articles 8, 9 and 10) or rents other than dividends, interest, royalties or rents effectively connected with a trade or business carried on through a permanent establishment which an enterprise of one of the territories has in the other territory; or

(*b*) remuneration for personal (including professional) services; or

(*c*) income arising from, or in relation to, contracts or obligations to provide the services of public entertainers or athletes referred to in Article 13.

(8) Nothing in this Article shall apply to either territory to prevent the operation in the territory of any provisions of its law relating specifically to the taxation of any person who carries on a business of any form of insurance or to the taxation of a non-resident who derives income under any contract or

agreement with any person in relation to the carrying on in the territory by that person of any form of film business controlled abroad. Provided that if the law in force in either territory at the date of signature of this Agreement relating to the taxation of such persons is varied (otherwise than in minor respects so as not to affect its general character, or by this Agreement), the Contracting Governments shall consult with each other with a view to agreeing to such amendment of this paragraph as may be necessary.

(9) This Article shall not apply to profits derived by a resident of one of the territories from the operation of ships or aircraft which are exempt from tax in the other territory under paragraph (1) of Article 6, nor shall it apply to profits to which paragraph (2) of Article 6 applies.

Article 6

(1) A resident of one of the territories shall be exempt from tax in the other territory on profits from the operation of ships or aircraft, other than profits from voyages or operations of ships or aircraft confined solely to places in the other territory, voyages of ships or aircraft between a place in Australia and a place in the Territory of Papua or the Territory of New Guinea being treated as voyages between places within Australia.

(2) The amount which shall be charged to tax in one of the territories as profits from voyages of ships in respect of which a resident of the other territory is not exempt from tax in the first-mentioned territory under paragraph (1) of this Article shall not exceed 5 per cent. of the amounts paid or payable (net of rebates) in respect of such voyages for the carriage of passengers, livestock, mails or goods shipped in the first-mentioned territory.

(3) Paragraph (2) of this Article shall not apply to the profits derived from the operation of ships by a United Kingdom enterprise whose principal place of business is in Australia, but there shall be excluded from the profits on which any such enterprise is charged to Australia tax any amounts of profits taxed in the Territory of Papua or the Territory of New Guinea.

Article 7

(1) Where—
(*a*) an enterprise of one of the territories participates directly or indirectly in the management, control or capital of an enterprise of the other territory; or
(*b*) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the territories and an enterprise of the other territory,
and, in either case conditions are operative between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing at arm's length with one another, then, if by reason of those conditions, profits which might be expected to accrue to one of the enterprises do not accrue to that enterprise there may be included in the profits of that enterprise the profits which might have been expected to accrue to it if it were an independent enterprise and its dealings with the other enterprise were dealings at arm's length with that enterprise or an independent enterprise.

(2) Profits included in the profits of an enterprise of one of the territories under paragraph (1) of this Article shall be deemed

to be income derived from sources in that territory and shall be taxed accordingly.

(3) If the information available to the taxation authority concerned is inadequate to determine, for the purposes of paragraph (1) of this Article, the profits which might be expected to accrue to an enterprise, nothing in this Article shall affect the application of the law of either territory in relation to the liability of that enterprise to pay tax on an amount determined by the exercise of a discretion or the making of an estimate by the taxation authority of that territory. Provided that such discretion shall be exercised or such estimate shall be made, so far as the information available to the taxation authority permits, in accordance with the principle stated in that paragraph.

Article 8

(1) The United Kingdom tax on dividends derived and beneficially owned by an Australian resident shall not exceed 15 per cent. of the gross amount of the dividends.

(2) The Australian tax on dividends derived and beneficially owned by a United Kingdom resident shall not exceed 15 per cent. of the gross amount of the dividends.

(3) The term "dividends" includes any item (other than interest or royalties relieved from tax under Article 9 or Article 10 of this Agreement) which—
(*a*) in the case of the United Kingdom is, under the law of the United Kingdom, a distribution of a company;
(*b*) in the case of Australia is, or is deemed to be, under the laws in force in Australia relating to Australian tax, a dividend.

(4)—(*a*) Notwithstanding paragraphs (1) and (2) of this Article where a company (other than a company to which the proviso to paragraph (8) of this Article applies) which is a resident of one of the territories satisfies the condition prescribed in sub-paragraph (*b*) of this paragraph, tax shall not be imposed in that territory on dividends paid by that company which are derived and beneficially owned by a resident of the other territory, provided that the Government of the other territory does not impose on the profits attributable to a permanent establishment of the company in that other territory any tax which is in addition to the tax which would be chargeable on those profits if they were the profits of a company which was a resident of the territory of that Government;
(*b*) the condition referred to in sub-paragraph (*a*) of this paragraph is that the company derived not less than 90 per cent. of its income for each of its last three accounting periods or years of income before the dividend was paid (or in the case of a company having fewer than three accounting periods or years of income, for each accounting period or year of income before that date) from a business carried on by it in the other territory.

(5) Paragraphs (1) and (4) of this Article shall not apply if the beneficial owner of the dividends, being an Australian resident, has in the United Kingdom a permanent establishment and the holding giving rise to the dividends is effectively connected with a trade or business carried on through such permanent establishment and, in the case of a company, the trade or business is such that a profit on the sale of the holding would be a trading receipt.

(6) Paragraphs (2) and (4) of this Article shall not apply if the beneficial owner of the dividends, being a United Kingdom resi-

dent, has in Australia a permanent establishment and the holding giving rise to the dividends is effectively connected with a trade or business carried on through such permanent establishment and, in the case of a company, the trade or business is such that the proceeds of sale or a profit on the sale of the holding would be assessable income.

(7) If the beneficial owner of dividends being an Australian resident owns 10 per cent. or more of the class of shares in respect of which the dividends are paid, then paragraph (1) of this Article shall not apply to the dividends to the extent that they can have been paid only out of profits which the company paying the dividends earned or other income which it received in a period ending twelve months or more before the relevant date. For the purpose of this paragraph the term "relevant date" means the date on which the beneficial owner of the dividends became the owner of 10 per cent. or more of the class of shares in question. Provided that this paragraph shall not apply if the shares were acquired for bona fide commercial reasons and not primarily for the purpose of securing the benefit of this Article.

(8) Dividends paid by a company which is a resident of one of the territories and which are beneficially owned by a person who is not a resident of the other territory shall be exempt from tax in that other territory. Provided that this paragraph shall not apply in relation to any United Kingdom company which is also a resident of Australia or any Australian company which is also resident in the United Kingdom.

(9) The Government of one of the territories shall not impose on a company which is a resident of the other territory any tax in the nature of an undistributed profits tax on undistributed profits of the company on a basis that is less favourable than that applicable in the case of a company which is a resident of the first-mentioned territory.

Article 9

(1) The United Kingdom tax on interest (on bonds, securities, debentures, or on any other form of indebtedness) derived and beneficially owned by an Australian resident shall not exceed 10 per cent. of the gross amount of the interest.

(2) The Australian tax on interest (on bonds, securities, debentures, or on any other form of indebtedness) derived and beneficially owned by a United Kingdom resident shall not exceed 10 per cent. of the gross amount of the interest.

(3) Paragraphs (1) and (2) of this Article shall not apply if the beneficial owner of the interest, being a resident of one of the territories, has in the other territory a permanent establishment and the indebtedness giving rise to the interest is effectively connected with a trade or business carried on through that permanent establishment.

(4) Any provision in the law of either of the territories relating only to interest paid to a non-resident company shall not operate so as to require such interest paid to a company which is a resident of the other territory to be treated as a distribution of or a dividend from the company paying such interest. The preceding sentence shall not apply to interest paid to a company which is a resident of one of the territories in which more than 50 per cent. of the voting power is controlled, directly or indirectly, by a person resident in the other territory.

(5) Paragraphs (1) and (2) of this Article shall not apply to interest on any form of debt-claim dealt in on a stock exchange where the beneficial owner of the interest—
(*a*) is not subject to tax in respect thereof in the territory of which it is a resident; and
(*b*) sells (or makes a contract to sell) the debt-claim from which such interest is derived within three months of the date on which such beneficial owner acquired such debt-claim.

(6) Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest paid exceeds the amount which would have been agreed upon in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount.

Article 10

(1) The United Kingdom tax on royalties derived and beneficially owned by an Australian resident shall not exceed 10 per cent. of the gross amount of the royalties.

(2) The Australian tax on royalties derived and beneficially owned by a United Kingdom resident shall not exceed 10 per cent. of the gross amount of the royalties.

(3) Paragraphs (1) and (2) of this Article shall not apply if the beneficial owner of the royalties, being a resident of one of the territories, has in the other territory a permanent establishment and the knowledge, information, assistance, right or property giving rise to the royalties is effectively connected with a trade or business carried on through that permanent establishment.

(4) Royalties paid by a company which is a resident of one of the territories to a resident of the other territory shall not be treated as a distribution of or a dividend from that company. The preceding sentence shall not apply to royalties paid to a company which is a resident of one of the territories where—
(*a*) the same persons participate directly or indirectly in the management or control of the company paying the royalties and the company deriving the royalties; and
(*b*) more than 50 per cent. of the voting power in the company deriving the royalties is controlled, directly or indirectly, by a person resident in the other territory.

(5) In the Article the term "royalties" means payments of any kind to the extent to which they are paid as consideration for the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark, or other like property or right, or industrial, commercial or scientific equipment, or for the supply of scientific, technical, industrial or commercial knowledge, information or assistance, and includes any payments of any kind to the extent to which they are paid as consideration for the use of, or the right to use, motion picture films, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but does not include royalties or other amounts paid in respect of the operation of mines or quarries or of the extraction or removal of natural resources.

(6) Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties paid exceeds the amount which would have been agreed upon in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount.

Article 11

Income derived by a resident of one of the territories in respect of professional services or other independent activities of a similar character shall be subjected to tax only in that territory unless he has a fixed base regularly available to him in the other territory for the purpose of performing his activities. If he has such a fixed base, such part of that income as is attributable to that base shall be deemed to have a source in, and may be taxed in, that other territory.

Article 12

(1) Subject to Articles 14, 15 and 16, salaries, wages and other similar remuneration derived by a resident of one of the territories in respect of an employment shall be subjected to tax only in that territory unless the employment is exercised in the other territory. If the employment is so exercised such remuneration as is derived therefrom shall be deemed to have a source in, and may be taxed in, that other territory.

(2) Notwithstanding the provisions of paragraph (1) of this Article remuneration derived by a resident of one of the territories in respect of an employment exercised in the other territory shall be exempt from tax in the other territory if—

(*a*) the recipient is present in the other territory for a period or periods not exceeding in the aggregate 183 days in the year of income or the year of assessment as the case may be of that other territory; and

(*b*) the remuneration is paid by or on behalf of an employer who is not a resident of the other territory; and

(*c*) the remuneration is not deductible in determining the profits of a permanent establishment or a fixed base which the employer has in the other territory.

(3) Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic may be taxed in the territory in which the place of effective management of the enterprise is situated.

(4) In relation to remuneration of a director of a company derived from the company the preceding provisions of this Article shall apply as if the remuneration were remuneration of an employee in respect of an employment and as if references to employers were references to the company.

Article 13

Notwithstanding anything contained in Articles 11 and 12, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such shall be deemed to have a source in, and may be taxed in, the territory in which these activities are exercised.

Article 14

(1) Any pension or annuity derived from sources within one of the territories by an individual who is a resident of the other territory shall be exempt from tax in the first-mentioned territory.

(2) The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 15

(1) Remuneration (other than pensions) paid by the Government of the Commonwealth or of any State of the Commonwealth to any individual for services rendered to that Government in the discharge of governmental functions shall be exempt from United Kingdom tax if the individual is not ordinarily resident in the United Kingdom or is ordinarily resident in the United Kingdom solely for the purpose of rendering those services.

(2) Remuneration (other than pensions) paid by the Government of the United Kingdom or the Government of Northern Ireland to any individual for services rendered to that Government in the discharge of governmental functions shall be exempt from Australian tax if the individual is not a resident of Australia or is resident in Australia soley for the purpose of rendering those services.

(3) This Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by a Government referred to in paragraphs (1) and (2) of this Article.

Article 16

A professor or teacher who visits one of the territories for a period not exceeding two years for the purpose of teaching at a university, college, school or other educational institution in that territory and who is, or was immediately before that visit, a resident of the other territory shall be exempt from tax in the first-mentioned territory on any remuneration for such teaching in respect of which he is subject to tax in the other territory.

Article 17

A student who is, or was immediately before visiting one of the territories, a resident of the other territory and is present in the first-mentioned territory solely for the purpose of his education shall not be taxed in that first-mentioned territory on payments which he receives for the purpose of his maintenance or education provided that such payments are made to him from sources outside that first-mentioned territory.

Article 18

(1) This Article shall apply to a person who is a resident of Australia and is also resident in the United Kingdom.

(2) Where such a person is treated for the purposes of this Agreement solely as a resident of one of the territories he shall be exempt in the other territory from tax on any income in respect of which he is subject to tax in the first-mentioned territory if the income is derived—

(*a*) from sources in the first-mentioned territory; or

(*b*) from sources outside both territories.

Article 19

(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof)—

(*a*) Australian tax payable under the laws of Australia and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Australia (excluding in the case of a dividend, tax payable in

respect of the profits out of which the dividend is paid), shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Australian tax is computed; and

(*b*) in the case of a dividend paid by a company which is a resident of Australia and is not resident in the United Kingdom to a company which is resident in the United Kingdom and which controls directly or indirectly at least 10 per cent. of the voting power in the first-mentioned company, the credit shall take into account (in addition to any Australian tax creditable under (*a*)) the Australian tax payable by the company in respect of the profits out of which such dividend is paid.

(2)—(*a*) Subject to the provisions of the law of Australia from time to time in force and which relate to the allowance of a credit against Australian tax of tax payable in a country outside Australia (which shall not affect the general principle hereof), United Kingdom tax payable under the laws of the United Kingdom and in accordance with this Agreement (reduced by the amount of any relief or repayment attributable to that income which is allowable under the law of the United Kingdom), whether directly or by deduction, on income derived by a resident of Australia from sources in the United Kingdom (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against the Australian tax assessed by reference to the same income by reference to which the United Kingdom tax is payable;

(*b*) in the event that Australia should cease to allow a company which is a resident of Australia a rebate in its assessment at the average rate of tax payable by the company in respect of dividends derived from sources in the United Kingdom and included in the taxable income of the company, the Contracting Governments will enter into negotiations in order to establish new provisions concerning the credit to be allowed by Australia against its tax on the dividends.

(3) For the purposes of this Article—

(*a*) (i) Australian tax borne by a United Kingdom resident in respect of dividends (as defined in Article 8) paid by a company which is a resident of Australia shall be treated as tax on income from sources in Australia;

(ii) United Kingdom tax borne by an Australian resident in respect of dividends (as defined in Article 8) paid by a company which is resident in the United Kingdom shall be treated as tax on income from sources in the United Kingdom;

(*b*) interest and royalties (as defined in Articles 9 and 10), which under the law of one of the territories—

(i) are derived from sources within that territory; or

(ii) being derived by a non-resident are subject to withholding tax,

shall be treated in the other territory as having a source in the first-mentioned territory;

(*c*) remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic shall be treated as having a source in the territory in which the place of effective management of the enterprise is situated;

(*d*) any amount which is included, for the purposes of tax in one of the territories, in the chargeable profits or taxable income of a person who is a resident of the other territory, and which is so included under any provision of the law of the first-mentioned territory for the time being in force

regarding taxation of income of a business of any form of insurance or of income derived under a contract or agreement with a person who carries on in the first-mentioned territory any form of film business controlled abroad shall be treated as having a source in that first-mentioned territory;

(*e*) profits to which paragraph (2) of Article 6 applies derived by a resident of one of the territories from the operation of ships, being profits that are charged to tax in the other territory, shall be treated as having a source in that other territory.

(4) Where profits on which an enterprise of one of the territories has been charged to tax in that territory are also included in the profits of an enterprise of the other territory and the profits so included are profits which might have been expected to accrue to that enterprise of the other territory if conditions operative between each of the enterprises had been those which might be expected to operate between independent enterprises dealing at arm's length, the amount of such profits included in the profits of both enterprises shall be treated for the purposes of this Article as income from a source in the other territory of the enterprise of the first-mentioned territory and relief shall be given in accordance with this Article in respect of the extra tax chargeable in the other territory as a result of the inclusion of the said amount.

Article 20

(1) Where a taxpayer considers that the action of the taxation authority of either territory has resulted or will result in taxation contrary to the provisions of this Agreement, he shall be entitled to present his case to either taxation authority. Should the taxpayer's claim be deemed worthy of consideration, the taxation authority to which the claim is made shall endeavour to come to an agreement with the other taxation authority with a view to a satisfactory adjustment.

(2) The taxation authorities may communicate with each other directly to implement the provisions of this Agreement and to assure its consistent interpretation and application. In particular, the taxation authorities may consult together to endeavour to resolve disputes arising out of the application of paragraph (3) of Article 5 or Article 7, or the determination of the source of particular items of income.

Article 21

The taxation authorities shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement or for the prevention of fraud or for the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret but may be disclosed to persons (including a court or tribunal) concerned with the assessment, collection, enforcement or prosecution in respect of the taxes which are the subject of this Agreement. No information as aforesaid shall be exchanged which would disclose any trade, business, industrial or professional secret or trade process.

Article 22

(1) This Agreement may be extended, either in its entirety or with modifications to any territory for whose international relations either of the Contracting Govern-

ments is responsible, and which imposes taxes substantially similar in character to those which are the subject of this Agreement, and any such extension shall take effect from such date and subject to such modifications and conditions (including conditions as to termination) as may be specified and agreed between the Contracting Governments in Letters to be exchanged for this purpose.

(2) The termination of this Agreement under Article 24 shall, unless otherwise expressly agreed by both Contracting Governments, terminate the application of this Agreement to any territory to which it has been extended under this Article.

Article 23

(1) This Agreement shall enter into force on the date when the last of all such things shall have been done in the United Kingdom and Australia as are necessary to give the Agreement the force of law in the United Kingdom and Australia respectively, and shall thereupon have effect—

(*a*) in the United Kingdom—

(i) in respect of income tax (including surtax) for any year of assessment beginning on or after 6 April, 1967;

(ii) in respect of capital gains tax for any year of assessment beginning on or after 6 April 1965;

(iii) in respect of corporation tax for any financial year beginning on or after 1 April, 1964;

(*b*) in Australia—

(i) in respect of any Australian tax on dividends, on dividends derived by a non-resident on or after 1 July, 1967;

(ii) in respect of withholding tax on income (other than dividends) that is derived by a non-resident, in respect of any income derived on or after 1 July, 1967;

(iii) in respect of other Australian tax, for any year of income beginning on or after 1 July, 1967.

(2) Subject to paragraph (3) of this Article, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia signed at London on 29 October, 1946 shall terminate and cease to have effect in relation to any tax in respect of which this Agreement comes into effect in accordance with paragraph (1) of this Article.

(3)—(*a*) Where any provision of the Agreement signed at London on 29 October, 1946 would have afforded any greater relief from tax in one of the territories than is afforded by this Agreement any such provision as aforesaid shall continue to have effect in that territory—

(i) in the case of the United Kingdom, for any year of assessment or financial year beginning before the date this Agreement shall enter into force;

(ii) in the case of Australia, for the purposes of withholding tax on income derived by a non-resident on income derived during any financial year beginning before the date this Agreement shall enter into force and, for the purposes of other Australian tax, for any year of income beginning before that date;

(*b*) notwithstanding sub-paragraph (*a*) of this paragraph where any greater relief from United Kingdom tax would have been afforded by Article XII of the Agreement signed at London on 29 October, 1946 in respect of dividends paid by a company which is a resident of Australia than is

afforded by Article 19 of this Agreement, the aforesaid Article XII shall continue to have effect as respects United Kingdom tax for any year of assessment or any financial year beginning before the date this Agreement shall enter into force only in respect of dividends paid before the said date;

(*c*) notwithstanding sub-paragraph (*a*) of this paragraph where any greater relief from Australian tax would have been afforded by paragraph (2) of Article VI of the Agreement signed at London on 29 October, 1946 than is afforded by Article 8 of this Agreement, the aforesaid paragraph (2) of Article VI shall continue to have effect only in respect of dividends declared on or before the date which falls seven days after the date of signature of this Agreement.

(4) This Article shall be construed as having the result, in relation to United Kingdom tax on dividends paid by companies which are resident in the United Kingdom to residents of Australia, that the limits set by section 31 of the Finance Act 1966 on the amount of such tax chargeable shall continue to apply to dividends declared on or before the date which falls seven days after the date of signature of this Agreement to a company which is a resident of Australia and which satisfies the converse of the conditions set out in paragraph (2) of Article VI of the Agreement signed at London on 29 October, 1946.

Article 24

This Agreement shall continue in effect indefinitely but either of the Contracting Governments may, on or before the thirtieth day of June in any calendar year after the year 1973, give notice of termination to the other Contracting Government and, in such event, this Agreement shall cease to be effective—

(*a*) in the United Kingdom—

(i) in respect of income tax (including surtax) and capital gains tax for any year of assessment beginning on or after 6 April, in the calendar year next following that in which the notice is given;

(ii) in respect of corporation tax for any financial year beginning on or after 1 April, in the calendar year next following that in which the notice is given;

(*b*) in Australia—

(i) in respect of withholding tax on income that is derived by a non-resident, in respect of income derived on or after the commencement of the financial year beginning on 1 July, in the calendar year next following that in which the notice is given;

(ii) in respect of other Australian tax, for any year of income beginning on or after 1 July, in the calendar year next following that in which the notice is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement.

DONE in duplicate at Canberra on the 7th day of December of the year One thousand nine hundred and sixty-seven.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

C. H. JOHNSTON.

For the Government of the Commonwealth of Australia:

WILLIAM MCMAHON.

Supplement **B**
1969

Traité instituant l'Union Douanière et Economique de l'Afrique Centrale

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

Vol. XXIII, No. 3, March/mars 1969

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

CAMEROON, CENTRAL AFRICAN REPUBLIC, CONGO, GABON and CHAD signed an agreement on December 8, 1964 for the establishment of an UNION DOUANIERE ECONOMIQUE DE L'AFRIQUE CENTRALE, to enter into force on January 1, 1966. The agreement provides for a common customs regime and for the application of a "taxe unique". This Supplement contains the provisions of the treaty dealing with its general principles and the customs and tax régime.
As a matter of comparison see also Supplement A 1968: Treaty for East African Co-operation.

TEXT

LE PRESIDENT DE LA REPUBLIQUE FEDERALE DU CAMEROUN,
LE PRESIDENT DE LA REPUBLIQUE CENTRAFRICAINE,
LE PRESIDENT DE LA REPUBLIQUE DU CONGO-BRAZZAVILLE,
LE PRESIDENT DE LA REPUBLIQUE GABONAISE,
LE PRESIDENT DE LA REPUBLIQUE DU TCHAD

Vu la Convention réglant les relations économiques et douanières entre les Etats de l'Union Douanière Equatoriale et la République Fédérale du Cameroun, signée à Bangui le 23 juin 1961;
Vu le Protocole d'accord signé le 11 février 1964 à Fort-Lamy;
Décidés à promouvoir l'établissement graduel et progressif d'un Marché Commun de l'Afrique Centrale;
Persuadés que l'extension des marchés nationaux actuels; grâce à l'élimination des entraves *au commerce interrégional*, à l'adoption d'une procédure de *répartition équitable des projets d'industrialisation* et à la coordination des programmes de développement des différents secteurs de la production, contribuera dans une large mesure à l'amélioration du niveau de vie de leurs peuples;
Soucieux de renforcer l'unité de leurs économies et d'en assurer le développement harmonieux par l'adoption des dispositions tenant compte des intérêts de tous et de chacun, et compensant, de manière adéquate et par des mesures appropriées, la situation spéciale des

pays de moindre développement économique;
Résolus à participer, par la constitution d'un tel groupement économique sous-régional à la création d'un véritable Marché Commun Africain,

DECIDENT

la création d'une Union Douanière et Economique de l'Afrique Centrale et

CONVIENNENT

de ce qui suit:

PREMIERE PARTIE

Les institutions

Article 1

Par le présent Traité, les Hautes Parties contractantes instituent entre elles une Union Douanière et Economique de l'Afrique Centrale (U.D.E.A.C.), dénommée ci-après «L'Union».
L'Union est ouverte à tout Etat africain indépendant et souverain qui en fait la demande; l'admission d'un nouvel Etat se fait à l'unanimité des membres composant l'Union.

Article 2

La réalisation des tâches incombant à «l'Union» est assurée par:
- Le Conseil des Chefs d'Etat;
- Le Comité de Direction;
- Le Secrétariat Général.

TITRE PREMIER

Le conseil des chefs d'état

Chapitre premier. – Organisation

Article 3

Le Conseil est constitué par la réunion des Chefs d'Etat ou de leurs représentants investis du pouvoir de décision. Les Chefs d'Etat peuvent être assistés de Ministres et d'Experts.

Article 4

Le Conseil se réunit aussi souvent qu'il est nécessaire et au moins une fois par an.

Article 5

La présidence des réunions est assurée chaque année, à tour de rôle par l'un des Chefs d'Etat pris dans l'ordre alphabétique de désignation des Etats, sauf décision contraire des Chefs d'Etat prise à l'unanimité. La Présidence change à l'ouverture de la première réunion de chaque année civile.
Dans l'éventualité où de nouveaux Etats adhéreraient à l'Union, leurs Chefs d'Etat assureraient la Présidence du Conseil à la suite de l'Etat signataire du présent Traité placé le dernier dans l'ordre alphabétique.

Article 6

Dans le cas où une vacance nationale du pouvoir prive le Conseil du Président, la Présidence est assurée par le Chef d'Etat suivant dans l'ordre alphabétique des Etats.

Article 7

Le Président en exercice fixe les date et lieu des réunions et convoque les membres du Conseil.

Article 8

En cas d'urgence, il peut être procédé à la consultation à domicile des membres du Conseil sur décision de son Président.

Chapitre II. – Compétences

Article 9

Le Conseil est l'organe suprême de l'Union en vue d'assurer la réalisation des objets fixés par le présent Traité et dans les conditions prévues par celui-ci:
1° Il oriente et coordonne les politiques économiques et douanières des Etats membres;
2° Il dispose d'un pouvoir de décision et contrôle le Comité de Direction;

Il établit son règlement intérieur et approuve le règlement intérieur du Comité de Direction;
Il fixe le siège de l'Union;
Il nomme le Secrétaire Général de l'Union;
Il arrête le budget de l'Union et fixe la contribution annuelle de chaque Etat membre sur proposition du Comité de Direction;
Il décide des négociations tarifaires avec les pays tiers et de l'application du tarif général;
Il décide en dernier ressort de toutes les questions pour lesquelles le Comité de Direction n'a pu arrêter une décision à l'unanimité;
3° Il arbitre les différends qui peuvent survenir entre les Etats membres en ce qui concerne l'application du présent Traité.
Pour les matières relatives à la législation économique, douanière et fiscale, les décisions du Conseil sont prises par délégation des Assemblées Législatives Nationales suivant les règles institutionnelles propres à chaque Etat.

Chapitre III. – Décisions – Notification
Force exécutoire

Article 10

Les décisions du Conseil sont prises à l'unanimité. Elles sont exécutoires de plein droit dans les Etats membres un jour franc après l'arrivée du Journal Officiel de l'Union dans la capitale de chaque Etat membre.
Ces décisions sont également publiées dans les Journaux Officiels des cinq Etats.
Le Conseil peut décider de la publication de ses décisions suivant la procédure d'urgence.

TITRE II

Comité de direction

Chapitre premier. – Organisation

Article 11

Le Comité de Direction est composé de deux membres par Etat:
– Le Ministre des Finances ou son représentant;
– Le Ministre chargé des problèmes du développement économique ou son représentant.
La délégation de chaque Etat, qui dispose d'une voix délibérative, comprend obligatoirement au moins un Ministre.
Les membres du Comité de Direction peuvent être de quatre Experts au plus, par délégation.

Article 12

Le Comité peut appeler en séance, hors délibération à titre consultatif, toute personne qualifiée.
Le Comité se réunit aussi souvent qu'il est nécessaire et au moins deux fois par an.

Article 13

La Présidence des réunions est assurée chaque année, à tour de rôle, par l'un des deux Ministres de chaque Etat, dans l'ordre alphabétique de désignation des Etats. La Présidence change à l'ouverture de la première réunion de chaque année civile.
Dans l'éventualité où de nouveaux Etats adhéreraient à l'Union, leurs Ministres assureraient la Présidence du Comité à la suite de l'Etat signataire du présent Traité placé le dernier dans l'ordre alphabétique.

Article 14

Dans le cas où une vacance nationale du pouvoir prive le Comité de Direction de Président, la Présidence est assurée par l'un des Ministres de l'Etat suivant dans l'ordre alphabétique des Etats.

Article 15

Le Président en exercice fixe les date et lieu des réunions et convoque les membres du Comité.

Article 16

En cas d'urgence, il peut être procédé à la consultation à domicile des membres du Comité.

Le Comité ne peut siéger valablement que si tous les Etats sont représentés au moins par un Ministre.

Chapitre II. – Compétences

Article 17

Le Comité agit par délégation du Conseil. Cette délégation porte notamment sur les matières suivantes:

- Nomenclature tarifaire et statistique;
- Tarif douanier extérieur commun;
- Tarif des droits et taxes fiscaux d'entrée;
- Taxe unique;
- Code des Douanes;
- Législation et réglementation douanières;
- Harmonisation des fiscalités internes;
- Code des investissements;
- Harmonisation des projets d'industrialisation, des plans de développement et de la politique des transports;
- Consultation en matière de droits de sortie, de mercuriales à l'exportation sur les produits d'intérêt commun ainsi qu'en matière de régime salarial et social.

Les conditions dans lesquelles le Comité exerce ses compétences sont détaillées aux titres ci-après.

Chapitre III. – Décisions du Comité Notification – Force exécutoire

Article 18

Les décisions du Comité sont prises à l'unanimité. Elles sont exécutoires de plein droit dans les Etats membres un jour franc après l'arrivée du Journal Officiel de l'Union dans la capitale de chaque Etat membre.
Ces décisions sont également publiées dans les Journaux Officiels des cinq Etats.
Le Comité peut décider de la publication de ces décisions suivant la procédure d'urgence.
Il peut également formuler des recommandations et émettre des voeux.

TITRE III

Secrétariat général

Article 19

Le Secrétariat du Conseil et celui du Comité sont assurés par le Secrétaire Général de l'Union, assisté d'un personnel administratif.
Le Secrétaire Général est nommé par une décision du Comité des Chefs d'Etat. Il est placé sous l'autorité directe du Président en exercice.

Article 20

Le Secrétariat Général comporte les divisions suivantes:
Une division du Commerce extérieur, la Fiscalité, des Statistiques et de la Mécanographie.
Une division du Développement et de l'Industrialisation.
D'autres divisions peuvent être créées, suivant les besoins par décision du Conseil.

Article 21

Dans l'exercice de leurs fonctions, le Secrétaire Général et le personnel du Secrétariat, ne pourront ni solliciter, ni recevoir d'instructions d'aucun Gouvernement et d'aucune entité nationale ou internationale. Ils s'abstiendront de toute attitude incompatible avec leur qualité de fonctionnaires internationaux.
Le statut du personnel du Secrétariat Général sera fixé par une décision du Conseil.

Article 22

Les Etats contractants adresseront à titre d'information au Secrétariat Géneral de l'Union, tous les textes législatifs et réglementaires, toutes les décisions à caractère fiscal, douanier, économique, y compris les décisions concernant les admissions à des régimes privilégiés de la compétence interne des Etats. Le Secrétaire Général en assurera la diffusion auprès des Etats membres.

TITRE IV

Personnalité juridique

Article 23

L'Union jouit de la personnalité juridique et plus particulièrement de la capacité nécessaire pour:

a) Contracter;
b) Acquérir et céder les biens meubles et immeubles indispansables à la réalisation de ses objectifs:
c) Emprunter;
d) Ester en Justice;
e) Accepter les dons et legs et les libéralités de toute nature.

A cet effet, elle est représentée par le Président en exercice du Conseil des Chefs d'Etat, lequel peut déléguer ses pouvoirs.

La capacité de contracter, d'acquérir et d'aliéner des biens immobiliers et mobiliers, d'emprunter, est exercée par le Président avec l'accord préalable des Chefs de tous les Etats contractants.

Article 24

Le Conseil de l'Union décide des immunités à accorder à l'Union, aux représentants des parties contractantes et au personnel du Secrétariat Général dans les territoires des Etats membres.

TITRE V

Dispositions financières

Articles 25

Le budget des organismes de l'Union est arrêté annuellement par le Conseil des Chefs d'Etat. Il est rendu exécutoire par le Président du Conseil.

Article 26

Les dépenses des organismes de l'Union sont couvertes par des contributions égales versées par chaque Etat membre.

DEUXIEME PARTIE

L'Union douanière
L'Administration des fiscalités internes
Les codes d'investissement

Article 27

L'Union constitue un seul territoire douanier à l'intérieur duquel la circulation des personnes, marchandises, biens, services et capitaux est libre.

TITRE PREMIER

Législation et réglementation douanières

Article 28

L'Union douanière constituée entre les cinq Etats s'étend à l'ensemble des échanges de marchandises; elle comporte, sous les réserves et dans les conditions fixées au présent titre:

– L'adoption d'un tarif douanier et fiscal d'entrée commun dans leurs relations avec les pays tiers;

– L'interdiction, entre les Etats membres, de tous droits et taxes à l'importation et à l'exportation.

Article 29

Les Etats membres adoptent, appliquent et maintiennent une législation et une réglementation douanières communes en ce qui concerne les droits et taxes à l'importation. Cette législation et cette réglementation communes sont essentiellement constituées par le Code des Douanes et ses textes d'application, le tarif, la nomenclature douanière et statistique, les autres textes et règlements douaniers rendus nécessaires pour une exacte application des droits et taxes d'entrée.

Le Comité de Direction détermine au cours de sa première réunion les points particuliers de la législation et de la réglementation douanières pour lesquels l'unification doit être recherchée en priorité; il fixe à cet effet un programme de travail et un calendrier.

L'unification des régimes applicables dans les Etats membres en matière d'exemptions exceptionnelles et conditionnelles de droits et taxes d'entrée doit, en tout état de cause, être achevée dans les trois mois suivant la date d'entrée en vigueur du présent traité.

Article 30

Le tarif douanier et fiscal d'entrée commun est elaboré par le Comité de Direction et adopté par le Conseil avant la fin du premier semestre 1965, de façon à pouvoir être mis en vigueur simultanément dans les cinq Etats au plus tard le 1er janvier 1966.

a) Le droit de douane du tarif extérieur commun institué par l'acte no. 16/62 dans les Etats de l'Afrique Equatoriale et le décret n° 62/DF-223 en République Fédérale du Cameroun:

- le droit fiscal d'entrée commun;
- la taxe commune sur le chiffre d'affaires à l'importation;

b) La taxe complémentaire à l'importation dont le taux peut être différent selon les Etats.

Les autres droits et taxes existant dans les Etats, dont les règles d'assiette, de liquidation, de recouvrement et le contentieux sont celles prévues en matière de droits à l'importation, sont supprimés, le cas échéant, par incorporation dans un ou plusieurs des droits et taxes énumérés ci-dessus à l'exception du droit de douane.

Article 31

Les Etats informent le Comité de Direction des taux de la taxe complémentaire à l'importation prévue à l'article 30 «b» et de leurs variations eventuelles des consultations peuvent avoir lieu en l'objet au sein du Comité de Direction à la demande d'un des Etats membres.

Article 32

Les produits et marchandises originaires des Etats membres qui sont transférés d'un Etat membre dans un autre Etat membre pour y être consommés sont exempts de tous droits et taxes d'entrée et de sortie sauf application des clauses de sauvegarde prévue aux articles 40 et 41 ci-après.

Toutefois les produits et marchandises fabriqués dans les Etats membres et qui sont transférés d'un Etat membre dans un autre Etat membre pour y être consommé, sont soumis au régime de la taxe unique dans les conditions fixées à la quatrième partie du présent traité.

La liste de ces produits et marchandises est établie par le Comité de Direction.

A compter de la date d'entrée en vigueur du présent traité les contingents d'importation applicables aux produits et marchandises dont il s'agit dans les échanges entre les Etats de l'Afrique Equatoriale, d'une part, et la République Fédérale du Cameroun d'autre part, sont supprimés.

Article 33

Les marchandises d'importation prises à la consommation dans un Etat membre et transférées dans un autre Etat membre, sont exemptes de tous droits et taxes de sortie dans le pays expéditeur et d'entrée dans le pays destinataire.

Toutefois, lorsqu'il s'agit d'opérations commerciales, les marchandises sont, au franchissement des frontières, soumises a un pointage statistique en quantité et en valeur.

Pendant une période transitoire qui ne pourra excéder trois ans à compter de la date d'entrée en vigueur du présent Traité, l'Etat d'importation remboursera à l'Etat de consommation effective, le montant des droits et taxes correspondant aux opérations recensées.

Les modalités de remboursement seront définies par le Comité de Direction dans les trois mois suivant l'entrée en vigueur du présent Traité.

Article 34

Les droits et taxes applicables à l'exportation demeurent de la compétence de chacun des Etats membres.

Toutefois, les Etats membres s'engagent à procéder à des consultations bilatérales ou multilatérales pour la détermination des tarifs et éventuellement des valeurs mercuriales applicables aux productions similaires ou d'intérêt commun.

TITRE II

Répartition des droits à l'importation et à l'exportation

Article 35

Le produit des droits et taxes liquidés par la Douane à l'importation dans un Etat membre, est versé au budget de l'Etat membre dans lequel la marchandise est déclarée devoir être mise à la consommation.

A cet effet, les formules de déclaration de mise à la consommation, sont uniformisées entre les cinq Etats membres et comportent obligatoirement un cadre réservé à la déclaration du pays de destination de la marchandise.

Le produit des droits et taxes à l'exportation liquidés par la Douane à la sortie des Etats membres, est versé au budget de l'Etat dont la marchandise est originaire.

Des certificats d'origine sont produits à l'appui des déclarations d'exportation; le modèle du certificat d'origine et ses conditions d'utilisation sont fixés par le Comité de Direction.

Article 36

La liste des bureaux de Douane communs installés dans les Etats membres et appelés à liquider des droits ou taxes pour le compte d'Etats autres que celui de leur implantation, est arrêtée par le Comité de Direction.

Dans ces bureaux, une comptabilité distincte est tenue pour le compte de chaque Etat membre. Un double de cette comptabilité est adressé à la fin de chaque mois aux Directions des Douanes des Etats pour lesquels des liquidations ont été effectuées.

Le transfert des recettes correspondantes est effectué par opération de Trésor à Trésor.

Le Comité de Direction fixe les conditions dans lesquelles est tenue la comptabilité des Bureaux de Douane communs aux cinq Etats, ainsi que les modalités de contrôle de cette comptabilité et de transfert des recettes douanières d'Etat à Etat.

Article 37

Afin de faciliter dans toute la mesure du possible la déclaration en douane dans l'Etat de destination des marchandises importées, les Etats s'engagent à généraliser l'utilisation des régimes de transit par voies maritime, aérienne, terrestre et fluviale.

Article 38

Dans un esprit de solidarité, pour tenir compte des erreurs possibles dans l'indication de l'Etat de consommation et des avantages retirés des activités de transit, notamment par les Etats côtiers, un pourcentage des droits et taxes à l'importation perçus par les bureaux de douane communs aux cinq Etats, est versé à un Fonds Commun de Solidarité.

Le taux de ce prélèvement est fixé par le Conseil sur la proposition du Comité de Direction.

Le produit de ce Fonds de Solidarité est ristourné aux Etats membres selon des pourcentages de répartition qui sont fixés par le Conseil sur la proposition du Comité de Direction.

Article 39

La date d'entrée en vigueur de la procédure de répartition des droits et taxes à l'importation faisant l'objet des articles 35 à 38 ci-dessus, sera fixé par le Conseil.

TITRE III

Clauses de sauvegarde

Article 40

Dans le cas où pour faire face aux nécessités de son développement ou aux besoins de son industrialisation, un Etat membre envisage de recourir à l'établissement de restrictions quantitatives à l'égard des produits et marchandises en provenance des pays tiers, il en informe immédiatement le Comité de Direction.

Le cas échéant, le Comité de Direction arrête les mesures nécessaires pour prévenir les détournements de trafic.

Article 41

Si des perturbations se produisent dans un secteur de l'activité économique d'un ou de plusieurs Etats membres ou si des difficultés surgissent pouvant se traduire par l'altération grave d'une situation économique régionale, le Comité de Direction peut prendre ou autoriser le ou les Etats membres intéressés à prendre, par dérogation aux dispositions du présent titre, les mesures qui se révèleraient nécessaires au rétablissement d'un situation saine.

TITRE IV

L'harmonisation des fiscalités internes

Article 42

Le Comité de Direction examine les conditions dans lesquelles les législations des cinq Etats membres relatives aux impôts directs et, éventuellement, aux impôts indirects non perçus par l'administration des Douanes, peuvent être harmonisées dans l'intérêt commun.

Le Comité de Direction soumet des propositions au Conseil dans les trois mois suivant l'entrée en vigueur du présent Traité.

Le Conseil arrête des directives pour le rapprochement des dispositions législatives et réglementaires.

Article 43

Dans la conduite de ses travaux, le Comité de Direction a pour objectif de favoriser l'installation et l'exploitation des entreprises, dans les conditions fiscales analogues dans les cinq Etats.

Il recherche notamment, à cette fin, l'harmonisation des règles d'assiette et, dans la mesure du possible, des taux des impôts suivants:

- Impôt sur les bénéfices industriels et commerciaux;
- Impôt intérieur sur le chiffre d'affaires;
- Impôt sur le revenu des valeurs mobilières.

Article 44

A cet effet, les Etats membres s'engagent à se communiquer périodiquement en Comité de Direction, toutes informations utiles relatives à leur politique fiscale, et à se consulter dans la mesure du possible, préalablement à toute création ou à toute modification d'assiette ou de taux des impôts.

TITRE V

Les codes d'investissements

Article 45

Le Comité de Direction prépare et soumet au Conseil, avant le 1er juillet 1965, un projet de code-cadre régissant les conditions fiscales, financières opérant sur le marché de l'Union. Dans un souci d'harmonisation, les Etats membres éliminent ou corrigent dans l'année d'entrée en vigueur du présent traité les dispositions de leur Code national qui sont contraires aux dispositions du code-cadre commun.

Article 46

Les dispositions des codes nationaux, telles qu'elles ont été soumises au Comité de Direction et, le cas échéant, harmonisées selon ses directives, ne peuvent plus être modifiées unilatéralement.

TROISIEME PARTIE

La répartition des projets d'industrialisation
L'harmonisation des plans de développement
et de la politique des transports

TITRE PREMIER

Les principes

Article 47

Les Hautes Parties contractantes conviennent d'harmoniser leurs politiques d'industrialisation, leurs plans de développement et leurs politiques de transports en vue de favoriser le développement équilibré et la diversification des économies des Etats membres de l'Union dans un cadre propre à permettre la multiplication des échanges inter-Etats et l'amélioration des conditions de vie des populations.

TITRE II

De l'harmonisation des politiques de transports
et des plans de développement

Article 48

Les Etats membres décident de se communiquer, à partir de la date d'entrée en vigueur de présent Traité, les documents faisant le point de leur situation économique respective et, pour les années à venir, leurs plans ou programmes de développement et les rapports annuels d'exécution de ces plans ou programmes.
Ils se tiennent également informés de leurs projets d'amelioration et de développement des voies de communications susceptibles d'intéresser un ou plusieurs autres Etats, ainsi que de leur réglementation nationale de transports et de la circulation.

Article 49

Ces documents sont adressés par chaque Etat au Secrétariat Général de l'Union.
Ils font l'objet d'une étude d'ensemble par le Secrétariat Général en vue de présenter au Comité de Direction et au Conseil, l'évolution de la situation économique de l'Union pendant la période considérée.
Cette étude doit faire ressortir les distorsions éventuellement observées en particulier au regard des objectifs d'harmonisation définies à l'article 47 et présenter des propositions tendant à corriger ces distorsions.
Les documents et les études sont adressés aux Etats par le Secrétaire Général.
Il pourra se faire assister dans sa tâche par des Experts ou des organismes d'études agréés par le Comité.

Article 50

L'examen de ces documents est inscrit à l'ordre du jour du prochain Comité de Direction qui émet un avis à leur sujet. Cet avis est communiqué au Conseil qui décide des mesures à prendre.

TITRE III

Cooperation industrielle

Article 51

On distingue dans ce domaine:

a) Les industries à vocation essentiellement exportatrices en dehors de l'Union;
b) Les industries intéressant le marché d'un seul Etat, pour lesquelles il n'est pas demandé d'avantages économiques, fiscaux ou douaniers aux autres Etats de l'Union;
c) Les projets industriels intéressant le marché d'un seul Etat, qui portent sur une production industrielle existant déjà dans un autre Etat de l'Union ou dont la création est également prévue aux plans ou programmes de développement dans un autre Etat de l'Union;
d) Les projets industriels dont le marché est et restera limité à deux Etats, pour lesquels une harmonisation peut être recherchée entre ces deux Etats;

e) Les projets industriels intéressant le marché de plus de deux Etats et pour lesquels une harmonisation est directement recherchée au sein de l'Union.

Les dispositions du présent article s'appliquent à toutes les entreprises industrielles, y compris celles ayant le statut de sociétés d'économie mixte ou de société d'Etat.

Article 52

Les industries entrant dans les catégories a) et b) peuvent être créées dans chacun des Etats concernés sans intervention des organes de l'Union.

Toutefois, et sauf accord préalable du Comité de Direction, le marché des industries de la catégorie b) demeure limité à l'Etat d'implantation et ne peut être étendu à celui des autres Etats membres.

L'Etat intéressé adresse régulièrement au Secrétariat Général un inventaire des industries ainsi créées, accompagné des renseignements économiques utiles, et un échange de vues peut être institué au Comité de Direction sur ces informations.

Article 53

Les projets industriels de la catégorie d) font l'objet d'un raport commun et sont communiqués conjointement par les deux Etats concernés aux autres Etats de l'Union par l'intermédiaire du Secrétariat Général.

Les projets d'investissement concernant les industries des catégories c) et e) sont obligatoirement communiqués aux Etats de l'Union par l'Etat du lieu projeté d'implantation de l'industrie.

A cet effet, avant toute décision d'exécution et tout engagement définitif vis-à-vis des tiers concernés, chaque projet, accompagné d'un rapport de présentation, est adressé au Secrétariat Général qui le transmet à chaque Etat membre.

Tout Etat membre a la faculté de demander au Secrétaire Général de faire procéder à une étude des projets des catégories c), d) et e), en fonction des objectifs d'harmonisation définie à l'article 47 du Traité.

Cette étude est effectuée par les experts ou organismes d'études agréés par le Comité.

Le Secrétariat Général transmet ce rapport à tous les Etats.

Article 54

Le projet doit comporter tous renseignements utiles d'ordre économique, financier, juridique, technique, fiscal et douanier.

Une décision du Comité précise la composition du dossier.

Article 55

Les Etats sont consultés à domicile selon la procédure prévue à l'article 53 du Traité. Ils disposent d'un délai de deux mois à compter de la date de la communication du Secrétariat Général. L'absence de réponse dans ce délai de deux mois vaut agrément du projet.

En cas de désaccord exprimé, le projet est soumis au Comité de Direction qui décide éventuellement du ou des taux de taxe unique à appliquer au projet et pour les industries de la catégorie e) du régime du Code des Investissements à octroyer.

Article 56

En ce qui concerne les projets de la catégorie e), le Comité de Direction s'inspire, pour prendre sa décision, des critères suivants:

- Situation des matières premières;
- Volume des investissements déjà réalisés dans les divers Etats de l'Union et comparaison des avantages consentis de ce fait par chaque Etat à ses partenaires;
- Opportunité de compenser la situation de moindre développement économique de certains Etats de l'Union.

Article 57

Le Secrétaire Général assure, après consultation des Ministères chargés du plan dans les Etats membres, la préparation d'un plan d'industrialisation général de l'Union concernant les projets de la catégorie e) visée à l'article 51 établi pour tous les secteurs industriels en fonction des objectifs d'harmonisation définis à l'article 47. Il peut se faire assister dans cette tâche par des organismes d'études agréés par le Comité.

Ce plan de développement industriel de l'Union est soumis à l'approbation du Conseil, après avis du Comité de Direction, dans un délai d'un an à compter de la mise en vigueur du Traité.

Article 58

Dans le cas où une production industrielle d'un Etat membre n'ayant pas fait l'objet d'une mesure d'harmonisation et n'ayant pas été placée sous le régime de la taxe unique, atteint le marché d'un ou plusieurs autres Etats membres, le ou les Etats qui s'estiment lésés, ont la faculté, soit d'interdire l'entrée des produits en cause sur leur territoire, soit d'instituer, à titre provisoire, une taxe compensatrice dont le taux correspond au maximum à la fiscalité globale supportée par les produits similaires importés des pays tiers, à l'exception cependent des droits inscrits au tarif douanier extérieur commun. Le ou les Etats concernés doivent, dans un délai d'un mois après l'intervention de telles décisions, en informer le Comité de Direction qui décide des mesures appropriées, sauf à en référer au Conseil.

Les mesures de sauvegarde prises par le ou les Etats demandeurs demeurent applicables jusqu'à la décision du Comité et du Conseil qui est immédiatement exécutoire.

QUATRIEME PARTIE

La taxe unique

Article 59

Sont obligatoirement soumises au régime de la taxe unique, les productions industrielles nationales dont le marché s'étend ou est susceptible de s'étendre au territoire de plusieurs Etats membres.

Article 60

La perception de la taxe unique est exclusive:

– Des droits et taxes applicables à l'importation sur les matières premières et produits essentiels utilisés en usine pour l'obtention des produits fabriqués, dans leur forme de livraison au commerce;

– De toute taxe intérieure tant sur les matières premières et produits essentiels utilisés en usine que sur les produits fabriqués.

Article 61

La taxe unique est liquidée et perçue dans l'Etat où l'usine est implantée, au profit du budget de l'Etat où les produits sont consommés, conformément aux règles en vigueur en matière de droits de Douane et aux dispositions de l'article 36 du présent Traité. La constatations et la poursuite des infractions sont soumises aux règles du contentieux douanier.

Article 62

La réglementation et les taux de la taxe unique sont fixés par le Comité de Direction. Ils sont révisables.

Pendant une période transitoire, venant à expiration le 1er janvier 1972, les taux de la taxe unique peuvent étre différents pour une même marchandise, selon le lieu de production. Passé cette date, le Comité de Direction peut, à titre exceptionnel et à la demande d'un Etat membre, autoriser le maintien

de taux différents selon les Etats, pour une même production.
Toutefois, et sauf le cas où il est fait application des dispositions de l'article 41 ci-dessus, les différences existant entre les taux de la taxe unique ne peuvent être aggravées; elles font l'objet de réductions progressives à la suite d'un examen annuel.
Les taux de la taxe unique sont calculés notamment en fonction des éléments suivants:
- Exonération de droits et taxes de toute nature sur les produits importés ou d'origine nationale;
- Autres avantages et protections d'ordre douanier et fiscal dont les entreprises ont bénéficié ou continuent à bénéficier du fait notamment de leur admission à un régime prioritaire des Codes d'Investissements;
- Les disparités éventuelles dans les conditions de production d'articles similaires.

Le Comité de Direction fixe, dans les trois mois de l'entrée en vigueur du présent Traité, la composition du dossier à fournir par les entreprises qui sollicitent leur admission au régime de la taxe unique.

CINQUIEME PARTIE

Libre circulation des personnes, des services et des capitaux

Le droit d'établissement

Article 63

La situation des personnes et le droit d'établissement sont régis par la Convention signée le 8 septembre 1961 par les Etats membres de l'U.A.M.

Article 64

Les mouvements de capitaux à l'intérieur de l'Union ne peuvent être soumis à d'autres restrictions que celles prévues par la réglementation des changes actuellement en vigueur.

SIXIEME PARTIE

Dispositions générales et finales

Article 65

Les droits et obligations résultant de conventions conclues ultérieurement à l'entrée en vigueur du présent Traité, entre un ou plusieurs Etats membres d'une part, et un ou plusieurs Etats tiers d'autre part, ne sont pas affectées par les dispositions du présent Traité.
Dans la mesure où ces Conventions ne sont pas compatibles avec le présent Traité, le ou les Etats membres en cause recourent à tous les moyens appropriés pour éliminer les incompatibilités constatées. En cas de besoin, les Etats membres se prêtent une assistance mutuelle en vue d'arriver à cette fin, et adoptent le cas échéant, une attitude commune.
Dans l'application des conventions visées au premier alinéa, les Etats membres tiennent compte du fait que les avantages consentis dans le présent Traité per chacun des Etats membres font partie intégrante de l'établissement de l'Union et sont, de ce fait, inséparablement liés à la création d'institutions communes, à l'attribution des compétences en leur faveur et à l'octroi de mêmes avantages par tous les autres Etats membres.
Le présent Traité entrera en vigueur dès sa ratification dans les formes constitutionnelles, par chacun des Etats contractants.
Les instruments de ratification seront déposés auprès de la République du Congo, désigné comme Gouvernement dépositaire. Dès réception par ses soins des instruments de ratification, le Gouvernement dépositaire en donnera communication à toutes les parties contractantes ainsi qu'au Secrétaire Général de l'Union.

Convention du 29 octobre 1958 modifiée par l'avenant du 6 décembre 1965 entre la France et l'Italie pour éviter les doubles impositions et régler certaines autres questions en matière d'impôts directs sur les revenus et sur la fortune

SUPPLEMENT TO THE BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION
AU BULLETIN DE DOCUMENTATION FISCALE INTERNATIONALE

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INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort — 124 Sarphatistraat — Amsterdam

The instruments of ratification for the 1958 convention between France and Italy were never exchanged due to major changes in legislation introduced after the conclusion of the convention. An additional agreement was signed on December 6, 1965; the ratification instruments were exchanged on December 15, 1967. The text of the treaty as it reads after the additional agreement is reproduced below. A commentary by Prof. V. Uckmar and P. Durand is to be found in this issue of the Bulletin.

TEXT

Article 1

La présente Convention est applicable aux personnes physiques domiciliées en France ou en Italie, ainsi qu'aux personnes morales françaises et italiennes.

Article 2

(1) § 1er. – La présente convention détermine les règles applicables aux impôts suivants:
A. – Pour la France:
1. L'impôt sur le revenu des personnes physiques.
2. La taxe complémentaire.
3. L'impôt sur le bénéfice des sociétés et autres personnes morales.

B. – Pour l'Italie:
1. L'impôt sur le revenu de la propriété bâtie (l'imposta sui redditi dei fabbricati),
2. L'impôt sur le revenu de la propriété non bâtie (l'imposta sui redditi dei terreni),
3. L'impôt sur les revenus agricoles (l'imposta sui redditi agrari),

4. L'impôt sur la richesse immobilière (l'imposta sui redditi di ricchezza mobile),
5. L'impôt complémentaire progressif sur le revenu (l'imposta complementare progressiva sul reddito),
6. L'impôt sur les società, pour autant qu'il s'applique aux revenus et non au capital (l'imposta sulle società per quanto riguarda la componente reddito e non la componente patrimonio),
7. La retenue à titre d'impôt sur les bénéfices distribués par les sociétés (la ritenuta d'imposta sugli utili distribuiti dalle società).

§ 2. – Cette convention s'applique également aux impôts sur les revenus perçus pour le compte des provinces, départements, communes, Chambres de commerce et toutes autres collectivités locales.

Elle s'appliquera aussi à tous autres impôts de nature analogue qui seront établis après sa signature, dans le territoire de l'un ou de l'autre des deux Etats contractants, sur le revenu, sur la fortune ou sur l'accroissement de la fortune.

§ 3. – Il est entendu que dans le cas où il serait apporté à la législation fiscale de l'un ou de l'autre Etat des modifications qui affecteraient sensiblement la nature ou le caractère des impôts visés au paragraphe 1er du présent article, les autorités compétentes des deux pays se concerteraient.

Article 3

Pour l'application de la présente convention:

§ 1er. – Le terme «France», quand il est employé dans un sens géographique, ne comprend que la France métropolitaine et les départements d'outre-mer (Guadeloupe, Martinique, Guyane et Réunion);

Le terme «Italie» employé dans le même sens désigne le territoire de la République italienne.

§ 2. – *a*) Le domicile fiscal d'une personne physique est au lieu où elle a son «foyer permanent d'habitation», cette expression désignant le centre des intérêts vitaux, c'est-à-dire le lieu avec lequel les relations personnelles sont les plus étroites.

Lorsqu'il n'est pas possible de déterminer le domicile d'après l'alinéa qui précède, la personne physique est réputée posséder son domicile dans celui des deux Etats où elle séjourne principalement.

En cas de séjour d'égale durée dans les deux Etats, elle est réputée avoir son domicile dans celui des deux Etats dont elle a la nationalité; si elle a la nationalité des deux Etats ou si elle ne possède la nationalité d'aucun d'eux, les autorités administratives supérieures des deux Etats s'entendront.

b) Le domicile fiscal d'une personne morale est au lieu du siège de la direction effective.

§ 3. – Lorsqu'un contribuable a transféré définitivement son domicile d'un Etat dans l'autre, il cesse d'être assujetti dans le premier Etat aux impôts qui sont établis en fonction du domicile, pour la période postérieure à la date à laquelle le transfert a eu lieu. La période d'assujettissement auxdits impôts commence à cette date dans l'autre Etat.

§ 4. – 1. Sont considérés comme établissements stables les sièges de direction effective, les usines et ateliers, les sièges d'exploitation de mines, gisements minéraux et autres ressources naturelles, les succursales, les magasins, les bureaux, les laboratoires ainsi que toutes autres installations de caractère permanent dans lesquelles s'exerce en toute ou en partie l'activité de l'entreprise.

2. Présentent en particulier ce caractère:

a) les chantiers ouverts par une entreprise dans l'un des deux Etats pour l'exécution de travaux publics ou privés dans cet Etat lorsque la durée des travaux exécutés dans ces chantiers excède une période totale de trois mois au cours de douze mois consécutifs;

b) les représentations ou agences lorsque le représentant ou l'agent exerce habituellement un pouvoir général lui permettant de négocier et de conclure les contrats pour le compte de l'entreprise. Est, en particulier, considéré comme investi d'un tel pouvoir l'agent qui prélève habituellement sur un stock des produits ou marchandises qu'il vend et livre à la clientèle.

3. N'implique pas, au contraire, l'existence d'un établissement stable dans l'un des deux Etats contractants le fait pour une entreprise de l'autre Etat;

a) de posséder dans le premier Etat un entrepôt ayant pour objet exclusif de faciliter la livraison dans cet Etat des produits ou marchandises qui ont fait l'objet de contrats de vente conclus dans l'autre Etat;

b) de posséder sous quelque forme que ce soit une participation dans une société ou personne morale contribuable du premier Etat;

c) d'avoir des relations d'affaires dans le premier Etat par l'entremise soit d'un agent vraiment autonome (courtier, commissionnaire, agent d'affaires ou autre intermédiaire) agissant dans le cadre de son activité normale, soit d'une société juridiquement indépendante (filiale par exemple);

d) de posséder dans le premier Etat, même sous la forme d'installations permanentes, des comptoirs qui se bornent à l'achat de marchandises destinées à son approvisionnement.

§ 5. – En ce qui concerne l'imposition de leurs bénéfices dans le cadre de l'article 5, les entreprises d'assurances sont considérées comme ayant un établissement stable dans l'un des deux Etats dès l'instant que, par l'intermédiaire d'un représentant, elles perçoivent des primes sur le territoire dudit Etat ou assurent des risques situés sur ce territoire.

Article 4

§ 1er. – Les revenus des biens immobiliers, y compris les bénéfices des exploitations agricoles ou forestières ainsi que les profits provenant de l'aliénation de ces biens, ne sont imposables que dans l'Etat où lesdits biens sont situés.

§ 2. – Les redevances versées pour la jouissance de biens immobiliers pour l'exercice des droits de chasse, de pêche et autres droits analogues ou pour l'exploitation de mines, carrières ou autres ressources naturelles sont seulement imposables dans l'Etat ou sont situés les biens auxquels se rapportent ces redevances.

Article 5

§ 1er – Lorsqu'une entreprise exploitée dans l'un des Etats contractants possède dans l'autre Etat un établissement stable au sens de l'article 3 de la présente Convention, les revenus provenant de l'ensemble des opérations traitées par cet établissement, ainsi que les profits résultant de l'aliénation totale ou partielle des biens investis dans ledit établissement, ne sont imposables que dans ce dernier Etat.

§ 2. – Si la comptabilité ou d'autres éléments ne permettent pas de déterminer exactement et distinctement le montant effectif des revenus produits par l'établissement stable, les autorités fiscales des deux Etats s'entendent, s'il est nécessaire, pour arrêter les règles de ventilation propres à déterminer la quote-part du revenu de l'ensemble de l'entreprise qui peut être équitablement attribuée à cet établissement.

§ 3. – Les revenus et profits de l'établissement stable, tels qu'ils sont définis au paragraphe 1er ci-dessus, comprennent, notamment, tous profits et avantages qui, suivant des pratiques commerciales normales, n'au-

raient pas été consentis à des tiers et qui sont attribués ou accordés par l'établissement stable de quelque manière que ce soit, directement ou indirectement, soit à l'entreprise elle-même, ou à d'autres établissements de cette entreprise, soit à ses dirigeants, ses actionnaires, associés ou autres participants ou à des personnes ayant avec eux des intérets communs.

§ 4. – Pour la détermination des revenus de l'établissement stable qu'une entreprise de l'un des deux Etats possède dans l'autre Etat, il est tenu compte:
d'une part, des charges et dépenses réelles supportées par l'entreprise dans l'Etat où se trouve l'établissement stable et grevant directement et spécialement l'acquisition et la conservation de ces revenus;
d'autre part, de la fraction normalement imputable à l'établissement stable dans les autres frais, y compris les frais normaux de direction et d'administration générale exposés pour l'ensemble de l'entreprise au siège de sa direction effective.

Article 6

Lorsqu'une entreprise de l'un des deux Etats, qui est sous la dépendance ou possède le contrôle d'une entreprise de l'autre Etat ou qui se trouve sous la dépendance d'une entreprise ou d'un groupe possédant également le contrôle d'un entreprise de l'autre Etat, consent ou impose à cette entreprise de l'autre Etat dans leurs relations commerciales ou financières, des conditions différentes de celles qui seraient normalement faites à des entreprises effectivement indépendantes, tous bénéfices qui auraient dû normalement apparaître dans les comptes de l'une de ces entreprises, mais qui ont été de la sorte transférés, directement ou indirectement, à l'autre entreprise, peuvent être incorporés aux bénéfices imposables de la première entreprise. A défaut d'éléments précis permettant de déterminer exactement le montant des bénéfices transférés, les autorités compétentes des deux Etats contractants s'entendent, s'il est nécessaire, pour fixer le chiffre auquel ces bénéfices doivent être évalués et pour en éviter la double imposition dans l'esprit de la Convention.

Article 7

Par dérogation aux dispositions de l'article 5, les bénéfices provenant de l'exploitation d'entreprises de navigation maritime ou aérienne ne sont imposables que dans l'Etat sur le territoire duquel se trouve le siège de la direction effective de l'entreprise, à condition que les navires ou les aéronefs battent pavillon ou possèdent la nationalité dudit Etat.

Article 8

§ 1er. – Les dividendes payés par une société qui est domiciliée dans un des Etats contractants à une personne domiciliée dans l'autre Etat contractant sont imposables dans cet autre Etat.
§ 2. – Toutefois, ces dividendes peuvent être imposés dans l'Etat contractant ou la société qui paie les dividendes est domiciliée et selon la législation de cet Etat, mais l'impôt ainsi établi ne peut excéder 15% du montant brut des dividendes.
Les autorités compétentes des Etats contractants règlent d'un commun accord les modalités d'application de cette limitation. 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. Dans ce cas, les dispositions de l'article 5 sont applicables.

Article 9

§ 1er. – Les intérêts provenant d'un Etat contractant payés à une personne domiciliée dans l'autre Etat contractant sont imposables dans ce 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 15% du montant des intérêts. Les autorités compétentes des Etats contractants règlent d'un commun accord les modalités d'application de cette limitation.

§ 3. – 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 de 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, domicilié dans un Etat contractant a, dans l'autre Etat contractant d'où proviennent les intérêts, un établissement stable. Dans ce cas, les dispositions de l'article 5 sont applicables.

§ 5. – 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.

§ 6. – Si, par suite de relations spéciales existant entre le débiteur et le créancier ou que l'un et l'autre entretiennent avec des 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 9 bis

Les revenus des sociétés de personnes sont imposables, suivant leur nature, d'après les dispositions de la présente convention, et conformément à la législation de chaque Etat.

Article 10

1. – Les sociétés ayant leur domicile en Italie qui possèdent en France un établissement stable et qui y sont soumises à l'impôt sur le revenu des capitaux mobiliers en vertu de l'article 109-2 du Code général des Impôts, acquitteront cet impôt dans les conditions prévues par cette disposition.

Toutefois, la fraction des répartitions de bénéfices effectivement passible de la retenue à la source au titre de l'impôt sur le revenu des personnes physiques ne peut dépasser le quart du revenu taxable selon l'article 109-2 susvisé, ledit revenu ne pouvant lui-même excéder le montant des bénéfices

industriels et commerciaux réalisés par l'établissement stable français, tel que ce montant est retenu pour l'assiette de l'impôt sur les sociétés dans les conditions prévues par les dispositions de la présente Convention.

Si la société peut justifier, dans les conditions qui auront reçu l'accord des autorités administratives supérieures des deux Etats, que plus des trois quarts de l'ensemble de ses actions, de ses parts de fondateur ou de ses parts sociales appartiennent à des personnes domiciliées en Italie, la fraction des répartitions de bénéfices passible de l'impôt français d'après l'alinéa qui précède est réduite à due concurrence.

2. – Une société ayant son domicile fiscal en Italie n'est pas soumise en France à la retenue à la source au titre de l'impôt sur le revenu des personnes physiques en raison de sa participation dans la gestion ou le capital d'une société ayant son domicile fiscal en France ou à cause de tout autre rapport avec cette société mais les bénéfices distribués par cette dernière société et passibles de la retenue à la source au titre de l'impôt sur le revenu des personnes physiques seront, le cas échéant, augmentés, pour l'assiette de l'impôt, de tous les bénéfices ou avantages que la première aurait indirectement retirés de la dernière société dans les conditions prévues aux articles 5 et 6 de la présente convention.

Article 11

§ 1er. – Les redevances et autres produits de la concession par un contribuable de l'un des Etats contractants à un contribuable de l'autre Etat de l'usage de biens mobiliers incorporels, tels que les brevets d'invention, dessins ou modèles, procédés et formules secrets, marques de fabrique et autres droits analogues, les droits d'auteur et de reproductions, les droits d'utilisation de l'équipement industriel, commercial ou scientifique et les droits de location de films cinématographiques, ne sont imposables que dans l'Etat où se trouve le domicile du bénéficiaire, à condition que celui-ci n'ait pas dans l'autre Etat un établissement stable de son entreprise.

Dans ce dernier cas, les redevances ne sont imposables que dans cet autre Etat. Cette règle reste applicable en cas de substitution à un établissement stable d'une participation dans une société. En cas de difficulté, les administrations ficales des deux pays se concerteront.

§ 2. – Nonobstant les dispositions du paragraphe 1er ci-dessus, les redevances, produits et droits y mentionnés ne sont imposables que dans l'Etat sur le territoire duquel est située l'entreprise qui en supporte la charge, lorsque et dans la mesure où ces redevances, produits et droits excèdent la valeur intrinsèque et normale des biens pour lesquels ils sont attribués.

Dans les cas particuliers où il apparaît qu'il y a lieu de faire application de l'alinéa précédent, les autorités fiscales des deux Etats s'entendent pour fixer la fraction du montant des redevances, produits et droits qui peut être considérée comme normale.

§ 3. – Les dispositions des paragraphes 1 et 2 du présent article s'appliquent également aux profits provenant de l'aliénation des mêmes biens.

Article 12

Les traitements, salaires et rémunérations analogues ainsi que les pensions versées par l'un des Etats contractants ou par l'une de ses collectivités locales à des personnes physiques résidant dans l'autre Etat en considération de services administratifs ou militaires, actuels ou antérieurs, sont imposables exclusivement dans le premier Etat.

Toutefois, cette disposition ne trouve pas à s'appliquer lorsque les rémunérations sont allouées à des personnes possédant la nationalité de l'autre Etat.

Article 13

§ 1er. – Sous réserve des dispositions des articles 12 et 14 de la présente Convention, les traitements, salaires et autres rémunérations analogues ne sont imposables que dans l'Etat sur le territoire duquel s'exerce l'activité personelle source de ces revenus.
§ 2. – Toutefois, une personne physique ayant son domicile dans l'un des deux Etats est exonérée de l'impôt dans l'autre Etat en raison des rémunérations relatives aux services personnels rendus dans cet autre Etat;
1. Si elle n'a séjourné dans ce dernier Etat que pendant une ou plusieurs périodes n'excédant pas au total cent quatre-vingt-trois jours au cours de douze mois consécutifs, et
2. Si les services sont rendus pour le compte d'une personne physique ou morale ayant son domicile dans le premier Etat ou d'un établissement situé dans cet Etat, et
3. Si lesdites rémunérations n'ont pas grevé comme telles les résultats d'une activité lucrative, imposables dans l'autre Etat.
§ 3. – Les rémunérations des services personnels rendus sur des navires ou des aéronefs ne sont imposables que dans l'Etat où se trouve le siège de la direction effective de l'entreprise de navigation maritime ou aérienne.

Article 14

Les tantièmes, jetons de présence et autres allocations attribués aux membres du conseil d'administration ou de surveillance de sociétés par actions ou sociétés coopératives, ou aux gérants de sociétés à responsabilité limitée ne sont imposables que dans celui des deux Etats ou est domiciliée la société qui les verse.
Les rémunérations normales que les intéressés perçoivent effectivement en une autre qualité sont imposables, suivant leur nature, d'après l'article 13 ou d'après l'article 16 de la présente Convention.

Article 15

Les pensions autres que celles visées à l'article 12 de la présente Convention, ainsi que les rentes viagères ne sont imposables que dans l'Etat où est domicilié le débiteur.

Article 16

1er. – Les revenus des professions libérales et d'une manière générale tous revenus du travail, autres que ceux dont le régime est spécialement fixé par les dispositions de la présente Convention, sont imposables seulement dans l'Etat où s'exerce l'activité personnelle.
L'activité personnelle n'est considérée comme s'exerçant dans l'un des deux Etats que dans la mesure où le contribuable y utilise une installation permanente dont il dispose de façon régulière.
§ 2. – Sont considérées comme professions libérales au sens du paragraphe 1er ci-dessus notamment l'activité scientifique, artistique, littéraire, enseignante ou pédagogique, ainsi que celle des médecins, avocats, architectes ou ingénieurs.
Toutefois, les règles prévues à l'article 13, paragraphe 1, sont applicables aux artistes du spectacle, de la radio, de la télévision, du cinéma et aux sportifs lorsqu'ils sont engagés par une entreprise ou un organisme quelconque moyennant une rémunération déterminée.

Article 17

Les professeurs et les membres du corps enseignant de l'un des Etats, qui reçoivent une rémunération pour l'enseignement qu'ils donnent pendant une période de résidence n'excédant pas deux ans dans une université ou dans une autre institution d'enseignement supérieur située dans l'autre Etat, sont exonérés d'impôts sur ladite rémunération dans cet autre Etat.

Article 18

Les étudiants et les apprentis de l'un des deux Etats contractants, qui séjournent dans l'autre Etat à seule fin d'y faire leurs études ou d'y acquérir une formation professionnelle, ne sont soumis à aucune imposition de la part de ce dernier Etat pour les subsides qu'ils reçoivent en provenance du premier Etat.

Article 19

Les impôts prélevés sur tous autres revenus que ceux visés aux articles précédents ne sont perçus que dans l'Etat où le bénéficiaire a son domicile.

Article 20

Dans les cas où, conformément aux dispositions de la présente Convention, un revenu doit être exempté de la part de l'un des deux Etats, l'exemption sera accordée si, et dans la mesure où ce revenu est imposable dans l'autre Etat.

Article 21

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Article 22

Il est entendu que la double imposition est évitée de la manière suivante:

1. – Un Etat contractant ne peut pas comprendre dans les bases des impôts sur le revenu visés à l'article 2 les revenus dont l'imposition est exclusivement réservée à l'autre Etat contractant en vertu de la présente Convention, mais chaque Etat conserve le droit de calculer l'impôt frappant les revenus dont l'imposition lui est attribuée au taux correspondant à l'ensemble des revenus imposables d'après sa législation.

2. – En ce qui concerne les dividendes visés à l'article 8 et les intérêts visés à l'article 9, l'Etat du domicile imputera sur l'impôt afférent à ces dividendes ou intérêts l'impôt effectivement perçu dans l'autre Etat sur les mêmes revenus, dans les conditions fixées par lesdits articles.

Toutefois, en Italie, l'imputation ne jouera que lorsque ces dividendes ou intérêts sont soumis à l'impôt sur la richesse mobilière. Dans le cas où ledit impôt n'est pas applicable suivant la législation italienne, l'imputation ne jouera que lorsque l'impôt afférent à ces dividendes ou intérêts excédera 20% et ne portera alors que sur la partie de cet impôt excédant ledit taux.

Article 22 bis

§ 1er. – 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 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 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 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, detenu ou contrôlé par une ou plusieurs 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.

§ 7. – Les dispositions des paragraphes 4 et 5 du présent article ne doivent pas être interprétées comme modifiant en Italie l'application de l'impôt sur les sociétés qui reste perçu en conformité avec la législation italienne.

Article 23

Les dispositions de la présente Convention ne limitent pas les droits et avantages que la législation de l'un quelconque des Etats contractants accorde aux contribuables en matière d'impôts visés à l'article 2 de la présente Convention.

Article 24

§ 1er. – Les autorités fiscales des deux Etats contractants se communiqueront tous renseignements dont elles disposent ou qu'elles peuvent obtenir et qui seront nécessaires pour assurer l'application des dispositions de la présente Convention ainsi que pour éviter la fraude fiscale ou pour appliquer les règles detinées à prévenir l'évasion fiscale dans le domaine des impôts faisant l'objet de cette Convention.

§ 2. – Tous renseignements ainsi échangés devront être tenus secrets et ne pourront être révélés, en dehors du contribuable ou de son mandataire, à aucune personne autre que celles qui s'occupent de l'établissement et du recouvrement des impôts visés à la présente Convention, ainsi que des réclamations et recours relatifs à ces impôts.

§ 3. – Les dispositions du présent article ne peuvent avoir pour effet d'imposer aux autorités fiscales de l'un des deux Etats l'obligation de communiquer soit des renseignements qui, en raison de leur nature, ne peuvent être obtenus d'aprés sa propre législation fiscale ou d'après celle de l'autre Etat, soit des renseignements dont elles estimeraient que la communication est susceptible de révéler un procédé de fabrication et de porter atteinte à un secret industriel, commercial ou professionnel ou à l'ordre public. Ces dispositions ne peuvent, non plus, être considérées comme imposant aux autorités fiscales de l'un des deux Etats l'obligation d'accomplir des actes qui ne seraient pas conformes à sa réglementation ou à ses pratiques.

§ 4. – L'échange des renseignements aura

lieu d'office ou sur demande visant de cas concrets. Les autorités compétentes des deux Etats s'entendront pour déterminer la liste des informations qui seront fournies d'office.

Article 25

§ 1er. – Les Etats contractants s'engagent à se prêter aide et assistance pour le recouvrement des impôts, qui font l'objet de la présente Convention et pour celui des intérêts, des frais, des suppléments et majorations d'impôts.

§ 2. – Les autorités fiscales de l'Etat requis de prêter aide et assistance à l'autre Etat procéderont au recouvrement suivant les règles applicables au recouvrement de leurs propres créances fiscales similaires. Les créances fiscales à recouvrer ne seront pas considérées comme des créances privilégiées dans l'Etat requis.

§ 3. – Les poursuites et mesures d'exécution auront lieu sur production d'une copie officielle des titres exécutoires et eventuellement des décisions passées en force de chose jugée.

§ 4. – En ce qui concerne les créances fiscales qui sont encore susceptibles de recours, l'Etat créancier, pour la sauvegarde de ses droits, peut demander à l'autre Etat de notifier au redevable une contrainte ou un titre de perception. Les contestations touchant le bien-fondé des réclamations qui ont motivé la notification ne peuvent être portées que devant la jurisdiction compétente de l'Etat requérant.

Article 26

§ 1er. – Les autorités fiscales des deux Etats contractants pourront arrêter, de commun accord, les règlements nécessaires à l'exécution des dispositions de la présente Convention.

§ 2. – Dans le cas ou l'exécution de certaines dispositions de cette Convention donnerait lieu à des difficultés ou à des doutes, les autorités fiscales des deux Etats contractants s'entendront pour interpréter ces dispositions dans l'esprit de la Convention.

§ 3. – Si un contribuable de l'un des Etats contractants prouve que les taxations établies ou projetées à sa charge ont entraîné ou doivent entraîner pour lui une double imposition interdite par la Convention il peut, sans préjudice de l'exercice de ses droits de réclamation et de recours dans chaque Etat, adresser aux autorités fiscales de l'Etat ou se trouve son domicile une demande écrite de revision desdites taxations. Cette demande doit être présentée dans un délai de six mois à compter de la date de la notification ou de la perception à la source de la seconde imposition. Si elles en reconnaissent le bien-fondé, les autorités fiscales saisies d'une telle demande s'entendront avec les autorités fiscales de l'autre Etat pour éviter la double imposition.

§ 4. – S'il apparaît que, pour parvenir à une entente, des pourparlers soient opportuns, ceux-ci seront confiés à une Commission mixte formée de représentants des deux Etats désignés par leurs autorités administratives supérieures.

Article 27

Les autorites fiscales visées dans la présente Convention sont, en ce qui concerne la France, le Ministère des Finances (Direction Générale des Impôts) et, en ce qui concerne l'Italie, le Ministère des Finances (Direction Générale des Impôts directs).

Article 28

La présente convention pourra être étendue telle quelle, ou avec les modifications

nécessaires, aux territoires français d'outre-mer qui perçoivent des impôts de caractère analogue à ceux auxquels s'applique ladite Convention.
Les conditions et les modalités de l'extension seront fixées dans un échange de notes diplomatiques entre les deux Etats.
A tout moment après l'expiration d'une période d'un an à partir de l'entrée en vigueur de l'extension notifiée conformément aux dispositions de l'alinéa qui précède, chacun des Etats contractants pourra, moyennant un préavis de six mois notifié par la voie diplomatique, faire cesser pour la fin de l'année civile l'application de la présente Convention à l'égard de tout territoire auquel elle aura été étendue. La Convention s'appliquera pour la dernière fois dans ledit territoire suivant les prévisions de l'article 30 ci-après.
A moins que les deux Etats ne soient expressément convenus de dispositions contraires, la dénonciation de la présente Convention en vertu de l'article 30 mettra fin à l'application de cette Convention en ce qui concerne tous les territoires auxquels elle aura été étendue dans les conditions prévues par le présent article.

Article 29

§ 1er. – La présente Convention est rédigée en langues française et italiennc, les deux textes faisant également foi. Elle sera ratifiée et les instruments de ratification seront échangés à Rome dans le plus brcf délai possible.

(1) § 2. – La Convention entrera en vigueur dès l'échange des instruments de ratification et ses dispostions s'appliqueront pour la première fois aux impôts dus sur les revenus afférents soit à l'année civile de cet échange, soit aux exercices sociaux ouverts au cours de ladite année.
Toutefois, pour les impôts perçus par voie de retenue à la source sur les dividendes et intérêts visés aux articles 8 et 9, elles s'appliqueront pour la première fois aux produits dont la mise en paiement interviendra après l'expiration d'un délai de trois mois compté à partir de cet échange.

Article 30

La présente Convention restera en vigueur aussi longtemps qu'elle n'aura pas été dénoncée par l'un des deux Etats contractants.
Chaque Etat pourra, moyennant un préavis de six mois notifié par la voie diplomatique, la dénoncer pour la fin de l'année civile à partir de la cinquième année suivant celle de la ratification.
Dans ce cas, la convention s'appliquera pour la dernière fois aux impôts dus sur les revenus afférents soit à l'année civile pour la fin de laquelle la dénonciation aura été notifiée soit aux exercices clos au cours de ladite année.
Toutefois, pour les impôts perçus par voie de retenue à la source sur les dividendes et intérêts visés aux articles 8 et 9, elle s'appliquera pour la dernière fois aux produits dont la mise en paiement interviendra au plus tard le 31 décembre de l'année civile pour la fin de laquelle la dénonciation aura été notifiée.

Article 31

Les dispositions de la Convention signée entre la France et l'Italie le 16 juin 1930 pour éviter les doubles impositions et régler certaines autres questions en matière fiscale s'appliqueront pour la dernière fois:
1° aux impôts perçus par voie de retenue à la source sur les revenus visés à l'article 29, 2, 1° de la présente Convention, dont la mise en paiement interviendra au plus tard à

l'expiration du délai de trois mois prévu audit article;
2° aux autres impôts sur les revenus, en ce qui concerne l'imposition des revenus produits soit pendant l'année civile précédant celle de l'échange des instruments de ratification, soit pendant les exercices clos au cours de ladite année.

PROTOCOLE

Au moment de procéder à la signature du présent avenant conclu ce jour entre la France et l'Italie pour modifier et compléter la convention signée le 29 octobre 1958, les plénipotentiaires des deux Etats sont convenus des dispositions suivantes, qui formeront partie intégrante de ladite convention:

I. – Les deux Etats contractants se réservent le droit de considérer, conformément aux dispositions de leur loi interne respective, comme des biens immobiliers, pour l'application de l'article 4 de la convention, les droits sociaux possédés par les associés ou actionnaires des sociétés qui ont, en fait, pour unique objet, soit la construction ou l'acquisition d'immeubles ou de groupes d'immeubles en vue de leur division par fractions destinées à être attribuées à leurs membres en propriété ou en jouissance, soit la gestion de ces immeubles ou groupes d'immeubles ainsi divisés.

II. – Dans le cas où l'une des deux hautes parties contractantes apporterait des changements à sa législation fiscale, les réajustements des dispositions de la convention seraient effectués, dans l'esprit de celle-ci, par accord entre les deux Etats.
Ces accords modificatifs ou complémentaires feraient l'objet de notes échangées par la voie diplomatique.

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NETHERLANDS: TAX ON VALUE ADDED

TEXT OF THE TURNOVER TAX LAW 1968 (TAX ON VALUE ADDED)*

— unofficial translation —

For a detailed description, see the article by A.E. de Moor on page 297 of the July/August/September issue 1969 of the Bulletin for International Fiscal Documentation

CHAPTER I

Introductory Provisions

Section 1

A tax, referred to as "turnover tax", shall be imposed in respect of:

a) the supply of goods and services, within the Kingdom, by entrepreneurs within the scope of their business;

b) importation of goods.

Section 2

The tax in respect of goods supplied and services rendered to the entrepreneur and of imported goods intended for him shall be deducted from the tax due in respect of the goods and services supplied by him.

CHAPTER II

Levy in respect of Deliveries and the Rendering of Services

Part 1
Taxable Event

Section 3

1. The delivery of goods shall be understood to mean:

a. the transfer of ownership of goods resulting from an agreement;

b. the delivery of goods resulting from a hire-purchase agreement;

c. the delivery of goods by the person who has manufactured the goods;

d. the transfer of ownership of goods resulting from a requisition by or on behalf of the Government;

e. the transfer of goods, as a result of which they cease to form part of the entrepreneur's business assets;

f. the transfer of ownership of goods forming the subject of an agreement under which these goods are incorporated into other goods;

g. the use of goods for purposes other than business, as a result of which they cease to form part of the entrepreneur's business assets;

h. The use for business purposes of goods manufactured in the entrepreneur's own establishment in those cases where, if the goods had been purchased from an entrepreneur, the tax levied on those goods would not qualify for deduction in full or in part; any goods manufactured on

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* Law of 28th June 1968, Staatsblad van het Koninkrijk der Nederlanden (official Journal of the Kingdom of the Netherlands) 329.

the instructions of the entrepreneur, who supplies materials for this purpose, shall be deemed to be identical with goods manufactured in the entrepreneur's own establishment.

2. The delivery of goods shall also be understood to mean the establishment, assignment, alteration and cession of corporeal rights, with the exception of mortgage and ground rents, to immovable property, provided such rights have been established for a fixed period of at least ten years.
3. If agreements are concluded by more than one person, resulting in an obligation to supply the same goods, and these goods are subsequently delivered by the first person to the last purchaser direct, the goods shall be deemed to have been supplied by every one of those persons.
4. Any goods sold at an auction shall be deemed to have been supplied to, and subsequently supplied by, the auctioneer. Subject to conditions to be laid down by Our Minister, this provision shall not apply to auctions that have submitted a request to this effect.
5. Any goods supplied and services rendered through the intermediary of an agent or similar entrepreneur, who concludes agreements in his own name but on the instructions and for the account of someone else, shall be deemed to have been supplied or rendered to, and subsequently supplied or rendered by, that entrepreneur.
6. The assignment of ownership by way of security and the reassignment thereof shall not be deemed to constitute a delivery.

Section 4

1. The rendering of services shall be understood to mean the performance of any acts, other than the supply of goods, rendered against payment.
2. In order to avoid serious disturbances in the conditions of competition, the rendering of services shall also be understood to mean activities, to be designated by Our Minister, performed by entrepreneurs within their business, in cases where, if these entrepreneurs were to have the aforesaid activities performed by other entrepreneurs, they would not be able to claim relief in respect of the tax, either in full or in part.
3. Paragraph two shall apply, mutatis mutandis, to activities performed by parties other than entrepreneurs; when activities are so designated, the parties performing such activities shall be considered as entrepreneurs.

Section 5

Goods shall be understood to mean all corporeal property.

Section 6

1. The place where a delivery is effected shall be deemed to be:
   a. if the goods are being transported in connection with the delivery thereof, the place where transportation begins;
   b. in other cases the place where the goods are at the time of delivery.
2. The place where a service is rendered shall be deemed to be:
   a. if the service is rendered by an entrepreneur residing or domiciled within the Kingdom, the place where the entrepreneur resides or is domiciled;
   b. if the service is rendered by an entrepreneur not residing or domiciled within the Kingdom:
   i) from a permanent establishment situated within the Kingdom, the place where such establishment is situated;
   ii) not from a permanent establishment situated within the Kingdom to an entre-

preneur residing or domiciled there, or a body domiciled there within the meaning of the General Government Taxes Law ("Staatsblad" 1959, 301), the place where such entrepreneur or such body resides or is domiciled;

iii) in other cases the place where the service is actually rendered.

3. Notwithstanding the provisions of paragraph two, the rendering of a service consisting of the transportation of persons or goods shall be deemed to be rendered at the actual places where the transportation takes place.

Section 7

1. An entrepreneur is anyone conducting a business independently.
2. Whenever mention is made in this Law of a business, this shall be understood to include the carrying on of a profession.
3. Our Minister may decide that public bodies which, in a capacity other than that of entrepreneur, render services which, by their nature, could also be performed by entrepreneurs, shall be considered as entrepreneurs in respect of those services.
4. A lessor as referred to in section 11, sub b (3) shall in all cases be considered as an entrepreneur.
5. Subject to conditions to be laid down by Our Minister, bodies within the meaning of the General Government Taxes Law which, in a capacity other than that of entrepreneur, perform tasks on behalf of entrepreneurs who would have been able to claim tax relief in respect thereof by virtue of section 15 if such tasks had been performed on their behalf by an entrepreneur, may be considered as entrepreneurs in respect of those tasks.

Part 2
Tax Base and Tax Rates

Section 8

1. The tax shall be calculated on the amount payable.
2. The amount payable shall be understood to mean the total sum—or, in the event that the consideration does not consist of an amount in money, the total value of the consideration—charged on account of the delivery or service rendered, excluding turnover tax. In the case where a larger amount is paid for the delivery or service rendered than is charged, the amount actually paid and not the amount charged shall be regarded as the amount payable.
3. Subject to conditions to be laid down by Our Minister, in cases where movable goods are delivered against goods of the same kind received in exchange, the value of the goods received in exchange shall not be included in the amount payable.
4. In respect of supplies as referred to in section 3, paragraph one, letters g and h, the amount payable shall be the cost of purchasing or producing the goods, excluding turnover tax.
5. In respect of services rendered as referred to in section 4, paragraphs two and three, the amount payable shall be the cost price of the services, excluding turnover tax.
6. We reserve the right to issue general administrative orders stipulating:

a. to what extent discounts for cash payment, the cost of packaging, freight and insurance charges, advance payments for taxes and other sums and similar items shall be excluded from the amount payable;

b. in the case of property encumbered by ground rents, rights of emphytensis (erfpacht), superficies (opstal) or hereditary tenure (beklemming), flats, membership

rights, and the like, to what extent the fixed charges attaching thereto shall be included in the amount payable;
c. in the case of property encumbered with rights of emphytensis (erfpacht), superficies (opstal) or hereditary tenure (beklemming), to what extent the amount payable shall be reduced by the fixed charges attaching to those rights.

Section 9

1. The tax shall amount to 12 per cent.
2. Notwithstanding the provisions of paragraph one, the tax shall amount to:
   a. 4 per cent in respect of deliveries of goods and the rendering of services as referred to in Table I annexed to this Law;
   b. zero in respect of deliveries of goods and the rendering of services as referred to in Table II annexed to this Law, provided that the conditions to be laid down by Us, by means of a general administrative order, have been fulfilled.

Section 10

If goods are delivered for the manufacture of which materials have been made available, and if the percentage of tax on the goods exceeds that due on the materials, the supplier of the goods, in cases to be designated by Us by means of a general administrative order, shall also be obliged to pay turnover tax on the value of the materials made available to him up to a percentage amounting to the difference between the two percentages referred to above.

Part 3

Exemptions

Section 11

Subject to conditions to be laid down by Us by means of a general administrative order, the following shall be exempt from tax:

a. the delivery of immovable property, with the exception of delivery by the entrepreneur who has constructed the property as well as of any subsequent supplies of the property concerned, where tax relief has been claimed, either in full or in part, in respect of the previous supply;
b. the leasing and letting of immovable property, with the exception of:
   i) leasing of machinery and business installations;
   ii) letting within the scope of the hotel, boarding-house, camping and holiday business, to persons only staying for a short period of time;
   iii) letting to entrepreneurs who use the immovable property in their business, provided that the lessor has submitted a request to that effect to the Inspector and fulfils the conditions to be laid down by Our Minister;

the renting of goods shall also be understood to include any other manner in which goods may be made available for use, other than for a fixed period of at least ten years;
   c. the provision of food and drink by an entrepreneur running an institution without making or intending to make any profits, as well as nursing or looking after persons admitted to such an institution and providing them with medicine and dressings;
   d. services rendered to youth and youth leaders by general youth work organizations, recognized as such by the Government;
   e. services—with the exception of providing admission to matches, demonstrations and the like—rendered by organizations performing sports or promoting them, to their members, provided no profits are made or intended to be made on these services;
   f. supplies and services, to be designated by

Us by means of general administrative orders, of a social or cultural nature, provided the entrepreneur does not make, or intend to make, any profits and no serious disturbance in the conditions of competition is caused with regard to entrepreneurs who do make, or intend to make, profits;
g. the services rendered by physicians, psychologists, male and female nurses, speech therapists, midwives and physiotherapists; supplies and services rendered by dentists and dental technicians; the transportation of patients by ambulance;
h. the services rendered by undertakers;
i. the supply of coins which serve as legal tender in any country, as well as the transfer of securities and other negotiable instruments;
j. the granting of credit; the transfer, collection and payment of monetary claims, including giro, cheque, and current account transactions;
k. insurance and the services rendered by insurance agents;
l. games of chance within the meaning of section 2, paragraph one, of the Gaming Tax Law ("Staatsblad" 1961, 313);
m. the services rendered in postal, telegraph and telephone communications and the services, to be designated by Us in a general administrative order, rendered by transport enterprises in behalf of those communications services;
n. radio and television transmissions by the Government and authorized organizations, with the exception of advertising transmissions;
o. the provision of:
i) education, by institutions intended for that purpose, as described in or by virtue of the laws regulating education which—inasmuch as this does not apply to higher education—according to legal provisions is subject to supervision by the State School Inspectorate or any other supervision by or on behalf of the Minister responsible for the type of education concerned;
ii) types of education to be designated by Us in a general administrative order, which order may stipulate that the exemption shall only apply to entrepreneurs who do not make or intend to make any profits on such education;
p. lectures and similar services, in cases to be designated by Our Minister, provided these are rendered against a consideration serving mainly to cover expenses;
q. the services of composers, writers, journalists and press photographers;
r. the delivery of goods which are employed in the business of the entrepreneur exclusively or principally in behalf of exempt supplies and services.

Part 4

Collection Procedure

Section 12

1. The tax shall be levied on the entrepreneur delivering the good or rendering the service.
2. If the entrepreneur delivering the good or rendering the service does not reside or is not domiciled within the Kingdom and does not have any permanent establishment there, and the party to whom the goods are supplied or the service is rendered is an entrepreneur residing or domiciled within the Kingdom or a body domiciled there within the meaning of the General Government Taxes Law, the tax shall be levied on the party receiving the goods or the service.

Section 13

1. The tax shall fall due:

a. in those cases where, in accordance with section 35, an invoice has to be submitted, at the time when the invoice is submitted, or, if this is not done at the correct time, on the last date by which the invoice should have been submitted;
b. in other cases at the time when the goods are delivered or the service is rendered.

2. Notwithstanding the provisions of paragraph one, the tax, or the relevant part thereof, shall fall due not later than the time when the amount payable has been received either in full or in part.

Section 14

The taxes falling due within a definite period shall be paid at the time the declaration is made.

Section 15

1. The tax referred to in section 2, in respect of which the entrepreneur may claim relief, shall be the following:
a. the tax charged, during the declaration period, by other entrepreneurs in respect of goods delivered and services rendered to the entrepreneur by means of an invoice made out in the prescribed manner;
b. the tax which has fallen due during the declaration period:
i) in respect of imported goods intended for the entrepreneur, provided the conditions to be laid down by Our Minister have been fulfilled;
ii) by virtue of section 12, paragraph two, in respect of goods delivered and services rendered to the entrepreneur;
iii) in respect of the employment by the entrepreneur of goods for business purposes;
iv) in respect of services rendered as referred to in section 4, paragraph two; inasmuch as the goods and services are used by the entrepreneur within the scope of his business.
2. No tax relief shall be granted inasmuch as the goods and services are used in behalf of operations by the entrepreneur as referred to in section 11.
3. Our Minister shall issue further regulations concerning tax relief in cases where the goods and services are also used for purposes other than in the framework of a business, or on behalf of performances as referred to in section 11. It may be stipulated that no account shall be taken of the retirement of goods used by the entrepreneur in his business.

Section 16

1. We reserve the right to exclude in certain cases, either in full or in part, the relief referred to in section 15, paragraph one, in order to avoid a situation where the tax, in full or in part, is not levied on goods and services which are used for maintaining a certain style of living, for satisfying needs of persons other than entrepreneurs or on behalf of performances as referred to in section 11.
2. After the enactment of a decree issued by Us by virtue of paragraph one, a bill providing for the approval of that decree shall be submitted forthwith to the Second Chamber of the States-General.
3. If the bill is withdrawn or if one of the Chambers of the States-General resolves to reject it, Our decree shall be revoked forthwith.

Section 17

If the tax for which relief can be claimed exceeds the tax due during a certain period, the difference shall be refunded to the entrepreneur upon his request.

CHAPTER III

Levy in respect of Imports

Part 1
Taxable Event

Section 18

The importation of goods shall be understood to mean the bringing of goods into free circulation.

Part 2
Tax Base and Tax Rates

Section 19

1. The tax shall be calculated on the amount payable in respect of the delivery of goods charged to the party for whom the latter are intended.
2. The tax shall be calculated on the value for customs purposes, if the goods are not supplied or if the value for customs purposes exceeds the amount payable.
3. The value for customs purposes shall be understood to mean the value established according to the provisions governing import duty, with the proviso that, wherever mention is made in those provisions of the territory of the Netherlands, Belgium and Luxembourg, or of the European territory of the Member States of the European Communities, this shall be read as: the territory of the Netherlands.
4. The amount payable or the value for customs purposes shall include:
   a. the Dutch taxes and levies, with the exception of turnover tax;
   b. the cost of transportation to the place of destination;
   c. the installation costs in cases where the imported goods are supplied within the meaning of section 3, paragraph one, letter f.

Section 20

1. The tax shall amount to 12 per cent.
2. Notwithstanding the provisions of paragraph one, the tax shall amount to:
   a. 4 per cent in respect of imported goods as referred to in Table I, letters a and c, pertaining to this Law;
   b. zero in respect of imported goods as referred to in Table II, letter a, item 3, annexed to this Law, provided that the conditions to be laid down by Us, by means of a general administrative order, have been fulfilled.

Part 3
Exemptions

Section 21

The exemptions from import duty as laid down in sections 24, paragraph one, letter a, insofar as these relate to repairs of goods, 25, 26, 27, 28, 30, 31, 32, 33, 34 and 35 of the Tariff Decree 1960 ("Staatsblad" 30) shall apply mutatis mutandis, with the proviso that, wherever mention is made in those provisions of the territory of the Netherlands, Belgium and Luxembourg, this shall be read as: the territory of the Netherlands.

Part 4
Collection Procedure

Section 22

The General Customs and Excise Law ("Staatsblad" 1961, 31) shall be applied in the same manner as if the taxes concerned were import duty.

Section 23

1. Notwithstanding the provisions of section 22, the tax in respect of imports intended for designated entrepreneurs and bodies within the meaning of the General Government Taxes Law, not being

entrepreneurs, shall be levied on those entrepreneurs and bodies. The designation, whether or not upon a request to that effect, shall be made by or on behalf of Our Minister, on conditions to be laid down by him or on his behalf.

2. The tax shall fall due at the time when the goods are received following their importation, and in any case not later than the eighth day after their importation.
3. The tax falling due within a definite period of time shall be paid at the time the declaration is made.

CHAPTER IV

Exportation of Goods

Section 24

Bodies within the meaning of the General Government Taxes Law, not being entrepreneurs, which export goods in an unused condition or store them in a bonded warehouse shall, at their request, be granted a refund of the tax paid on such goods.

CHAPTER V

Special Provisions

Part 1
Tax Reductions (Small Entrepreneurs)

Section 25

1. If an entrepreneur is a natural person and the tax due from him within a calendar year, after application of the relief referred to in section 15, does not exceed N.fls. 1800, this amount shall be reduced by N.fls. 1200, but in no instance by more than the amount of the tax. If the tax exceeds N.fls. 1800, it shall be reduced by an amount equal to the amount by which the tax falls short of N.fls. 3000.
2. Our Minister shall issue regulations concerning the allocation of the reduction referred to in paragraph one over periods of the calendar year.
3. Our Minister shall issue regulations according to which an entrepreneur who, by virtue of paragraph one, is not liable to pay tax, may request exemption from the obligations imposed in or by virtue of sections 34 and 35. In that event the entrepreneur shall not make any mention of turnover tax on his invoice; nor shall any refund be made to him under section 17.
4. The reduction referred to in paragraph one shall not be applicable if in the calendar year in question the entrepreneur fails to fulfil the conditions laid down in or by virtue of section 34, section 35 or paragraph three.

Part 2
Payment based on Cash Receipts

Section 26

Our Minister may issue regulations whereby designated entrepreneurs, who do not as a rule deliver goods or render services to entrepreneurs, shall be obliged to pay the tax due on deliveries and services at the time when the amount payable is received; the tax shall then be calculated on the payment received.

Part 3
Regulations concerning Agriculture

Section 27

1. Farmers, livestock owners, horticulturists and foresters shall not be considered as entrepreneurs provided their deliveries and services rendered consist exclusively of:

a. deliveries of goods as referred to in Table I, letter a, which they have produced or bred in their capacity as mentioned above;
b. deliveries of used equipment and other goods used in their business;
c. other deliveries and services rendered, the total amount payable in respect of which does not exceed N.fls. 10,000 annually.

2. Entrepreneurs to whom the persons referred to in paragraph one, letter a, deliver goods may claim relief of $^{4}/_{104}$ of the amount charged to them by virtue of section 15.
3. The persons referred to in paragraph one may make a request of the Inspector to be considered as entrepreneurs. If this request is granted, their qualification as entrepreneur shall be deemed to continue until notice of termination is given by the interested party, but in any case for a minimum period of five years; in that case paragraph two shall not be applicable. A renewed request can only be granted five years from the time notice of termination was given. The Inspector's decision on a request shall be given in the form of an order.
4. Section 25 shall not apply to farmers, livestock owners, horticulturists and foresters delivering goods as referred to in Table I, letter a, which they have produced or bred.
5. Our Minister may issue further regulations with regard to the application of this section.

Part 4
Tobacco Products

Section 28

The tax in respect of the delivery and importation of tobacco products, as referred to in section 2, paragraph one, of the Tobacco Products Excise Law ("Staatsblad" 1964, 208), shall be applied in the same manner as the regulations applicable to that excise duty, with the proviso that the rate of tax shall amount to $^{12}/_{112}$ of the retail price subject to excise duty. The relief referred to in section 15 shall not be granted in respect of this tax.

CHAPTER VI

Special Provisions

Section 29

1. Upon submission of a request, a refund shall be made of tax in respect of delivery and services, inasmuch as the amount payable:
a. has not been and will not be received;
b. is restituted because a reduction has been granted on the amount payable or because the goods have been returned unused.
2. The amount of tax relief claimed by an entrepreneur in accordance with section 15 shall become due in the form of tax at the time when, and inasmuch as, it can be reasonably assumed that the entrepreneur will not pay, or not pay in full, the amount payable to which the tax related, or if the amount payable has been refunded to him. The tax shall become due in any event two years from the time of maturity of the amount payable, inasmuch as it has not been settled by that time. The tax falling due shall be paid in accordance with section 14.
3. We reserve the right, by means of a general administrative order, to declare paragraphs one and two to be inapplicable to amounts which have not been paid or received, as the case may be, as a result of a cash discount.

Section 30

Upon submission of a request, a refund shall be made of the tax relating to the delivery of goods, in cases to be designated by Us in a general administrative order, in which no turnover tax is levied on imports of such goods, and subject to conditions to be laid down in that respect.

Section 31

In the event of the assignment of an enterprise, or a part thereof, to a party continuing the enterprise or the relevant part thereof, no tax shall be levied in respect of the deliveries and services constituting the assignment, subject to conditions to be laid down by Our Minister.

Section 32

An entrepreneur residing or domiciled within the Kingdom shall be deemed to deliver goods and render services within the Kingdom, inasmuch as his books and records do not prove the contrary. This provision shall also apply to an entrepreneur who has a permanent establishment within the Kingdom, inasmuch as goods are delivered, or services rendered, from that establishment.

Section 33

1. A request for a refund of tax shall be submitted simultaneously with the declaration over the period during which the claim to a refund has arisen.
2. In those cases where no declaration according to section 14 is to be submitted, a request for refund shall be made by means of a declaration form to be determined by Our Minister. This declaration should be submitted within three months from the end of the quarter during which the claim to a refund has arisen.
3. The Inspector's decision on a request shall be given in the form of an order.

Section 34

Subject to regulations to be issued by Our Minister, entrepreneurs shall be obliged to keep records of the goods delivered and the services rendered by them and to them, as well as of imported and exported goods.

Section 35

1. With regard to the goods delivered and the services rendered to another entrepreneur, entrepreneurs shall be obliged to submit a numbered and dated invoice stating clearly and specifically:
   a. the day on which the goods were delivered or the service rendered;
   b. the name and address of the entrepreneur delivering the goods or rendering the service;
   c. the name and address of the entrepreneur to whom the goods are delivered or the service is rendered;
   d. an explicit description of the goods delivered or service rendered;
   e. the quantity of the goods delivered;
   f. the amount payable;
   g. the amount of tax due in respect of the supply or service. No mention of any other amount of tax shall be made.
2. The invoice shall be submitted before the 15th day of the month after which the goods were delivered or the service was rendered.
3. If the entrepreneur has agreed that the amount payable for the goods to be delivered or services to be rendered by him to another entrepreneur is to be settled in advance, either in full or in instalments, an invoice made out in accordance with paragraph one shall be submitted prior to the date of maturity in respect of every payment or instalment payment.
4. The entrepreneur shall be obliged to retain a duplicate of the invoice submitted.

5. Our Minister may grant exemption from the obligations laid down in this section to certain entrepreneurs or groups of entrepreneurs.

Section 36

Sections 25, paragraph three, and 29, paragraph one, of the General Government Taxes Law shall apply mutatis mutandis, if the obligations laid down in or by virtue of sections 34, 35 and 39 have not been performed in full.

Section 37

Anyone who indicates, on an invoice, an amount of turnover tax in excess of that falling due, other than by virtue of this section, shall be liable to pay the amount of tax indicated at the time he submits that invoice; he shall be obliged to pay his tax in accordance with section 14.

Section 38

It shall be forbidden for an entrepreneur to offer goods and services to parties other than entrepreneurs and public bodies at prices with an indication to the effect that the turnover tax is not included in the prices.

Section 39

We reserve the right to issue, by means of a general administrative order:

a. further regulations deviating, if necessary, from the provisions of this Law, which may facilitate the collection of the tax;

b. other regulations, within the scope of this Law, supplementary to the subjects dealt with under this Law.

CHAPTER VII

Collection

Section 40

The collection of arrears shall be carried out in accordance with the provisions applying to the collection of direct taxes, with the exception of land tax.

Section 41

The arrears shall be payable one month from the date of the assessment.

CHAPTER VIII

Penalties

Section 42

Anyone failing to fulfil the obligations laid down in sections 34, 35 or 38, or contravening a provision contained therein, shall be fined a sum not exceeding five thousand guilders.

CHAPTER IX

Transitional and Final Provisions

Section 43

1. Any entrepreneur who, on 1st January, 1969, holds a stock of unused goods, other than goods that are to be used in his business, shall be granted a refund of the turnover tax—other than that referred to in section I, paragraph one, of the Law of 13th December, 1967 ("Staatsblad" 614)—paid in respect of these goods and of the raw and auxiliary materials used in manufacturing these goods. The refund shall include the turnover tax paid on the goods used in the business and the services used in

manufacturing the goods held in stock, provided the entrepreneur exports the goods, during that year, unused and in the same condition in which they were on 1st January, 1969. The entrepreneur must be able to prove his right to a refund from his books and records.

2. Regarding the refund, Our Minister shall issue further regulations to enable the refund to be determined according to general standards.
3. A refund shall only be granted inasmuch as an entrepreneur, in the event of delivery of the goods to him after 31st December, 1968, would be able to deduct the tax due on them by virtue of section 15.
4. A claim to a refund shall arise, as to one-fourth in each case, at the end of the second, third and fourth quarters of 1969 and the first quarter of 1970. However, a claim to a refund in respect of exports shall arise at the end of the quarter during which the goods were exported.

Section 44

1. In respect of the importation in 1969 of goods brought into the Kingdom before 1st January, 1969, a special consumption tax shall be levied up to the amount that would have been due in the event of importation in 1968 by virtue of section I, paragraph one, of the Law of 13th December, 1967 ("Staatsblad" 614).
2. The General Customs and Excise Law shall apply as if the tax referred to in paragraph one were import duty.

Section 45

1. Notwithstanding the provisions of section 2 and 15, relief in respect of goods intended to be used by the entrepreneur in his business shall be restricted to:
   a. 30 per cent of the tax, if the goods are supplied or imported in 1969;
   b. 60 per cent of the tax, if the goods are supplied or imported in 1970;
   c. 90 per cent of the tax, if the goods are supplied or imported in 1971.
2. Paragraph one shall not apply to:
   a. ships, with the exception of houseboats and pleasure craft;
   b. machinery and appliances for the production and processing or finishing in the manufacturing process of products in the textile industry (with the exception of machinery and appliances for spinning synthetic or man-made textile materials and with the exception of spinnerets) and the measurement, control and other ancillary apparatus for, or pertaining to, such machinery and appliances, as well as the buildings in which the said goods are employed.
3. In cases where paragraph one has been applied in respect of goods to be used in the entrepreneur's business and the entrepreneur subsequently supplies those goods, a refund of 70, 40 or 10 per cent of the tax due in respect of such supply shall be granted to the entrepreneur, depending upon whether such supply is effected in 1969, 1970 or 1971, subject to conditions to be laid down by Our Minister.
4. Our Minister may raise the percentages referred to in paragraph one, with effect from a date to be determined by him, either in general or in respect of certain categories of goods, and adapt the percentages referred to in paragraph three accordingly.
5. After the enactment of an order issued by Our Minister by virtue of paragraph four, a bill providing for the approval of that order shall be submitted as soon as possible, however within two months at the latest, to the Second Chamber of the States-General. If the bill is withdrawn or if one of the Chambers of the States-

General resolves to reject it, the order shall be revoked forthwith.

Section 46

In 1969, 1970 and 1971 the tax in respect of the delivery and importation of both daily and non-daily newspapers by subscription shall, notwithstanding the provisions of sections 9 and 20, be zero.

Section 47

1. In connection with the introduction of this Law, we reserve the right to adjust, where necessary, the tariffs of section 3 of the Tobacco Products Excise Law.
2. This adjustment in respect of the various types of tobacco products shall be such that, according to the distinctions made in section 2, paragraph one, of the Tobacco Products Excise Law, the amount of excise duty payable on account of the introduction of this Law shall be approximately equal to the amount of excise duty due prior to its introduction. Furthermore, in those cases where this is deemed necessary, these amounts may be rounded off by Us.
3. Section 16, paragraphs two and three, shall apply mutatis mutandis.

Section 48

The following addition shall be made to section 101, paragraph one, before part c, of the Registration Law 1967 ("Staatsblad" 243):

a. the instruments whereby immovable property is assigned by an entrepreneur who is liable to pay turnover tax in respect of such assignment, unless the property is used in that entrepreneur's business and the party to whom the assignment is made may deduct the turnover tax, either in full or in part, by virtue of section 15 of the Turnover Tax Law 1968;

b. the instruments whereby a parent assigns immovable property to one or more of his own children, children by marriage or foster children, if that property is part of and serves the purposes of enterprise belonging to that parent, which enterprise will be continued in full by the child or children.

Section 49

1. The following amendments shall be made to the Alcoholic Substances Excise Law ("Staatsblad" 1963, 240):
   A. Section 7, paragraphs one and two, to read as follows:
   Section 7
   i) The excise duty on alcohol to which alcoholic substances manufactured in this country are subject, shall be calculated on the basis of the quantity of absolute alcohol contained therein at a temperature of 15 degrees Centigrade, and shall amount to N.fls. 1,540 per hectolitre of absolute alcohol.
   ii) The excise duty on alcohol in respect of imported alcoholic substances shall amount, per hectolitre to N.fls. 15.40 per degree of strength proof.
   B. In section 73, paragraph two, "N.fls. 700" to be replaced by: N.fls. 770.
2. Alcohol substances subject to excise duty on alcohol which, when this Law comes into force, are anywhere other than in a distillery, a distillery of the first category, a warehouse or depot, and in respect of which a refund may be claimed by virtue of section 43, shall be liable to an additional assessment of excise duty amounting to:
   a. N.fls. 70 per hectolitre of absolute alcohol at a temperature of 15 degrees Centigrade, in respect of alcoholic substances subject to a limited exemption from excise duty;
   b. N.fls. 140 per hectolitre of absolute

alcohol at a temperature of 15 degrees Centigrade, in respect of other alcoholic substances.

3. Paragraph two shall not apply:
a. to alcoholic substances which are completely exempt from excise duty;
b. to chocolates, tablets, bars, etc. made of chocolate or other confectionery containing alcohol.

4. Anyone who, by virtue of section 43, is entitled to claim a refund of turnover tax shall be obliged to declare, within two days from the date on which this Law comes into force, the quantity, kind, strength, and the quantity of absolute alcohol, of the alcoholic substances subject to an additional assessment, while at the same time stating the place where they are stored.

5. The excise duty to which alcoholic substances are subject by virtue of paragraph two shall be payable by the person who, according to paragraph four, is obliged to declare the same.

6. The declarations shall be subject to verification.

7. The excise duty shall be determined by the Inspector and shall be paid as to one-fourth in each case to a tax collector to be designated by the Inspector, on the dates when, by virtue of section 43, paragraph four, first sentence, a claim to a refund arises. The excise duty shall be based on the declaration, with due observation of the findings of the verification. If no declaration has been filed the excise duty shall be calculated according to the particulars available, established, if necessary, by means of an estimate.

8. Anyone who carries a stock of alcoholic substances which, in contravention of paragraph four, have not been declared in time shall be fined a maximum amount of five thousand guilders or five times the amount of excise duty to which the goods are subject according to paragraph two, whichever is the higher.

9. Anyone who commits the offence referred to in paragraph eight with a view to evading excise duty, either in full or in part, or to aiding such evasion, shall either be sentenced to a maximum of two years imprisonment and fined a maximum amount of twenty thousand guilders or ten times the amo[illegible] of excise duty to which the goods [illegible]bject according to paragraph two, whichever is the higher, or receive one of the sentences referred to above.

10. Our Minister of Finance shall be authorized to issue regulations in implementation of this section.

Section 50

1. A tax, referred to as "special consumption tax on passenger cars" shall be imposed in respect of the delivery by the manufacturer within the Kingdom and the importation of passenger cars.

2. Passenger cars shall be understood to mean: motor vehicles on three or more wheels which, by virtue of their construction, can serve to transport persons by road, including so-called utility cars and station cars, with the following exceptions:
a. vehicles which normally accommodate more than eight passengers, excluding the driver;
b. vehicles which are obviously equipped for the transportation of patients or prisoners;
c. vehicles which are obviously equipped for use by the police or fire service, or for military purposes;
d. motor tricycles for use by invalids.

3. A manufacturer of passenger cars shall be understood to mean an entrepreneur bringing goods within the Kingdom into such a condition that they are to be

regarded as passenger cars within the meaning of paragraph two.

4. The special consumption tax shall be calculated on the amount that has been or would be charged in the event of sale of the car to a non-entrepreneur at the time when a certificate is issued in respect of the notification of a registration number as referred to in section 9 of the Road Traffic Law ("Staatsblad" 1935, 554), less 12/112 of that amount on account of turnover tax included therein.
5. We reserve the right to issue further regulations, by means of a general administrative order, with regard to the establishment of the amount referred to in paragraph four.
6. The tax shall amount to 15 per cent.
7. Without prejudice to the provisions of paragraph six, the special consumption tax shall amount to zero in respect of the supply of passenger cars exported by an entrepreneur, provided that the conditions to be laid down by Us by means of a general administrative order have been fulfilled. An entrepreneur exporting passenger cars in unused condition shall, upon submission of a request and subject to a similar reservation, be granted a refund of the special consumption tax paid on those passenger cars. Export shall be deemed to include storage in a bonded warehouse, if the goods are regarded after such storage as incoming goods in customs bond.
8. The turnover tax refund referred to in section 43, shall be reduced by 13 per cent of the amount referred to in paragraph four in the case of passenger cars held in stock by entrepreneurs other than the manufacturers of those passenger cars. This reduction shall not apply in respect of passenger cars which are supplied to the entrepreneur in a used condition, inasmuch as relates to the turnover tax paid in respect of such supply.
9. For the application of sections 52 and 53, the special consumption tax shall be considered as turnover tax.
10. Sections 3, paragraphs one and six, 6, paragraph one, 7, 12, paragraph one, 13, 14, 18, 21, 22, 23, 24, 32, 33, 39, 40 and 41 shall, as far as possible, apply mutatis mutandis.
For the application of section 3, the bringing of goods into such a condition that they are to be regarded as passenger cars within the meaning of paragraph two shall be considered as manufacture.

Section 51

1. The following addition shall be made to section 4 of the Financial Relationships Law 1960 ("Staatsblad" 1961, 217), letter *a*:
14. the special consumption tax on passenger cars;
2. The following addition shall be made to section 159 of the Provincial Authorities Law ("Staatsblad" 1962, 17), the final full stop being replaced by a semicolon:
n. the special consumption tax on passenger cars.

Section 52

1. Anyone who is obliged to deliver goods or render services under an agreement concluded prior to the entry into force of an amendment to the legislation regarding turnover tax shall be entitled to reclaim from the party to whom he has to deliver the goods or render the services, the amount of tax levied on those goods or services in excess of that due prior to the date of entry into force of such amendment. Any stipulation to the contrary shall be void.
2. This section shall also apply to turnover tax falling due after application of section 11, letter b (3).

Section 53

Anyone to whom goods are delivered or a service is rendered under an agreement concluded prior to the entry into force of an amendment to the legislation regarding turnover tax shall be entitled to reclaim, from the party that is obliged to deliver the goods or render the service, the amount of turnover tax less than that which would have been levied prior to the entry into force of such amendment. Any stipulation to the contrary shall be void.

Section 54

1. The Turnover Tax Law 1954 ("Staatsblad" 558) and the Law of 29th December, 1966 ("Staatsblad" 592) are hereby repealed, except with regard to goods and services already supplied and offences already committed.
2. Our Minister shall be authorized to issue further regulations with regard to the transition.

Section 55

1. This Law shall come into force with effect from 1st January, 1969.
2. It may be cited as the "Turnover Tax Law 1968".

Table I, Appendix to the Turnover Tax Law 1968

a. 1. potatoes;
2. butter, margarine, cooking and frying fat and other oils and fats suitable as such for human consumption;
3. all types of bread, rusks and rusk rolls (beschuitbollen);
4. chocolate and confectionery, inasmuch as customarily used for sandwiches;
5. eggs;
6. fresh fruit—with the exception of tropical fruits, oranges, lemons and the like, with the exception of bananas;
7. cereals; flour prepared therefrom;
8. vegetables, fresh, prepared or preserved, as well as apple sauce;
9. oatmeal, barley meal and cornflakes;
10. treacle and apple syrup;
11. jam, peanut butter and natural honey;
12. cheese;
13. coffee, coffee essence and coffee substitutes;
14. milk, including powdered milk with a fat content of 1.5% by weight or less and a fluid content of 5% by weight or less;
15. all types of ginger cakes and ginger bread;
16. horses—with the exception of race horses;
17. milk porridge; yoghurt;
18. pulses, including those not fit for human consumption;
19. vegetable plants for bedding out;
20. poultry and other fowl and game, including tame rabbits, as well as parts thereof, fresh, prepared or preserved, clearly intended for human consumption;
21. cattle, sheep, goats and pigs;
22. pork, fresh, prepared or preserved;
23. table vinegar;
24. tea;
25. vermicelli, macaroni, spaghetti and noodles;
26. fish, shrimps, mussels, whelks and cockles as well as parts thereof, fresh, prepared or preserved, with the exception of smoked salmon, caviar and other types of fish roe used as caviar;
27. cattle, pig, sheep, goat and horse meat, fresh, prepared or preserved; sausage and other meat products prepared from the meats referred to above, including liver paste, not made from goose or duck liver; offal and intestines from the

animals referred to above;
28. water;
29. a. sculptures and other objects of plastic art designed by artists which are not considered as mass-produced articles and, in the case of other objects of plastic art, which have been made by the artist with his own hands;
b. paintings and drawings, framed or unframed, made by artists;
c. etchings, engravings, woodcuts and similar works of art, framed or unframed;
d. groups of antiques not mentioned above, to be designated by our Minister, provided they are more than one hundred years old and inasmuch as they are not to be considered as mass-produced articles;
30. books; daily and weekly papers, periodicals, and other publications appearing at least three times annually;
31. literature for the blind; Braille slates, Braille typewriters, and other Braille articles;
32. gas and electricity;
33. medicine and dressings, to be designated by Us by means of a general administrative order;
34. invalid carriages;
35. artificial members; arm, hand, leg and foot protheses, leg irons and artificial joints; artificial eyes and ears; face, nose and larynx protheses; surgically implanted protheses; hearing aids;
36. kerosine, gas oil, fuel oil and other mineral oils within the meaning of sections 4, 5, 6 and 7 of the Mineral Oils Excise Law ("Staatsblad" 1964, 207);
37. postage stamps and old coins;
38. coal, lignite, briquettes, cokes and peat;
39. soap, viz.:
a. domestic hard soap and soft soap (yellow soap, green soap and the like);
b. soaps, soap-containing washing agents and synthetic washing agents in which the capillary-active components consist as to not more than 40% of detergents and which are customarily employed with an excess of water for washing clothing and domestic textiles;
c. dishwashing, rinsing/polishing and cleansing agents which are customarily employed with an excess of water for cleaning dishes and sanitary fittings;
d. crystal soda;
e. aqueous solutions of alkali hypochlorite with a maximum active chlorine content of 16 grams per 100 millilitres,
subject to conditions to be laid down by our Minister with regard to the packaging;
40. beet;
41. agricultural and horticultural seeds, inasmuch as serving for the production of the articles mentioned in this Table, and oil seeds;
42. agricultural manure and fertilizers;
43. round timber;
44. straw and cattle fodder;
45. flax;
46. wool, raw and unwashed;

b. 1. clothing and shoe repairs;
2. lending of books, daily and weekly papers, periodicals and other publications appearing at least three times annually;
3. the services rendered by bath-house and swimming-pool operators;
4. advertisements in daily and weekly papers, periodicals and other publications appearing at least three times annually;
5. the services rendered by advocates and attorneys-at-law in matters relating to the law of persons and of family rela-

tions, governed by Book I of the Civil Code;
6. the services rendered by advocates and attorneys-at-law in matters concerning persons of limited means for which a fee is obtained from the State;
7. the provision of heat;
8. acting as an intermediary in concluding agreements for the delivery of goods mentioned under a;
9. the transportation of persons by railway, tramway or trolleybus or on ferries, as well as the transportation of persons as referred to in section 1, letters g, h and i, of the Passenger Motor Transport Law ("Staatsblad" 1939, 527); the transportation of persons by means of hired cars as referred to in section 1, sub 1, of the aforesaid Law and the transportation of persons by means of aircraft if the place of departure and the place of destination are situated within the Kingdom;
10. the provision of facilities for camping, within the scope of the camping and holiday business, to persons only staying for a short period of time;
11. the provision of accommodation, within the scope of the hotel, boarding-house and holiday business, to persons only staying for a short period of time;

c. during the years 1969, 1970 and 1971:
1. fresh tropical fruits, oranges, lemons and the like (with the exception of bananas);
2. admissions to musical and theatrical performances (including operas, operettas, dances, mime shows, reviews, cabarets and circuses).

General Note

The prepared goods mentioned in the Table do not include any goods prepared for use on the spot.

Table II, Appendix to the Turnover Tax Law 1968

a. 1. incoming goods in customs bond within the meaning of the General Customs and Excise Law;
2. goods exported by an entrepreneur or stored in a customs warehouse and regarded after such storage as incoming goods in customs bond;
Special Provision
This item shall not include goods which, in cases to be designated by our Minister, are exported as travellers' luggage or as a shipment devoid of any commercial character;
3. ocean-going vessels, with the exception of pleasure craft, and aircraft to be used principally as a means of public transportation on international routes;

b. 1. the services rendered in respect of goods mentioned under a. 1, 2 and 3;
2. the transportation of imported goods to their place of destination;
3. the transportation of persons by means of ocean-going ships or aircraft, if the place of destination or the place of departure is situated outside the Kingdom;
4. acting as intermediary in concluding agreements if the party to whom the service is rendered does not reside or is not domiciled within the Kingdom and does not have any permanent establishment there;
5. the services, the amount payable in respect of which is charged to a person who does not reside or is not domiciled within the Kingdom and does not have any permanent establishment there, provided the said person or another to whom the service is rendered does not have the benefit of that service within the Kingdom

PAYS-BAS: TAXE SUR LA VALEUR AJOUTÉE

TEXTE DE LA LOI RELATIVE À LA TAXE SUR LE CHIFFRE D'AFFAIRES 1968

(TAXE SUR LA VALEUR AJOUTÉE)*

— traduction officieuse —**

Pour une description détaillée, voir l'article par A.E. de Moor à la page 309 du numéro juillet, août, septembre 1969 du Bulletin de Documentation Fiscale Internationale

CHAPITRE I

Dispositions préliminaires

Article 1

Sous la dénomination «taxe sur le chiffre d'affaires» est perçue une taxe frappant:

a) des livraisons de biens et des prestations de services, effectuées à l'intérieur du Royaume par des «entrepreneurs» dans le cadre de leur entreprise;

b) des importations de biens.

Article 2

De la taxe due au sujet des livraisons de biens et des prestations de services est déduite la taxe ayant frappé les livraisons de biens effectuées à l'«entrepreneur» et les services qui lui sont rendus, ainsi que les importations de biens qui lui sont destinés.

CHAPITRE II

Imposition des livraisons et des prestations de services

Section 1
Acte imposable

Article 3

1. Constituent des livraisons de biens:

a) le transfert de propriété de biens en vertu d'un contrat;

b) la remise matérielle de biens en vertu d'un contrat de location-vente;

c) la délivrance à façon de biens par celui qui a fabriqué les biens;

d) la transmission de la propriété de biens en vertu d'une réquisition faite par ou au nom de l'autorité publique;

e) le transfert de biens à la suite duquel ceux-ci sortent du patrimoine d'un «entrepreneur»;

f) la transmission de la propriété de biens qui font l'objet d'un contrat prévoyant l'incorporation de ces biens à un autre bien;

g) l'utilisation de biens à des fins autres qu'aux fins de l'entreprise, à la suite de laquelle ces biens sortent du patrimoine d'un «entrepreneur»;

h) l'utilisation pour les besoins de son entreprise de biens produits dans l'entreprise elle-êmme dans les cas où, si les biens avaient été acquis chez un autre «entre-

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* Loi du 28 juin 1968, Staatsblad van het Koninkrijk der Nederlanden (Journal officiel du Royaume des Pays-Bas), 329.

** Commission des Communautés Européennes.

preneur», la taxe grevant ces biens n'ouvrirait pas ou pas intégralement droit à déduction; sont assimilés aux biens produits dans l'entreprise elle-même les biens qui ont été fabriqués sur commande de l'entreprise avec des matériaux fournis par celle-ci.

2. Sont également considérée comme livraisons de biens l'établissement, le transfert, la modification et la cession de droits réels, à l'exception des hypothèques et des rentes foncières, sur des biens immeubles, à la condition que le droit ait été établi au moins pour une durée fixe de dix ans.
3. Si plus d'une personne concluent des contrats contenant l'obligation de livrer un même bien, lequel est ensuite remis directement par la première personne au dernier acquéreur, ce bien est censé être livré par chacune de ces personnes.
4. Des biens commercialisés aux enchères sont censés être livrés au et ensuite par le titulaire de l'enchère. Sous des conditions à fixer par notre Ministre, la présente disposition n'est pas applicable aux titulaires d'enchères qui ont introduit une demande à cet effet.
5. Des biens livrés et la prestation de services rendus par l'intermédiaire d'un commissionnaire ou d'un «entrepreneur» similaire, qui conclut des contrats en son propre nom, mais sur l'ordre et pour le compte d'un autre, sont censés être livrés ou rendus à et ensuite par cet «entrepreneur».
6. Le transfert de propriété à titre de caution et le retransfert ne constituent pas des livraisons.

Article 4

1. Constituent des prestations de services toutes les opérations qui ne sont pas des livraisons de biens et qui sont effectuées à titre onéreux.
2. Afin de prévenir de graves distorsions des conditions de concurrence, sont également considérées comme prestations de services les activités que notre Ministre désignera, exercées par des «entrepreneurs» à l'intérieur de leur exploitation, dans les cas où ces «entrepreneurs», s'ils faisaient exécuter ces activités par d'autres «entrepreneurs», ne pourraient pas, ou pas intégralement, déduire la taxe.
3. Le paragraphe 2 s'applique de la même façon en ce qui concerne les activités exercées par des personnes autres que des «entrepreneurs»; en cas de désignation de ces activités (en vertu du paragraphe 2), les personnes qui exercent ces activités sont considérées comme «entrepreneurs».

Article 5

Sont considérés comme biens tous les biens corporels.

Article 6

1. Le lieu où une livraison est effectuée, est:
   a) dans le cas où le bien en rapport avec la livraison est transporté, l'endroit où commence le transport;
   b) dans les autres cas, l'endroit où le bien se trouve au moment de la livraison.
2. Le lieu où une prestation de services est effectuée, est:
   a) dans le cas où la prestation de services est effectuée par un «entrepreneur» qui a son domicile ou qui est établi à l'intérieur du Royaume, l'endroit où l'«entrepreneur» a son domicile ou est établi;
   b) dans le cas où la prestation de services est effectuée par un «entrepreneur» qui n'a pas son domicile à l'intérieur du Royaume, ou qui n'y est pas établi:
   1. à partir d'un établissement stable situé à l'intérieur du Royaume, à l'endroit où l'établissement est situé;
   2. non pas à partir d'un établissement stable situé à l'intérieur du Royaume, à un

«entrepreneur» ayant son domicile ou étant établi à l'intérieur du Royaume ou à un organisme au sens de la «Algemene wet inzake rijksbelastingen (Stb. 1959, 301)» qui y est établi, l'endroit où ce dernier «entrepreneur» a son domicile, ou l'endroit où il ou cet organisme est établi;

3. dans les autres cas, l'endroit où la prestation de services est effectivement effectuée.

3. Par dérogation au paragraphe 2, la prestation de services consistant en transport de personnes ou de biens est effectuée sur les territoires où l'action du transport est effectuée en fait.

Article 7

1. Est considéré comme «entrepreneur», quiconque exploite d'une façon indépendante une entreprise.
2. Où il est question d'entreprise dans cette loi, cela englobe également l'exercice d'une profession.
3. Notre Ministre peut prescrire que des organismes de droit public qui, autrement qu'en tant qu'«entrepreneur», effectuent des prestations de services, qui par leur nature peuvent également être effectuées par d'autres «entrepreneurs» soient considérés comme «entrepreneurs» en ce qui concerne ces prestations.
4. Le bailleur visé à l'article 11, littera b), 3., est toujours considéré comme «entrepreneur».
5. Sous des conditions à fixer par notre Ministre, des organismes au sens de la «Algemene wet inzake rijksbelastingen» qui, autrement qu'en tant qu'«entrepreneur», effectuent des prestations au profit d'«entrepreneurs» qui, en vertu de l'article 15, auraient pu déduire la taxe si ces prestations avaient été effectuées à leur profit par un «entrepreneur», peuvent être considérés comme «entrepreneurs» en ce qui concerne ces prestations.

Section 2
Base et taux d'imposition

Article 8

1. La taxe est calculée sur la rémunération.
2. La rémunération est le montant total – ou, dans la mesure où la contre-prestation ne consiste pas en une somme d'argent, la valeur totale de la contrepartie –, qui est porté en compte du chef de la livraison ou de la prestation de services, la taxe sur le chiffre d'affaires non comprise. Dans les cas où il est acquitté plus pour la livraison ou la prestation de services que ce qui a été porté en compte, ce qui a été acquitté se substitue au montant porté en compte.
3. En cas de livraison d'un bien meuble en échange d'un bien de la même espèce, la valeur du bien échangé n'est pas comprise, sous des conditions à fixer par notre Ministre, dans la rémunération.
4. Pour les livraisons visées à l'article 3, paragraphe 1, littera g) et h), la rémunération est déterminée par les coûts de l'acquisition ou le prix de revient de ces biens, la taxe sur le chiffre d'affaires non comprise.
5. Pour les prestations de services visées à l'article 4, paragraphes 2 et 3, la rémunération est déterminée par le prix coûtant de ces prestations, la taxe sur le chiffre d'affaires non comprise.
6. Nous Nous réservons de déterminer par arrêté dans quelle mesure:

a) le rabais pour paiement comptant, les coûts d'emballage, de frêt et d'assurance, des avances d'impôts et autres montants à assimiler à ceux comptabilisés dans des comptes de passage ne font pas partie de la rémunération;

b) à l'égard de la propriété grevée de rente foncière, des droits d'emphytéose ou de superficie («opstal» et «beklemming»), des appartements, des droits d'affiliation et des

droits similaires, les charges qui y sont liées font partie de la rémunération;
c) dans le cas de la propriété grevée d'un droit d'emphytéose ou de superficie («opstal» et «beklemming»), la rémunération est diminuée des charges liées à ces droits.

Article 9

1. La taxe s'élève à 12%.
2. Par dérogation au paragraphe 1, la taxe s'élève à:
   a) 4% pour les livraisons de biens et les prestations de services, figurant dans le tableau I joint à la présente loi;
   b) 0% pour les livraisons de biens et les prestations de services, figurant dans le tableau II joint à la présente loi, à condition que soient remplies les conditions que Nous déterminerons par arrêté.

Article 10

Si, en cas de la livraison d'un bien pour la fabrication duquel des matières ont été confiées, le taux de taxation pour le bien est plus élevé que celui applicable aux matières, celui qui effectue la livraison doit, dans les cas que Nous déterminerons par arrêté, en même temps la taxe sur le chiffre d'affaires calculée sur la valeur des matières confiées selon un taux correspondant à la différence entre les deux taux visés ci-dessus.

Section 3
Exonérations

Article 11

Sont exonérés de la taxe, sous les conditions que Nous déterminerons par arrêté:
   a) la livraison de biens immeubles, à l'exception de la livraison par l'«entrepreneur» qui a fabriqué le bien, ainsi que des livraisons suivantes du bien pour le cas où la taxe ayant grevé la livraison précédente de ce bien a été déduite intégralement ou partiellement;
   b) la location (y compris l'affermage) de biens immeubles, à l'exception de:
   1. la location de machines et d'installations d'exploitation;
   2. la location dans le cadre de l'industrie hôtelière ou dans celui de l'exploitation de pensions, camps et lieux de vacances, à des personnes qui n'y séjournent que pendant une brève période;
   3. la location à des «entrepreneurs» qui utilisent le bien immeuble comme moyen d'exploitation, à condition que le bailleur ait introduit une demande à cet effet auprès de l'inspecteur et respecte les conditions à fixer par notre Ministre;

Par «location» de biens, il faut également entendre tout autre forme par laquelle des biens sont mis à la disposition pour l'usage, autrement que pour une durée fixe de 10 ans au moins;
   c) la fourniture de boissons et de repas par un «entrepreneur» qui exploite un établissement par lequel il ne recherche ni réalise de bénéfice, ainsi que la fourniture de soins, de médicaments et d'objets de pansement à des personnes hébergées ou hospitalisées dans un tel établissement;
   d) la prestation de services à la jeunesse et aux chefs de mouvements de jeunesse par des organisations d'oeuvre générale de jeunesse, reconnues comme telles par les pouvoirs publics;
   e) la prestation de services – à l'exception de la fourniture d'accès à des compétitions, manifestations, etc. – effectuée par des organisations qui s'assignent comme but l'exercice ou la promotion du sport, à leurs membres, à condition qu'aucun bénéfice ne soit recherché ni réalisé avec ces services;
   f) les livraisons et les prestations de services de nature sociale ou culturelle, que Nous

désignerons par arrêté, à condition que l'«entrepreneur» ne recherche ou ne réalise aucun bénéfice et qu'aucune perturbation sérieuse des conditions de concurrence ne se produise à l'égard d'«entrepreneurs» qui recherchent ou réalisent des bénéfices;

g) la prestation de services par des médecins, des psychologues, des infirmiers et des infirmières, des spécialistes en logopédie, des sages-femmes, des spécialistes en physiothérapie; les soins et livraisons effectués par des dentistes et des techniciens dentaires; le transport de malades par ambulances automobiles;

h) les prestations de services par des entreprises de pompes funèbres;

i) la livraison de monnaies ayant dans un pays quelconque la qualité de moyen de paiement légal, ainsi que la cession d'effets et autres valeurs;

j) l'octroi de crédits; le transfert, la perception et le paiement de créances en argent, y compris les opérations de virements, chèques et comptes-courants;

k) les assurances et la prestation de services par des intermédiaires auprès des assurances;

l) les jeux de hasard au sens de l'article 2, paragraphe 1, de la «Wet op de kansspelbelasting (Stb. 1961, 313)»;

m) les prestations de services effectuées dans le cadre du trafic postal, téléphonique et télégraphique, ainsi que les services, que Nous désignerons par arrêté, effectués pour les besoins de ces opérations;

n) les émissions de radio et de télévision du Royaume et des organismes y habilités, à l'exception des émissions publicitaires;

o) 1. l'enseignement dispensé par des établissements destinés à cette fin, comme il est défini par ou en vertu des lois concourant à la réglementation de l'enseignement qui – pour autant qu'il ne s'agisse pas d'enseignement scientifique – est soumis, en vertu des prescriptions légales, à la surveillance scolaire du Royaume ou à toute autre surveillance exercée par le Ministre ou au nom du Ministre chargé de l'enseignement considéré;

2. l'enseignement que Nous désignerons par arrêté et par lequel il peut être précisé que l'exonération ne s'applique qu'à l'égard des «entrepreneurs» qui ne recherchent ou ne réalisent aucun bénéfice par cet enseignement;

p) les conférences et similaires dans les cas que notre Ministre désignera, à condition que la rémunération serve principalement à couvrir les frais;

q) les prestations de services effectuées par des compositeurs, des écrivains, des journalistes et des photographes de presse;

r) la livraison de biens qui ont été utilisés dans l'entreprise par l'«entrepreneur» exclusivement ou principalement pour des opérations exonérées.

Section 4

Modalités de perception

Article 12

1. La taxe est perçue auprès de l'«entrepreneur» qui effectue la livraison ou la prestation de services.
2. Au cas où l'«entrepreneur» qui effectue la livraison ou la prestation de services n'a pas son domicile ou n'est pas établi à l'intérieur du Royaume et n'y possède pas un établissement stable et si celui à qui la livraison est effectuée ou la prestation de services est rendue est un «entrepreneur» ayant son domicile ou étant établi à l'intérieur du Royaume ou un organisme au sens de la «Algemene wet inzake rijksbelastingen» qui y est établi, la taxe sur le chiffre d'affaires est toutefois perçue auprès de celui à qui la livraison est effectuée ou la prestation de services est rendue.

Article 13

1. La taxe est due:
   a) dans les cas où, d'après l'article 35, une facture doit être délivrée au moment de sa remise, ou, si la remise de la facture n'a pas eu lieu dans le délai prescrit, au moment où la facture aurait dû être délivrée au plus tard;
   b) dans les autres cas, au moment où la livraison ou la prestation de services est effectuée.
2. Par dérogation au paragraphe 1, la taxe ou la part correspondante de la taxe est due au plus tard au moment où la rémunération est encaissée intégralement ou partiellement.

Article 14

La taxe devenue exigible au cours d'une période déterminée, doit être versée sur déclaration.

Article 15

1. La taxe visée à l'article 2 à déduire par l'«entrepreneur» est:
a) la taxe qui, au cours de la période de déclaration, a été portée en compte sur une facture établie de façon prescrite par d'autres «entrepreneurs» pour leurs livraisons qui lui sont effectuées et leurs services qui lui sont rendus;
b) la taxe devenue exigible au cours de la période de déclaration:
   1. pour l'importation de biens destinés à l'«entrepreneur», à condition que soient remplies les conditions que notre Ministre déterminera;
   2. en vertu de l'article 12, paragraphe 2, pour les livraisons effectuées et les services rendus à l'«entrepreneur»;
   3. pour l'utilisation par l'«entrepreneur» de biens pour les besoins de son entreprise;
   4. pour les prestations de services visées à l'article 4, paragraphe 2;
   et ce dans la mesure où les biens et les services sont utilisés par l'«entrepreneur» dans le cadre de son entreprise.
2. La déduction de la taxe n'a pas lieu dans la mesure où les biens et les services sont utilisés aux fins des opérations effectuées par l'«entrepreneur», visées à l'article 11.
3. Notre Ministre édictera des règles complémentaires en ce qui concerne la déduction de la taxe au cas où des biens et des services sont également utilisés à des besoins autres que ceux de l'entreprise ou aux fins des opérations visées à l'article 11. A cet égard, il peut être prescrit que le fait pour l'«entrepreneur» de se défaire des biens utilisés dans son entreprise peut être négligé.

Article 16

1. Nous nous réservons d'exclure dans certains cas, intégralement ou particllement, la déduction visée à l'article 15, paragraphe 1, afin que la taxe grève, intégralement ou partiellement, des biens et des prestations de services, utilisés pour le «standing», pour satisfaire des besoins de personnes autres que des «entrepreneurs» ou pour des opérations visées à l'article 11.
2. Après la promulgation d'un arrêté pris par Nous en vertu du paragraphe 1, un projet de loi sera transmis sans délai, aux fins d'approbation de cet arrêté, à la deuxième Chambre des Etats généraux.
3. Au cas où ce projet serait retiré ou si l'une des Chambres des Etats généraux décidait de ne pas l'adopter, Notre arrêté serait abrogé sans délai.

Article 17

Au cas où le montant de taxe déductible dépasse le montant de taxe dû au cours de la période considérée, l'excédent est remboursé à l'«entrepreneur» sur sa demande.

CHAPITRE III

Imposition des importations

Section 1
Acte imposable

Article 18

L'importation de biens est la mise en libre pratique de ces biens.

Section 2
Bàse et taux d'imposition

Article 19

1. La taxe est calculée sur la rémunération portée en compte du chef de la livraison à celui à qui les biens sont destinés.
2. La taxe est calculée sur la valeur en douane, dans les cas où les biens ne sont pas livrés ou dans le cas où la valeur en douane est supérieure à la rémunération.
3. Par valeur en douane, il faut entendre la valeur établie conformément aux dispositions pour l'application des droits de douane, avec cette restriction que s'il est question dans ces dispositions du territoire des Pays-Bas, de la Belgique et du Luxembourg, ou du territoire européen des Etats membres des Communautés européennes, il faut lire: le territoire des Pays-Bas.
4. Sont à comprendre dans la rémunération ou la valeur en douane:
   a) les impôts et taxes néerlandais, à l'exception de la taxe sur le chiffre d'affaires;
   b) les frais de transport jusqu'au lieu de destination;
   c) les coûts d'incorporation si le bien importé est livré au sens de l'article 3, paragraphe 1, littéra f).

Article 20

1. La taxe s'élève à 12%.
2. Par dérogation au paragraphe 1, la taxe s'élève à:
   a) 4% pour les importations de biens figurant dans le tableau 1, littera a) et c), joint à la présente loi;
   b) 0% pour les importations de biens figurant dans le tableau II, littera a) position 3, joint à la présente loi, à condition que soient remplies des conditions que Nous déterminerons par arrêté.

Section 3
Exonérations

Article 21

Les exonérations concernant les droits de douane définies aux articles 24, paragraphe 1, littera a), pour autant qu'il s'agisse de réparation de biens, 25, 26, 27, 28, 30, 31, 32, 33, 34 et 35 du «Tariefbesluit 1960 (Stb. 30)» s'appliquent de la même façon, avec cette restriction que, s'il est question dans ces dispositions du territoire des Pays-Bas, de la Belgique et du Luxembourg, il faut lire: le territoire des Pays-Bas.

Section 4
Modalités de perception

Article 22

La «Algemene wet inzake de douane en de accijnzen» (loi générale en matière de douane et accises) (Stb. 1961, 31) s'applique, comme si la taxe était un droit de douane.

Article 23

1. Par dérogation à l'article 22, la taxe due pour les importations de biens destinés à des «entrepreneurs» désignés et des organismes au sens de la «Algemene wet inzake rijksbelastingen», autres que des «entrepreneurs», est perçue chez ces «entrepreneurs» et organismes. La désignation a lieu, sur demande ou non, par ou au nom de

Notre Ministre, à des conditions fixées par ou au nom de Notre Ministre.

2. La taxe est due au moment où les biens sont acquis après l'importation, mais au plus tard le huitième jour après l'importation.
3. La taxe devenue exigible au cours d'une période déterminée doit être versée sur déclaration.

CHAPITRE IV

Exportation de biens

Article 24

Il est restitué, sur demande, aux organismes au sens de la «Algemene wet inzake rijksbelastingen» qui ne sont pas «entrepreneurs» et qui exportent des biens non utilisés ou qui les stockent en entrepôt de douane, la taxe sur le chiffre d'affaires acquittée pour ces produits.

CHAPITRE V

Réglementations particulières

Section 1

Diminution de la taxe (petits «entrepreneurs»)

Article 25

1. Si l'«entrepreneur» est une personne physique et si la taxe due par lui au cours d'une année civile – après application de la déduction visée à l'article 15 – n'est pas supérieure à fl 1.800, ce dernier montant est diminué de fl 1.200, mais sans que la diminution ne puisse dépasser le montant de la taxe. Si la taxe est supérieure à fl 1.800, elle est diminuée d'un montant égal à la différence entre fl 3.000 et cette taxe.
2. Notre Ministre arrête des règles en ce qui concerne l'attribution aux périodes de l'année civile de la diminution visée au paragraphe 1.
3. Notre Ministre arrête les règles suivant lesquelles un «entrepreneur» qui, en vertu du paragraphe 1, ne doit verser aucune taxe, peut être dispensé sur sa demande des obligations imposées par les ou en vertu des articles 34 et 35. L'«entrepreneur» ne peut alors en aucune manière faire état sur une facture de la taxe sur le chiffre d'affaires; la restitution sur la base de l'article 17 ne lui est pas accordée.
4. La diminution visée au paragraphe 1 n'est pas appliquée, si l'«entrepreneur» ne respecte pas au cours de l'année civile considérée, les prescriptions des articles 34, 35 ou du paragraphe 3, ou les dispositions prises en vertu de ceux-ci.

Section 2

Perception selon les recettes

Article 26

Notre Ministre peut arrêter des règles selon lesquelles certains «entrepreneurs» désignés dans cet arrêté, qui habituellement n'effectuent pas de livraisons ou ne rendent pas de services à d'autres «entrepreneurs», sont redevables de la taxe frappant les livraisons et les services au moment où la rémunération est payée. La taxe est alors calculée d'après la rémunération acquittée.

Section 3

Réglementation concernant l'agriculture

Article 27

1. Des exploitations agricoles, des éleveurs, des horticulteurs et des sylviculteurs ne sont pas considérés comme «entrepreneurs» si leurs livraisons et prestations de services consistent seulement en:
   a) livraisons de biens mentionnés au tableau

I, littera a), qu'ils ont produits ou cultivés en leur qualité précitée;
b) livraisons de moyens d'exploitation utilisés et d'autres biens utilisés dans l'entreprise;
c) autres livraisons et prestations de services, dont la rémunération totale annuelle ne dépasse pas fl 10.000.

2. Les «entrepreneurs» auxquels les personnes visées au paragraphe 1 livrent des biens visés au littera a) peuvent déduire, sur la base de l'article 15, les quatre cent quatrièmes (4/104) du montant qui leur a été porté en compte.
3. Les personnes visées au paragraphe 1 peuvent demander à l'inspecteur d'être considérées comme «entrepreneurs». En cas d'acceptation de la demande, la qualité d'«entrepreneur» s'applique jusqu'à résiliation par l'intéressé, mais au moins pour une période de 5 ans; dans ce cas, le paragraphe 2 n'est pas d'application. Une demande renouvellée ne peut être acceptée que 5 ans après la résiliation. L'inspecteur statue sur la demande par voie de décision.
4. L'article 25 n'est pas d'application aux agriculteurs, éleveurs, horticulteurs et sylviculteurs, qui effectuent des livraisons de biens mentionnés au tableau I, littera a), qu'ils ont cultivés ou élevés.
5. Notre Ministre peut édicter des règles complémentaires en ce qui concerne l'application du présent article.

Section 4
Produits de tabac

Article 28

La perception de la taxe frappant la livraison et l'importation de tabacs manufacturés visés à l'article 2, paragraphe 1 de la «wet op de accijns van tabaksfabrikaten (Stb. 1964, 208)» (Loi en matière de droit d'accise sur les tabacs manufacturés) s'effectue avec application correspondante des règles applicables à cette accise, avec cette restriction que le taux s'élève au douze cent douzième (12/112) du prix de détail entrant en considération pour le calcul de l'accise. Cette taxe n'ouvre pas droit à la déduction visée à l'article 15.

CHAPITRE VI

Dispositions particulières

Article 29

1. La restitution de la taxe ayant frappé les livraisons et les services est octroyée, sur demande, dans la mesure où la rémunération:
a) n'est pas et ne sera pas reçue;
b) est remboursée parce qu'une diminution de la rémunération a été accordée ou parce que les biens ont été repris sans avoir été utilisés.
2. L'«entrepreneur» qui a déduit la taxe conformément à l'article 15, est redevable, à titre de taxe, d'une somme égale au prorata du montant déduit au moment et pour autant qu'il faille raisonnablement admettre qu'il ne paiera pas, qu'il ne paiera pas intégralement ou qu'il a récupéré la rémunération à laquelle ce montant se rapporte. En tout cas, la taxe sera due deux ans après l'exigibilité de la rémunération, pour autant que celle-ci n'ait pas encore été payée à ce moment. La taxe devenue exigible est versée sur la base de l'article 14.
3. Nous Nous réservons de déclarer par arrêté que les premier et deuxième paragraphes du présent article ne sont pas applicables aux montants qui n'ont pas été reçus ou payés par suite d'un rabais accordé pour un paiement comptant.

Article 30

La restitution de la taxe ayant frappé les livraisons de biens est octroyée, sur demande, dans les cas que Nous désignerons par arrêté, où la taxe sur le chiffre d'affaires n'est pas perçue à l'importation de ces biens et sous des conditions à fixer à cet effet.

Article 31

En cas de transfert d'une entreprise ou d'une partie de celle-ci à celui qui poursuit l'exploitation de l'entreprise ou de la partie de celle-ci, aucune taxe n'est perçue, compte tenu des conditions à fixer par Notre Ministre, sur les livraisons et prestations de services qui constituent ce transfert.

Article 32

L'«entrepreneur» qui a son domicile ou qui est établi à l'intérieur du Royaume est réputé avoir effectué ses livraisons et prestations de services à l'intérieur du Royaume, pour autant qu'il ne prouve pas le contraire au moyen de livres comptables et de documents. Cette disposition est également applicable pour l'«entrepreneur» ayant un établissement stable situé à l'intérieur du Royaume, pour autant que les livraisons et les prestations de services soient effectuées à partir de cet établissement.

Article 33

1. La demande de restitution de la taxe est introduite avec la déclaration portant sur la période au cours de laquelle le droit à restitution est né.
2. Lorsqu'une déclaration ne doit être déposée sur la base de l'article 14, la demande de restitution s'effectue au moyen d'une déclaration dont Notre Ministre détermine le formulaire. Cette déclaration doit être déposée dans les trois mois qui suivent le terme du trimestre au cours duquel le droit à restitution est né.
3. L'inspecteur statue sur la demande de restitution par voie de décision.

Article 34

L'«entrepreneur» est tenu, tout en respectant les règles à arrêter par Notre Ministre, de tenir des annotations sur les livraisons de biens et les prestations de services, qui ont été effectuées par lui et sur les biens qui lui sont livrés et les services qui lui sont rendus, ainsi que sur les importations et les exportations des biens.

Article 35

1. L'«entrepreneur» est tenu de délivrer une facture numérotée et datée pour les livraisons et les prestations de services, effectuées à un autre «entrepreneur»; cette facture doit mentionner d'une manière claire et distincte:
   a) le jour auquel la livraison est effectué ou la prestation de services rendue;
   b) le nom et l'adresse de l'«entrepreneur» qui effectue la livraison ou rend la prestation de services;
   c) le nom et l'adresse de l'«entrepreneur» à qui la livraison est effectuée ou la prestation de services est rendue;
   d) une description claire des biens livrés ou de la prestation de services;
   e) la quantité des biens livrés;
   f) la rémunération;
   g) le montant de la taxe qui est dû pour la livraison ou la prestation de services. Il n'est pas permis de mentionner un montant autre que le montant de la taxe dû.
2. La facture doit être délivrée avant le quinzième jour qui suit le mois au cours duquel la livraison ou la prestation de services a été effectuée.
3. Dans le cas où l'«entrepreneur» a convenu que la rémunération de la prestation qu'il effectue à un autre «entrepreneur» sera acquittée préalablement soit intégralement,

soit partiellement, chaque fois une facture établie conformément au paragraphe 1 doit être délivrée pour ce paiement ou ces paiements partiels avant la date d'exigibilité.

4. L'«entrepreneur» est tenu de conserver un double de la facture délivrée.
5. Notre Ministre peut dispenser certains «entrepreneurs» ou groupes d'«entrepreneurs» des obligations qui leur sont imposées aux termes du présent article.

Article 36

Les articles 25, paragraphe 3 et 29, paragraphe 1 de la «Algemene wet inzake rijksbelastingen» s'appliquent de la même façon au cas où les obligations imposées par ou en vertu des articles 34, 35 et 39 n'ont pas été intégralement respectées.

Article 37

Celui qui, de quelque manière que ce soit, mentionne sur une facture la taxe sur le chiffre d'affaires dont il n'est pas devenu redevable autrement que sur la base du présent article, est redevable de cette taxe au moment où il a délivré la facture; il est tenu de verser cette taxe sur la base de l'article 14.

Article 38

Il est interdit à l'«entrepreneur» d'offrir à des personnes autres que des «entrepreneurs» et organismes de droit public des biens et des services à des prix indiqués de manière telle que la taxe sur le chiffre d'affaires ne serait pas comprise dans les prix.

Article 39

Nous Nous réservons, par voie d'arrêté:

a) d'édicter des règles supplémentaires dérogeant, le cas échéant, aux dispositions de la présente loi, qui sont susceptibles de faciliter la perception de la taxe;

b) d'édicter, dans le cadre de la présente loi, d'autres règles supplémentaires en vue de compléter les sujets réglementés par la présente loi.

CHAPITRE VII

Recouvrement

Article 40

Le recouvrement des arriérés s'effectue selon les dispositions applicables au recouvrement des impôts directs autres que l'impôt foncier.

Article 41

Les arriérés sont recouvrables un mois après la date figurant sur l'avertissement.

CHAPITRE VIII

Disposition pénale

Article 42

Toute personne qui ne respecte pas l'une des obligations qui lui sont imposées aux termes des articles 34, 35 ou 38, ou qui contrevient à une interdiction contenue dans lesdits articles est punie d'une amende d'un maximum de 5.000 florins.

CHAPITRE IX

Dispositions transitoires et finales

Article 43

1. Il est accordé à l'«entrepreneur» qui, au début du 1er janvier 1969, a en stock à l'intérieur du pays des biens non utilisés autrement que comme moyens d'exploitation, la restitution de la taxe sur le chiffre d'affaires – autre que celle visée à l'article 1, paragraphe 1 de la loi du 13 décembre 1967

(Stb. 614) – payée pour ces biens et pour les matières premières et produits auxiliaires, utilisés pour la fabrication de ces biens. La restitution englobe également la taxe sur le chiffre d'affaires payée pour les moyens d'exploitation et les prestations de services, utilisés dans la fabrication des biens en stock, si l'«entrepreneur» exporte au cours de l'année 1969 les biens en question non utilisés et en l'état où ils se trouvent au début du 1er janvier 1969. Le droit à restitution doit pouvoir être prouvé au moyen de livres et de documents.

2. Notre Ministre édicte en matière de restitution des règles supplémentaires qui permettent de la fixer selon des critères généraux.
3. La restitution n'est accordée que pour autant que l'«entrepreneur» ait eu le droit à déduire, sur la base de l'article 15, la taxe qui lui serait portée en compte si les biens lui étaient livrés après le 31 décembre 1968.
4. Le droit à restitution s'ouvre, chaque fois à raison d'un quart, au terme du deuxième, troisième et quatrième trimestres de l'année 1969, et du premier trimestre de l'année 1970. Toutefois, le droit à restitution en raison de l'exportation de biens, s'ouvre au terme du trimestre au cours duquel l'exportation a eu lieu.

Article 44

1. Pour les importations effectuées au cours de 1969 de biens introduits dans le Royaume avant le 1er janvier 1969, une taxe spéciale de consommation est perçue à concurrence du montant qui aurait été dû au titre de l'article 1, paragraphe 1 de la loi du 13 décembre 1967 (Stb. 614) en cas d'importation en 1968.
2. La «Algemene wet inzake de douane en de accijnzen» s'applique, comme si la taxe visée au paragraphe 1 était un droit de douane.

Article 45

1. Par dérogation en ce sens aux articles 2 et 15, il n'est accordé pour les biens destinés à être utilisés par l'«entrepreneur» comme moyens d'exploitation, qu'une déduction de:
   a) 30% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1969;
   b) 60% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1970;
   c) 90% de la taxe, dans le cas où la livraison ou l'importation a lieu en 1971.
2. Le premier paragraphe du présent article n'est pas applicable:
   a) aux navires, à l'exception des habitations flottantes et des bateaux de plaisance;
   b) aux machines et appareils destinés à la fabrication et à la transformation ou à la finition, au cours du processus de fabrication, de produits de l'industrie textile (à l'exclusion des machines et appareils destinés au filage de tissus de textiles synthétiques ou artificiels et à l'exclusion des filières), aux appareils auxiliaires de mesure, de contrôle, de réglage et autres utilisés pour ou avec ces machines et appareils, ainsi qu'aux bâtiments dans lesquels ces biens sont utilisés.
3. Dans les cas où le paragraphe 1 a été appliqué à un moyen d'exploitation et que l'«entrepreneur» livre ce moyen d'exploitation par la suite, il est octroyé à cet «entrepreneur» sous des conditions à fixer par Notre Ministre, la restitution de respectivement 70, 40 ou 10% de la taxe due pour cette livraison, selon qu'elle aura lieu en 1969, 1970 ou 1971.
4. Notre Ministre peut augmenter, à partir d'une date qu'il fixera, en général ou pour certains groupes de moyens d'exploitation, les pourcentages visés au paragraphe 1 et y adapter les pourcentages visés au paragraphe 3.
5. Après la promulgation d'un décret pris

par Notre Ministre et vertu du paragraphe 4, un projet de loi en vue de l'approbation de ce décret sera transmis aussitôt que possible, et au plus tard dans les deux mois, à la deuxième Chambre des Etats généraux. Au cas où ce projet serait retiré ou si l'un des Chambres des Etats généraux décidait de ne pas l'adopter, le décret serait abrogé sans délai.

Article 46

Au cours des années 1969, 1970 et 1971, la taxe frappant les livraisons et les importations de journaux et de périodiques (journaux non quotidiens), effectuées par abonnement, s'élève, par dérogation aux articles 9 et 20, à 0%.

Article 47

1. Nous Nous réservons, en ce qui concerne l'introduction de la présente loi, d'effectuer l'aménagement nécessaire des taux de l'article 3 de la «Wet op de accijns van tabakfabrikaten» (loi en matière des droits d'accise sur les tabacs manufacturés).
2. Cet aménagement s'effectuera pour les différentes catégories des tabacs manufacturés de telle sorte que, d'après les distinctions prévues à l'article 2, paragraphe 1 de la «Wet op de accijns van tabaksfabrikaten», le montant de l'accise dû par suite de l'introduction de la présente loi, soit approximativement égal au montant de l'accise dû avant cette introduction. En outre, Nous Nous réservons de fixer les arrondissements que Nous considérons nécessaires.
3. Les paragraphes 2 et 3 de l'article 16 s'appliquent de la même façon.

Article 48

L'article 101, paragraphe 1 de la «Registratiewet 1917 (Stb. 243)» est complété comme suit avant la subdivision c:

a) les actes par lesquels des biens immeubles corporels et incorporels sont transférés par un «entrepreneur» qui est redevable de la taxe sur le chiffre d'affaires à cause de ce transfert, à moins que les biens ne soient utilisés par cet «entrepreneur» comme moyens d'exploitation et que celui à qui le bien est transféré puisse déduire intégralement ou partiellement la taxe sur le chiffre d'affaires, sur la base de l'article 15 de la «Wet op de omzetbelasting 1968» (loi relative à la taxe sur le chiffre d'affaires 1968);

b) les actes par lesquels un parent transfère des biens immeubles corporels et incorporels à un ou plusieurs de ses enfants, de ses beaux-enfants ou de ses enfants recueillis, si ces biens font partie ou servent à une entreprise du parent, dont l'exploitation est poursuivie intégralement par l'enfant ou par les enfants.

Article 49

1. La «Wet op de accijns van alcoholhoudende stoffen (Stb. 1963, 240)», (loi concernant les accises sur les matières contenant de l'alcool) est modifiée comme suit:

A. Article 7, paragraphes 1 et 2, il faut lire:

Article 7

1. L'accise sur l'alcool, à laquelle sont soumises les matières contenant de l'alcool fabriquées à l'intérieur du pays, est calculée d'après la quantité d'alcool pur qu'elles contiennent à la température de 15° C et s'élève à fl 1.540 par hectolitre d'alcool pur.
2. L'accise sur l'alcool, à laquelle sont soumises les matières contenant de l'alcool importées, s'élève par hectolitre et par degré à fl 15,40.

B. A l'article 73, paragraphe 2, il faut lire au lieu de «fl 700»: «fl 770».

2. Les matières contenant de l'alcool soumises à l'accise sur l'alcool qui, à la date de l'entrée en vigueur de la présente loi, se trouvent dans un lieu autre qu'une distille-

rie de Ière classe ou entrepôt et qui, en vertu de l'article 43, ouvrent droit à la restitution de la taxe sur le chiffre d'affaires, sont soumises au rappel de l'accise pour un montant de:
a) fl 70 par hectolitre d'alcool pur, à une température de 15° C, pour les matières contenant de l'alcool auxquelles s'applique une exonération partielle de l'accise;
b) fl 140 par hectolitre d'alcool pur, à une température de 15° C, pour d'autres matières contenant de l'alcool.

3. Le paragraphe 2 n'est pas applicable:
a) aux matières contenant de l'alcool auxquelles s'applique une exonération intégrale de l'accise;
b) aux bonbons, tablettes, bâtons et similaires de chocolats ou autres sucreries contenant de l'alcool.
4. Toute personne qui, en vertu de l'article 43, a droit à la restitution de la taxe sur le chiffre d'affaires, est tenue de déclarer dans les deux jours qui suivent l'entrée en vigueur de la présente loi, la quantité, la catégorie, le titre et la quantité d'alcool pur des matières contenant de l'alcool soumises au rappel de l'accise, ainsi que le lieu où elles se trouvent.
5. Toute personne qui est tenue, en application du paragraphe 4, de faire une déclaration, est redevable de l'accise à laquelle sont soumises en application du paragraphe 2 les matières contenant de l'alcool.
6. Les déclarations font l'objet d'une vérification.
7. L'accise est établie par l'inspecteur et à raison du quart, acquittée chez le receveur désigné par l'inspecteur, aux dates à partir desquelles le droit à la restitution s'ouvre, conformément à l'article 43, paragraphe 4, phrase 1. Elle est calculée conformément à la déclaration et compte tenu des résultats de la vérification. Si aucune déclaration n'a été faite, l'accise est calculée à l'aide de données connues et, le cas échéant, par voie d'estimation.
8. Toute personne qui possède des matières contenant de l'alcool qui n'ont pas été déclarées, conformément au paragraphe 4, dans le délai prescrit, est punie d'une amende d'un maximum de 5.000 florins ou à 5 fois l'accise à laquelle ces biens sont soumis en application du paragraphe 2, si ce produit dépasse 5.000 florins.
9. Si le coupable comme le fait décrit au paragraphe 8 dans le dessein de se soustraire intégralement ou partiellement à l'accise ou d'encourager cette fraude, il est puni, soit d'une peine de prison de 2 ans au plus et d'une amende d'un maximum de 20.000 florins, ou à 10 fois l'accise à laquelle ces biens sont soumis en application du paragraphe 2, si ce produit dépasse 20.000 florins, soit d'une des peines susmentionnées.
10. Notre Ministre des finances est habilité à édicter des règles en exécution du présent article.

Article 50

1. Sous la dénomination de «taxe spéciale de consommation sur les voitures de tourisme» est perçue une taxe qui frappe les livraisons effectuées par le fabricant à l'intérieur du Royaume et l'importation des voitures de tourisme.
2. Par voitures de tourisme, il faut entendre les véhicules à moteur sur 3 roues ou plus qui, en raison de leur type de construction, peuvent servir au transport de personnes par la route, y compris les voitures mixtes et les «stations-cars», à l'exception des:
a) véhicules dont le nombre de places est généralement supérieur à 8, le chauffeur non compris;
b) véhicules manifestement conçus pour le transport de malades ou de prisonniers;
c) véhicules manifestement conçus pour

être utilisés par la police ou par le service d'incendie, ou à des fins militaires;
d) véhicules automobiles à 3 roues à l'usage des handicapés et des invalides.

3. Est fabricant de voitures de tourisme l'«entrepreneur» qui, à l'intérieur du Royaume, met un bien dans un état tel qu'il puisse être considéré comme une voiture de tourisme au sens du paragraphe 2.
4. La taxe spéciale de consommation est calculée sur le montant qui, au moment où un certificat est délivré attestant la communication du numéro d'immatriculation visé à l'article 9 de la «Wegenverkeerswet (Stb. 1935, 554)», est ou serait porté en compte lors de la vente de la voiture à un non-entrepreneur, diminué de la 12/112 partie de ce montant en raison de la taxe sur le chiffre d'affaires qui y est comprise.
5. Nous Nous réservons d'édicter par arrêté des règles complémentaires pour la détermination du montant visé au paragraphe 4.
6. Le taux s'élève à 15%.
7. Par dérogation au paragraphe 6, la taxe spéciale de consommation s'élève à 0% pour la livraison de voitures de tourisme à exporter par un «entrepreneur», à condition que soient remplies les conditions que Nous déterminerons par arrêté. Sur demande, il est octroyé sous la même réserve à un «entrepreneur» qui exporte des voitures de tourisme non utilisées, la restitution de la taxe spéciale de consommation payée pour ces voitures de tourisme. A l'exportation est assimilé le stockage en entrepôt de douane, si les biens sont considérés après ce stockage comme biens importés se trouvant sous régime douanier.
8. La restitution de la taxe sur le chiffre d'affaires, visée à l'article 43, est diminuée, pour les voitures de tourisme que d'autres «entrepreneurs» que les fabricants de ces voitures de tourisme ont en stock, de 13% du montant visé au paragraphe 4. Cette diminution ne s'applique pas aux voitures de tourisme déjà utilisées, livrées à l'«entrepreneur», pour autant qu'il s'agisse de la taxe sur le chiffre d'affaires payée pour cette livraison.
9. Pour l'application des articles 52 et 53, la taxe spéciale de consommation est assimilée à la taxe sur le chiffre d'affaires.
10. Les articles 3, paragraphes 1 et 6, 6, paragraphes 1, 7, 12, paragraphes 1, 13, 14, 18, 21, 22, 23, 24, 32, 33, 39, 40 et 41 trouvent autant que possible application correspondante. Pour l'application de l'article 3, la mise d'un bien dans un état tel qu'il puisse être considéré comme une voiture de tourisme au sens du paragraphe 2, équivaut à une fabrication.

Article 51

1. Il est ajouté à l'article 4, littera a) de la «Financiële-Verhoudingswet 1960 (Stb. 1961, 217)»:
14. La taxe spéciale de consommation sur les voitures de tourisme;
2. Il est ajouté à l'article 159 de la «Provinciewet (Stb. 1962, 17)», le point final étant remplacé par un point virgule:
n. la taxe spéciale de consommation sur les voitures de tourisme.

Article 52

1. Toute personne qui est tenue, en vertu d'un contrat conclu avant l'entrée en vigueur d'une modification de la législation en matière de taxe sur le chiffre d'affaires, de livrer des biens ou de rendre une prestation de services, est en droit de réclamer, chez celui à qui il doit livrer les biens ou rendre le service, la différence entre le montant exigible au titre de la taxe sur le chiffre d'affaires frappant ces biensou cette prestation de services et le montant moins élevé qui aurait pu être

exigé avant l'entrée en vigueur de la modification. Les conditions incompatibles avec ces dispositions sont nulles.

2. Le présent article s'applique à la taxe sur le chiffre d'affaires devenue exigible après application de l'article 11, littera b), 3.

Article 53

Toute personne à qui sont livrés des biens ou est rendue une prestation de services, en vertu d'un contrat conclu avant l'entrée en vigueur d'une modification de la législation en matière de taxe sur le chiffre d'affaires, est en droit de réclamer de celui qui doit livrer les biens ou rendre le service, la différence entre le montant exigible au titre de la taxe sur le chiffre d'affaires frappant ces biens ou cette prestation de services et le montant plus élevé qui aurait pu être exigé avant l'entrée en vigueur de la modification. Les conditions incompatibles avec ces dispositions sont nulles.

Article 54

1. La «Wet op de Omzetbelasting 1954 (Stb. 558)» et la loi du 29 décembre 1966 (Stb. 592) sont abrogées, sauf en ce qui concerne les livraisons et les prestations de services déjà effectuées et les infractions commises.
2. Notre Ministre est habilité à édicter des dispositions complémentaires en matière de transition.

Article 55

1. La présente loi entre en vigueur à compter du 1er janvier 1969.
2. Elle peut être citée comme «Wet op de omzetbelasting 1968».

Tableau I joint à la loi relative à la taxe sur le chiffre d'affaires 1968

a) 1. pommes de terre;
2. beurre, margarine, graisse à frire et à rôtir et autres huiles et graisses, en tant que tels propres à l'alimentation humaine;
3. pain sous toutes ses formes, biscottes et biscottes en boules;
4. chocolaterie et sucreries si normalement utilisés comme substances à tartiner;
5. oeufs;
6. fruits frais – à l'exclusion des fruits tropicaux, oranges, citrons et fruits similaires, autres que bananes;
7. céréales; farines de céréales et fleurs de ces farines;
8. légumes, frais, préparés ou conservés, et compôtes de pommes;
9. flocons d'avoine, d'orge et de grains;
10. sirop de ménage et sirop de pommes;
11. confiture, beurre d'arachides et miel naturel;
12. fromages;
13. café, chicoré-café et succédanés du café;
14. lait, y compris le lait en poudre d'une teneur maximum en matières grasses de 1,5% en poids et d'une teneur maximum en humidité de 5% en poids;
15. pain d'épices et toutes sortes d'autres pains similaires à trancher;
16. chevaux – à l'exception des chevaux de course;
17. bouillie de lait, yogourt;
18. légumineuses, mêmes impropres à l'alimentation humaine;
19. plants destinés au repiquage pour la culture de légumes;
20. animaux de basse-cour et autres volailles et gibiers, y compris les lapins domestiques, ainsi que leurs parties, frais, préparés ou conservés, manifestement destinés à l'alimentation humaine;
21. bovins, ovins, caprins et porcins;

22. lard, frais, préparé ou conservé;
23. vinaigres comestibles;
24. thé;
25. vermicelle, macaroni, spaghetti et «mie»;
26. poissons, crevettes, moules, buccins et bigorneaux, ainsi que leurs parties, frais, préparés ou conservés, à l'exception du saumon fumé, du caviar et autres sortes d'oeufs utilisés comme caviar;
27. viandes des espèces bovine, porcine, ovine, caprine et chevaline, fraîches, préparées ou conservées; saucisses et autres charcuteries faites à partir des viandes susmentionnées, ainsi que pâté de foie, non préparé à partir de foie d'oie ou de canard; abats et tripes des animaux susmentionnés;
28. eau;
29. a) sculptures et autres objets d'art plastique, conçus par des artistes, non considérés comme produit de masse et, pour autant qu'il s'agisse d'autres objets d'art plastique, exécutés de leurs propres mains;
    b) peintures encadrées ou non et dessins, exécutés par des artistes;
    c) eaux-fortes, gravures, gravures sur bois et oeuvres d'art similaires, encadrées ou non;
    d) catégories d'antiquités, non citées ci-dessus, que Notre Ministre désignera, à condition qu'elles aient plus de cent ans et pour autant qu'elles ne soient pas considérées comme produits de masse;
30. livres; quotidiens, hebdomadaires, revues et autres éditions périodiques paraissant au moins trois fois par an;
31. imprimés en écriture braille; ardoises, machines à écrire et autres articles servant à l'écriture braille;
32. gaz et électricité;
33. produits pharmaceutiques et articles de pansements que Nous déterminerons par arrêté;
34. voitures d'invalides;
35. membres artificiels, à savoir: prothèses des bras, des mains, des jambes et des pieds; bottines et articulations artificielles; yeux et oreilles artificiels; prothèses du visage, du nez et du larynx; prothèses d'implantation chirurgicale; appareils de correction auditive;
36. pétrole, gasoil, fuel-oil et autres huiles minérales, au sens des articles 4, 5, 6 et 7 de la «Wet op de accijns van minerale oliën (Stb. 1964, 207)» (loi concernant les accises sur les huiles minérales);
37. timbres-poste et monnaies anciennes;
38. houilles, lignites, briquettes, cokes et tourbe;
39. savon; à savoir:
    a) savon à usage domestique et savon doux (savon jaune, savon vert, etc.);
    b) savons, produits pour lessives contenant du savon et produits synthétiques pour lessive, dans lesquels les éléments capillaires actifs sont constitués au maximum de 40% de détergents et qui sont généralement utilisés avec un excédent d'eau pour le lavage des vêtements et des produits textiles ménagers;
    c) produits de lavage, de rinçage et de nettoyage, généralement utilisés avec un excédent d'eau pour le nettoyage de la vaisselle et des installations sanitaires;
    d) cristaux de soude;
    e) solutions acqueuses d'hypochloriter alcalins, dont la teneur en chlore actif s'élève au maximum à 16 grammes pas 100 millimètres;
    à des conditions en matière d'emballage que Notre Ministre arrêtera;
40. betteraves;
41. semences pour l'agriculture et l'horticulture dans la mesure où elles servent à la culture des produits et des grains oléagineux, figurant dans le présent tableau;

42. engrais à usage agricole;
43. bois rond;
44. pailles et fourrages;
45. lin;
46. laines, grossières et non lavées;

b) 1. la réparation de vêtements et de chaussures;
2. la location de livres et de journaux, hebdomadaires, revues et autres périodiques paraissant au moins trois fois par an;
3. les prestations de services effectuées par des exploitations d'établissements de bains et de piscines;
4. les publicités dans les journaux, hebdomadaires, revues et autres périodiques paraissant au moins trois fois par an;
5. les prestations de services effectuées par des avocats et des procureurs dans des matières relevant du droit des Personnes et de la Famille, réglementées au livre I du Code civil;
6. les prestations de services effectuées par des avocats et des procureurs dans des affaires plaidées pour des nécessiteux pour lesquelles une rémunération leur est attribuée par l'Etat;
7. la fourniture de chaleur;
8. l'intervention dans la conclusion des contrats prévoyant la livraison de biens visés au point a);
9. le transport de personnes par chemin de fer, tramway ou trollybus, ou par bac, ainsi que le transport de personnes visé à l'article 1, littera g), h) et i), de la «Wet Autovervoer Personen (Stb. 1939, 527)», le transport de personnes avec des voitures louées et visées à l'article 1, littera b) de ladite loi, ainsi que le transport de personnes par air, si le lieu de départ et le lieu de destination sont situés à l'intérieur du Royaume;
10. la fourniture de possibilités de camping dans le cadre de l'exploitation de camps et lieux de vacances, à des personnes qui n'y séjournent que pendant une brève période;
11. la fourniture de logement dans le cadre de l'industrie hôtelière ou dans celui de l'exploitation de lieux de vacances, à des personnes qui n'y séjournent que pendant une brève période;

c) au cours des années 1969, 1970 et 1971:
1. fruits tropicaux, oranges, citrons et fruits similaires (autres que des bananes), frais;
2. la fourniture d'accès à des représentations musicales et théâtrales (y compris les opéras, opérettes, danses, pantomimes, revues, cabarets et cirques).

Note générale

Ne sont pas compris dans les biens préparés mentionnés dans le présent tableau, les biens destinés à être consommés sur place.

Tableau II joint à la loi relative à la taxe sur le chiffre d'affaires 1968

a) 1. biens importés se trouvant sous le régime douanier au sens de la «Algemene wet inzake de douane en de accijnzen» (loi générale concernant la douane et les accises);
2. biens à exporter ou à stocker en entrepôt de douane, par un «entrepreneur» et considérés après le stockage comme bien importés se trouvant sous régime douanier;
Disposition particulière
Sont exclus de cette position les biens à exporter, dans les cas que Notre Ministre déterminera, comme bagages de voyageurs ou comme envois dépourvus de tout caractère commercial.
3. navires de mer, à l'exception des ba-

teaux de plaisance, et aéronefs utilisés principalement comme moyens de transport public dans le trafic international;

b) 1. les prestations de services se rapportant à des biens visés au point a), 1, 2 et 3.
2. le transport de biens importés jusqu'au lieu de destination;
3. le transport de personnes au moyen de navires de mer ou d'aéronefs, si le lieu de destination ou le lieu de départ est situé à l'extérieur du Royaume;
4. les interventions dans la conclusion de contrats, si celui à qui la prestation de services est rendue n'a pas son domicile à l'intérieur du Royaume ou n'y est pas établi et n'y possède aucun établissement stable;
5. les prestations de services dont la rémunération est portée en compte à une personne qui n'a pas son domicile à l'intérieur du Royaume ou n'y est pas établie et qui n'y possède pas un établissement stable, à condition que cette personne, ou encore une autre personne à qui la prestation de services est rendue, n'ait pas la jouissance de la prestation à l'intérieur du Royaume.

NIEDERLANDE: MEHRWERTSTEUER

TEXT DES UMSATZSTEUERGESETZES 1968

(MEHRWERTSTEUER)*

— offiziöse Übersetzung —**

Für eine ausführliche Analyse: siehe A.E. de Moor in dem Juli, August, September Heft 1969 des „Bulletin for International Fiscal Documentation", S. 321

KAPITEL I

Einleitende Bestimmungen

Artikel 1

Unter der Bezeichnung „Umsatzsteuer" wird eine Steuer erhoben:
a) auf Lieferungen von Gegenständen und auf Dienstleistungen, die Unternehmer im Rahmen ihres Unternehmens im Inland ausführen;
b) auf die Einfuhr von Gegenständen.

Artikel 2

Von der für Lieferungen von Gegenständen und Dienstleistungen geschuldeten Steuer wird die Steuer auf die an den Unternehmer ausgeführten Lieferungen und Dienstleistungen sowie die Steuer auf die Einfuhr von für ihn bestimmten Gegenständen in Abzug gebracht.

KAPITEL II

Besteuerung von Lieferungen und Dienstleistungen

Abschnitt 1
Steuertatbestand

Artikel 3

1. Lieferungen von Gegenständen sind:
a) die Übertragung des Eigentums an Gegenständen aufgrund eines Vertrages;
b) die Übergabe von Gegenständen aufgrund eines Mietkaufvertrages;
c) die Ablieferung von Gegenständen durch ihren Hersteller;
d) die Übertragung des Eigentums an Gegenständen aufgrund einer behördlichen Anordnung;
e) die Übertragung von Gegenständen, die dadurch aus dem Betriebsvermögen eines Unternehmers ausscheiden;
f) der Übergang des Eigentums an Gegenständen, deren Anbringung an einem anderen Gegenstand in einem Vertrag vorgesehen ist;
g) die Verwendung von Gegenständen für betriebsfremde Zwecke, wodurch diese Gegenstände aus dem Betriebsvermögen eines Unternehmers ausscheiden;
h) die Verwendung von im eigenen Betrieb hergestellten Gegenständen für Zwekke des Unternehmens in Fällen, in denen

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* Gesetz vom 28. Juni 1968, Staatsblad van het Koninkrijk der Nederlanden (Gesetzblatt des Königreichs der Niederlande).
** Kommission der Europäischen Gemeinschaften.

der Abzug der auf den Gegenständen lastenden Steuer, wenn die Gegenstände von einem Unternehmer bezogen worden wären, nicht oder nicht voll zulässig wäre. Im eigenen Betrieb hergestellten Gegenständen werden Gegenstände gleichgestellt, die unter Beistellung von Stoffen in Auftrag hergestellt werden.

2. Als Lieferung von Gegenständen gelten auch die Bestellung, Übertragung, Änderung und Veräußerung dinglicher Rechte – ausgenommen Hypotheken und Grundrenten – an unbeweglichen Gegenständen, sofern das Recht zumindest für einen festen Zeitraum von zehn Jahren bestellt ist.
3. Schließen mehrere Personen Verträge ab, die zur Lieferung desselben Gegenstandes verpflichten, der danach von der ersten Person unmittelbar an den letzten Abnehmer geliefert wird, so gilt der Gegenstand als von jeder dieser Personen geliefert.
4. Gegenstände, die im Wege der Versteigerung umgesetzt werden, gelten als an den Versteigerer und nachfolgend vom Versteigerer geliefert. Unter von Unserem Minister festzulegenden Bedingungen gilt diese Bestimmung nicht für Versteigerer, wenn diese einen entsprechenden Antrag gestellt haben.
5. Gegenstände und Dienstleistungen, die durch Vermittlung eines im eigenen Namen aber im Auftrage und für Rechnung eines anderen handelnden Kommissionärs oder ähnlichen Unternehmers geliefert oder erbracht werden, gelten als an diesen Unternehmer und nachfolgend von diesem Unternehmer geliefert oder erbracht.
6. Die Sicherungsübereignung und die Rückübertragung gelten nicht als Lieferung.

Artikel 4

1. Dienstleistungen sind alle gegen Entgelt erbrachte Leistungen, die nicht eine Lieferung von Gegenständen sind.
2. Zur Vermeidung ernster Wettbewerbsstörungen gelten als Dienstleistungen auch die von Unserem Minister anzugebenden Tätigkeiten von Unternehmern innerhalb ihres Betriebs, wenn diese Unternehmer für den Fall, daß sie die Tätigkeiten von anderen Unternehmern verrichten lassen würden, die Steuer nicht oder nicht ganz in Abzug bringen könnten.
3. Absatz 2 gilt auch für Tätigkeiten anderer Personen als Unternehmer. Bei der Angabe dieser Tätigkeiten werden die Personen, die diese Tätigkeiten verrichten, als Unternehmer betrachtet.

Artikel 5

Gegenstände sind alle körperlichen Sachen.

Artikel 6

1. Als Ort der Lieferung gilt:
   a) für den Fall, daß der Gegenstand im Zusammenhang mit der Lieferung befördert wird, der Ort, an dem die Beförderung beginnt;
   b) in den anderen Fällen der Ort, an dem sich der Gegenstand zum Zeitpunkt der Lieferung befindet.
2. Als Ort der Dienstleistung gilt:
   a) für den Fall, daß die Dienstleistung von einem im Inland wohnhaften oder ansässigen Unternehmer erbracht wird, der Ort, an dem der Unternehmer wohnhaft oder ansässig ist;
   b) für den Fall, daß die Dienstleistung von einem nicht im Inland wohnhaften oder ansässigen Unternehmer erbracht wird:
   1°. wenn die Dienstleistung von einer im Inland belegenen festen Betriebstätte erbracht wird, der Ort, an dem diese Betriebstätte belegen ist;
   2°. wenn die Dienstleistung nicht von einer im Inland belegenen festen Betrieb-

stätte an einem im Inland wohnhaften oder ansässigen Unternehmer oder an eine dort ansässige Körperschaft im Sinne des Allgemeinen Reichssteuergesetzes (Staatsblatt 1959, 301) erbracht wird, der Ort, an dem dieser Unternehmer oder diese Körperschaft wohnhaft oder ansässig ist;
3°. in den anderen Fällen der Ort, an dem die Dienstleistung tatsächlich erbracht wird.

3. Abweichend von Absatz 2 werden Dienstleistungen, die in der Beförderung von Personen oder Gegenständen bestehen, an den Orten erbracht, an denen die Beförderung tatsächlich geschieht.

Artikel 7

1. Unternehmer ist jede Person, die ein Unternehmen selbständig betreibt.
2. Wo in diesem Gesetz der Begriff Unternehmen verwendet wird, ist darunter auch Beruf zu verstehen.
3. Unser Minister kann anordnen, daß öffentlich-rechtliche Körperschaften, die nicht als Unternehmer Leistungen erbringen, welche ihrer Art nach auch von Unternehmern erbracht werden können, in bezug auf diese Leistungen als Unternehmer anzusehen sind.
4. Der in Artikel 11 Buchstabe b) Ziffer 3° genannte Vermieter gilt stets als Unternehmer.
5. Unter von Unserem Minister festzulegenden Bedingungen können Körperschaften im Sinne des Allgemeinen Reichssteuergesetzes, die nicht als Unternehmer Leistungen für Unternehmer erbringen, welche die Steuer aufgrund von Artikel 15 hätten abziehen können, wenn die an sie erbrachten Leistungen von einem Unternehmer ausgeführt worden wären, in bezug auf diese Leistungen als Unternehmer betrachtet werden.

Abschnitt 2
Besteuerungsmaßstab und Steuersätze

Artikel 8

1. Die Steuer wird nach dem Entgelt bemessen.
2. Entgelt ist der Gesamtbetrag oder, sofern die Gegenleistung nicht in Geld besteht, der Gesamtwert der Gegenleistung, der für die Lieferung oder Dienstleistung in Rechnung gestellt wird, die Umsatzsteuer nicht einbegriffen. Für den Fall, daß für die Lieferung oder Dienstleistung mehr gezahlt wird, als in Rechnung gestellt ist, tritt der gezahlte Betrag an die Stelle des in Rechnung gestellten Betrages.
3. Unter von Unserem Minister festzulegenden Bedingungen wird im Falle eines Umtausches eines beweglichen Gegenstandes gegen einen gleichartigen Gegenstand der Wert des umgetauschten Gegenstands nicht in das Entgelt einbegriffen.
4. Bei Lieferungen im Sinne von Artikel 3 Absatz 1 Buchstabe g) und h) bemißt sich das Entgelt nach den Anschaffungs- oder Herstellungskosten der Gegenstände, die Umsatzsteuer nicht einbegriffen.
5. Bei Dienstleistungen im Sinne von Artikel 4 Absatz 2 und 3 bemißt sich das Entgelt nach dem Kostenpreis der Dienstleistungen, die Umsatzsteuer nicht einbegriffen.
6. Wir behalten Uns vor, im Verordnungswege nähere Bestimmungen darüber zu treffen, inwieweit:
a) der Abzug für Bezahlungen, die Verpackungskosten, die Fracht- und Versicherungskosten, die Auslagen an Abgaben (einschließlich Zölle) und andere, durchlaufenden Posten gleichzustellende Beträge nicht zum Entgelt gehören;
b) bei einem mit Grundrente belasteten Eigentum, bei Erbpacht- oder Erbbaurechten, Wohnungen, Mitgliedschaftsrechten und dergleichen die damit ver-

bundenen Lasten zum Entgelt gehören;
c) bei einem mit Erbpacht- oder Erbbaurecht belasteten Eigentum das Entgelt um die mit diesen Rechten verbundenen Lasten vermindert wird.

Artikel 9

1. Die Steuer beträgt 12 vom Hundert.
2. In Abweichung von Absatz 1 beträgt die Steuer:
a) 4 vom Hundert für Lieferungen von Gegenständen und die Dienstleistungen, die in der Tabelle I zu diesem Gesetz bezeichnet sind;
b) Null für die Lieferungen von Gegenständen und die Dienstleistungen, die in der Tabelle II zu diesem Gesetz bezeichnet sind, sofern die von Uns im Verordnungswege noch festzulegenden Voraussetzungen erfüllt sind.

Artikel 10

Wird ein Gegenstand geliefert, für dessen Herstellung Stoffe zur Verfügung gestellt worden sind, so schuldet, wenn der Steuersatz für den Gegenstand höher ist als für die Stoffe, diejenige Person, die den Gegenstand liefert, in den von Uns im Verordnungswege näher zu bestimmenden Fällen auf den Wert der zur Verfügung gestellten Stoffe die Umsatzsteuer zu einem Steuersatz, der sich aus dem Unterschied zwischen den beiden obenbezeichneten Steuersätzen ergibt.

Abschnitt 3
Steuerbefreiungen

Artikel 11

Unter von Uns durch Verordnung zu bestimmenden Voraussetzungen sind von der Steuer befreit:
a) die Lieferung von unbeweglichen Gegenständen, mit Ausnahme der Lieferung durch den Unternehmer, der den Gegenstand hergestellt hat, und der folgenden Lieferungen des Gegenstandes für den Fall, daß die Steuer für die vorhergehende Lieferung dieses Gegenstandes ganz oder teilweise in Abzug gebracht wird;
b) die Vermietung (einschließlich Verpachtung) unbeweglicher Gegenstände, ausgenommen:
1°. die Vermietung von Maschinen und Betriebseinrichtungen;
2°. die Beherbergung im Rahmen des Betriebs von Hotels, Pensionen, Camping-Plätzen und Ferienheimen, von Personen, die dort nur für einen kurzen Zeitraum Unterkunft nehmen;
3°. die Vermietung an Unternehmer, die den unbeweglichen Gegenstand als Betriebsmittel benutzen, sofern der Vermieter beim Finanzamt einen entsprechenden Antrag gestellt hat und den von Unserem Minister festzulegenden Bedingungen genügt;
Als Vermietung von Gegenständen gilt auch jede andere Form der Überlassung von Gegenständen zum Gebrauch, es sei denn, sie umfaßt einen festen Zeitraum von zehn Jahren oder mehr;
c) die Gewährung von Beköstigung durch einen Unternehmer, der eine Einrichtung betreibt, mit der er keinen Gewinn zu erzielen beabsichtigt oder erzielt, sowie die Pflege oder Versorgung von in eine solche Einrichtung aufgenommenen Personen und deren Versorgung mit Arznei- und Verbandsmitteln;
d) die von staatlich anerkannten Jugendverbänden im Rahmen des allgemeinen Jugendwerks an die Jugend und Jugendleiter erbrachten Dienstleistungen;
e) die von Organisationen zur Pflege und Förderung des Sports an ihre Mitglieder erbrachten Dienstleistungen – ausgenommen die Gewährung des Zugangs zu Wettkämpfen, Vorführungen usw. –, so-

fern mit diesen Dienstleistungen keine Gewinnerzielung beabsichtigt ist oder Gewinn nicht erzielt wird;
f) die von Uns im Verordnungswege zu bestimmenden Lieferungen und Dienstleistungen sozialer oder kultureller Art, soweit der Unternehmer keinen Gewinn zu erzielen beabsichtigt oder erzielt und keine ernstlichen Wettbewerbsstörungen gegenüber Unternehmern auftreten, die Gewinnerzielung beabsichtigen oder Gewinn erzielen;
g) die Dienstleistungen von Ärzten, von Psychologen, Pflegern und Pflegerinnen, Sprach- und Stimmkundlern, Hebammen und Physiotherapeuten; die Lieferungen und Dienstleistungen von Zahnärzten und Zahntechnikern; die Beförderung von Kranken mit Krankenwagen;
h) die Dienstleistungen von Leichenbestattern;
i) die Lieferung von Geld und Geldsorten, die in irgendeinem Lande die Eigenschaft eines gesetzlichen Zahlungsmittels besitzen, sowie die Übertragung von Effekten und anderen Wertpapieren;
j) die Kreditgewährungen; die Übertragung, Vereinnahmung und Bezahlung von Geldforderungen, einschließlich Giro, Scheck- und Kontokorrentverkehr;
k) die Versicherungen und die Dienstleistungen von Versicherungsvermittlern;
l) die Glücksspiele im Sinne von Artikel 2 Absatz 1 des Gesetzes über die Steuer auf Glücksspiele (Staatsblatt 1961, 313);
m) die Dienstleistungen im Post-, Telegraphen- und Fernsprechverkehr sowie die von Uns im Verordnungswege zu bestimmenden Dienstleistungen von Beförderungsunternehmen für diesen Verkehr;
n) die Rundfunk- und Fernsehsendungen des Reichs und der dazu ermächtigten Organisationen, mit Ausnahme von Werbesendungen;
o) die Erteilung von:
1°. Unterricht durch hierzu bestimmte Einrichtungen im Sinne der Gesetze zur Regelung des Unterrichts, welcher – soweit er nicht wissenschaftlicher Unterricht ist – aufgrund gesetzlicher Vorschriften der Reichsschulaufsicht oder einer anderen Aufsicht unterliegt, die durch den für den betreffenden Unterricht zuständigen Minister oder in seinem Namen ausgeübt wird;
2°. Unterricht nach Maßgabe der von Uns im Verordnungswege zu treffenden Bestimmungen, durch die bestimmt werden kann, daß die Befreiung nur für Unternehmer gilt, die mit diesem Unterricht keinen Gewinn zu erzielen beabsichtigen oder erzielen;
p) Vorträge und gleichartige Dienstleistungen nach Maßgabe der von Unserem Minister zu treffenden Bestimmungen, soweit das Entgelt hauptsächlich zur Dekkung der Kosten dient;
q) die Dienstleistungen von Komponisten, Schriftstellern, Journalisten und Pressefotographen;
r) die Lieferung von Gegenständen, die im Betrieb des Unternehmers ausschließlich oder hauptsächlich für steuerbefreite Leistungen verwendet werden.

Abschnitt 4
Erhebungsmodalitäten

Artikel 12

1. Die Steuer wird von dem Unternehmer erhoben, der die Lieferung oder die Dienstleistung ausführt.
2. In Fällen, in denen der Unternehmer, der die Lieferung oder Dienstleistung ausführt, im Inland nicht wohnhaft oder ansässig ist und dort keine feste Betriebstätte hat, und die Person, an die die Lieferung oder Dienstleistung bewirkt wird, ein im Inland

wohnhafter oder ansässiger Unternehmer oder eine dort ansässige Körperschaft im Sinne des Allgemeinen Reichssteuergesetzes ist, wird die Steuer von derjenigen Person erhoben, an die die Lieferung oder Dienstleistung bewirkt wird.

Artikel 13

1. Die Steuerschuld entsteht:
   a) in Fällen, in denen nach Artikel 35 eine Rechnung ausgestellt werden muß, zu dem Zeitpunkt der Rechnungsausstellung oder, wenn die Rechnungsausstellung nicht fristgemäß erfolgt, zu dem Zeitpunkt, zu dem die Rechnung spätestens ausgestellt werden muß;
   b) in anderen Fällen, zu dem Zeitpunkt, zu dem die Lieferung der Dienstleistung ausgeführt wird.
2. In Abweichung von Absatz 1 entsteht die Steuerschuld oder der betreffende Teil der Steuerschuld spätestens zu dem Zeitpunkt, zu dem das Entgelt ganz oder teilweise vereinnahmt wird.

Artikel 14

Die in einem Zeitraum entstandene Steuerschuld muß anhand einer Steuererklärung entrichtet werden.

Artikel 15

1. Die in Artikel 2 bezeichnete, vom Unternehmer in Abzug zu bringende Steuer ist:
   a) die Steuer, die im Steuererklärungszeitraum von anderen Unternehmern für die von ihnen an den Unternehmer bewirkten Lieferungen oder Dienstleistungen auf einer ordnungsgemäß angestellten Rechnung ausgewiesen ist;
   b) die im Steuererklärungszeitraum entstandene Steuerschuld:
   1°. für die Einfuhr von Gegenständen, die für den Unternehmer bestimmt sind, soweit die von Unserem Minister zu bestimmenden Voraussetzungen erfüllt sind;
   2°. für die an den Unternehmer bewirkten Lieferungen und Dienstleistungen im Sinne von Artikel 12 Absatz 2;
   3°. für die Verwendung von Gegenständen durch den Unternehmer für Zwecke des Unternehmens;
   4°. für Dienstleistungen im Sinne von Artikel 4 Absatz 2.
   dies gilt jeweils insoweit, als die Gegenstände und Dienstleistungen vom Unternehmer im Rahmen seines Unternehmens verwendet werden.
2. Ein Steuerabzug ist nicht zugelassen, soweit die Gegenstände und Dienstleistungen für Leistungen des Unternehmers nach Artikel 11 verwendet werden.
3. Unser Minister erläßt nähere Bestimmungen über den Steuerabzug in den Fällen, in denen Gegenstände und Dienstleistungen vom Unternehmer auch auf andere Weise als im Rahmen seines Unternehmens oder für Leistungen im Sinne von Artikel 11 verwendet werden. Dabei kann bestimmt werden, daß die Veräußerung von Gegenständen, die der Unternehmer in seinem Unternehmen gebraucht hat, unberücksichtigt bleibt.

Artikel 16

1. Wir behalten Uns vor, den in Artikel 15 Absatz 1 genannten Abzug in bestimmten Fällen ganz oder teilweise auszuschließen, um zu vermeiden, daß Gegenstände und Dienstleistungen, die dazu verwendet werden, eine aufwendige Lebenshaltung zu führen, Bedürfnisse anderer als Unternehmer zu befriedigen oder Leistungen im Sinne von Artikel 11 zu erbringen, ganz oder teilweise von der Steuer entlastet werden.
2. Nach Herausgabe eines Erlasses aufgrund von Absatz 1 wird der Zweiten Kammer der Generalstaaten unverzüglich ein Ge-

setzesvorschlag zur Genehmigung dieses Erlasses zugeleitet.

3. Wird dieser Vorschlag zurückgezogen oder von einer Kammer der Generalstaaten abgelehnt, so wird Unser Erlaß unverzüglich aufgehoben.

Artikel 17

Übersteigt der zulässige Steuerabzugsbetrag den für den Zeitraum geschuldeten Steuerbetrag, so wird dem Unternehmer der Unterschiedsbetrag auf Antrag erstattet.

KAPITEL III

Steuererhebung bei der Einfuhr

Abschnitt 1
Steuertatbestand

Artikel 18

Einfuhr von Gegenständen ist das Verbringen von Gegenständen in den freien Verkehr.

Abschnitt 2
Besteuerungsmaßstab und Steuersätze

Artikel 19

1. Die Steuer bemißt sich nach dem Entgelt, das für die Lieferung an die Person, für die die Gegenstände bestimmt sind, in Rechnung gestellt wird.
2. Die Steuer bemißt sich nach dem Einfuhrwert, wenn die Gegenstände nicht geliefert werden oder der Einfuhrwert höher ist als das Entgelt.
3. Als Einfuhrwert gilt der nach den Einfuhrvorschriften festgestellte Wert mit der Maßgabe, daß sofern in diesen Vorschriften vom Hoheitsgebiet der Niederlande, Belgiens und Luxemburgs oder vom europäischen Gebiet der Mitgliedstaaten der Europäischen Gemeinschaften die Rede ist, statt dessen: "das Hoheitsgebiet der Niederlande" zu lesen ist.
4. Im Entgelt oder Einfuhrwert sind einbegriffen:
   a) die niederländischen Steuern und Abgaben, ausgenommen die Umsatzsteuer;
   b) die Beförderungskosten bis zum Bestimmungsort;
   c) die Kosten der Anbringung in den Fällen, in denen der eingeführte Gegenstand im Sinne von Artikel 3 Absatz 1 Buchstabe f) geliefert wird.

Artikel 20

1. Die Steuer beträgt 12 vom Hundert.
2. In Abweichung von Absatz 1 beträgt die Steuer:
   a) 4 vom Hundert für die Einfuhr von Gegenständen, die in Tabelle I Buchstabe a) und c) zu diesem Gesetz bezeichnet sind;
   b) null für die Einfuhr von Gegenständen, die in Tabelle II Buchstabe a) Ziffer 3 zu diesem Gesetz aufgeführt sind, sofern die von Uns im Verordnungswege festzulegenden Bedingungen erfüllt sind.

Abschnitt 3
Steuerbefreiungen

Artikel 21

Die in den Artikeln 24 Absatz 1 Buchstabe a) (soweit es die Herstellung von Gegenständen betrifft), 25, 26, 27, 28, 30, 31, 32, 33, 34 und 35 des Erlasses über den Zolltarif 1960 (Staatsblatt 30) bestimmten Befreiungen vom Einfuhrzoll finden entsprechende Anwendung mit der Maßgabe, daß sofern in den genannten Bestimmungen vom Hoheitsgebiet der Niederlande, Belgiens und Luxemburgs die Rede ist, statt dessen: "das Hoheitsgebiet der Niederlande" zu lesen ist.

Abschnitt 4
Erhebungsmodalitäten

Artikel 22

Das allgemeine Zoll- und Verbrauchsteuergesetz (Staatsblatt 1961, 31) findet auf die Steuer entsprechende Anwendung.

Artikel 23

1. In Abweichung von Artikel 22 wird die Steuer für die Einfuhr von Gegenständen, die für besonders bezeichnete Unternehmer und für Körperschaften im Sinne des Allgemeinen Reichssteuergesetzes, die nicht Unternehmer sind, bestimmt sind, von diesen Unternehmern und Körperschaften erhoben. Die besondere Anweisung der Unternehmer erfolgt auf deren Antrag oder von Amtswegen unter Voraussetzungen, die von Unserem Minister oder in seinem Auftrag festzulegen sind.
2. Die Steuerschuld entsteht zu dem Zeitpunkt, zu dem die Gegenstände nach der Einfuhr im Empfang genommen werden, jedoch spätestens am achten Tag nach der Einfuhr.
3. Die in einem Zeitraum entstandene Steuerschuld muß anhand einer Steuererklärung entrichtet werden.

KAPITEL IV

Ausfuhr von Gegenständen

Artikel 24

Körperschaften im Sinne des Allgemeinen Reichssteuergesetzes, die nicht Unternehmer sind und die Gegenstände in ungebrauchtem Zustand ausführen oder in ein Zollager bringen, wird auf Antrag die für diese Gegenstände entrichtete Steuer erstattet.

KAPITEL V

Sonderregelungen

Abschnitt 1
Steuerermäßigung (Kleinunternehmer)

Artikel 25

1. Ist der Unternehmer eine natürliche Person und beträgt die von ihm in einem Kalenderjahr zu zahlende Steuer nach Vornahme des in Artikel 15 genannten Abzuges nicht mehr als 1800 hfl., so wird dieser Betrag um 1200 hfl., höchstens jedoch um den Steuerbetrag ermäßigt. Beträgt die Steuer mehr als 1800 hfl., so wird sie um einen Betrag ermäßigt, der dem Betrag entspricht, um den die Steuer niedriger ist als 3.000 hfl.
2. Unser Minister erläßt Vorschriften über die Anrechnung der in Absatz 1 genannten Ermäßigung auf die Zeiträume des Kalenderjahres.
3. Unser Minister erläßt Vorschriften, nach denen ein Unternehmer, der aufgrund von Absatz 1 keine Steuer zu entrichten hat, auf seinen Antrag von den Verpflichtungen nach Artikel 34 und 35 entbunden werden kann. Der Unternehmer darf dann in keiner Weise die Umsatzsteuer auf einer Rechnung ausweisen. Eine Erstattung nach Artikel 17 wird ihm nicht gewährt.
4. Die in Absatz 1 genannte Ermäßigung findet keine Anwendung, wenn der Unternehmer in dem betreffenden Kalenderjahr die Verpflichtungen nach Artikel 34, Artikel 35 oder nach Absatz 3 nicht erfüllt.

Abschnitt 2
Besteuerung nach vereinnahmten Entgelten

Artikel 26

Unser Minister kann Vorschriften erlassen,

nach denen bei hierzu besonders angewiesenen Unternehmern, die weder Lieferungen noch Dienstleistungen an Unternehmer auszuführen pflegen, die Steuerschuld für Lieferungen und Dienstleistungen zu dem Zeitpunkt entsteht, zu dem das Entgelt vereinnahmt wird. In diesem Fall wird die Steuer nach dem vereinnahmten Entgelt berechnet.

Abschnitt 3
Regelung für die Landwirtschaft

Artikel 27

1. Landwirte, Viehhalter, Obst- und Gemüsebauern und Forstwirte gelten nicht als Unternehmer, wenn ihre Lieferungen und Dienstleistungen ausschließlich bestehen aus:
   a) Lieferungen von in der Tabelle I Buchstabe a) aufgeführten Gegenständen, die sie in Ausübung ihrer obenbezeichneten beruflichen Tätigkeit erzeugt oder gezüchtet haben;
   b) Lieferungen von gebrauchten Betriebsmitteln und anderen im Unternehmen verwendeten Gegenständen;
   c) anderen Lieferungen und Dienstleistungen, für die das Gesamtentgelt jährlich nicht mehr als 10.000 hfl. beträgt.
2. Unternehmer, an welche die in Absatz 1 Buchstabe a) genannten Gegenstände durch die in Absatz 1 genannten Personen geliefert werden, können aufgrund von Artikel 15 einen Abzug in Höhe von 4/104 des ihnen in Rechnung gestellten Betrags vornehmen.
3. Die in Absatz 1 genannten Personen können beim Finanzamt beantragen, als Unternehmer zu gelten. Wird dem Antrag stattgegeben, so gilt die Unternehmerseigenschaft bis zum Widerruf durch den Betroffenen, mindestens jedoch für einen Zeitraum von fünf Jahren. In diesem Fall findet Absatz 2 keine Anwendung. Einem neuen Antrag kann erst fünf Jahre nach dem Widerruf stattgegeben werden. Das Finanzamt entscheidet über den Antrag durch Verfügung.
4. Artikel 25 gilt nicht für Landwirte, Viehhalter, Obst- und Gemüsebauern und Forstwirte, die Lieferungen von in der Tabelle I Buchstabe a) aufgeführten Gegenständen ausführen, die von ihnen erzeugt oder gezüchtet worden sind.
5. Unser Minister kann nähere Vorschriften über die Anwendung dieses Artikels erlassen.

Abschnitt 4
Tabakwaren

Artikel 28

Die Erhebung der Steuer für die Lieferung und die Einfuhr von Tabakwaren, die in Artikel 2 Absatz 1 des Gesetzes über die Verbrauchsteuer auf Tabakwaren (Staatsblatt 1964, 208) genannt sind, geschieht durch entsprechende Anwendung der für diese Verbrauchsteuer geltenden Vorschriften, mit der Maßgabe, daß der Steuersatz zwölf Hundertzwölftel des für die Berechnung der Verbrauchsteuer maßgeblichen Kleinhandelspreises beträgt. Diese Steuer kommt nicht für einen Abzug nach Artikel 15 in Betracht.

KAPITEL VI

Sonderbestimmungen

Artikel 29

1. Auf Antrag wird die Steuer für Lieferungen und Dienstleistungen erstattet, insoweit das Entgelt:
   a) weder vereinnahmt worden ist noch vereinnahmt werden wird;
   b) zurückgezahlt wird, da eine Entgelts-

verminderung erfolgt oder die Gegenstände in ungebrauchtem Zustand zurückgenommen werden.

2. Ein Unternehmer, der den Steuerabzug nach Artikel 15 vorgenommen hat, schuldet den entsprechenden Abzugsbetrag zu dem Zeitpunkt als Steuer, zu dem mit Recht angenommen werden kann, daß er das Entgelt, auf das sich dieser Betrag bezieht, nicht oder nicht ganz zahlen wird oder zurückerhalten hat. Die Steuerschuld entsteht in jedem Falle zwei Jahre nach der Fälligkeit des Entgelts, sofern zu diesem Zeitpunkt noch nicht gezahlt ist. Die geschuldete Steuer wird nach Artikel 14 entrichtet.
3. Wir behalten Uns vor, im Verordnungswege zu bestimmen, daß Absatz 1 und 2 nicht auf Beträge anwendbar sind, die infolge eines Abzugs für Barzahlung nicht vereinnahmt beziehungsweise nicht bezahlt worden sind.

Artikel 30

Auf Antrag wird die Steuer für die Lieferung von Gegenständen in den von Uns im Verordnungswege festzulegenden Fällen erstattet, wenn bei der Einfuhr dieser Gegenstände unter noch festzulegenden Bedingungen eine Erhebung der Umsatzsteuer unterbleibt.

Artikel 31

Bei der Übertragung eines Unternehmens oder eines Unternehmensteils an eine Person, die das Unternehmen oder den betreffenden Unternehmensteil weiterführt, wird unter Beachtung der von Unserem Minister festzulegenden Bedingungen für die Lieferungen und Dienstleistungen, die die Übertragung bilden, keine Steuer erhoben.

Artikel 32

Die Lieferungen und Dienstleistungen eines Unternehmers, der im Inland wohnhaft oder ansässig ist, gelten als im Inland ausgeführt, sofern er anhand von Büchern und Unterlagen nicht das Gegenteil beweist. Diese Bestimmung wird auch auf Unternehmer angewandt, die im Inland eine feste Betriebstätte haben, sofern die Lieferungen und Dienstleistungen von dieser Betriebstätte ausgeführt werden.

Artikel 33

1. Ein Antrag auf Steuererstattung ist mit der Steuererklärung für den Zeitraum zu stellen, in dem der Erstattungsanspruch entstanden ist.
2. Besteht keine Verpflichtung zur Abgabe einer Steuererklärung aufgrund von Artikel 14, so wird die Erstattung mit einer Erklärung beantragt, dessen Formblatt Unser Minister festlegt. Diese Erklärung ist binnen drei Monaten nach Ablauf des Kalendervierteljahrs abzugeben, in dem der Erstattungsanspruch entstanden ist.
3. Das Finanzamt entscheidet über den Erstattungsantrag durch Verfügung.

Artikel 34

Der Unternehmer ist verpflichtet, unter Beachtung der von Unserem Minister zu erlassenden Vorschriften Aufzeichnungen zu machen über die von ihm und an ihn gelieferten Gegenstände und bewirkten Dienstleistungen sowie über die Ein- und Ausfuhr von Gegenständen.

Artikel 35

1. Der Unternehmer ist verpflichtet, für seine Lieferungen und Dienstleistungen an einen anderen Unternehmer eine numerierte und datierte Rechnung auszustellen, in der eindeutig und übersichtlich angegeben sind:
a) der Tag, an dem die Lieferung oder die Dienstleistung ausgeführt wird;

b) Name und Anschrift des Unternehmers, der die Lieferung oder die Dienstleistung ausführt;
c) Name und Anschrift des Unternehmers, an den geliefert oder dem die Dienstleistung erbracht wird;
d) eine deutliche Beschreibung der gelieferten Gegenstände oder der Dienstleistung;
e) die Menge der gelieferten Gegenstände;
f) das Entgelt;
g) der Steuerbetrag, der für die Lieferung oder die Dienstleistung geschuldet wird. Die Angabe eines anderen Steuerbetrages ist nicht zulässig.

2. Die Rechnung muß vor dem 15. Tag nach dem Monat ausgestellt werden, in dem die Lieferung oder die Dienstleistung ausgeführt wird.
3. Vereinbart der Unternehmer, daß das Entgelt für die von ihm einem anderen Unternehmer zu erbringende Leistung ganz oder teilweise im voraus gezahlt werden soll, so ist vor der Fälligkeit dieser Zahlungen jedes Mal eine Rechnung gemäß Absatz 1 auszustellen.
4. Der Unternehmer ist verpflichtet, ein Duplikat der ausgestellten Rechnung aufzubewahren.
5. Unser Minister kann bestimmte Unternehmer oder Gruppen von Unternehmern von den in diesem Artikel festgelegten Verpflichtungen entbinden.

Artikel 36

Artikel 25 Absatz 3 und Artikel 29 Absatz 1 des Allgemeinen Reichssteuergesetzes finden entsprechende Anwendung, wenn den Verpflichtungen nach Artikeln 34, 35 und 39 nicht in vollem Umfang nachgekommen wird.

Artikel 37

Wer auf einer Rechnung in irgendeiner Weise Umsatzsteuer ausweist, die er aus keinem anderen Grunde als aufgrund dieses Artikels schuldet, schuldet diese Steuer zu dem Zeitpunkt, zu dem er diese Rechnung ausgestellt hat. Er ist verpflichtet, diese Steuer gemäß Artikel 14 zu entrichten.

Artikel 38

Es ist dem Unternehmer untersagt, Personen, welche nicht Unternehmer oder öffentlich-rechtliche Körperschaften sind, Gegenstände und Dienstleistungen gegen Entgelt anzubieten mit dem Hinweis, daß die Umsatzsteuer nicht im Preis einbegriffen sei.

Artikel 39

Wir behalten Uns vor, im Verordnungswege:

a) nähere, erforderlichenfalls von den Vorschriften dieses Gesetzes abweichende Bestimmungen zur Erleichterung der Steuererhebung zu treffen;
b) andere ergänzende Vorschriften zu den in diesem Gesetz enthaltenen Bestimmungen zu erlassen.

KAPITEL VII

Steuereinziehung

Artikel 40

Die Einziehung der veranlagten Steuernachforderungen erfolgt aufgrund der Bestimmungen, die für die Einziehung der direkten Steuern mit Ausnahme der Grundsteuern gelten.

Artikel 41

Die veranlagten Steuernachforderungen sind einen Monat nach dem Datum des Veranlagungsbescheids fällig.

KAPITEL VIII

Strafvorschriften

Artikel 42

Wer einer ihm gemäß Artikel 34, 35 oder 38 obliegenden Verpflichtung nicht nachkommt oder ein in diesen Artikeln enthaltenes Verbot übertritt, wird mit einer Geldbuße bis zu 5.000 Gulden bestraft.

KAPITEL IX

Übergangs- und Schlußvorschriften

Artikel 43

1. Ein Unternehmer, der zu Beginn des 1. Januars 1969 Gegenstände, die nicht Gegenstände des Anlagevermögens (bedrijfsmiddelen) sind, in ungebrauchtem Zustand im Inland auf Vorrat hat, erhält eine Erstattung der nicht in Artikel 1 Absatz 1 des Gesetzes vom 13. Dezember 1967 (Stb. 614) genannten Umsatzsteuer, die er für diese Gegenstände und für die bei der Herstellung dieser Gegenstände verwendeten Roh- und Hilfsstoffe gezahlt hat. Die Erstattung umfaßt im Falle der Ausfuhr auch die gezahlte Umsatzsteuer für die Gegenstände des Anlagevermögens (bedrijfsmiddelen) und für die Dienstleistungen, die bei der Herstellung der auf Vorrat befindlichen Gegenstände verwendet worden sind, sofern der Unternehmer die Gegenstände ungebraucht und in dem Zustand, in dem sie sich zu Beginn des 1. Januars 1969 befinden, im Jahre 1969 ausführt. Der Anspruch auf Erstattung muß anhand von Büchern und Belegen nachgewiesen werden können.
2. Unser Minister trifft nähere Bestimmungen über die Erstattung; die Erstattung kann dabei nach allgemeinen Maßstäben festgesetzt werden.
3. Eine Erstattung wird nur insoweit gewährt, als der Unternehmer, wenn die Gegenstände nach dem 31. Dezember 1968 an ihn geliefert würden, die ihm dafür in Rechnung gestellte Steuer gemäß Artikel 15 in Abzug bringen könnte.
4. Der Anspruch auf Erstattung entsteht jeweils für ein Viertel am Ende des zweiten, dritten und vierten Quartals 1969 und des ersten Quartals 1970. Der Anspruch auf Erstattung für die Ausfuhr der Gegenstände entsteht jedoch am Ende des Vierteljahrs, in dem die Ausfuhr bewirkt wird.

Artikel 44

1. Auf die im Jahre 1969 erfolgende Einfuhr von Gegenständen, die vor dem 1. Januar 1969 in die Niederlande verbracht worden sind, wird eine besondere Verbrauchsteuer erhoben, deren Höhe den Betrag erreichen kann, der aufgrund von Artikel 1 Absatz 1 des Gesetzes vom 13. Dezember 1967 (Stb. 614) bei Einfuhr im Jahre 1968 zu zahlen gewesen wäre.
2. Das Allgemeine Zoll- und Verbrauchsteuergesetz wird so angewandt, als wäre die in Absatz 1 genannte Steuer ein Einfuhrzoll.

Artikel 45

1. In Abweichung von Artikel 2 und 15 ist in bezug auf Gegenstände, die dazu bestimmt sind, vom Unternehmer als Betriebsmittel verwendet zu werden, der Abzug nur zulässig in Höhe von:
   a) 30% der Steuer, falls die Lieferung oder die Einfuhr im Jahre 1969 bewirkt wird;
   b) 60% der Steuer, falls die Lieferung oder die Eintuhr im Jahre 1970 bewirkt wird;
   c) 90% der Steuer, falls die Lieferung oder die Einfuhr im Jahre 1971 bewirkt wird.
2. Absatz 1 ist nicht anwendbar in bezug auf:
   a) Schiffe, mit Ausnahme von Wohn-

schiffen und Vergnügungsschiffen oder -booten;
b) Maschinen und Geräte für die Herstellung und die während der Herstellung erfolgende Be- oder Verarbeitung von Erzeugnissen der Textilindustrie (ausgenommen Maschinen und Geräte zum Spinnen synthetischer oder künstlicher Spinnmassen und ausgenommen Spinndüsen) und die für diese Maschinen und Geräte verwendeten bzw. an ihnen angebrachten Meß-, Kontroll-, Regel- und sonstigen Hilfsinstrumente sowie die Gebäude, in denen diese Gegenstände benutzt werden.

3. In Fällen, in denen Absatz 1 auf ein Betriebsmittel angewandt worden ist und der Unternehmer dieses Betriebsmittels in der Folge liefert, wird diesem Unternehmer unter von Unserem Minister festzulegenden Bedingungen eine Erstattung in Höhe von 70, 40 bzw. 10 v.H. der für diese Lieferung zu zahlenden Steuer gewährt, je nachdem, ob die Lieferung im Jahre 1969, 1970 oder 1971 bewirkt wird.
4. Unser Minister kann die in Absatz 1 genannten Vomhundertsätze mit Beginn eines von ihm festzulegenden Zeitraumes allgemein oder für bestimmte Gruppen von Betriebsmitteln erhöhen und die in Absatz 3 genannten Vomhundertsätze entsprechend anpassen.
5. Nach Herausgabe eines Erlasses durch Unseren Minister aufgrund von Absatz 4 wird der Zweiten Kammer der Generalstaaten möglichst bald, spätestens jedoch binnen zwei Monaten ein Gesetzesvorschlag zur Genehmigung dieses Erlasses zugeleitet. Wird der Vorschlag zurückgezogen oder von einer Kammer der Generalstaaten abgelehnt, so wird der Erlaß unverzüglich aufgehoben.

Artikel 46

Während der Jahre 1969, 1970 und 1971 beträgt die Steuer für die Lieferung und die Einfuhr von Tageszeitungen und sonstigen (nicht täglich erscheinenden) Zeitungen im Abonnement in Abweichung von Artikel 9 und 20 null v.H.

Artikel 47

1. Wir behalten Uns vor, in Verbindung mit der Einführung dieses Gsetzes die erforderliche Angleichung der in Artikel 3 des Gesetzes über die Verbrauchsteuer auf Tabakerzeugnisse genannten Steuersätze vorzunehmen.
2. Die Angleichung wird für die verschiedenen Arten von Tabakerzeugnissen so vorgenommen, daß gemäß Artikel 2 Absatz 1 des Gesetzes über die Verbrauchsteuer auf Tabakerzeugnisse der Verbrauchsteuerbetrag, der in Verbindung mit der Einführung dieses Gesetzes geschuldet wird, annähernd dem vor Einführung dieses Gesetzes geschuldeten Verbrauchsteuerbetrag entspricht. Des weiteren können die von Uns für notwendig erachteten Abrundungen vorgenommen werden.
3. Artikel 16 Absatz 2 und 3 finden entsprechende Anwendung.

Artikel 48

Zu Artikel 101 Absatz 1 des Eintragungsgesetzes (Registratiewet), von 1917 (Stb. 243) wird vor Buchstabe c) folgendes hinzugefügt:

a) Rechtsvorgänge der Übertragung von unbeweglichen Sachen durch einen Unternehmer, der bezüglich dieser Übertragung umsatzsteuerpflichtig ist, es sei denn, der Unternehmer verwendet die Sachen als Betriebsmittel und derjenige, an den die Übertragung erfolgt, kann die Umsatzsteuer gemäß Artikel 15 des Umsatzsteuergesetzes 1968 ganz oder teilweise in Abzug bringen;
b) Rechtsvorgänge, durch welche ein El-

ternteil an eines oder mehrere eigene oder durch Heirat angenommene Kinder oder Pflegekinder unbewegliche Sachen überträgt, sofern diese Sachen zu einem von dem Kind oder den Kindern im ganzen fortgeführten Unternehmen des Elternteils gehören und in diesem Unternehmen verwendet werden.

Artikel 49

1. Das Gesetz über die Verbrauchsteuer auf alkoholhaltige Erzeugnisse (Stb. 1963, 240) wird wie folgt geändert:
A. Artikel 7 Absatz 1 und 2 lautet wie folgt:
Artikel 7
1. Die Alkoholsteuer, der die im Inland hergestellten alkoholhaltigen Stoffe unterliegen, wird aufgrund der darin enthaltenen Mengen reinen Alkohols bei einer Temperatur von 15 Grad Celsius bemessen und beträgt 1540 hfl. je hl. reiner Alkohol.
2. Die Alkoholsteuer, der eingeführte alkoholhaltige Stoffe unterliegen, beträgt je hl und Grad Stärke 15,40 hfl.
B. In Artikel 73 Absatz 2 wird "hfl. 700.—" ersetzt durch "hfl. 770,—".
2. Alkoholsteuerpflichtige alkoholhaltige Erzeugnisse, die sich bei Inkrafttreten dieses Gesetzes an anderen Orten als in einer Brennerei, einer Destillerei der ersten Klasse, einem Steueraufschub- oder Zollager befinden, und bei denen gemäß Artikel 43 Anspruch auf Umsatzsteuererstattung besteht, unterliegen einer Verbrauchsteuernachforderung in Höhe von:
a) hfl. 70,— je hl reiner Alkohol bei einer Temperatur von 15 Grad Celsius für alkoholhaltige Erzeugnisse für die eine beschränkte Verbrauchsteuerbefreiung gilt;
b) hfl. 140.— je hl reiner Alkohol bei einer Temperatur von 15 Grad Celsius für andere alkoholhaltige Erzeugnisse.
3. Absatz 2 gilt nicht für:
a) alkoholhaltige Erzeugnisse, die ganz von der Verbrauchsteuer befreit sind;
b) alkoholhaltige Pralinen, Tafeln, Riegel und dergleichen aus Schokolade oder anderen Süßwaren.
4. Wer gemäß Artikel 43 Anspruch auf Umsatzsteuererstattung hat, muß binnen zwei Tagen nach Inkrafttreten dieses Gesetzes eine Erklärung über Menge, Art, Stärke und Gehalt an reinem Alkohol der einer Steuernachforderung unterliegenden alkoholhaltigen Erzeugnisse abgeben und muß dabei den Ort angeben, an dem diese Erzeugnisse sich befinden.
5. Schuldner der Verbrauchsteuer, der die alkoholhaltigen Erzeugnisse gemäß Absatz 2 unterliegen, ist die Person, die gemäß Absatz 4 zur Abgabe einer Erklärung verpflichtet ist.
6. Die Erklärungen werden überprüft.
7. Die Verbrauchsteuer wird vom Finanzamt festgesetzt und jeweils zu einem Viertel von dem durch das Finanzamt beauftragten Steuereinnehmer zu dem Zeitpunkt erhoben, zu dem gemäß Artikel 43 Absatz 4 Satz 1 der Erstattungsanspruch entsteht. Die Verbrauchsteuer wird aufgrund der Erklärung und unter Berücksichtigung der Prüfungsfeststellungen berechnet. Ist keine Erklärung abgegeben worden, wird die Verbrauchsteuer autgrund der bekannten Gegebenheiten berechnet und erforderlichenfalls geschätzt.
8. Wer alkoholhaltige Erzeugnisse in Besitz hat, über die entgegen den Bestimmungen des Absatzes 4 eine Erklärung nicht fristgemäß abgegeben worden ist, wird mit einer Geldbuße bis zu 5.000 hfl. oder, wenn dies mehr ergibt, dem Fünffachen der Verbrauchsteuer, der die Gegenstände gemäß Absatz 2 unterliegen, bestraft.
9. Der Schuldige, der die in Absatz 8 bezeichnete Tat mit dem Vorsatz begeht, die Steuer ganz oder teilweise zu hinterziehen

oder die Hinterziehung zu begünstigen, wird mit Gefängnis bis zu zwei Jahren und einer Geldbuße bis zu 20.000 hfl. oder, wenn dies mehr ergibt, dem Zehnfachen der Verbrauchsteuer, der die Gegenstände gemäß Absatz 2 unterliegen, oder mit einer der beiden genannten Strafen bestraft.

10. Unser Finanzminister ist befugt, Durchführungsbestimmungen zu diesem Artikel zu erlassen.

Artikel 50

1. Unter der Bezeichnung "besondere Verbrauchsteuer auf Personenkraftwagen" wird auf die im Inland erfolgende Lieferung durch den Hersteller und auf die Einfuhr von Personenkraftwagen eine Steuer erhoben.
2. Als Personenkraftwagen gelten Motorfahrzeuge mit drei oder mehr Rädern, die nach ihrer Bauart zur Personenbeförderung auf Straßen geeignet sind, sogenannte Kombinationswagen und Stationswagen (stationcars) einbegriffen, jedoch mit Ausnahme von:
   a) Fahrzeugen, die normalerweise Platz für mehr als acht Personen haben, den Fahrer nicht einbegriffen;
   b) Fahrzeugen, die erkennbar für die Beförderung von Kranken oder Gefangenen eingerichtet sind;
   c) Fahrzeugen, die erkennbar für Zwecke der Polizei, der Feuerwehr, oder für militärische Zwecke eingerichtet sind;
   d) Motordreirädern für Invaliden oder Körperbeschädigte Personen.
3. Hersteller von Personenkraftwagen ist ein Unternehmer, der im Inland einen Gegenstand in einen solchen Zustand versetzt, daß er als Personenkraftwagen im Sinne von Absatz 2 anzusehen ist.
4. Die besondere Verbrauchsteuer wird nach dem Betrag bemessen, der beim Verkauf des Kraftfahrzeugs an einen Nichtunternehmer zu dem Zeitpunkt in Rechnung gestellt worden ist oder gestellt werden soll, zu dem im Hinblick auf die in Artikel 9 des Straßenverkehrsgesetzes (Stb. 1935, 554) genannte Kennzeichenangabe eine Bescheinigung erteilt wird, abzüglich 12/112 dieses Betrages wegen der darin einbegriffenen Umsatzsteuer.
5. Wir behalten Uns vor, im Verordnungswege nähere Bestimmungen über die Festsetzung des in Absatz 4 genannten Betrages zu treffen.
6. Der Steuersatz beträgt 15 v.H.
7. In Abweichung von Absatz 6 beträgt die besondere Verbrauchsteuer 0 v.H. für die Lieferung von Personenkraftwagen, die von einem Unternehmer ausgeführt werden, sofern die von Uns im Verordnungswege festzulegenden Bedingungen erfüllt sind. Einem Unternehmer, der Personenkraftwagen in ungebrauchtem Zustand ausführt, wird unter dem gleichen Vorbehalt auf Antrag die für diese Personenkraftwagen entrichtete besondere Verbrauchsteuer erstattet. Als Ausfuhr gilt auch die Lagerung in einem Zollager, wenn die Gegenstände nach der Lagerung als ins Inland verbrachtes Zollgut betrachtet werden.
8. Die in Artikel 43 genannte Umsatzsteuererstattung vermindert sich bei Personenkraftwagen, die andere Unternehmer als die Hersteller dieser Personenkraftwagen vorrätig halten, um 13 v.H. des in Absatz 4 genannten Betrages. Soweit es die für diese Lieferung gezahlte Umsatzsteuer betrifft, gilt diese Verminderung nicht für Personenkraftwagen, die in gebrauchtem Zustand an den Unternehmer geliefert worden sind.
9. Für die Anwendung der Artikel 52 und 53 wird die besondere Verbrauchsteuer der Umsatzsteuer gleichgestellt.

10. Soweit möglich, finden die Artikel 3 Absatz 1 und 6, 6 Absatz 1, 7, 12, Absatz 1, 13, 14, 18, 21, 22, 23, 24, 32, 33, 39, 40 und 41 entsprechende Anwendung. Für die Anwendung von Artikel 3 wird eine Tätigkeit, durch die ein Gegenstand in einen solchen Zustand versetzt wird, daß er als Personenkraftwagen im Sinne von Absatz 2 anzusehen ist, der Herstellung gleichgestellt.

Artikel 51

1. Artikel 4 Buchstabe a) des Finanzausgleichsgesetzes 1900 (Stb. 1961, 217) wird folgende Ziffer hinzugefügt:
   14. die besondere Verbrauchsteuer auf Personenkraftwagen.
2. Am Schluß von Artikel 159 des Provinzgesetzes (Stb. 1962, 17) wird der Punkt durch einen Strichpunkt ersetzt und folgender Buchstabe hinzugefügt:
   n. die besondere Verbrauchsteuer auf Personenkraftwagen.

Artikel 52

1. Wer aufgrund eines Vertrages, der vor dem Inkrafttreten einer Änderung der Umsatzsteuergesetzgebung abgeschlossen worden ist, verpflichtet ist, Gegenstände zu liefern oder Dienstleistungen zu erbringen, kann den Mehrbetrag, um den sich die Umsatzsteuer für diese Lieferungen oder Dienstleistungen gegenüber dem Steuerbetrag erhöht, der sich vor Inkrafttreten dieser Änderungen ergeben hätte, von der Person zurückfordern, an die er die Gegenstände liefern oder die Dienstleistungen erbringen muß. Bedingungen, die dem entgegenstehen, sind nichtig.
2. Dieser Artikel gilt auch für Umsatzsteuern, die nach Anwendung von Artikel 11 Buchstabe b) Ziffer 3 fällig werden.

Artikel 53

Wem aufgrund eines Vertrages, der vor dem Inkrafttreten einer Änderung der Umsatzsteuergesetzgebung abgeschlossen worden ist, Gegenstände geliefert oder Dienstleistungen erbracht werden, kann von der Person, die zur Lieferung der Gegenstände oder Erbringung der Dienstleistungen verpflichtet ist, den Mehrbetrag zurückfordern, um den sich die Umsatzsteuer für diese Lieferungen oder Dienstleistungen gegenüber dem Steuerbetrag vermindert, der sich vor Inkrafttreten dieser Änderungen ergeben hätte. Bedingungen, die dem entgegenstehen, sind nichtig.

Artikel 54

1. Das Umsatzsteuergesetz 1954 (Stb. 558) und das Gesetz vom 29. Dezember 1966 (Stb. 592) werden aufgehoben, bleiben aber in bezug auf bereits bewirkte Lieferungen und Dienstleistungen, sowie in bezug auf bereits begangene strafbare Handlungen in Kraft.
2. Unser Minister ist ermächtigt, nähere Übergangsbestimmungen zu erlassen.

Artikel 55

1. Dieses Gesetz tritt zu Beginn des 1. Januars 1969 in Kraft.
2. Es kann als "Umsatzsteuergesetz 1968" benannt werden.

Tabelle I
zum Umsatzsteuergesetz 1968

a) 1. Kartoffeln;
2. Butter, Margarine, Back- und Bratfett und andere genießbare Öle und Fette;
3. Brot in jeder Form, Zwieback jeder Art;
4. Schokoladen- und Süßwaren, soweit sie allgemein als Brotbelag verwendet werden;

5. Eier;
6. Früchte – mit Ausnahme von tropischen Früchten, Apfelsinen, Zitronen u.dgl. (andere als Bananen) – frisch;
7. Getreide; Mehl und Mehlauszüge aus Getreide;
8. Gemüse, frisch, zubereitet oder haltbar gemacht; auch Apfelmus;
9. Hafergries, Gerstengries und Getreideflocken;
10. Haushalt- und Apfelsirup;
11. Marmelade, Erdnußbutter und natürlicher Honig;
12. Käse;
13. Kaffee, Kaffeezusatz und Kaffeersatz;
14. Milch, auch in Pulverform mit einem Fettgehalt von 1,5 Gewichthundertteilen oder weniger und einem Feuchtigkeitsgehalt von 5 Gewichthundertteilen oder weniger;
15. Honigkuchen, Pfefferkuchen und alle Sorten Schnittkuchen dieser Art;
16. Pferde, ausgenommen Rennpferde;
17. Milchbrei; Joghurt;
18. Hülsenfrüchte, auch wenn zum menschlichen Genuß nicht geeignet.
19. Pflanzgut für den Gemüsebau;
20. Federvieh und anderes Geflügel und Wild einschließlich Hauskaninchen sowie Teile davon, frisch, zubereitet oder haltbar gemacht, sichtlich zum menschlichen Genuß bestimmt;
21. Rindvieh, Schafe, Ziegen und Schweine;
22. Speck, frisch, zubereitet oder haltbar gemacht;
23. Speiseessig;
24. Tee;
25. Vermicelli, Makkaroni, Spaghetti und Nudeln;
26. Fische, Krabben, Miesmuscheln, Seeschnecken, Herzmuscheln sowie Teile davon, frisch, zubereitet oder haltbar gemacht, ausgenommen geräucherter Lachs, Kaviar und andere Arten von Fischrogen, die als Kaviar verwendet werden;
27. Fleisch von Rindern, Schweinen, Schafen, Ziegen und Pferden, frisch zubereitet oder haltbar gemacht; Wurst und andere aus dem vorgenannten Fleisch bereitete Fleischwaren, sowie Leberpastete, nicht aus Gänseleber oder Entenleber; Schlachtabfall und Därme der genannten Tiere;
28. Wasser;
29. a) Bildhauerarbeiten und andere Gegenstände der bildenden Künste, die von Künstlern entworfen worden sind, keine Massenerzeugnisse darstellen und – soweit es andere Gegenstände der bildenden Künste betrifft – eigenhändig ausgeführt worden sind.
    b) Eingerahmte oder nichteingerahmte Gemälde und Zeichnungen, die von Künstlern angefertigt worden sind.
    c) Eingerahmte oder nichteingerahmte Radierungen, Stiche, Holzschnitte und ähnliche Kunstwerke.
    d) Von Unserem Minister zu bezeichnende Gruppen von Antiquitäten, sofern sie älter als 100 Jahre sind und keine Massenerzeugnisse darstellen.
30. Bücher, Zeitungen, Wochenblätter, Zeitschriften und andere, mindestens dreimal jährlich in regelmäßigen Zeitabschnitten erscheinende Ausgaben;
31. Druckwerke in Blindenschrift, Schiefertafeln für Blindenschrift, Schreibmaschinen für Blindenschrift und derartige Blindenschriftartikel;
32. Gas und Elektrizität;
33. Die von Uns im Verordnungswege zu bezeichnenden Arznei- und Verbandmittel;
34. Krankenfahrstühle;
35. Künstliche Gliedmaßen, und zwar: Prothesen für Arme, Hände, Beine und Füße; Beinschienen und künstliche Ge-

lenke, künstliche Augen und Ohren; Gesichts-, Nasen- und Kehlkopfprothesen; chirurgische Regulierungsprothesen; Hörgeräte;

36. Petroleum, Gasöl, Heizöl und andere Mineralöle im Sinne der Artikel 4, 5, 6 und 7 des Mineralölsteuergesetzes (Stb. 1964, 207);
37. Briefmarken und alte Münzen;
38. Steinkohle, Braunkohle, Briketts, Koks und Torf;
39. Seife, und zwar:
    a) Haushaltsseife und weiche Seife (gelbe Seife, grüne Seife u.dergl.);
    b) Seifen, seifenhaltige Waschmittel und synthetische Waschmittel, deren kapillar-aktive Bestandteile zu höchstens 40% aus Detergentien bestehen und die gewöhnlich überwiegend mit Wasser zum Waschen von Kleidung und Haustextilien verwendet werden;
    c) Abwasch-, Spül- und Reinigungsmittel, die gewöhnlich überwiegend mit Wasser zum reinigen von Geschirr und sanitären Anlagen verwendet werden;
    d) Kristallsoda;
    e) Wässerige Lösungen von Alkalihypochlorit, mit einem Gehalt an wirksamen Chlor von höchstens 16 g je 100 ml.
    Hierbei sind noch die von Unserem Minister festzulegenden Vorschriften über die Verpackung zu beachten.
40. Zuckerrüben;
41. Saatgut für die Landwirtschaft und den Gemüsebau, soweit es zur Erzeugung der in dieser Tabelle genannten Erzeugnisse dient, sowie Ölsaaten;
42. Düngemittel für die Landwirtschaft;
43. Rundholz;
44. Stroh und Viehfutter;
45. Flachs;
46. Wolle, weder bearbeitet noch gewaschen;

b) 1. die Reparatur von Kleidung und Schuhen;
    2. der Verleih von Büchern, Tageszeitungen, Wochenblättern, Zeitschriften und anderen, mindestens dreimal jährlich in regelmäßigen Zeitabschnitten erscheinenden Ausgaben;
    3. die Dienstleistungen von Bade- und Schwimmanstalten;
    4. Anzeigen in Tageszeitungen, Wochenblättern, Zeitschriften und anderen, mindestens dreimal jährlich in regelmäßigen Zeitabständen erscheinenden Ausgaben;
    5. die Dienstleistungen von Rechtsanwälten und Prozeßbevollmächtigten in Sachen des Personen- und Familienrechts gemäß Band I des Bürgerlichen Gesetzbuches;
    6. die Dienstleistungen von Rechtsanwälten und Prozeßbevollmächtigten in Rechtssachen mittelloser Personen, für die der Staat eine Gebühr zahlt;
    7. das Liefern von Wärme;
    8. die Vermittlung beim Abschluß von Verträgen über die Lieferung der unter a) genannten Gegenstände;
    9. die Beförderung von Personen durch die Eisenbahn, Straßenbahn oder Trolleybusse oder mit einer Fähre sowie die Beförderung von Personen gemäß Artikel 1 Buchstabe g), h) und i) des Kraftfahrzeugbeförderungsgesetzes (Stb. 1939, 527), die Beförderung von Personen mit Mietwagen gemäß Artikel 1 Buchstabe 1) des genannten Gesetzes und die Beförderung von Personen mit Luftfahrzeugen, sofern der Ausgangs- und der Bestimmungsort im Inland liegen;
    10. die Bereitstellung von Campinggelegenheiten im Rahmen des Fremdenverkehrsgewerbes an Personen, die sich dort nur für kurze Zeit aufhalten;

11. die Gewährung von Unterkunft im Rahmen des Beherbergungsgewerbes an Personen, die sich dort nur für kurze Zeit aufhalten;

c) während der Jahre 1969, 1970 und 1971:
1. tropische Früchte, Apfelsinen, Zitronen und dergleichen (ausgenommen Bananen), frisch;
2. die Gewährung des Zugangs zu Musikveranstaltungen und Theateraufführungen (Opern, Operetten, Tänze, Pantomimen, Revuen, Kabaretts und Zirkusse einbegriffen).

Allgemeine Bemerkung

In den in der Tabelle genannten zubereiteten Gegenständen sind solche nicht einbegriffen, die zum Verzehr an Ort und Stelle bestimmt sind.

Tabelle II
zum Umsatzsteuergesetz 1968

a) 1. Ins Inland verbrachtes Zollgut im Sinne des Allgemeinen Zoll- und Verbrauchsteuergesetzes;
2. Gegenstände, die von einem Unternehmer ausgeführt oder in einem Zollager gelagert werden und nach der Lagerung als ins Inland verbrachtes Zollgut gelten.
Sonderbestimmung
Zu dieser Ziffer zählen nicht Gegenstände, die in von Unserem Minister anzugebenden Fällen als Reisegepäck oder als Sendungen ohne jeglichen kommerziellen Charakter ausgeführt werden;
3. Seeschiffe, ausgenommen Vergnügungszwecken dienende Wasserfahrzeuge und Luftfahrzeuge, die hauptsächlich als öffentliche Beförderungsmittel im internationalen Verkehr zu dienen bestimmt sind.

b) 1. Dienstleistungen, die in bezug auf die unter a), 1, 2, und 3 aufgeführten Gegenständen erbracht werden;
2. die Beförderung eingeführter Gegenstände bis zum Bestimmungsort;
3. die Beförderung von Personen durch Seeschiffe oder Luftfahrzeuge, wenn der Bestimmungsort oder der Ausgangsort nicht im Inland liegt;
4. die Vermittlung beim Abschluß von Verträgen, wenn die Person, an die die Dienstleistung erbracht wird, nicht im Inland wohnhaft oder ansässig ist und dort keine feste Betriebsstätte hat;
5. Dienstleistungen, für die das Entgelt einer Person in Rechnung gestellt worden ist, die nicht im Inland wohnhaft oder ansässig ist und dort keine Betriebsstätte hat, sofern diese oder eine andere Person, an die die Dienstleistung erbracht wird, nicht im Inland in den Genuß der Leistung gelangt.

NETHERLANDS: SUBSTANTIAL HOLDING PRIVILEGE AND THE CORPORATE INCOME TAX

TEXT OF ART. 10 OF THE CORPORATE INCOME TAX DECREE 1942 AND OF ART. 12 OF THE DRAFT CORPORATE INCOME TAX LAW 1969

— unofficial translation —

For a detailed description, see the article by M.J. van Rooyen on page 337 of the July/August/September issue 1969 of the Bulletin for International Fiscal Documentation

Corporate Income Tax Decree 1942

Art. 10

1. If the taxpayer without interruption from the beginning of the year has possessed a substantial interest in a company whose capital is totally or partly divided into shares, the dividends received from this interest shall be left out of account so far they are not deducted from the book value of the relative shares. With regard to a participation in a company the seat of which is situated outside the Kingdom, (in this article "kingdom" means the European part of the kingdom of the Netherlands) the exemption shall only be applicable if such company is liable to a similar tax levied outside the Kingdom.
2. A substantial interest in the meaning of paragraph 1 shall be deemed to exist if the taxpayer directly holds at least one quarter of the nominal paid-in capital and there is no reciprocal shareholdership.
3. The provisions of paragraph 1 shall also apply in the absence of a substantial interest, if the State Secretary of Finance has declared that the relative shares constitute a participation and that the maintenance of this participation fits into the normal exercise of the business concerned, or that the acquisition of this participation served the public interest.
4. The provisions of paragraph 1 shall only apply to companies whose capital is divided totally or partly into shares, to mutual insurance companies and similar associations, as well as to enterprises of public bodies.

Draft Corporate Income Tax Law 1969

Art. 12

1. In case the taxpayer without interruption from the beginning of the year has possessed a participation either in a company whose capital is totally or partly divided into shares, or in an investment fund on joint account *(fonds voor gemene rekening)* or has been a member of a co-operative society, the benefits derived from this participation or a thereto related possession of "jouissance" shares *(winstbewijzen)* or from this membership shall be left out of account when calculating the profits.
2. The provisions of paragraph 1 shall not apply to a taxpayer who is considered to be an investment institution. Similarly, the provisions of paragraph 1 shall not apply to a participation in an investment institution and to distributions made payable by a

limited liability company or by a fund on joint account within eight months after the end of the period during which the company was considered to be an investment institution. However the provisions of paragraph 1 shall apply to distributions made payable within eight months after the beginning of such period, which do not contain profits of that period.

3. With regard to a participation in a company or a membership of a society, the seat of which is not situated within the Kingdom, (in this article "Kingdom" means the European part of the kingdom of the Netherlands) the provisions of paragraph 1 shall only apply if such a company or society is liable to a tax, which on account of one of the other parts of the Kingdom of the Netherlands or of another State is levied there on profits, whatever its form.
4. The expenses connected with the participation or the membership shall only be deducted in the case where and to the extent that, it is likely that they contribute indirectly to the production of profits, which are taxable within the Kingdom.
5. The provisions of paragraph 1 shall not apply with respect to loss arising either from a participation, or from a thereto related possession of "jouissance" shares or from a membership, which came to light after either the company or the fund in which the taxpayer participates, or the society of which the taxpayer is a member, was dissolved. Such a loss shall be fixed at an amount by which the amount, which has been sacrificed in order to acquire the participation or a thereto related possession of "jouissance" shares or to acquire the membership, exceeds the total of distributions at liquidation. Such loss shall be taken into account in the year in which the liquidation has been completed. In case either the participation or the thereto related possession of "jouissance" shares or the membership has been acquired from an entity or physical person with whom either the taxpayer or a third person has relations as defined in article 7 paragraph 2, letters b and c, then the amount sacrificed for the acquisition shall not be fixed at an amount greater than the amount which that entity or that physical person sacrificed for the acquisition.
6. A participation in a company the seat of which is situated within the Kingdom shall be deemed to exist if the tax-payer is shareholder of at least five per cent of the nominal paid-in capital of the company. A participation in an investment fund on joint account the seat of which is situated within the Kingdom, shall be deemed to exist if the taxpayer possesses at least five per cent of the number of units of the fund, which are in circulation at the beginning of the year. When determining whether this is the case the number of units other than single units shall be converted into an equivalent number of single units.
7. A participation in a company the seat of which is not situated within the Kingdom, shall be deemed to exist if the taxpayer is shareholder of at least five per cent of the nominal paid-in capital of the company, unless it is likely, that the shares are held as an investment. A possession of units of a fund on joint account the seat of which is not situated in the Kingdom, shall not be considered to constitute a participation.
8. Our Minister is permitted to declare a possession of shares or a possession of units, which does not represent a participation, to be a participation if either the maintenance of such possession fits into the normal exercise of the enterprise carried on by the taxpayer, or the acquisition of it served the public interest.

PAYS-BAS: RÉGIME FISCAL DES SOCIÉTÉS-MÈRES ET FILIALES ET L'IMPÔT SUR LES SOCIÉTÉS

TEXTE DE L'ARTICLE 10 DU DÉCRET SUR L'IMPÔT SUR LES SOCIÉTÉS 1942 ET DE L'ARTICLE 12 DU PROJET DE LA LOI RELATIVE À L'IMPÔT SUR LES SOCIÉTÉS 1969

— traduction officieuse —

Pour une description détaillée, voir l'article par M.J. van Rooyen à la page 359 du numéro juillet, août, septembre 1969 du Bulletin de Documentation Fiscale Internationale

Décret sur l'impôt sur les sociétés 1942

Art. 10

1. Lorsque le contribuable a eu, depuis le début de l'année et sans interruption, un intérêt considérable dans une société dont le capital est divisé, en total ou en partie, en actions, les dividendes produits par cet intérêt ne sont pas pris en considération pour autant qu'ils ne soient pas déduits de la valeur comptable des actions relatives. En ce qui concerne la participation dans une société dont le siège est établi en dehors du Royaume (dans le présent article «Royaume» désigne la partie européenne du Royaume des Pays-Bas), l'exonération ne s'applique que si cette société est soumise à un impôt analogue perçu en dehors du Royaume.
2. Un intérêt considérable dans le sens de l'article premier est censé exister si le contribuable est actionnaire direct pour un quart au moins du capital versé nominal et si la qualité d'actionnaire ne revêt pas un caractère réciproque.
3. La disposition de l'alinéa premier s'appliquera même en l'absence d'un intérêt considérable, lorsque le secrétaire d'Etat des Finances déclare que les actions relatives constituent une participation et que le maintien de cette participation se trouve dans le cadre de l'exercice normal des activités de l'entreprise ou que la constitution de cette participation a favorisé l'intérêt public.
4. L'alinéa premier ne trouvera application que pour les sociétés dont le capital est divisé, en total ou en partie, en actions, pour les sociétés d'assurances mutuelles et les associations y assimilées, ainsi que pour les entreprises de personnes morales de droit public.

Projet de loi relative à l'impôt sur les sociétés 1969

Art. 12

1. Dans le cas où le contribuable a eu sans interruption depuis le début de l'année une participation soit dans une société, dont le capital est en total ou en partie divisé en actions, soit dans un fonds commun de placement *(fonds voor gemene rekening)*, soit qu'il ait été membre d'une société coopérative, les bénéfices résultant soit de cette participation ou d'une possession d'actions de jouissance en rapport avec celle-ci, soit de sa qualité de membre, ne sont pas pris en considération pour la détermination du bénéfice.
2. Le premier alinéa ne s'applique pas pour

les contribuables qui sont considérés comme des institutions de placement. De même le premier alinéa ne s'applique pas pour une participation dans une institution de placement et pour les distributions effectuées par des sociétés anonymes ou des fonds communs de placement et mises à la disposition des ayants-droit endéans les huits mois après la fin de la période pour laquelle la société ou le fond a été considérée comme une institution de placement. Néanmoins le premier alinéa s'applique pour les distributions mises à la disposition des ayants-droit endéans les huits mois après le début d'une telle période et qui ne comprennent pas de bénéfice de cette période.

3. En ce qui concerne une participation dans une société ou la qualité de membre d'une association qui n'est pas établie dans le Royaume (dans le présent article «Royaume» désigne la partie européenne du Royaume des Pays-Bas), le premier alinéa ne s'applique que si cette société ou cette association a été assujettie par une des autres parties du Royaume des Pays-Bas ou par un autre Etat à un impôt qui prend la forme d'un impôt sur les bénéfices.
4. Les frais afférant à la participation ou à la qualité de membre ne sont déductibles que dans le cas et dans la mesure où il est admissible qu'ils contribuent indirectement à obtenir des bénéfices imposables dans le Royaume.
5. Le premier alinéa ne s'applique pas à l'égard d'une perte soit sur une participation, soit sur une possession d'actions de jouissance en rapport avec celle-ci, soit à l'égard d'une qualité de membre, qui se déclare manifeste après que soit la société ou le fonds, dans lequel le contribuable participe, soit l'association dont le contribuable est membre, a été dissous. Une telle perte est fixée au chiffre avec lequel le montant sacrifié, soit pour l'acquisition de la participation ou des actions de jouissance en rapport avec celle-ci, soit pour la qualité de membre, excède le total des distributions de liquidation. Cette perte est prise en considération pour l'année dans laquelle la liquidation est achevée. Dans le cas où, soit la participation ou la possession d'actions de jouissance en rapport avec celle-ci, soit la qualité de membre, a été obtenue d'une entité juridique non-physique ou d'une personne physique avec laquelle le contribuable ou un tiers a des relations comme décrit à l'article 7, second alinéa, lettres b ou c, le montant sacrifié pour l'acquisition n'est pas estimé plus haut que le montant que cette entité ou cette personne physique a sacrifié pour l'acquisition.
6. On estime qu'il existe une participation dans une société établie dans le Royaume, si le contribuable est actionnaire pour au moins cinq pour cent du capital versé nominal de la société. On estime qu'il existe une participation dans un fonds commun de placement établi dans le Royaume, si le contribuable possède au moins cinq pour cent du nombre des parts du fonds en circulation au début de l'année. Dans l'occurence, le nombre de parts autres que les parts simples est réduit à un nombre equivalent de parts simples.
7. On estime qu'il existe une participation dans une société qui n'est pas établie dans le Royaume si le contribuable est actionnaire pour au moins cinq pour cent du capital versé nominal de la société, à moins qu'il soit admissible que les actions sont tenues comme investissement. La possession de parts d'un fonds commun de placement, qui n'est pas établi dans le Royaume, n'est pas considérée comme une participation.
8. Notre ministre peut assimiler la possession

d'actions ou la possession de parts, qui ne répresente pas de participation, à une participation, si le maintien de cette possession se trouve dans le cadre de l'exercice normal de l'entreprise exploitée par le contribuable, ou si l'acquisition de cette possession a favorisé l'intérêt public.

NIEDERLANDE: SCHACHTELPRIVILEG UND KÖRPERSCHAFTSTEUER

TEXT DES PARAGRAPHEN 10 DER KÖRPERSCHAFTSTEUER-VERORDNUNG 1942 UND DES PARAGRAPHEN 12 DES ENTWURFS KÖRPERSCHAFTSTEUERGESETZ 1969

— offiziöse Übersetzung —

Für eine ausfiihrliche Analyse, siehe M.J. van Rooyen in dem Juli, August, September Heft 1969 des „Bulletin for International Fiscal Documentation", S.382

Körperschaftsteuerverordnung 1942

Artikel 10

1. Wenn der Steuerpflichtige ohne Unterbrechung seit Beginn des Jahres eine wesentliche Beteiligung an einer Kapitalgesellschaft hatte, deren Kapital ganz oder teilweise in Aktien aufgeteilt ist, bleiben die Dividenden aus dieser Beteiligung außer Ansatz, soweit sie nicht vom Buchwert der Beteiligung abgesetzt worden sind. Bei einer Beteiligung an einer Kapitalgesellschaft, deren Sitz sich außerhalb des Königreichs befindet (in diesem Artikel bedeutet „Königreich" den europäischen Teil des Königreichs der Niederlande) gilt die Befreiung nur, wenn diese Gesellschaft außerhalb des Königreichs einer der niederländischen Körperschaftsteuer vergleichbaren Steuer unterliegt.
2. Das Bestehen einer wesentlichen Beteiligung im Sinne von Absatz 1 ist dann anzunehmen, wenn der Steuerpflichtige mindestens zu einem Viertel des Nominalbetrags des eingezahlten Kapitals unmittelbar beteiligt ist und keine gegenseitige Beteiligung besteht.
3. Die Bestimmungen von Absatz 1 gelten auch bei Nichtbestehen einer wesentlichen Beteiligung, wenn der Staatssekretär der Finanzen erklärt hat, daß die betreffenden Aktien eine Beteiligung darstellen und daß diese Beteiligung im üblichen Rahmen des betreffenden Unternehmens oder Betriebs liegt, oder daß der Erwerb dieser Beteiligung im öffentlichen Interesse lag.
4. Die Bestimmungen von Absatz 1 sind nur auf Kapitalgesellschaften anwendbar, deren Kapital ganz oder teilweise in Aktien aufgeteilt ist, ferner auf Versicherungsvereine auf Gegenseitigkeit und ähnliche Vereine sowie auf Unternehmen öffentlich-rechtlicher Körperschaften.

Entwurf Körperschaftsteuergesetz 1969

Artikel 12

1. Wenn der Steuerpflichtige ohne Unterbrechung seit Beginn des Jahres an einer Kapitalgesellschaft, deren Kapital ganz oder teilweise in Aktien aufgeteilt ist, oder an einem Investmentfonds auf gemeinsame Rechnung (*fonds voor gemene rekening*) beteiligt oder Mitglied einer Genossenschaft ist, bleiben die Gewinne

aus dieser Beteiligung oder einem damit zusammenhängenden Besitz von „Genußscheinen" (*winstbewijzen*) oder aus dieser Mitgliedschaft bei der Gewinnermittlung außer Ansatz.

2. Die Bestimmungen von Absatz 1 sind nicht anwendbar auf einen Steuerpflichtigen, der selbst als Investment-Einrichtung betrachtet wird. Ebenso finden die Bestimmungen von Absatz 1 keine Anwendung auf eine Beteiligung an einer Investment-Einrichtung und auf Ausschüttungen einer GmbH oder eines Investmentfonds auf gemeinsame Rechnung während der acht Monate nach Ablauf der Periode, in der die Gesellschaft als Investment-Einrichtung betrachtet wurde. Dagegen gelten die Bestimmungen von Absatz 1 für Ausschüttungen während der acht Monate nach Beginn dieser Periode, die keine Gewinne aus diesem Zeitraum enthalten.
3. Auf eine Beteiligung an einer Kapitalgesellschaft oder auf die Mitgliedschaft in einer Genossenschaft, deren Sitze sich nicht im Königreich befinden (in diesem Artikel bedeutet „Königreich" den europäischen Teil des Königreichs der Niederlande) finden die Bestimmungen von Absatz 1 nur dann Anwendung, wenn diese Kapitalgesellschaft bzw. Genossenschaft einer Steuer unterliegt, die, gleichgültig in welcher Form, in einem der anderen Teile des Königreichs der Niederlande oder in einem anderen Staat von Gewinnen erhoben wird.
4. Die mit der Beteiligung oder der Mitgliedschaft verbundenen Aufwendungen sind nur dann und nur insoweit abzugsfähig, als die Wahrscheinlichkeit besteht, daß sie indirekt zu der Entstehung von Gewinnen beitragen, die im Königreich steuerpflichtig sind.
5. Die Bestimmungen von Absatz 1 gelten nicht für Verluste aus einer Beteiligung oder dem damit verbundenen Besitz von „Genußscheinen" oder aus der Mitgliedschaft in einer Genossenschaft, wenn diese Verluste sich erst nach Auflösung der Kapitalgesellschaft oder des Investmentfonds, an dem der Steuerpflichtige beteiligt ist, oder der Genossenschaft, in der er Mitglied ist, herausstellen. Ein solcher Verlust ist mit dem Betrag anzusetzen, um den die Kosten für den Erwerb der Beteiligung oder des damit zusammenhängenden Besitzes von „Genußscheinen" oder für den Erwerb der Mitgliedschaft den Gesamtbetrag der Ausschüttungen bei Liquidation überschreiten. Derartige Verluste sind in dem Jahr in Ansatz zu bringen, in dem die Liquidation abgeschlossen wurde. Wenn die Beteiligung oder der damit zusammenhängende Besitz von „Genußscheinen" oder die Mitgliedschaft von einer juristischen oder natürlichen Person erworben wurde, zu der der Steuerpflichtige oder eine dritte Person Beziehungen gemäß Art. 7. Abs. 2, Ziffer b und c unterhält, sind die Kosten für den Erwerb nicht höher anzusetzen als der Betrag, den diese juristische oder natürliche Person für den Erwerb aufgewendet hat.
6. Eine Beteiligung an einer im Königreich ansässigen Kapitalgesellschaft gilt dann als gegeben, wenn der Steuerpflichtige mindestens zu 5 v.H. des Nominalbetrags des eingezahlten Kapitals an der Gesellschaft beteiligt ist. Eine Beteiligung an einem im Königreich ansässigen Investmentfonds gilt dann als gegeben, wenn der Steuerpflichtige mindestens 5 v.H. der Investmentanteile des Fonds besitzt, die zu Beginn des Jahres in Umlauf sind. Um festzustellen, ob dies der Fall ist, sind die Investmentanteile, bei

denen es sich nicht um Einzelanteile handelt, in eine entsprechende Anzahl von solchen Einzelanteilen zu zerlegen.

7. Eine Beteiligung an einer im Königreich nicht ansässigen Kapitalgesellschaft ist dann als gegeben anzunehmen, wenn der Steuerpflichtige mindestens zu 5 v.H. des Nominalbetrags des eingezahlten Kapitals an der Gesellschaft beteiligt ist, wenn nicht anzunehmen ist, daß die Anteile eine Kapitalanlage darstellen. Der Besitz von Anteilen eines Investmentfonds mit Sitz außerhalb des Königreichs ist nicht als Beteiligung anzusehen.

8. Unser Minister ist ermächtigt, einen Besitz von Aktien oder Investmentanteilen, der keine Beteiligung darstellt, zur Beteiligung zu erklären, wenn dieser Besitz in den normalen Rahmen des Unternehmens oder Betriebs des Steuerpflichtigen paßt oder der Erwerb im öffentlichen Interesse lag.

NETHERLANDS: UNILATERAL REGULATION FOR THE AVOIDANCE OF DOUBLE TAXATION

TEXT OF THE ROYAL DECREE OF APRIL 7, 1965

— unofficial translation —

For a detailed description, see the article by J. Bouwsma on page 407 of the July/August/September issue 1969 of the Bulletin for International Fiscal Documentation

Art. 1

This decree shall only apply so far no other regulation for the avoidance of double taxation is applicable.

Art. 2

1. A resident taxpayer shall be exempt from income tax relating to his foreign gross income.
2. Foreign gross income is composed of the total amount accruing to the taxpayer as:
a) profits derived from a foreign enterprise i.e. an enterprise* or such part of an enterprise, which is carried on through a permanent establishment *(vaste inrichting)* situated outside the Kingdom** or a representative *(vaste vertegenwoordiger)*.
b) net income arising from:
(i) personal services so far the income is received with respect to an employment which is or has been performed outside the Kingdom;
(ii) immovable property, or parts thereof situated outside the Kingdom;
(iii) debt claims guaranteed by a mortgage on immovable property situated or established outside the Kingdom, unless such debt claims are incorporated in a negotiable instrument;
(iv) rights to a share in the profits of an enterprise the management of which is established outside the Kingdom, so far such income is not derived from securities or from employment;
(v) rights to periodical payments and public welfare benefits (including salaries from employment) at the expense of a public body, the seat of which is situated outside the Kingdom, unless such income is paid with respect to dependent personal services performed on behalf ot an enterprise;
provided that such profits and net income are liable to a tax on income which is levied on behalf of another State.
3. For the purposes of this Decree
a) a permanent establishment *(vaste inrichting)* means a durable establishment of an enterprise through which the enterprise's activities are totally or partially carried out, including the seat of the management of the enterprise, and agricultural land as well as works the execution of which lasts for more than twelve months;
b) the following are not considered to be a permanent representative *(vaste vertegenwoordiger)*:
(i) a completely independent representative;

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* The term "enterprise" comprises independent professions.

** The term "Kingdom" means the European part of the Kingdom of the Netherlands.

(ii) a representative who has no authority to conclude transactions, although he may have a stock for urgent deliveries.

c) a permanent establishment or a permanent representative is not deemed to exist where only goods are held in commission.

Art. 3

1. The exemption envisaged in Article 2 shall be applied through a reduction of income tax, not exceeding the amount of tax due in the case of the non-application of this Decree. The ratio between the amount of this reduction and the tax which would be due by virtue of the Income Tax Act 1964 (*Staatsblad* 519) shall be the same as the ratio between the foreign gross income and the gross income reduced by losses which in accordance with Chapter IV of that Act may be compensated, so far such losses consist of negative gross income.
2. If, and to the extent that, in any year subsequent to 1956, the foreign gross income—calculated taking into account the setting off by virtue of paragraph 3—is greater than the taxable income, it shall be carried forward to one or more of the six following years, beginning with the earliest year, in such a way that, for the purpose of the calculation of the reduction by virtue of paragraph 1, in the year to which the carry-over takes place, a part of the gross income, so far as this income does not consist of foreign gross income, equal to the amount to be carried forward shall be deemed to be part of the foreign gross income.
3. If in any year subsequent to 1956 the foreign gross income—calculated taking into account carrying-over by virtue of paragraph 2—is negative, this income shall be set off against positive foreign gross income of one or more of the six following years, beginning with the earliest year.

Art. 4

An employee resident of the Kingdom shall be exempt from income tax on salaries relating to the net income received by him, as is defined in Article 2, paragraph 2, letter b, 1° and 5°, which is liable to a tax on income levied on behalf of another State.

Art. 5

A resident taxpayer shall be exempt from wealth tax relating to assets belonging to a foreign enterprise carried on by him, as mentioned in Article 2, paragraph 2, letter a, and assets are mentioned in Article 2, paragraph 2, letter b, 2°, 3°, and 4°, if such assets are liable to a wealth tax or if the profits and the net income mentioned in these provisions are liable to a tax on income, which are levied on behalf of another State.

Art. 6

1. The exemption envisaged in Article 5 shall be applied through a reduction of wealth tax, not exceeding the amount of tax due in the case of the non-application of this Decree. The ratio between the amount of this reduction and the tax which would be due by virtue of the Wealth Tax Act 1964 (*Staatsblad* 520) shall be the same as the ratio between the total amount of the assets mentioned in Article 5 and the wealth.
2. For the calculation of the reduction by virtue of paragraph 1, the value of the assets mentioned in Article 5, shall be reduced by the value of the debts of a foreign enterprise as is defined in Article 2, paragraph 2, letter a, such debts including debts arising from participation in such enterprise otherwise than as a shareholder, and by the value of the debts which are

not related to such enterprise and are guaranteed by a mortgage on immovable property situated or established outside the Kingdom.

Art. 7

The provisions of this Decree concerning income tax shall apply correspondingly with respect to the company tax.

Art. 8

1. The recipient of a prize in a foreign game of chance, who is a resident of or established within the Kingdom shall be exempt from tax on games of chance relating to such prize, if the prize is liable to an identical tax, which is levied on behalf of another country of the Kingdom of the Netherlands or on behalf of another State.
2. Paragraph 1 shall not apply if the prize must be considered as a profit derived from an enterprise.

Art. 9

1. The Royal Decree of 30 August, 1962 (*Staatsblad* 244) is repealed.
2. The Decree mentioned in paragraph 1 shall continue to apply:
   as regards the income tax with respect to the civil years and fiscal periods which ended before 1 January 1965, whilst Article 2, paragraphs 2 and 3 of the said Decree shall continue to apply also with respect to such years after 1964 to which an amount originating from years before 1965 has to be carried forward by virtue of paragraph 2 of that Article, as well as with respect to such years after 1964 in which an amount originating from years before 1965 has to be set off by virtue of paragraph 3 of that Article;
   as regards the salary tax with respect to salaries liable to withholding of tax before 1 July 1965;
   as regards the wealth tax with respect to the fiscal years which ended before 1 January 1965;
   as regards the tax on lotteries with respect to prizes the claim to which arose before 1 January 1965.

Art. 10

1. This Decree shall enter into force the second day after the date of publication of the *Staatsblad* in which it is published, and it shall have retroactive effect as of 1 January 1965.
2. This Decree shall apply as regards the salary tax with respect to salaries liable to withholding of tax after 30 June 1965.
3. This Decree may be cited as: Decree for the Avoidance of Double Taxation.
   Our Minister of Finance is charged with the execution of this Decree which shall be published in the *Staatsblad*.

PAYS-BAS: RÉGLEMENTATION UNILATÉRALE EN VUE D'ÉVITER LES DOUBLES IMPOSITIONS

TEXTE DE L'ARRÊTÉ ROYAL DU 7 AVRIL 1965

— traduction officieuse —

Pour une description détaillée, voir l'article par J. Bouwsma à la page 418 du numéro juillet, août, septembre 1969 du Bulletin de Documentation Fiscale Internationale

Art. 1

Le présent arrêté n'est d'application que s'il n'a été pourvu d'aucune autre manière à la prévention des doubles impositions.

Art. 2

1. Un contribuable, résident du Royaume*, est exonéré de l'impôt sur les revenus s'appliquant au revenu brut étranger *(buitenlandse onzuivere inkomen)*.
2. Le revenu brut étranger se compose du montant total dont le contribuable bénéficie au titre:

a) de bénéfice d'une entreprise étrangère ceci étant une entreprise ou la partie d'une entreprise exploitée par l'intermédiaire d'un établissement stable *(vaste inrichting)* se trouvant en dehors du Royaume ou par l'intermédiaire d'un représentant permanent *(vaste vertegenwoordiger)* en dehors du Royaume;**

b) de revenus nets provenant:

(i) des activités pour autant qu'il s'agisse de revenus touchés au titre d'un emploi salarié exercé ou ayant été exercé en dehors du Royaume;

(ii) de biens immobiliers, ou parties de ceux-ci situés en dehors du Royaume;

(iii) de créances garanties par une hypothèque grevant un bien immobilier situé ou établi en dehors du Royaume, à moins que ces créances ne soient représentées par un titre.

(iv) de droits à des participations dans les bénéfices d'une entreprise dont la direction est établie en dehors du Royaume, pour autant que ces revenus ne proviennent pas de valeurs mobilières ou d'un emploi;

(v) de droits à des versements périodiques et de prestations de droit public (y compris le salaire en vertu d'un emploi) à la charge d'une personne morale de droit public dont le siège est situé en dehors du Royaume, à moins que ces revenus n'aient été accordés au titre d'activités dépendantes effectuées au profit d'une entreprise;

pour autant que ces bénéfices et revenus nets se trouvent soumis à un impôt sur le revenu perçu au profit d'un autre Etat.

3. Pour l'application de cet arrêté

a) établissement stable *(vaste inrichting)* désigne un établissement permanent d'une entreprise par l'intermédiaire duquel les activités de l'entreprise sont en tout ou en partie excercées, y compris le siège de direction de l'entreprise, les terrains agricoles ainsi que les travaux dont la durée dépasse douze mois;

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* Dans le présent article «Royaume» désigne la partie européenne du Royaume des Pays-Bas.
** Le terme «entreprise» comprend les professions libérales.

b) n'est pas considéré comme représentant permanent *(vaste vertegenwoordiger)*:
(i) un représentant complètement indépendant;
(ii) un représentant qui n'est pas habilité à conclure des transactions, encore qu'il tienne un stock pour des livraisons urgentes.
c) On ne considère pas qu'il y a établissement stable ou représentant permanent si des marchandises sont seulement détenues à la commission.

Art. 3

1. L'exonération visée à l'article 2 est appliquée en accordant une réduction de l'impôt sur le revenu, réduction pouvant atteindre au maximum le montant de l'impôt dû en cas de non-application du présent arrêté. Le rapport entre le montant de cette réduction et l'impôt qui serait dû en vertu de la loi sur l'impôt sur le revenu 1964 (*Staatsblad* 519) sera le même que le rapport entre le revenu étranger brut et le revenu brut réduit par les pertes à compenser en vertu du chapitre IV de cette loi, pour autant que ces pertes consistent en revenus négatifs.
2. Si, et pour autant que dans une année quelconque postérieure à 1956, le revenu étranger brut – calculé en observant la compensation sur la base du troisième alinéa – se trouve supérieur au revenu imposable, il est reporté à une année ou plusieurs années des six années suivantes, à commencer par l'année la plus ancienne, de telle façon que dans l'année à laquelle le report est effectué, pour le calcul de la reduction sur la base du premier alinéa, une partie du revenu brut, pour autant que celui-ci ne consiste pas en revenus étrangers, égale au montant à reporter est considerée faire partie du revenu étranger brut.
3. Si le revenu étranger brut dans une année quelconque postérieure à 1956 – calculé en observant le report sur la base du second alinéa – est négatif, ce revenu est compensé avec le revenu étranger brut positif d'une année ou de plusieurs années des six années suivantes, à commencer par l'année la plus ancienne.

Art. 4

Un employé, résident du Royaume, est exonéré de la taxe sur les salaires s'appliquant aux revenus nets touchés par lui, qui appartiennent aux revenus décrits à l'art. 2, second alinéa, lettre b, 1° et 5°, et sont soumis à un impôt sur le revenu perçu au profit d'un autre Etat.

Art. 5

Un contribuable, résident du Royaume, est exonéré de l'impôt sur la fortune s'appliquant aux avoirs appartenant à une entreprise étrangère exploitée par lui et visée à l'article 2, second alinéa, lettre a, et aux avoirs visés à l'article 2, second alinéa, lettre b, 2°, 3° et 4°, si lesdits avoirs sont soumis à un impôt sur la fortune ou si le bénéfice ou les revenus nets visés dans ces dispositions sont soumis à un impôt sur le revenu perçu au profit d'un autre Etat.

Art. 6

1. L'exonération visée à l'article 5 est appliquée en accordant une réduction de l'impôt sur la fortune, réduction pouvant atteindre au maximum le montant de l'impôt dû en cas de non-application du présent arrêté. Le rapport entre le montant de cette reduction et l'impôt qui serait dû en vertu de la loi sur l'impôt sur la fortune 1964 (*Staatsblad* 520) sera le même que le rapport entre le montant total des avoirs visés à l'article 5 et la fortune.
2. Pour le calcul de la réduction en vertu du premier alinéa, on déduit de la valeur des

avoirs visés à l'article 5, la valeur des dettes d'une entreprise étrangère visée à l'article 2, deuxième alinéa, lettre a, y compris les dettes résultant d'une participation dans une telle entreprise autrement qu'en qualité d'actionnaire, ainsi que la valeur des dettes ne dépendant pas d'une telle entreprise et garanties par une hypothèque grevant un bien immobilier situé ou établi en dehors du Royaume.

Art. 7

Les dispositions du présent arrêté régissant l'impôt sur le revenu trouveront une application identique en matière d'impôt sur les sociétés.

Art. 8

1. Un bénéficiaire d'un lot d'un jeu de hasard étranger, domicilié ou établi dans le Royaume est exonéré de l'impôt sur les jeux de hasard s'appliquant à ce lot, si le lot est soumis à un impôt identique perçu au profit d'un autre pays du Royaume des Pays-Bas ou d'un autre Etat.
2. Le premier alinéa ne trouvera pas application lorsque le lot doit être considéré comme un bénéfice produit par une entreprise.

Art. 9

1. L'arrêté royal du 30 août 1962 (*Staatsblad* 344) est abrogé.
2. L'arrêté visé au premier alinéa continuera à trouver application:
   en ce qui concerne l'impôt sur le revenu pour les années civiles et les périodes fiscales ayant pris fin antérieurement au 1er janvier 1965, tandis que l'article 2, deuxième et troisième alinéas, de cet arrêté continuera, en outre, à trouver application pour des années postérieures à 1964 auxquelles un montant provenant d'années antérieures à 1965 devra être reporté en vertu du deuxième alinéa de cet article, ainsi que pour des années postérieures à 1964 dans lesquelles il devra être procédé à la compensation d'un montant provenant d'années antérieures à 1965 en vertu du troisième alinéa de cet article;
   en ce qui concerne la taxe sur les salaires pour les salaires sur lesquels la taxe devra être retenue avant le 1er juillet 1965;
   en ce qui concerne l'impôt sur la fortune pour les années fiscales ayant pris fin avant le 1er janvier 1965;
   en ce qui concerne l'impôt sur les jeux de hasard pour les lots pour lesquels le droit a pris naissance antérieurement au 1er janvier 1965.

Art. 10

1. Le présent arrêté entrera en vigueur à compter du surlendemain de la date d'édition du *Staatsblad* dans lequel il sera publié, et aura effet rétroactif au 1er janvier 1965.
2. Le présent arrêté trouvera application en ce qui concerne la taxe sur les salaires, aux salaires soumis à la retenue de la taxe postérieurement au 30 juin 1965.
3. Le présent arrêté pourra être cité comme: Arrêté en vue d'éviter les doubles impositions *(Besluit voorkoming dubbele belasting)*.
   Notre Ministre des Finances est chargé de l'exécution du présent arrêté qui sera publié au *Staatsblad*.

NIEDERLANDE: EINSEITIGE REGELUNG ZUR VERMEIDUNG VON DOPPELBESTEUERUNG

TEXT DER KÖNIGLICHEN VERORDNUNG VOM 7. APRIL 1965

— offiziöse Übersetzung —

Für eine ausführliche Analyse, siehe J. Bouwsma in dem Juli, August, September Heft 1969 des „Bulletin for International Fiscal Documentation", S. 427.

Art. 1

Diese Verordnung ist nur dann anzuwenden, soweit nicht in anderer Weise die Vermeidung von Doppelbesteuerung geregelt ist.

Art. 2

1. Ein inländischer Steuerpflichtiger ist von der Einkommensteuer auf den Gesamtbetrag der ausländischen Einkünfte (buitenlandse onzuivere inkomen) befreit.
2. Der Gesamtbetrag der ausländischen Einkünfte besteht aus dem Gesamtbetrag dessen, was der Steuerpflichtige bezieht als:
   a) Gewinn aus einem ausländischen Unternehmen, d.i. ein Unternehmen oder ein Teilunternehmen, das mit Hilfe einer ausserhalb des Reiches[1] befindlichen Betriebstätte (vaste inrichting), oder eines ständigen Vertreters (vaste vertegenwoordiger) ausserhalb des Reiches, ausgeübt wird;[2]
   b) Nettoeinkünfte aus:
   (1) Arbeit, soweit sie aufgrund eines ausserhalb des Reiches bestehenden oder früheren Dienstverhältnisses bezogen werden;
   (2) Grundstücken oder Grundstücksteilen, die ausserhalb des Reiches liegen;
   (3) Forderungen, die durch Hypothek auf ein ausserhalb des Reiches gelegenes Grundstück oder eingetragenes grundstückgleiches Recht gesichert sind, mit Ausnahme von Forderungen, die in einem Wertpapier verkörpert sind;
   (4) Rechten auf Anteile am Gewinn eines Unternehmens, dessen Leitung sich ausserhalb des Reiches befindet, sofern sie nicht aus Wertpapierbesitz oder aus einem Dienstverhältnis stammen;
   (5) Rechten auf wiederkehrende Zahlungen und Leistungen öffentlichrechtlicher Art einschliesslich des Lohnes aus einem Dienstverhältnis zu Lasten einer juristischen Person des öffentlichen Rechts mit Sitz ausserhalb des Reiches, mit Ausnahme von solchen Einkünften, die wegen Leistung nichtselbständiger Arbeit für ein Unternehmen gewährt werden;
   soweit dieser Gewinn und diese Nettoeinkünfte einer zugunsten eines andern Staates erhobenen Steuer vom Einkommen unterworfen sind.
3. Für die Anwendung dieser Verordnung wird
   a) unter Betriebstätte (vaste inrichting) eine ständige Einrichtung eines Unternehmens

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1. Der europäische Teil des Königreichs der Niederlande.
2. Ein selbständig ausgeübter Beruf ist in dem Begriff „Unternehmen" mitenthalten.

verstanden, mit deren Hilfe die Tätigkeit dieses Unternehmens ganz oder teilweise ausgeübt wird, darin inbegriffen der Sitz der Leitung des Unternehmens, landwirtschaftliche Grundstücke, sowie Werke, deren Ausführung länger als 12 Monate dauert;

b) nicht als ein ständiger Vertreter (vaste vertegenwoordiger) betrachtet:

(1) ein völlig unabhängiger Vertreter;

(2) ein Vertreter, der nicht zum Abschluss von Geschäften bevollmächtigt ist, ungeachtet ob er für Eilablieferungen einen Vorrat hält;

c) eine Betriebstätte oder ein ständiger Vertreter nicht angenommen, falls nur Güter in Kommission gehalten werden.

Art. 3

1. Die in Artikel 2 bezeichnete Befreiung erfolgt durch Gewährung einer Verminderung der ohne Anwendung dieser Verordnung geschuldeten Einkommensteuer bis maximal in voller Höhe derselben.

   Diese Verminderung ist gleich dem Betrag, der zu der Steuer, die gemäss Einkommensteuergesetz 1964 (Staatsblad 519) geschuldet würde, im gleichen Verhältnis steht wie der Gesamtbetrag der ausländischen Einkünfte zu dem um die nach Kapitel IV dieses Gesetzes abzugsfähigen Verluste anderer Jahre, soweit sie aus negativen Einkünften bestehen, verminderten Gesamtbetrag der Einkünfte (onzuivere inkomen).

2. Wenn und soweit in irgendeinem Jahre nach 1956 der Gesamtbetrag der ausländischen Einkünfte – berechnet unter Berücksichtigung der Verrechnung gemäss Absatz 3 – grösser ist als die Bemessungsgrundlage (belastbare inkomen), wird dieser auf ein oder mehrere Jahre der folgenden sechs Jahre, beginnend mit dem ältesten davon, überbracht, in der Weise, dass in dem Jahre, auf das überbracht wird, für die Ermittlung der Verminderung gemäss dem ersten Absatz des Gesamtbetrags der Einkünfte, sofern dieser nicht aus ausländischen Einkünften besteht, ein Betrag in Höhe des zu überbringenden Betrages als zum Gesamtbetrag der ausländischen Einkünfte gehörend rechnet.

3. Wenn der Gesamtbetrag der ausländischen Einkünfte in irgendeinem Jahre nach 1956 – berechnet unter Berücksichtigung der Überbringung gemäss Absatz 2 – negativ ist, wird dieser Betrag mit dem positiven Gesamtbetrag der ausländischen Einkünfte eines oder mehrerer der folgenden sechs Jahre, beginnend mit dem ältesten davon, verrechnet.

Art. 4

Ein im Reich ansässiger Arbeitnehmer ist von der Lohnsteuer auf die ihm gewährten, in Artikel 2 Absatz 2, Buchstabe b (1) und (5) bezeichneten Nettoeinkünfte, die einer zugunsten eines andern Staates erhobenen Steuer vom Einkommen unterworfen sind, befreit.

Art. 5

1. Ein inländischer Steuerpflichtiger ist befreit von der Vermögensteuer, die sich auf die Aktiva, die zu einem von ihm betriebenen ausländischen Unternehmen im Sinne von Artikel 2 Absatz 2 Buchstabe a gehören, und auf die Aktiva im Sinne von Artikel 2 Absatz 2 Buchstabe b (2), (3) und (4) bezieht, wenn die vorerwähnten Aktiva einer Vermögensteuer oder der in diesen Bestimmungen bezeichnete Gewinn und die darin bezeichnete Nettoeinkünfte einer Steuer vom Einkommen unterworfen sind, die zugunsten eines andern Staates erhoben werden.

Art. 6

1. Die in Artikel 5 bezeichnete Befreiung erfolgt durch Gewährung einer Verminderung der ohne Anwendung dieser Verordnung geschuldeten Vermögensteuer bis maximal in voller Höhe derselben. Diese Verminderung ist gleich dem Betrag, der zu der Steuer, die gemäss Vermögensteuergesetz 1964 (Staatsblad 520) geschuldet würde, im gleichen Verhältnis steht wie der Gesamtbetrag der in Artikel 5 bezeichneten Aktiva zum Gesamtvermögen (vermogen).
2. Bei der Ermittlung der Verminderung gemäss Absatz 1 wird der Wert der in Artikel 5 bezeichneten Aktiva um den Wert der zu einem ausländischen Unternehmen im Sinne von Artikel 2 Absatz 2 Buchstabe a gehörenden Schulden – einschliesslich der sich aus einer andern Mitberechtigung an einem solchen Unternehmen als der eines Aktionärs ergebenden Schulden – und den Wert der nicht zu einem solchen Unternehmen gehörenden, durch Hypothek auf ein ausserhalb des Reiches gelegenes Grundstück oder eingetragenes grundstückgleiches Recht gesicherten Schulden vermindert.

Art. 7

Die für die Einkommensteuer geltenden Bestimmungen dieser Verordnung finden auf die Körperschaftsteuer entsprechende Anwendung.

Art. 8

1. Eine auf einen Preis eines ausländischen Glücksspiels berechtigte Person, die ihren Wohnsitz oder Sitz im Reich hat, ist von der sich darauf beziehenden Lotteriesteuer befreit, wenn der Preis einer gleichartigen Steuer unterworfen ist, die zugunsten eines andern Landes des Königreiches oder eines andern Staates erhoben wird.
2. Der erste Absatz findet keine Anwendung, wenn der Preis als Unternehmensgewinn gelten muss.

Art. 9

1. Die Königliche Verordnung vom 30. August 1962 (Staatsblad 344) wird aufgehoben.
2. Die im ersten Absatz bezeichnete Verordnung findet weiter Anwendung:
auf die Einkommensteuer für Kalenderjahre und Veranlagungszeiträume, die vor dem 1. Januar 1965 endigten, und Artikel 2, zweiter und dritter Absatz dieser Verordnung findet weiter Anwendung für die Jahre nach 1964, auf die ein aus den Jahren vor 1965 stammender Betrag gemäss dem zweiten Absatz dieses Artikels überbracht werden muss, sowie für die Jahre nach 1964, in denen ein aus den Jahren vor 1965 stammender Betrag gemäss dem dritten Absatz dieses Artikels verrechnet werden muss;
auf die Lohnsteuer für Lohn, bei dem die Steuer vor dem 1. Juli 1965 einbehalten werden muss;
auf die Vermögensteuer für Steuerjahre, die vor dem 1. Januar 1965 endigten;
auf die Lotteriesteuer für Preise, auf die der Anspruch vor dem 1. Januar 1965 enststanden ist.

Art. 10

1. Diese Verordnung tritt am zweiten Tage nach dem Erscheinen des Staatsblad, in dem sie veröffentlicht wird, in Kraft mit Wirkung vom 1. Januar 1965.
2. Diese Verordnung findet Anwendung auf die Lohnsteuer für Lohn, bei dem die Steuer nach dem 30. Juni 1965 einbehalten werden muss.
3. Diese Verordnung kann angeführt werden als:
Verordnung Vermeidung von Doppelbesteuerung (Besluit voorkoming dubbele belasting).

Agreement between the Government of Malaysia and the Government of the Republic of Singapore 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

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INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION

Muiderpoort – 124 Sarphatistraat – Amsterdam

TEXT

The Government of Malaysia and the Government of the Republic of Singapore,
Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.
Have agreed as follows:

Article I

1. The taxes which are the subject of this Agreement are—
(*a*) in Malaysia:
  (i) the income tax,
  (ii) the tin profits tax, and
  (iii) the development tax (hereinafter referred to as "Malaysian tax"); and
(*b*) in Singapore:
  the income tax (hereinafter referred to as "Singapore tax").

2. This Agreement shall also apply to any other taxes of a substantially similar character to those referred to in the preceding paragraph imposed in Malaysia or Singapore after the date of signature of this Agreement.

3. The provisions of this Agreement in respect of the taxation of income or profits shall likewise apply to the development tax computed other than on the basis of income.

Article II

1. In this Agreement, unless the context otherwise requires—
(*a*) the term "Malaysia" means the Federation of Malaysia;
(*b*) the term "Singapore" means the Republic of Singapore;
(*c*) the terms "one of the Contracting States" and "the other Contracting State" mean Malaysia or Singapore, as the context requires;

(*d*) the term "tax" means Malaysian tax or Singapore tax, as the context requires;

(*e*) the term "company" means a body corporate or any entity which is treated as a body corporate for tax purposes;

(*f*) the term "individual" means a natural person;

(*g*) the term "person" includes an individual, a company, a body of persons, a Hindu joint family and a corporation sole;

(*h*) (i) the term "resident of Malaysia" in relation to a year of assessment means any person who is ordinarily resident in Malaysia for the basis year for that year of assessment for the purposes of Malaysian tax:
Provided that—
(*aa*) for the purposes of this Agreement references to 30 days in section 7 (1) (*c*) of the Malaysian Income Tax Act, 1967 shall be read as references to 90 days;
(*bb*) an individual who is a resident of Singapore shall not be deemed to be ordinarily resident in Malaysia for the basis year 1968;
(*cc*) an individual who is a resident of Singapore shall not be deemed to be ordinarily resident in Malaysia for the basis year 1969 solely by the application of the provisions of section 7 (1) (*b*) of the Malaysian Income Tax Act, 1967;
(*dd*) in calculating the number of days an individual is in Malaysia under the provisions of section 7 (1) (*c*) of the Malaysian Income Tax Act, 1967, any day that he is in Malaysia solely for the purpose of medical treatment, vacation or recreation shall be disregarded if that individual has no source of income other than dividend or interest derived from Malaysia, and in the case of a person who derives income from any source, any period of hospitalization shall not be taken into account;
(ii) A company shall be deemed to be a resident of Malaysia for the basis year for a year of assessment if its business, or if more than one, any of its businesses is controlled and managed in Malaysia in that basis year:
Provided that a company which is a resident of Singapore shall not be treated as a resident of Malaysia for the basis year or basis years which coincide with the Singapore year of assessment 1968 or year of assessment 1969;
(iii) the term "resident of Singapore" in relation to a year of assessment means any person who is resident in Singapore for that year of assessment for the purposes of Singapore tax; and a company shall be deemed to be a resident of Singapore if it is managed and controlled in Singapore;

(*i*) the terms "resident of one of the Contracting States" and "resident of the other Contracting State" mean a resident of Malaysia or a resident of Singapore, as the context requires;

(*j*) the terms "Malaysian enterprise" and "Singapore enterprise" mean respectively an industrial, mining, commercial, timber, plantation or agricultural enterprise or undertaking carried on by a resident of Malaysia, and an industrial, mining, commercial, timber, plantation or agricultural enterprise or undertaking carried on by a resident of Singapore;

(*k*) the terms "enterprise of one of the Contracting States" and "enterprise of the other Contracting State" mean a Malaysian enterprise or a Singapore enterprise, as the context requires;

(*l*) the terms "income or profits of a Malaysian enterprise" and "income or profits of a Singapore enterprise" do not include rents or royalties in respect of literary or artistic copyrights, motion picture films or of tapes for television or broadcasting

or of mines, oil wells, quarries, or other places of extraction of natural resources or of timber or forest produce, or income in the form of dividends, interest, rents, royalties or fees or other remuneration derived from the management, control or supervision of the trade, business or other activity of another enterprise or concern or remuneration for labour or personal services or income derived from the operation of ships or aircraft;

(*m*) (i) subject to this sub-paragraph, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on;

(ii) a permanent establishment shall include especially—

(*aa*) a place of management;

(*bb*) a branch;

(*cc*) an office;

(*dd*) a factory;

(*ee*) a workshop;

(*ff*) a mine, oil well, quarry or other place of extraction of natural resources;

(*gg*) a building site or installation or construction or assembly project;

(*hh*) a farm or plantation;

(*ii*) a place of extraction of timber or forest produce;

(iii) the term "permanent establishment" shall not be deemed to include—

(*aa*) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(*bb*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(*cc*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(*dd*) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

(*ee*) 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;

(iv) an enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other Contracting State in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State;

(v) a person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State (other than an agent of independent status to whom sub-paragraph (*m*) (vi) applies) shall be deemed to be a permanent establishment of that enterprise in the first-mentioned Contracting State if—

(*aa*) he has, and habitually exercises in that first-mentioned Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(*bb*) 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;

(vi) an enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that Contracting State through a broker, general commis-

sion agent or any other agent of independent status where such a person is acting in the ordinary course of the business;

(vii) the fact that a company which is a resident of one of the Contracting States 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 either company a permanent establishment of the other;

(*n*) the term "competent authorities" means, in the case of Malaysia, the Federal Minister of Finance or his authorised representative; and in the case of Singapore, the Minister for Finance or his authorised representative.

2. In the application of this Agreement by one of the Contracting States, 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 Agreement.

Article III

Where this Agreement provides (with or without other conditions) that income from sources in one of the Contracting States shall be exempted from tax, or taxed at a reduced rate, by that Contracting State if it is subject to tax in the other Contracting State, and under the law in force in that 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 Agreement in the former Contracting State shall apply only to so much of the income as is remitted to or received in the other Contracting State.

Article IV

1. (*a*) The income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment in Malaysia.

(*b*) The income or profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carries on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment in Singapore.

2. Where an enterprise of one of the Contracting States 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 independently with the enterprise of which it is a permanent establishment.

3. In determining the income or profits of a permanent establishment, there shall be allowed as deductions all expenses including

executive and general administrative expenses, which would be deductible if the permanent establishment were an independent enterprise in so far as they are reasonably allocable to the permanent establishment, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

4. No income or profits shall be derived by or attributed to a permanent establishment by reason of the mere purchase and transportation by that permanent establishment of goods or merchandise for the enterprise.

Article V

Where—

(*a*) an enterprise of one of the Contracting States 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 one of the Contracting States 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, any income or 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 income or profits of that enterprise and taxed accordingly.

Article VI

1. Notwithstanding the provisions of Article IV of this Agreement the income or profits of an enterprise of one of the Contracting States from the operation of ships or aircraft in international traffic may be taxed in the other Contracting State only if such income or profits are derived from that other Contracting State:

Provided that—

(*a*) where a Singapore enterprise derives income or profits from Malaysia from such operations, the tax charged in Malaysia on such income or profits shall be reduced by an amount equal to fifty per cent thereof;

(*b*) where a Malaysian enterprise derives income or profits from Singapore from such operations, the tax charged in Singapore on such income or profits shall be reduced by an amount equal to fifty per cent thereof.

2. The provisions of paragraph 1 shall likewise apply to income or profits arising from participation in shipping or aircraft pools of any kind by such enterprise engaged in shipping or air transport.

3. For the purposes of this Article income or profits derived from the other Contracting State shall mean income or profits from the carriage of passengers, mails, livestock or goods shipped or loaded into an aircraft in that other Contracting State:

Provided that there shall be excluded the income or profits accruing from passengers, mails, livestock or goods which are brought to that other Contracting State solely for transhipment, or for transfer from one aircraft to another or from an aircraft to a ship or from a ship to an aircraft.

Article VII

1. Dividends paid by a company which is a resident of one of the Contracting States

shall be treated as derived from that Contracting State.

2. Where a company which is a resident of Malaysia for the basis year for a year of assessment for the purposes of Malaysian tax is also a resident of Singapore for the purposes of Singapore tax for the year of assessment which coincides with that basis year, a dividend paid by the company shall be deemed to be derived from the Contracting State in which the meeting at which the dividend was declared was held.

3. For the purpose of this Article only, a company which is a resident of one of the Contracting States may when paying a dividend declare itself to be a resident of the other Contracting State.

4. Where a dividend is derived or deemed to have been derived from one of the Contracting States in accordance with the provisions of this Article, the Contracting State in which the dividend is derived or deemed to have been derived shall allow to the recipient of such dividend a tax set-off under section 46 of the Income Tax Ordinance (Singapore) or section 110 of the Income Tax Act, 1967 (Malaysia) as the case may be, equal to the tax which would have been deducted from such dividend under the provisions of section 44 of the Income Tax Ordinance (Singapore) or section 108 of the Income Tax Act, 1967 (Malaysia) as the case may be, had the dividend been paid by a company resident in that Contracting State.

5. Nothing in this Article shall affect the provisions of the law of either Contracting State in which the tax in respect of a dividend paid by a company resident in either Contracting State has been, or has been deemed to be, deducted may be adjusted by reference to the rate of tax appropriate to the year of assessment immediately following that in which the dividend was paid.

6. Where a company which is a resident of one of the Contracting States derives income or profits from sources within the other Contracting State, there shall not be imposed in that other Contracting State any form of taxation on dividends paid by the company to persons not resident in that other Contracting State or any tax in the nature of an undistributed profits tax on the undistributed profits of the company, whether or not those dividends represent, in whole or in part, income or profits so derived.

7. The provisions of paragraphs 1, 2 and 3 shall not apply if the recipient of the dividends, being a resident of one of the Contracting States, 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 Article IV shall apply.

8. If the system of taxation applicable in either Contracting State to the income and distributions of companies is altered, the taxation authorities may consult each other in order to determine whether it is necessary for this reason to amend the provisions of this Article.

Article VIII

1. Royalties derived from sources within one of the Contracting States by a resident of the other Contracting State may be taxed in the Contracting State from which the royalties are derived.

2. The term "royalties" as used in this Article means payments of any kind received as consideration for the use of, or the right to use, any copyright, patent, trademark, design or model, plan, secret formula or process or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, but does not include any royalty or other amount paid in respect of literary or artistic copyrights or of motion picture films or of tapes for television or broadcasting or of the operations of a mine, oil well, quarry or other place of extraction of natural resources or of timber or forest produce.

3. Sums derived by a resident of one of the Contracting States from sources within the other Contracting State from the alienation of any right or property from which royalties, as defined in paragraph 2 of this Article, are or may be derived, may be taxed in the Contracting State from which the sums are derived.

4. The provisions of paragraphs 1 and 3 of this Article shall not apply if the recipient of the royalties or sums, being a resident of one of the Contracting States, has in the other Contracting State from which the royalties or sums are derived, a permanent establishment with which the right or property giving rise to the royalties or sums is effectively connected. In such event, the provisions of Article IV shall apply.

5. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties or sums paid, having regard to the use, right, property 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 laws of each Contracting State, due regard being had to the other provisions of this Agreement.

6. Royalties as defined in paragraph 2 of this Article shall be treated as derived from sources within the Contracting State in which the property from which such royalties are derived is used.

7. Sums derived from the alienation of any right or property referred to in paragraph 3 of this Article shall be treated as derived from sources within the Contracting State in which such right or property is used.

Article IX

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 rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, oil wells, quarries or other places of extraction of natural resources or of timber or forest produce.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

Article X

1. Remuneration other than a pension paid by the Government of one of the Contracting States to an individual who is a citizen of that Contracting State and who is subject to tax therein in respect of the services rendered in the discharge of governmental functions in the other Contracting State shall be exempt from tax in that other Contracting State.

2. This Article shall not apply to any remuneration in respect of services rendered in connection with any trade or business carried on for purposes of profit:
Provided that nothing in this paragraph shall affect the right of the Governments of the Contracting States mutually agreeing that any activity shall be deemed to be not carried on for the purposes of profit.

3. Any remuneration to which this Article applies shall be deemed to be income from a source within the Contracting State the Government of which pays the remuneration.

4. For the purposes of this Article, the word "Government" shall include any State Government, or local or statutory authority of either Contracting State.

Article XI

1. Subject to the provisions of this Article and Articles X, XII, XIII and XIV, salaries, wages and other similar remuneration derived by a resident of one of the Contracting States in respect of an employment shall be deemed to have been derived from a source in, and may be taxed in the other Contracting State if the employment is exercised in that other Contracting State.

2. In relation to remuneration of a director of a company from the company, this Article and Article XII shall apply as if the remuneration were remuneration of an employee in respect of an employment. Director's fees and similar payments derived by a resident of one of the Contracting States in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State shall be deemed to have been derived from an employment exercised in, and may be taxed in, that other Contracting State.

Article XII

1. An individual who is a resident of Malaysia shall be exempt from Singapore tax on income in respect of an employment exercised in Singapore in a year of assessment which coincides with the basis year for a year of assessment for which he is a resident of Malaysia, if—

(*a*) he is present within Singapore for a period or periods not exceeding in the aggregate 120 days during that year of assessment; and

(*b*) the services are performed for or on behalf of a person who is a resident of Malaysia; and

(*c*) the income is subject to Malaysian tax; and

(*d*) the income is not directly deductible for Singapore tax purposes from the income or profits of a permanent establishment in Singapore of that person.

2. An individual who is a resident of Singapore shall be exempt from Malaysian tax on

income in respect of an employment exercised in Malaysia in the basis year for a year of assessment which coincides with a year of assessment for which he is a resident of Singapore, if—

(*a*) he is present within Malaysia for a period or periods not exceeding in the aggregate 120 days during that basis year; and

(*b*) the services are performed for or on behalf of a person who is a resident of Singapore; and

(*c*) the income is subject to Singapore tax; and

(*d*) the income is not directly deductible for Malaysian tax purposes from the income or profits of a permanent establishment in Malaysia of that person.

3. The provisions of this Article shall apply to the remuneration or profits derived from sources within one of the Contracting States by public entertainers (such as stage, motion picture, radio or television artistes, musicians and athletes) only if the visit to that Contracting State is supported, wholly or substantially, from the public funds of the Government of the other Contracting State.

4. Notwithstanding anything contained in this Agreement, where services are provided in one of the Contracting States by an enterprise of the other Contracting State, then the profits derived from providing those services by such an enterprise may be taxed in the first-mentioned Contracting State unless the enterprise is substantially supported by the public funds of the Government of the other Contracting State in connection with the provision of such services.

5. For the purposes of this Article, the term "Government" has the same meaning as in paragraph 5 of Article X.

6. For the purposes of this Article, income or profits to which this Article applies shall be treated as derived from sources within the Contracting State in which the services are rendered.

Article XIII

1. Any pension or annuity derived by an individual who is a resident of one of the Contracting States from sources within the other Contracting State may be taxed in the first-mentioned Contracting State.

2. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

3. The term "pension" means periodical payments made, whether voluntarily or otherwise, in consideration for services rendered or by way of compensation for injuries received.

4. Any pension paid by the Government of one of the Contracting States shall be deemed to be derived from a source within that Contracting State. Any other pension shall be deemed to be derived from a source within the Contracting State of which the person paying the pension is a resident.

Article XIV

1. An individual who is a resident of one of the Contracting States immediately before making a visit to the other Contracting State and is temporarily present in the other Contracting State solely as a student at a recognised university, college, school or other similar recognised educational institution in that other

Contracting State or as an approved business or technical apprentice therein, for a period not exceeding two years (or such further period as may be approved) from the date of his first arrival in that other Contracting State in connection with that visit, shall be exempt from tax in that other Contracting State on—

(*a*) any income not derived from that other Contracting State;

(*b*) any grant, allowance or award whether or not in connection with the employment;

(*c*) any income derived from that other Contracting State in respect of services rendered in that other Contracting State and which is paid by his employer in the first-mentioned Contracting State; and

(*d*) any income (other than income of the kind referred to in paragraph (*c*) above) derived from the other Contracting State, in respect of services rendered in that other Contracting State with a view to supplementing the resources available to him for such purposes, not exceeding the sum of $3,000 in a calendar year.

2. An individual who is a resident of one of the Contracting States immediately before making a visit to the other Contracting State and is temporarily present in the other Contracting State for the purposes of study, research or training solely as a recipient of a grant, allowance or award from the Government of either of the Contracting States or from a scientific, educational, religious or charitable organisation or under a technical assistance programme entered into by the Government of either of the Contracting States for a period not exceeding two years from the date of his first arrival in that other Contracting State in connection with that visit shall be exempt from tax in that other Contracting State on—

(*a*) the amount of such grant, allowance or award; and

(*b*) any income derived from that other Contracting State in respect of services in that other Contracting State if the services are performed in connection with his study, research or training or are incidental thereto.

3. An individual who is a resident of one of the Contracting States immediately before making a visit to the other Contracting State and is temporarily present in the other Contracting State solely as an employee of, or under contract with, the Government or an enterprise of the first-mentioned Contracting State solely for the purpose of acquiring technical, professional or business experience for a period not exceeding twelve months from the date of his first arrival in that other Contracting State shall be exempt in that other Contracting State on any income derived from the first-mentioned Contracting State and any income derived from that other Contracting State in respect of services rendered in that other Contracting State if the services are performed in connection with his studies or training or are incidental thereto:

Provided that where that individual is an employee of, or under contract with an enterprise of one of the Contracting States, this paragraph shall apply only in respect of approved employees.

4. In this Article "approved" means approved by the Contracting State in which the individual will be temporarily present.

Article XV

1. Interest paid by the Government or a resident of Malaysia shall be treated as derived from Malaysia and interest paid by the Government or a resident of Singapore shall be treated as derived from sources

within Singapore. Where, however, the person paying the interest, whether he is a resident of one of the Contracting States or not, has in the other 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 be derived from Malaysia or from sources within Singapore as the case may be in which the permanent establishment is situated.

2. The provisions of this Article shall not apply if the recipient of the interest, being a resident of one of the Contracting States, has in the other Contracting State from which the interest is derived a permanent establishment with which the indebtedness in respect of which the interest is derived is effectively connected. In such a case, the provisions of Article IV shall apply.

3. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of interest paid, having regard to the indebtedness 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 and dealing with each other at arm's length, 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 laws of each Contracting State, due regard being had to the other provisions of this Agreement.

Article XVI

1. The Government of one of the Contracting States shall be exempt from tax in respect of any income derived from sources within the other Contracting State.

2. For the purpose of this Article the term "Government" shall include—

(*a*) in the case of Malaysia—
  (i) the Government of the States;
  (ii) the Bank Negara, Malaysia;
  (iii) any local or statutory authority exempt from tax in Malaysia;
  (iv) such institutions, as may be agreed from time to time between the two Contracting States;

(*b*) in the case of Singapore—
  (i) the Board of Commissioners of Currency;
  (ii) any local or statutory authority exempt from tax in Singapore;
  (iii) such institutions, as may be agreed from time to time between the two Contracting States.

Article XVII

1. Individuals who are residents of Malaysia shall for the purposes of Singapore tax be treated as Singapore citizens not resident in Singapore.

2. Individuals who are residents of Singapore shall for the purposes of Malaysian tax be treated as Malaysian citizens not resident in Malaysia.

Article XVIII

1. The laws of Malaysia shall continue to govern the taxation of income derived from Malaysia except where express provision to the contrary is made in this Agreement. The laws of Singapore shall continue to govern the taxation of income arising in Singapore except where express provision to the contrary is made in this Agreement. Where in-

come is subject to tax in both Contracting States, relief from double taxation shall be given in accordance with the following paragraphs of this Article.

2. (i) Subject to the provisions of the laws of Malaysia regarding the allowance as a credit against Malaysian tax of tax payable in any country other than Malaysia. Singapore tax payable whether directly or by deduction, in respect of income derived from Singapore shall be allowed as a credit against Malaysian tax chargeable in respect of that income.
(ii) For the purposes of this paragraph, the tax chargeable on any income of a person derived from Singapore shall be taken to be so much of the tax chargeable on his chargeable income for a year of assessment as the aggregate of the statutory income for that year of assessment of those sources the income of which is derived from Singapore less the aggregate of losses which if they had been profits would have been derived from Singapore and deductible under section 43 (2) and 44 (2) of the Malaysian Income Tax Act, 1967, bears to the total income for that year of assessment before the deduction of any gifts or donations allowable under section 44 (6) or any deduction falling to be made pursuant to Schedule 4 to the same Act for that year of assessment.

3. Subject to the provisions of the laws of Singapore regarding the allowance as a credit against Singapore tax of tax payable in any country other than Singapore, Malaysian tax payable, whether directly or by deduction, in respect of income from sources within Malaysia shall be allowed as a credit against Singapore tax payable in respect of that income.

4. Notwithstanding the provisions of this Article, where remuneration for services performed on ships or aircraft engaged in international traffic is received by a person who is by the taxation laws of Malaysia treated as resident in Malaysia for the basis year for a year of assessment which coincides with the year of assessment for which he is resident in Singapore and is chargeable to tax on such income in both Contracting States, credit shall be given by the Contracting State in which he does not have a permanent home available to him and if he has a permanent home in both Contracting States, by the Contracting State with which his personal and economic relations are less close.

5. Where the person paying the pension under paragraph 4 of Article XIII, or the person paying the interest under paragraph 1 of Article XV is a resident of both Contracting States, credit shall be given by the Contracting State in which he does not have a permanent home available to him, and if he has a permanent home in both Contracting States, by the Contracting State with which his personal and economic relations are less close.

6. Notwithstanding the provisions of this Article, the income derived by any pension or provident fund or society of one of the Contracting States from the other Contracting State shall be exempt from tax in that other Contracting State if such fund or society is an approved fund or society under the taxation law of the first-mentioned Contracting State.

Article XIX

1. The taxation authorities of the Contracting States shall exchange such information

(being information which is available under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement or for the prevention of fraud or underpayment of taxes by reasons other than fraud or for the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than persons, including a court, concerned with the assessment and collection of those taxes or the determination of appeals in relation thereto.

2. In no case shall 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 administration of that or of the other Contracting State;

(*c*) to supply any 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 XX

1. Where a person who is a resident of one of the Contracting States considers that the actions of one or both of the Contracting States result or will result in taxation not in accordance with this Agreement he may, notwithstanding the remedies provided by the taxation laws in force in the Contracting States, appeal to the taxation authorities of the first-mentioned Contracting State. If the claim is justified, such taxation authorities shall endeavour to come to an agreement with the taxation authorities of the other Contracting State with a view to avoidance of taxation which is not in accordance with this Agreement.

2. The taxation authorities of the Contracting States may communicate with each other directly for the purposes of giving effect to this Agreement and for resolving difficulty or doubt as to the application or interpretation of this Agreement. In particular the taxation authorities may consult together to resolve disputes arising out of the application of paragraph 2 of Article IV or Article V or the determination of the source of a particular item of income or to endeavour to eliminate double taxation.

Article XXI

1. This Agreement shall come into force on the date when the last of all such things shall be done in Malaysia and Singapore as are necessary to give the Agreement the force of law in Malaysia and Singapore, and shall thereupon have the effect as respects—

(*a*) Malaysian tax for the year of assessment 1969 and subsequent years of assessment;

(*b*) Singapore tax for the year of assessment 1969 and subsequent years of assessment.

2. Nothing in this Agreement shall affect:

(*a*) anything duly done or suffered to be done; or

(*b*) any right, privilege, benefit, obligation or liability acquired, accrued or incurred,

under the provisions of the Agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to

taxes on income signed on the sixteenth day of August 1966 (hereinafter referred to as the 1966 Agreement).

3. For the purposes of this Agreement the balances as at 31st December, 1968 under section 108 (6) of the Income Tax Act, 1967 (Malaysia) or section 44 (3) of the Income Tax Ordinance (Singapore) as determined under the provisions of the 1966 Agreement shall be carried forward.

Article XXII

This Agreement shall continue in effect indefinitely, but the Government of either Contracting State may, on or before 30th June in any calendar year (not earlier than the year 1972) give to the Government of the other Contracting State written notice of termination and in such event this Agreement shall cease to be effective as respects—

(*a*) Malaysian tax for the year of assessment next following that in which such notice is given and subsequent years of assessment;

(*b*) Singapore tax for the year of assessment next following that in which such notice is given and subsequent years of assessment.

IN WITNESS WHEREOF, the undersigned duly authorised thereto have signed this Agreement.

DONE in duplicate at Singapore this twenty-sixth day of December of the year one thousand nine hundred and sixty-eight in the English language.