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Clayton Utz Confirms Top Tier Status for M&A Deals

Media Release
Sydney

Success reflects ability to close complex deals
18 January 2002:
With a substantial increase of just on 54 percent in value of announced deals during 2001 Clayton Utz has decisively defied the national downwards trend in announced mergers and acquisitions activity experienced in Australia last year.

In the Thomson Financial 2001 Australian and New Zealand M&A Legal Advisors League Table released today Clayton Utz was credited with 25 deals worth $US14.3 billion ($A21.6 billion). Clayton Utz' deals included the $US9.96 billion ($A20 billion) sale by Cable & Wireless Optus, described today by Thomson as the largest Australian M&A transaction in 2001. This result moved Clayton Utz into second place on the table of announced rankings, reflecting the firm's position as one of Australia's premier law firms for M&A counsel.

Clayton Utz' national M&A leader Rod Halstead said: "This increase in the value of M&A transactions handled by the firm over the past 12 months clearly demonstrates our capacity to win and implement the toughest and most complex deals, with the value of overall deals climbing from nine to over 14 billion dollars US in the past year.

"This growth reflects the breadth and depth of the firm's M&A expertise, particularly in complex transactions including cross-border issues. Our 2001 transactions included Australia's largest M&A deals. We acted for Cable and Wireless plc in its sale of Optus to SingTel - the year's largest telco deal. We also acted for Mayne Nickless in its acquisition of FH Faulding, worth $US1.33 billion ($A2.6 billion)."

According to Mr Halstead, this level of success flows from Clayton Utz' ability to find the best solutions for clients in a rigorous and complex environment, as was evident in the Cable and Wireless/SingTel, and Mayne Nickless/Faulding transactions.

"Cable and Wireless was a major cross-border deal, involving activity in London, Amsterdam and Singapore, as well as Australia. It showcased the 'seamless' way in which we operate across national boundaries, and as a continuum of the client's own business."

Cable and Wireless plc Senior Legal Advisor, Kingsley Wallman, agrees. Mr Wallman said that the Optus sale was in many ways the most difficult transaction his company has entered into.

"Our ability to deliver on it owes much to the sheer commerciality and depth of talent in Clayton Utz. There is no doubt in my mind, having worked with other major law firms in the US, UK and Hong Kong on other mega-deals, that Clayton Utz is certainly their equal, and in many ways a better firm," Mr Wallman said.

Mr Halstead attributed this kind of success to Clayton Utz' focus on anticipating and meeting clients' needs. "We have a reputation for innovation which is built on understanding business and transaction imperatives and our ability to apply the law to achieve the client's interests," he said.

"Our M&A expertise includes significant experience in business restructuring activity. Insolvency law has come a long way since the last recession in the early 1990s. The emphasis now is to save a business by restructuring and finding buyers for it.

“Our current work with the sale of Ansett's airline business is typical of this approach," Mr Halstead noted. (Clayton Utz is advising the Fox/Lew interests.)

"We were also one of the leaders of the breakthrough public-to-private conversion activity with the work we did for Just Jeans. When you consider that there was a long period in which it seemed that Australia would never take the public-to-private plunge, it was gratifying that Clayton Utz played a key role in what could well be the precursor to a significant number of venture capital activities in 2002."

Looking ahead, Mr Halstead said, "Although it is unlikely Australia will see the same volume of mega deals this year as in 2001, we nevertheless expect to see a significant amount of strategic and business restructuring merger and acquisitions activity in key sectors.

"We've also been keeping a close eye on the media sector. We played a key role in last year's largest media transactions, involving News Corp and with a total value exceeding $US6.6 billion. The potential for media ownership changes will give us the chance to put that expertise to further use.

"The resources sector is another very active area. We are currently working with a number of clients in this area and it will be interesting to see how far the current mining acquisitions trail still has to run."

- ENDS -

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Fraser Milner Casgrain LLP -Leading Canadian Corporate Lawyer Joins FMC

TORONTO, Ontario (January 23, 2002) -- Fraser Milner Casgrain LLP, one of Canada's leading business law firms, today announced that E. James Arnett, Q.C. has become of Counsel in the firm's Toronto office. Mr. Arnett is a former President and CEO of Molson Inc., prior to which he was a senior partner in the Toronto office of another major Canadian law firm.

During 1997-2000, Mr. Arnett led the transformation of Molson Inc. from a diversified holding company into a focused brewing company. Having successfully completed his mandate, he stepped down in June 2000. Prior to that, for almost 25 years Mr. Arnett practiced corporate and commercial law with an emphasis on negotiated mergers and acquisitions, direct foreign investment, privatizations, international trade and government relations. During the 1980's he served as head of his firm's Toronto Corporate/Commercial department and during 1993-96 he served as resident partner in its Washington, D.C. office.

"Mr. Arnett will be available to the lawyers and clients of FMC for senior strategic advice, drawing on his unique combination of experience in corporate law and business both in Canada and internationally, as well as his experience as a corporate director." said David Fuller, Managing Partner (Toronto) of FMC. "As such, he will add depth to the first-class legal talent we already offer our clients."

“I am involved in a number of activities, " said Mr. Arnett, "and an association with FMC appealed to me because of their great reputation across Canada, and their developing international focus. I look forward to being of counsel to their lawyers and clients."

Fraser Milner Casgrain LLP is one of Canada's leading business law firms, offering unparalleled resources and service designed to enhance clients' success. Built on more than 160 years of expert advice and guidance, Fraser Milner Casgrain LLP offers the depth of experience and legal expertise of more than 500 lawyers in six full-service offices across the country - Montréal, Ottawa, Toronto, Calgary, Edmonton and Vancouver.

NautaDutilh Nine New Partners Appointed

As of January 1st 2002, the following five attorneys, two candidate civil law notaries and two tax advisers have become partners of NautaDutilh: ms. T.L. Cieremans, P. François, J.C. Stoop, J.H.J. Timmermans and ms. M.M. Ulrici (all attorneys) W.H. Bossenbroek and C.H.T. Koetsier (both candidate civil law notaries) and N.J. Blom and ms. T.G. Perié (both tax advisers).

NautaDutilh has close to 500 attorneys, civil law notaries and tax advisers, of which 115 are partners. NautaDutilh has clearly and publicly chosen to remain independent and not to merge with an Anglo-Saxon firm. This strategy has proved to be successful so far. Next to three main offices in Amsterdam, Brussels and Rotterdam, NautaDutilh also has offices in London, Madrid, New York and Paris. Moreover, NautaDutilh has intensive ties with top law firms in the United Kingdom, United States, Germany, France, Spain, Scandinavia and other jurisdictions. Although corporate, corporate finance, banking and tax are our core business, we have opted to continue a relatively broad range of legal services that meet the very highest national and international standards.

A short introduction to our new partners:

Attorneys:

Tjitske Cieremans (1964) joined our Rotterdam office in 1991 and practises liability and insurance law. She assists (insurance) companies in claims handling, policy disputes and, concentrating on industrial accidents, product liability and personal injury.

Philippe François (1966) joined our Brussels office in 1994. He heads the employment law department, focusing in particular on collective dismissals, restructuring and employee consultation. With his appointment, the Brussels office now has 11 partners.

Jaap Stoop (1968) practises corporate & commercial law in our Amsterdam office. He joined NautaDutilh in 1998 and specialises in mergers & acquisitions, joint ventures and financing.

Jeroen Timmermans (1969) also practises corporate & commercial law in Amsterdam. He has been working for NautaDutilh since 1994 and focuses on mergers & acquisitions.

Michaëla Ulrici (1966), from the banking & finance department, joined our Amsterdam office in 1994. She specialises in structured finance and securities law. Together with Willem Ruys, she leads NautaDutilh's securitisation team.

Civil Law Notaries:

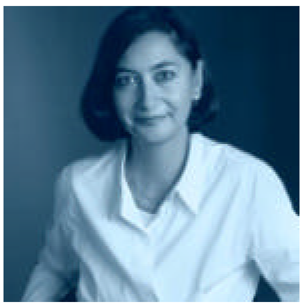
Wijnand Bossenbroek (1966), specialises in company law. His practice focuses on mergers & acquisitions, de-mergers, reorganisations, financing and joint ventures. Wijnand expects to be appointed civil law notary in the course of 2002.

Kees Koetsier (1969), who joined NautaDutilh in 1994, also practises company law in our Amsterdam notarial department. He specialises in reorganisations, mergers, de-mergers and joint ventures. Kees expects to be appointed civil law notary in the course of 2002.

Tax advisers:

Nico Blom (1967), who joined the taxation department of our Amsterdam office in 1998, focuses mainly on tax-related aspects of mergers & acquisitions and financial transactions (mergers & acquisitions and sations).

Trudy Perié (1962) joined NautaDutilh in 1999. She also works in our taxation department, and specialises in VAT and customs. She works from both our offices in Amsterdam and Rotterdam.



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Muniz Forsyth Ramirez Perez-Taiman & Luna-Victoria - British American Tobacco Ruling

The Consumer Protection Commission of the National Institute for the Protection of Competition and Intellectual Property (INDECOPI) overruled the accusation filed by the Consumption Quality Research Center against several cigarette trading and/or manufacturing companies in Peru, including British American Tobacco (South America Limited) Sucursal del Perú, its legal counselors being Muñiz, Forsyth, Ramírez, Pérez-Taiman & Luna Victoria Abogados; Tabacalera Nacional S.A.

The aforesaid accusation was supported by an alleged lack of information provided to consumers by tobacco companies regarding the harmful effects of cigarette. The Commission considers that a special legal regime already exists in Peru to regulate the marketing, advertising and consumption of cigarettes, and clearly establishes the information to be furnished by tobacco companies. Therefore, it came to the conclusion that tobacco companies comply with said regime, for which reason it overruled the accusation.

Tozzini Advises Banks on Groundbreaking Novo Mercado

Toll road operator Companhia de Concessões Rodoviárias (CCR) has become the first company to list on Brazil's Novo Mercado, a listing segment of the São Paulo Stock Exchange (Bovespa) which imposes more stringent corporate disclosure rules. Despite adverse market conditions following Enron and Global Crossing's filings for bankruptcy, on January 31 CCR raised R$351.1 million (US$146.3 million) with the initial placing of 19.5 million voting shares, or 20 per cent of its capital, at R$18 each. The company debuted with a market value of about R$1.5 billion (approx US$620 million).

Tozzini Freire Teixeira e Silva Advogados advised the group of banks involved, which was led by UBS Warburg and Banco Bradesco).

The IPO of CCR, which runs some of the main toll highways in São Paulo and Rio de Janeiro states, marks the long-awaited launch of the Novo Mercado. The modern-style bourse modelled on Europe's Neuer Markt had been scheduled to open last April.

Bankers have hailed the deal as the most significant IPO in the region since a US$526-million offering of Mexican broadcaster TV Azteca SA (TZA) in 1997. While CCR 's IPO is smaller, some bankers believe it will open the door to further flotations in the region, as software companies such as Microsiga SA and Datasul SA have held back while CCR tested the water.

The Novo Mercado mandates improved shareholder rights and high levels of transparency, and indeed some say CCR's IPO was only completed at this time thanks to the stringent regulations governing a Novo Mercado float.

Companies are only allowed to list voting shares on the Novo Mercado, which means that minority shareholders have more rights than on Bovespa, where companies tend to list preferred stock which gives them no say in the governance of the company.

Companies must also follow US accounting rules, provide results data every quarter, and buy all shares in circulation if they decide to close their capital – all moves analysts say will make the stock more attractive. The acceptance of these practices and procedures, which are considerably stricter than those prescribed by Brazilian law, makes the CCR transaction significant in terms of the growth of corporate governance in Brazil, according CCR.

The transaction also introduces a procedure for stabilising the price of shares for the 30 days following the offering, says Frossard. This mechanism, which has been approved by the CVM, the Brazilian Securities Commission, is similar to those adopted by the SEC in the USA and the FSA in the United Kingdom.

The Tozzini Freire Teixeira e Silva Advogados team advising the banks on Brazilian legal matters was led by partner **Antonio Felix de Araujo Cintra** and included associates **Ana Helena Lima Junqueira Franco** and **Katia Ichiba de Oliveira**. The banks included UBS Warburg LLC, Banco Espírito Santo de Investimento SA, Banco Bradesco SA, Banco Itaú SA and BES Investimento do Brazil SA - Banco de Investimento.

TRANSPORTATION UPDATE

Tozzini Freire Teixeira e Silva Advogados

AIRPORTS, ROADS AND MORE - JANUARY, 2002

Airports: *Maringá Regional Airport*

The publication of the request for proposals for the concession of the administration, extension, maintenance, operation and exploitation of the Maringá Regional Airport to the private sector is expected to occur in February 2002. The concession rights are being granted for the specific purpose of equipping the airport with the cargo airport facilities required for it to function as an important gateway to the Mercosur market. The concessionaire will be required to perform the following works: extension and reinforcement of the landing and take-off runways, allowing wide body aircrafts to operate; construction of aircraft parking facilities for the cargo terminal; installation of flight protection equipment, visual signs and radio systems adequate for the new design of the airport; construction of taxing runways and other improvements necessary for the operation of a new international cargo terminal; and expansion of the parking facilities for aircraft . The technical, economic and financial study for the airport concession is expected to be concluded by early February.

Subway: *Construction of New Line*

The World Bank approved a US$ 209 million credit line for financing the construction of the phase one of Line 4 of the São Paulo subway system. Line 4 will link the Vila Sônia Station to the Luz Station and is scheduled to be constructed in two phases. Phase one contemplates the construction of the totality of the underground line, with an extension of 12.8 Km. Nevertheless, only the Butantã-Luz segment, with five of the eleven foreseen stations, will be implemented during phase one. In phase two, the operation will reach Vila Sônia Station, and six additional stations will be constructed. The project will also receive investments from the State of São Paulo Government and financing from the Japan Bank for International Cooperation (JBIC). The entire investment is estimated in US$ 1.2 billion. The project is already done and the bid process for selecting the EPC contractors will be concluded by July. A data room with documents is opened for consultation by those companies interested in participating in the bid. The works for phase one are expected to start in the second semester of 2002 and their conclusion is scheduled for 2006. The project for concession of phase two will be developed in parallel with the implementation of phase one.

Airports: *Expansion of Airports*

Infraero executed an agreement with the Government of the State of São Paulo in the amount of approximately US$ 750 million for the expansion of the Cumbica and Viracopos Airports. The main goal of the project is to double the capacity of the passengers terminal of the Cumbica Airport. Infraero has also executed an agreement for the development of projects for expansion of the Santos Dumont Airport, in Rio de Janeiro, and the Vitória Airport, in Espírito Santo. The expansion of the Santos Dumont Airport will contemplate the extension of the passengers terminal and the aircraft parking facilities, with eight additional boarding platforms, and the construction of parking facilities with 1,000 lots and new road access. The total investment considered is R$ 80 million and the bid process for the EPC works is scheduled for July. The expansion of the Vitória Airport will foresee a new passengers terminal area, the extension of the facilities allowing simultaneous operation of up to seven aircrafts, the construction of a second landing and take-off runways, road access and complementary works. The construction is schedule to begin in November and total investment is estimated in R$ 120 million.

Tozzini, Freire, Teixeira e Silva Advogados has always distinguished for its diligence with the technical quality of its services and also for constantly developing expertise in matters that are important for our clients and new business opportunities for them.

With Transportation Update, we intend to provide our clients and friends with a summary of the most recent and important developments in the transportation infrastructure sector in Brazil, involving airports, roads, waterways, ports, railways, and subways, including information about regulatory aspects, projects and, of course, new business opportunities.

We hope that this initiative is useful for our readers. If you need any clarification on the contents of Transportation Uptade, or if you have any suggestions to improve our newsletter, please contact us at the e-mail address indicated below. Enjoy your reading!

Pedro Luís Galvão Seraphim
(pgs@tozzini.com.br)

QUICK NOTES

- The surveys requested by the Minister of Development, Industry and Commerce, Sérgio Amaral, to the National Bank for Economic and Social Development - BNDES about the airline industry should be concluded in the beginning of February, according to projections of the Chief Executive Officer of BNDES, Eleazar de Carvalho Filho.

Ports: *Suape Business Center*

The request for proposals for the Suape Business Center project is scheduled to be published by March of 2002. Suape will be the first port in Brazil to have a structure of 100 to 200 business unities, including offices for shipowners, port operators, logistics operators, and other related business. The company or consortium responsible for the construction and operation of the enterprise will be chosen through a bid process, and the estimated investment is in the amount of US$ 50 million. The Business Center will be built in three phases. The first phase will enter into operation three years after the execution of the EPC contract, and the last phase is scheduled to enter into operations 10 years after the execution of the EPC contract.

Roads: *'Nossa Estrada' Program*

The Minister of Transportation, Alderico Lima, has just created and published the *Nossa Estrada* program. This program contemplates the renovation and maintenance of 22,000 Km of roads throughout the Country, with investments in the range of US$ 600 million. During the ceremony for announcing the program, which took place in Palmas, capital of the State of Tocantins, the Minister announced the disbursement by the Federal Government of US$ 600 thousand for the renovation of federal road BR-153, known as Belém-Brasília. This road is considered the main access linking the North and Center-West regions. The program will guarantee the complete renovation of the Belém-Brasília road and its maintenance during a period of five years in the State of Tocantis. State of Tocantins officials expect the program to allocate an amount of approximately US$ 18 million.

Transportation: *Officers in the New Bodies*

The Brazilian Senate confirmed in the end of 2001 the appointment of the persons indicated by the President to hold offices in the recently created bodies for the transportation sector: the Infra-Structure Transportation Department (DNIT), the Land Transportation National Agency (ANTT), and the Waterway Transportation National Agency (ANTAQ). Francisco de Paula Magalhães was appointed General Manager of the DNIT and the other appointed officers are Luziel Reginaldo de Souza, Rogério Gonzales Alves, Wildjan da Fonseca Magno and Antônio Machado Bastos. The appointed General Managers of ANTAQ and of ANTT are Carlos Alberto Wanderley da Nóbrega and José Alexandre Nogueira Resende, respectively. The other officers of ANTAQ are José Guimarães Barreiros and Tarcísio Jorge Caldas Pereira, and of ANTT are Reinaldo Alves Costa Neto, Luiz Afonso dos Santos Senna, Noboru Ofugi and Anália Francisca Ferreira Martins.

Airports: *Garage and Platform A of Congonhas*

After five years of discussion in court, Infraero and the *Defenda São Paulo* program reached a settlement in connection with the construction of a parking facility in the Congonhas Airport, which was stopped in 1997. The project was redesigned and is supposed to be reinitiated by Infraero in the coming days. Although the settlement has not been officially approved yet, it is expected that the parking lot will have an underground structure preserving Comandante Lineu Gomes Square. The preservation of the square was the reason that originated the court challenge, and now, the new project includes the renovation and preservation of this area. A directive plan for the development of the Congonhas airport, which is one of the requirements under the *Defenda São Paulo* program, will be created. Infraero sees this settlement as an opportunity to move on with the plans for the expansion of the Congonhas Airport. Infraero expects to publish, in a few days, the request for proposals for the renovation of Platform A of the airport, ensuring more comfort to the passengers with the creation of new gates and baggage claim areas.

- As of the beginning of this year, Brazil will have a National Council for Integration of Transportation Policies - CONIT. It will be incumbent upon CONIT to suggest national policies for integration of the various transportation systems for passengers and cargo. The council will coordinate the activities related to the Federal Air System, attributed to the Ministries of Transportation, Defense and Justice and to the Special Secretariat for Urban Development. CONIT will also be responsible for the proposal of policies to promote competition, aiming at reducing costs, tariffs and freight and promote unbundling of the sector.

- This year, the State of São Paulo will have an agency to regulate the transportation sector. Last December, the State Legislative House approved the bill of a complementary law that creates the Delegated Public Transportation Services Agency of State of São Paulo - ARTESP. According to the bill, the agency will have budget autonomy, and will be entitled to regulate and supervise all kinds of public transportation services granted to the private sector, including concessionaires of toll roads, waterways, state airports and interstate bus transportation.

- In the end of 2001, Pedro Luís Galvão Seraphim, a partner at Tozzini, Freire, Teixeira e Silva Advogados, chaired the Annual Brazilian Airport Conference, organized by the International Business Communications - IBC. Several players in the air transportation sector attended the Conference and had the opportunity to discuss with keynote speakers and specialists the most relevant issues for the sector, specially the creation of the Brazilian Agency for Civil Aviation - ,ANAC and the situation of the airline companies.

CANADA - Health Information Act

Health Information Protected January 1st

Sensitive information such as medical records, information about a person's medications, tests results, medical examinations or mental or physical health, is defined as "personal health information" under the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). As of January 1, 2002, personal health information is specifically protected by PIPEDA, which means that health care professionals, private clinics, pharmacies and other health care service providers will have to ensure that their business practices are consistent with PIPEDA.

For more discussion see our related publication Privacy Law: Recent Developments in Canada, or for further information on privacy law in Canada and compliance practices, or to view a full copy of PIPEDA, please contact Richard Stobbe or Scott Lamb @ Richards Buell Sutton.

By Hiroshi Suga of Asahi Law Offices

1. Liability of ISP

No law in Japan expressly imposes liability on ISPs and website hosts (hereinafter referred to collectively within this section as providers) for any illegal or wrongful act committed over the Internet by a subscriber. However, the prevailing view is that providers may be held liable in civil cases for certain acts of users of their services. Specifically, under certain circumstances, a provider may have a duty to remove illegal or wrongful acts of expression that users of their services make available over the Internet, and the provider's failure to do so can result in liability.

Given the volume of information disseminated over the Internet, providers cannot realistically be expected to monitor the content of their sites so thoroughly as to prevent any acts of expression that is illegal or wrongful. For this reason, providers become obliged to act only when they learn of the existence of illegal or wrongful content. Once that happens, however, if they do not take appropriate measures to delete or prevent further dissemination of the offending material within a reasonable time, they may be subject to claims for compensatory damages. For these purposes, a "reasonable time" is the time required to determine whether the content is indeed illegal or wrongful, including the time it takes to notify the party that posted the content and the time it takes to decide whether to delete it.

In one district court case, a provider was held liable for compensatory damages on the basis of defamatory statements sent to an electronic chat room. The district court ruled that because the provider had not taken appropriate measures to remove the offending communications within a reasonable time after learning of them, it had committed the tort of nonfeasance.[1]

However, the Tokyo High Court overruled the decision and asserted that the provider was not liable.[2] In another case, the Tokyo District Court ordered a provider to delete a defamatory statement.[3]

It is conceivable that providers could be held criminally liable for cyberpornography and other expressive acts subject to criminal punishment on the same theory of nonfeasance. However, such an application of the doctrine probably would violate the basic principle of criminal law that crimes must be clearly defined.

It may not be easy to determine whether content is illegal or wrongful. Most Internet service agreements allow providers to censor materials they find inappropriate, and providers have exercised that power. However, if providers feel constrained to delete all messages that might in some way be harmful, this would have a chilling effect on the freedom of expression. This concern informs the view that providers should be held liable only in cases of "actual malice," where, for instance, a provider was actually aware that the content in question was illegal or wrongful, or where a provider gave absolutely no consideration to illegality or wrongfulness.

Providers may face some difficult decisions in this area because of an apparent conflict in statutory policies. Provider liability for illegal or wrongful acts by users is based on the assumption that providers have the right to monitor Internet content and take action against inappropriate expressive acts. Arguably, however, such actions may violate provisions of the Telecommunications Business Law,[4] namely, the prohibition against censorship[5] and the provisions protecting the confidentiality of communications.[6] Indeed, it has been argued that the Telecommunications Business Law precludes provider liability for user expression. However, this law may only address the "communications medium (Internet service)" aspect of

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[1] Tokyo District Court decision, May 26, 1997.
[2] Tokyo High Court decision, September 5. 2001.
[3] Tokyo District Court order, August 28, 2001
[4] Law No. 86 of 1984, as amended.
[5] *Id.* art. 2.
[6] *Id.* art. 4.

the provider business, not the website host aspect.[7] Given the ease with which users can inflict damage anonymously on the Internet, there is a strong public policy need to provide protection to victims. Accordingly, it is generally agreed that a provider that takes measures against inappropriate material should not be deemed to have violated the Telecommunications Business Law.

2. New ISP Protection Law

Considering such interpretation, the new statutory law (The Law concerning the Limitation of Liability of Special Telecommunications Service Providers and the Disclosure of Sender Information)[8] was enacted in November 2001 and will become effective by May 2002.

This Law defines "Special Telecommunications" as transmissions received by unspecified persons via telecommunications. If any third party's rights are infringed by the dissemination of certain information via Special Telecommunications, the provider will be released from liabilities against a third party for such infringement as long as:

1. It is not technically possible to interrupt such dissemination of the information; or
2 Neither of the following items are applicable:
   - i) The provider knows of the infringement of a third party's rights; and
   - ii) The provider knows of the dissemination of the information and there is a justifiable reason that it is possible for the provider to become aware of the infringement.

Also, if the provider interrupts the dissemination of the information, the provider will be released from any liabilities for such interruption against the sender as long as:

1. Such interruption is conducted only to the extent of the necessity for protection; or
2 Neither of the following items are applicable:
   - i) The provider has reasonable cause to believe that the dissemination of the information infringes a third party's rights; and
   - ii) If the provider was asked by a third party, which is alleging the infringement of such third party's rights, to interrupt the dissemination of the information, and the provider has not received a response from the sender within 7 days after the provider inquired of the sender as to whether the sender will accept the interruption of the dissemination of the information.

A third party alleging that its own rights are infringed by the dissemination of certain information may request from the provider information regarding the sender of such information if:

1. It is apparent that the dissemination of the information infringes such third party's rights; and
2. The third party has justifiable reasons to receive information regarding the sender (e.g., to know the name and address of the sender to execute a lawsuit against the sender).

Upon a third party's request for the disclosure of information about the sender, the provider shall inquire of the sender as to whether the provider may disclose such information to the third party. The provider released from the liability arising from the provider's refusal to provide the sender's information to a third party unless the provider acts willfully or with gross negligence.

We cannot foresee the impact of this new legislation with clarity. However, we think that it will ease the ISP's dilemma where it is forced to make a difficult decision.

Hiroshi Suga, Attorney-at-Law
Asahi Law Offices
February, 2002

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[7] "Report of Study Group Concerning Information Distribution Rule in Telecommunications Services" by Telecommunications Bureau of the Ministry of Posts and Telecommunications.
[8] Law No. 137 of 2001

International Taxation in the Netherlands

February 2002

Codification of arm's length principle

On 1 January 2002 a new provision in the Corporation Tax Act dealing with the arm's length principle entered into force. Prior to that date the arm's length principle formed part of the fiscal accounting rules of the Netherlands, but it had never been codified. The arm's length provision will only affect corporate income taxpayers. With a view to ensuring harmonisation between the new domestic rule and international tax practice, the new arm's length provision is similar to that in the OECD Model Treaty (Article 9). This is also expected to help avoid international double taxation.

The new provision states that if associated companies agree to terms and conditions which differ from those which would be agreed by independent companies, the computation of profit for corporation tax purposes realised by the associated entities will be based on the latter. Entities will be deemed to be associated not only if there is a shareholder relationship between them; a managing or supervisory director relationship can also imply that entities are associated with each other for the purpose of the new arm's length provision. The background to this interpretation of 'associated' is the increasing use, by groups, of entities whose equity is not divided into shares, such as Dutch foundations, Anglo-Saxon trusts and partnerships. The sole criterion is that the association be sufficiently strong for the shareholder, managing director or supervisory director to be able to exert sufficient influence on the determination of the terms and conditions applicable to transactions between such entities. A bank which supervises an entity to which it has granted a credit facility will not be deemed to be associated with that entity. The same applies to a single supervisory director and the company whose management board he supervises.

In most cases, there are margins for arm's length pricing. Terms and conditions within these margins will be deemed to be at arm's length.

The arm's length provision distinguishes between vertical and horizontal association. Vertical association exists where one entity has a say in another entity; horizontal association exists where the two associated entities are controlled by one other entity.

The provision requires that corporate taxpayers keep a record of the information which has served as the basis for the terms and conditions of their trading. Corporate taxpayers will not, however, be required to compare the various transfer pricing methods, pick the most suitable method, and demonstrate why they feel it is the best method ('best method rule'). If a corporate taxpayer fails to keep a record as referred to above, the burden of proving whether terms and conditions are at arm's length shifts from the Tax Authorities to the taxpayer.
For more on this issue please refer to Pieter C. Elias, New Transfer Pricing Legislation in the Netherlands, Tax Planning International Review, February 2002, p. 11.

Holding companies and recovery of VAT

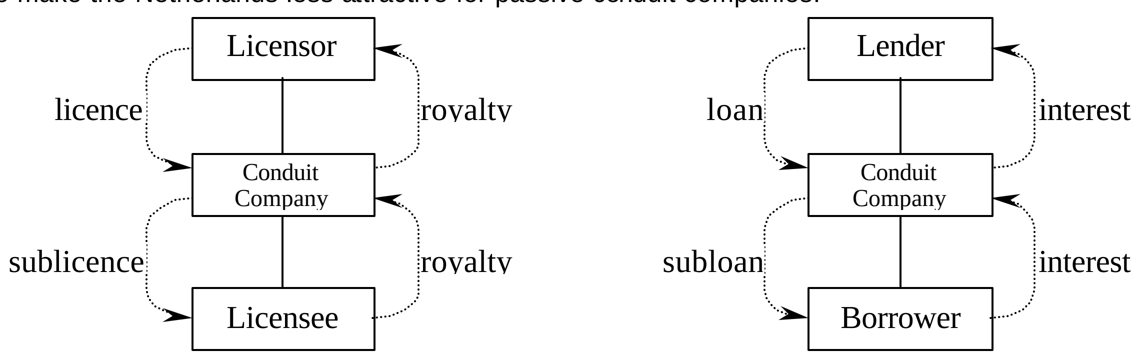
The European Court of Justice ("the Court") has not yet fully answered the question whether a holding company can recover the VAT incurred by it, hereafter referred to as "Input VAT". Pursuant to older case law, a company will not qualify as an entrepreneur for VAT purposes if it merely owns shares and is not directly involved in the management of its subsidiaries. A company which does not qualify as an entrepreneur for VAT purposes cannot recover Input VAT. If a holding company not only holds shares but also engages in other activities, such as management, it may qualify as an entrepreneur for VAT purposes. The question is whether the direct or indirect involvement in the management of the subsidiaries can be characterised as a taxable activity for VAT purposes. If the answer is affirmative, the next question is to what extent the holding company can recover the Input VAT. That a company's activities are subject to VAT where it engages in the management of its subsidiaries was decided by the Court in November 2000. The Court has ruled that involvement in the management of subsidiaries is an activity subject to VAT provided that the holding company also renders VAT taxable services, such as financial, administrative, commercial and technical services, to its subsidiaries.

Generally, Input VAT is deductible, provided that the costs to which the Input VAT is connected are directly related to VAT taxable transactions. In the past, the Court ruled that the VAT on goods and services purchased by a company that performed both VAT taxable and non-taxable supplies can be recovered only to the extent that the expenditure on these goods and services has been incurred in connection with the company's VAT-taxable transactions.

In September 2001, the Court had to review a case in which a holding company had rendered taxable services to its subsidiaries and, in addition, deducted the Input VAT incurred on costs in connection with its acquisition of a shareholding in a subsidiary. A substantial part of these costs had been charged to the holding company for fiscal and legal advice on the acquisition. The Court ruled that there is no direct and immediate link between the various services purchased by a holding company in connection with the acquisition of a shareholding and its VAT-taxable transactions. On the other hand, the costs of those services do form part of the holding company's general costs. Such services are, therefore, related to the company's business as a whole. The VAT on general costs can be recovered on a proportional basis. The ratio of recoverable VAT to total VAT is equal to the ratio of the company's VAT-taxable turnover to the company's total turnover. In the case at hand, the holding company performed only taxable activities. Consequently, it was allowed to recover in full the Input VAT on the services of the fiscal and legal advisers. This Court case shows that under certain circumstances an "active" holding company can deduct Input VAT. In practice, though, the question is what kind of services a holding company has to rtender to qualify as an active holding company. Passive holdings cannot recover Input VAT, which therefore constitutes a cost. In the event that legal and advisory costs are incurred by a holding company, the VAT consequences should be considered carefully.

Passive conduit companies

For years the large Dutch tax treaty network and advance tax ruling practice made the Netherlands a very popular jurisdiction for the establishment of conduit companies, such as companies which licence and sublicence intellectual property and companies which borrow and onlend funds. Where these companies are 'passive', they are perceived by the Government as harmful to the fiscal interests of the Netherlands' tax treaty partners. The Government has therefore introduced a bill adding a provision to the Corporation Tax Act to make the Netherlands less attractive for passive conduit companies.



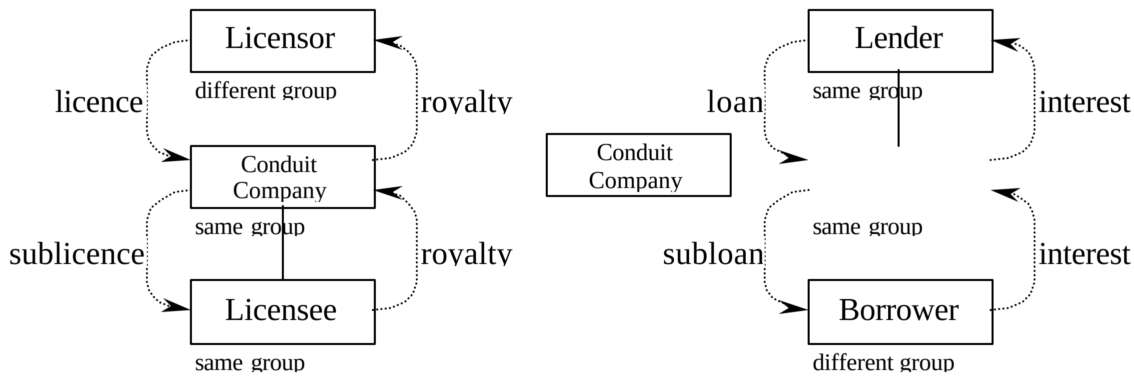
The effect of the new provision is to deny passive conduits the foreign tax credit to which a company would normally be entitled pursuant to the tax treaty between the Netherlands and the state of residence of the payer of the interest or royalty. This is achieved by excluding the interest or royalties paid to or by the conduit company from its Dutch corporation tax base. Where interest or royalties paid to the conduit company do not form part of its Dutch corporation tax base, the tax treaties do not require the Netherlands to grant a foreign tax credit.

The provision applies under the following circumstances:

1. the licensor, conduit company and licensee, or the lender, conduit company and borrower are all members of the same group, where group is a defined term;
2. There is a legal or factual connection between the licence and sublicence or loan and subloan;
3. On balance, the conduit company is not exposed to any real risks.

Conduit companies are considered to be exposed to real risks if their equity amounts to at least 1% of their outstanding loans or to € 2 million and if they adequately demonstrate that this equity is actually exposed to these risks. The fact that the interest or royalties are not included in the conduit's taxable base does not mean that it does not have to report any taxable profit for corporation tax purposes: the bill requires passive conduit companies to report a profit which is commensurate with their conduit activities.

The bill does not apply if the licensor and the lender and / or the licensee or the borrower are not associated with the conduit company. This means, for example, that the following situations are not affected by the bill:



Review of fiscal unit rules

The ITN August 2000 issue addressed the bill which introduces new rules for fiscal units. Fiscal units are groups of companies which submit a consolidated tax return. The bill has been amended twice since then and has now been adopted by the Second Chamber of Parliament. The amendments can be summarised as follows.

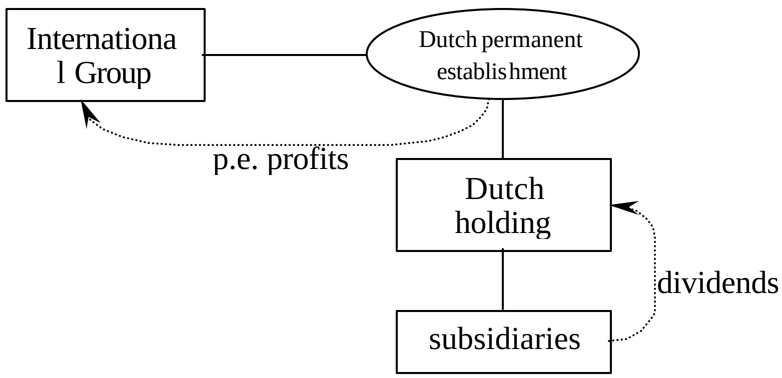
- At present, when companies form a fiscal unit they are considered to have become a single entity for corporate income tax purposes. Originally, the bill abandoned the current approach, whereby members of a fiscal unit are considered to be a single entity for corporation tax purposes, in favour of an approach that still recognises the separate entities. The bill now introduces an approach which has the benefits of the single entity approach, but ensures that the members of the unit are viewed as separate subjects for corporation tax purposes.
- Contrary to the rule in the original bill, it will be possible to terminate a fiscal unit immediately on request.
- Contrary to the rule in the original bill, if the fiscal unit is terminated, the loss carried forward by the fiscal unit will not pass to the subsidiary unless explicitly requested.
- The anti-abuse measure known as the "sixteenth standard condition" currently provides that if assets have been transferred from a parent to a subsidiary and more than six tax year ends have elapsed between the transfer and the termination of a fiscal unit, the assets and liabilities of the subsidiary have to be revalued and the resultant gain taxed in the hands of the fiscal unit. Originally, the bill limited the compulsory revaluation to the asset which had been transferred, but extended the six-year period to ten. The amendment has now re-introduced the six-year period. This period is even reduced to three years where the assets which have been transferred qualify as a separate part of an enterprise and the consideration for the transfer consists of shares.
- As amended, the bill contains a measure against the BV1/BV2 structures discussed in the March 2001 issue of ITN.
- A subsidiary which transfers its management and control to another state and leaves the fiscal unit after 1 June 2001 will be subject to an exit tax.

– Companies incorporated in the Netherlands are deemed to be resident in the Netherlands for corporate income tax purposes. The bill provides that this fiction no longer applies to members of fiscal units. As a consequence, a fiscal unit which includes a company which was incorporated in the Netherlands but is managed and controlled and, therefore, resident in another state, is terminated at the beginning of the first tax year starting after the effective date of the bill. A measure has been added to the bill which restores the Dutch tax claim on unrealised gains, goodwill and tax-free reserves which would otherwise be lost.

The rules which the bill introduces will apply to the tax year commencing on or after 1 January of the calendar year following the day on which the bill enters into force, which will be 1 January 2003 at the earliest. Existing fiscal units will upon request, be grandfathered until the end of the second tax year ending after the entry into force of the bill.

<u>Attribution of a shareholding to a permanent establishment</u>

The Ministry of Finance has published a decree which sets out the circumstances in which it is possible to obtain an advance tax ruling on the attribution of shares to a permanent establishment. The decree typically relates to the situation represented by the following diagram.



As a consequence of the attribution of the shares in a Dutch holding company to a Dutch permanent establishment, dividends can be distributed to the international group free from Dutch dividend withholding tax. Pursuant to the decree, an advance tax ruling cannot be obtained if the objective of the structure is the cancellation of an existing dividend tax claim. The company requesting the ruling is required to sufficiently demonstrate that this is not the structure's objective. If head office activities are transferred from the existing Dutch holding company to a permanent establishment, the structure will be deemed to be aimed at cancelling a dividend tax claim.

The conditions for an advance tax ruling on the attribution of the shares of the Dutch holding company to the Dutch permanent establishment are as follows:

1. The international group conducts a real enterprise in the Netherlands through a permanent establishment in accordance with the relevant double tax treaty.
2. There is a direct link between the business activities of the permanent establishment and the business activities of the Dutch holding company. This link is, for example, deemed to be present if the Dutch holding company qualifies as a European holding company and the permanent establishment can be characterised as the European headquarters of that European holding company.
3. The activities of the subsidiaries of the Dutch holding company have a direct link with the business activities of the permanent establishment. This is the case, for example, if the permanent establishment qualifies as the head office of the relevant subsidiaries.
4. The permanent establishment independently takes decisions on:
   – its own activities;
   – all of the activities which are linked with or stem from the acquisition, holding and disposal of the shares of the Dutch holding company, and
   – the activities stemming from its own activities regarding the subsidiaries of the Dutch holding company.

5. The activities of the permanent establishment are performed by trained staff. The staff perform these activities in and from the Netherlands.
6. The international group attributes all of its assets and liabilities which relate to the Dutch activities (including the activities of the Dutch holding company and the subsidiaries of the Dutch holding company) to the Dutch permanent establishment. These liabilities include the debt incurred to fund the acquisition of the shares of the Dutch holding company.
7. The Dutch holding company independently takes decisions on matters regarding the acquisition, ownership and disposal of the shares in its subsidiaries and exercises sufficient care in carrying out the relevant transactions. The Dutch holding company must have trained staff for this purpose.

Requests for an advance tax ruling must be submitted to the competent inspector, who is then required to seek binding advice from the Advance Pricing Agreement / Advance Tax Ruling Team of the Large Enterprises Department.
Decree of the Ministry of Finance of 13 June 2001, no. CPP2001/1045

Dividend Stripping

On 31 August 2001, the Ministry of Finance submitted an anti-dividend stripping bill, which has, in entered into force on 1 January 2002. The normal Dutch dividend withholding tax rate is 25%, but treaties for the avoidance of double taxation may reduce this rate. Dividend stripping results in a reduction of dividend withholding tax which goes further than the reduction to which the shareholder would otherwise be entitled. Dividend stripping takes the form of a transfer of the right to the dividend (by way of transfer of dividend coupons, repo transactions, securities lending or other means) by a shareholder to a person who is in a better position to utilise a tax credit, or to claim a reduction of the rate or an exemption from dividend tax. Meanwhile, the original shareholder continues to be the beneficial owner of the shares through the use of derivatives.

The Ministry of Finance had previously sought to introduce anti-dividend stripping measures. These were withdrawn, however, following criticism from the financial sector. The new law was discussed extensively with the financial sector.

The new anti-dividend stripping measures provide that a person will be denied the dividend withholding tax credit or refund of dividend withholding tax if that person is not the beneficial owner of the dividend. For practical purposes, the measure is limited to situations where the beneficial owner of the dividend is entitled to a smaller credit or refund than the recipient of the dividend and to situations where the recipient is entitled to an exemption from dividend withholding tax and the beneficial owner is not. The measure also applies to the sale of coupons and the establishment of a usufruct on shares for consideration. The burden of proving that the transaction can be characterised as dividend stripping lies on the Tax Authority.

Retroactive Dutch tax liability for non-resident corporate lenders

On 1 January 2001, the amended Corporate Income Tax Act 1969 came into force. Until then, non-resident corporate and individual lenders were subject to Dutch income tax upon granting a loan to a Dutch resident company if they had a substantial interest in this company and if the substantial interest was not attributable to the assets of an enterprise. Generally, a substantial interest is deemed to exist if the lender directly or indirectly owns not less than 5% of the shares in the capital of the Netherlands-resident borrower.

This provision still applies to non-resident individual lenders, but on 1 January 2001 ceased to apply to non-resident corporate lenders. For some time it was unclear whether this was an omission or a deliberate change. The Government argues that it was an omission and has submitted a bill reintroducing corporate income tax liability for non-resident corporate lenders with retroactive effect to 1 January 2001. What has not changed is that if the loan is attributable to an enterprise, a non-resident corporate lender is not subject to Dutch corporate income tax despite having a substantial interest in the Netherlands-resident borrower.

Amendment of the participation exemption for earn-out rights

Pursuant to the participation exemption, dividends and capital gains deriving from a qualifying holding of shares (a "participation") are exempt from corporate income tax. The Supreme Court has ruled several times on situations in which a participation was sold in consideration for a right to future payments which depend on, for example, the profits of the target, i.e. an earn-out right.

It has ruled that for the purpose of the participation exemption, the seller has to estimate the value of the earn-out right at the time of the sale. The earn-out right is exempt from corporate income tax pursuant to the participation exemption to the extent of this estimate, i.e. to the extent of its value estimated at the date of the sale the earn-out right is considered to be part of the exempt gain or non-deductible loss deriving from the sale of the participation. The difference between the estimate and the sum of the payments under the earn-out right is not exempt from corporate income tax where this sum exceeds the estimate or deductible where this sum does not.

The Supreme Court has ruled that the purchaser of the participation should also make an estimate of the value of the earn-out right; this estimate forms part of the purchaser's base in the participation: the difference between the estimate and the actual value of the earn-out right as determined by the payments by the purchaser to the seller are taxable or deductible for corporate income tax purposes, as the case may be. Problems arise where the seller and the purchaser value the earn-out right differently: it is in the interest of the purchaser to value the earn-out right as low as possible, whereas the seller would prefer to value it as high as possible for reasons which, in the light of the Supreme Court decisions, are understandable.

The participation exemption was amended effective 1 January 2002 so that earn-out rights are fully covered by the participation exemption where the seller is concerned. As far as the purchaser is concerned, any payments under the earn-out are treated as an adjustment of his base in the participation. The provision also applies to the accrual of interest and currency results in connection with earn-out rights.

<u>Tax treaty between the Netherlands and Belgium.</u>

On 5 June 2001, the Netherlands and Belgium signed a new treaty for the avoidance of double taxation. This treaty is going to replace the tax treaty of 19 October 1970. If the Belgian and Dutch parliaments give their approval in the course of 2002, it will enter into force on 1 January 2003.

Unlike the current treaty, the new treaty does not include a specific provision for frontier workers. Pursuant to the current treaty, the income from employment of frontier workers is only subject to taxation in the state of residence. Under the new treaty, the employment income of frontier workers will be subject to taxation in the work state. Frontier workers will be entitled to the personal allowances which are available to residents of their work state on a proportional basis.

Under the new treaty the withholding tax rate applying to dividends arising from shareholdings of not less than 10% of the paid-in share capital will be 5%, unless, of course, the EC Parent-Subsidiary Directive applies. In other cases, the dividend withholding tax rate will be limited to 15%. The maximum interest withholding tax rate will be 10%; certain categories of interest will be exempt from withholding tax, however. Royalties will not be subject to withholding tax.

Gains deriving from a substantial shareholding can be subject to tax in the former state of residence for a ten-year period from emigration to the new state of residence. Under the current treaty this period is five years. The transfer of the distributing company's place of management and control will be of no avail.

Exempt pension funds and other tax exempt institutions will be treated as residents of a state under the new treaty so that such institutions will be entitled to its benefits in relation to income deriving from the other state. The new treaty includes measures which avoid double taxation as well as the double exemption from tax of hybrid entities.

<u>Another change in the taxation of employee stock options</u>

In February of last year the Supreme Court took two decisions on the consequences of repurchasing shares in order to meet obligations under employee stock options. The effect of the decisions was to treat such a repurchase of shares as an amortisation. Prior to the Supreme Court decisions, the general view was that the repurchased shares qualified as a temporary portfolio investment, which has more favourable tax consequences. Last year a bill was submitted which aims to restore the situation that existed before the Supreme Court decisions.

Pursuant to the bill, shares which are repurchased in order to meet obligations under employee stock options are not treated as amortised, but rather as a temporary portfolio investment. If the options are not exercised and the shares not resold within three months from the expiry of the options, the shares are treated as amortised from that date.

The grant of employee stock options will be treated as an informal contribution of capital and as such will be subject to capital tax (0.55%). The capital tax base of the informal contribution will be equal to the value of the employee stock options for payroll tax purposes.

The corporation tax deduction with respect to the grant of employee stock options will be restricted to the value of the employee stock options for payroll tax purposes where the employees do not elect to defer taxation. The corporation tax deduction can be claimed in the tax year in which the employee stock options would be subject to payroll tax in the absence of the above deferral. The valuation of the repurchased shares and the dividends arising from these shares will not affect the result for corporation tax purposes.

The consequences of the bill for the tax treatment of employee stock options can be summarised as follows:

	corporation tax	dividend tax	capital tax
grant of employee stock options	payroll tax value of option deductible for corporation tax purposes	informal contribution of capital equal to payroll tax value of option	no consequences
valuation of option provision	does not affect taxable result	no consequences	no consequences
repurchase of shares to meet obligations under options	valuation of repurchased shares does not affect taxable result	repurchased shares treated as temporary portfolio investment, so not amortised	repurchased shares treated as temporary portfolio investment, so not amortised
exercise of options: sale of repurchased shares	no consequences	no consequences	no consequences
exercise of options: issue of new shares	no consequences	no consequences	capital tax on contribution to share capital
expiry of options	no consequences	amortisation of repurchased shares	no consequences

Hybrid instruments

In the second half of 2000, the Government submitted a bill on the taxation of hybrid loans which threatened to affect a host of structured finance transactions which were not meant to be affected. In 2001 the Government submitted a new bill on hybrid loans, which entered into force on 1 January 2002.
The new provision which the bill introduces into the Corporation Tax Act provides that the interest on and valuation of a hybrid loan do not affect the taxable result of the corporate taxpayer. A loan is treated as hybrid if:

1. the interest wholly or partly depends on the profits of or distributions of profit by the company or an associated entity, and the term of the loan is not less than ten years, or
2. the indebtedness of the interest depends on the profits of or distributions of profit by the company or an associated entity, the loan is subordinated and the term is not less than 50 years.

These criteria apply not only if the formal terms and conditions of the loan meet the above criteria but also if the characteristics of the loan actually match these criteria. The Ministry of Finance does not rule out that loans which do not meet the above criteria for hybrid loans are still treated as hybrid loans on the basis that the loan has been feigned and the parties to the loan actually meant to contribute equity, or on the basis that at the time the loan was made, the lender should have known that it was not going to be repaid as a consequence of the dire financial straits the borrower was in.
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Where a loan is characterised as hybrid and the lender owns shares in the borrower which qualify for the participation exemption, the hybrid loan also falls within the scope of the participation exemption. This does not apply, however, in the event that the borrower resides in another state where the interest is treated as an allowable expense for corporation tax purposes.

<u>New policy on advance tax rulings</u>

In ITN March 2001 we reported that the Ministry of Finance intended to convert and modernise the Dutch advance tax ruling practice. In the spring of 2001 the Ministry of Finance followed up with a set of eight decrees on the new tax ruling practice. In the first of these decrees (30 March 2001, no. IFZ2001/295) the Ministry stated that the OECD Transfer Pricing Guidelines apply to the determination of arm's length transfer pricing for Dutch tax purposes. The first decree seeks to clarify a number of aspects of the OECD Transfer Pricing Guidelines for the Dutch tax practice. The second decree (30 March 2001, no. RTB2001/1379) makes it clear that no advance tax rulings will be issued with respect to hybrid finance structures if it is likely that the transaction is mainly driven by the avoidance of tax. The same applies with respect to the use of hybrid entities.

The third decree (30 March 2001, no. IFZ2001/294) relates to passive conduit companies, i.e. companies whose main activity consists of the receipt from associated companies and the payment to associated companies of interest and royalties. Conduit companies are not eligible for advance tax rulings if they do not meet one or more substance criteria as listed in the annex to the decree and if they are not exposed to real risks in connection with the transactions to which they are party. If a conduit company meets the substance criteria but fails to be exposed to risks, it is eligible for a ruling provided that it agrees to the spontaneous exchange of information with the state from which the conduit company derives interest or royalties by way of agreement determining the legal relationship between parties. Risks which the conduit company protects itself from through some form of insurance from a third party are treated as risks to which the conduit company is exposed. A new provision has in the meantime been introduced into the Corporation Tax Act which provides that passive conduit companies are not entitled to a foreign tax credit with respect to tax withheld from incoming interest or royalties by the source state, see the article on "<u>Passive conduit companies</u>" above.

The fourth decree (30 March 2001, no. BOB2001/698) provides that the Dutch Tax Authority will not issue an advance tax ruling if it suspects that the transaction harms the interests of a state which is party to a tax treaty with the Netherlands or if it suspects that the transaction harms another international interest.

The fifth decree implements the guidelines of the OECD Committee on Fiscal Affairs with respect to advance pricing agreements (APAs). Requests to enter into such agreements have to be submitted to the competent tax inspector, who then forwards them to the APA/ATR-team of the Tax Authority in Rotterdam for binding advice. The Dutch Tax Authority prefers bilateral APAs but unilateral APAs are also available. An APA can apply to all of the transfer pricing issues of the relevant company. The request for an APA can be limited, however, to transactions with specific companies associated with the company which submitted the request or to specific transactions. The term of an APA will usually amount to four to five years.

The sixth decree (30 March 2001, no. IFZ2001/293) explains the new procedure for the issue of advance tax rulings (ATRs). An ATR takes the form of an agreement determining the legal relationship between parties between the Tax Authority and the taxpayer and addresses the tax consequences of a certain transaction or set of transactions. Requests for ATRs must be submitted to the competent tax inspector. If the request relates to the eligibility of intermediate holding companies which are part of an international group structure or top holding companies whose subsidiaries do not conduct an enterprise in the Netherlands, the competent tax inspector is required to refer the request to the APA/ATR-team of the Rotterdam Tax Authority. The same applies to requests relating to hybrid financial instruments or entities and whether the activities of a non-resident company in the Netherlands will be treated as a permanent establishment. The usual term of an ATR is four years. The decree lists the information which the taxpayer is required to supply with the request and the contents of the binding determination agreement.

The seventh (30 March 2001, no. RTB2001/1195) and eighth decrees (30 March 2001, no. RTB2001/1365) deal with organisational aspects of the APA/ATR practice and the duties and responsibilities of the Co-ordination Group Transfer Pricing.

Developments relating to the Netherlands Antilles: changes to the New Fiscal Framework and Kingdom Tax treaty

Previous issues of ITN addressed the changes in Netherlands Antilles tax law known as the New Fiscal Framework or NFR. The NFR was adopted on 29 December 1999, but on 29 November 2001 the Netherlands Antilles Government submitted an amendment, which was adopted on 19 December 2001. The amended NFR has retroactive effect to 1 January 2001.

The Kingdom Tax Regulation or KTR, which is essentially a tax treaty between the Netherlands and the Netherlands Antilles, needed to be amended to bring it in line with the NFR. The amendment to the KTR entered into force on 1 January of this year and does not have retroactive effect to 1 January 2001.

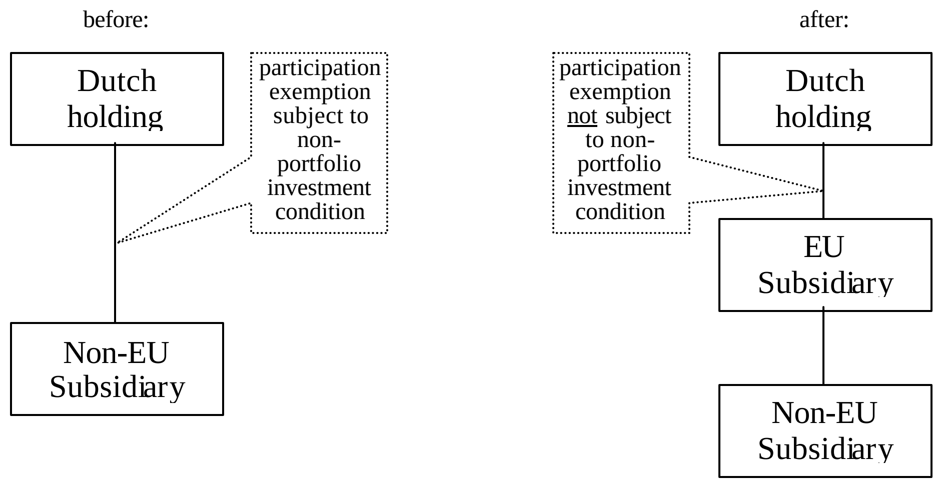
The effect of the amendment of the KTR is that dividends paid by a Dutch company to a Netherlands Antilles company which owns at least 25% of the share capital of the Dutch company are subject to Dutch dividend withholding tax at the reduced rate of 8.3%. The Netherlands will discharge the Dutch dividend withholding tax to the Netherlands Antilles.

The NFR introduces a participation exemption for dividends paid by a Dutch company to a Netherlands Antilles company owning not less than 25% of the Dutch company's share capital. Such dividends are 100% exempt from the new standard Netherlands Antilles profit tax rate of 34.5% (the same applies to gains deriving from the disposal of the shares of the Dutch subsidiary). Consequently, the aggregate Dutch and Netherlands Antilles tax burden on dividends paid by a Dutch company to a Netherlands Antilles parent company owning not less than 25% of the Dutch company's share capital is 8.3%.

Dividends received by companies qualifying as a Netherlands Antilles offshore company are subject to 2.4-3% Netherlands Antilles profit tax. Where such dividends originate from a Dutch company, they have already been subject to 7.5% Dutch dividend withholding tax. The aggregate tax burden suffered on such dividends may be 10.3% in the absence of deductible expenses for Netherlands Antilles profit tax purposes. Under certain circumstances it would have been more favourable for an offshore company to be treated as a normal company in 2001: in that case, the dividends from the Dutch company would be subject to only 7.5% Dutch dividend withholding tax plus 0.8% Netherlands Antilles tax, i.e. a total of 8.3%. Offshore companies may be able to obtain a ruling to that effect.

Amendment of participation exemption for portfolio investment subsidiaries

Shares in the capital of a non-resident subsidiary qualify for the participation exemption provided that they cannot be characterised as a portfolio investment. This requirement does not apply, however, if the subsidiary is a resident of an EU Member State and the shareholding amounts to 25% of the subsidiary's paid in share capital. On 1 January 2002 an anti-abuse measure in the Corporation Tax Act entered into force. This measure aims to prevent Dutch companies from circumventing the non-portfolio investment condition by transferring the shares of a company resident outside the EU, which can be characterised as a portfolio investment, to a company resident in the EU whose shares are owned by the Dutch company.



Pursuant to the anti-abuse provision, the participation exemption does not apply to shares of an EU subsidiary where:

1. the assets of the EU subsidiary mainly, i.e. for not less than 70%, consist of shares of non-EU subsidiaries, and
2. the shares of non-EU subsidiaries would not qualify for the participation exemption if they were owned directly by the Dutch company.

For practical purposes, these two tests are applied at the end of every tax year. If the anti-abuse provision applies, the Dutch company may have to revalue its shares in the EU subsidiary annually; gains resulting from such revaluation would be subject to corporation tax. The anti-abuse provision does not apply if the Dutch company can successfully demonstrate that the EU subsidiary has not been interposed to avoid or defer taxation. The Dutch company could demonstrate, for example, that income deriving from the shares of the non-EU subsidiary and gains are subject to adequate taxation in the hands of the EU subsidiary which has been imposed, without deferral.

Treaty developments

On 27 February 2001 the Netherlands Trade and Investment Office in Taipei and the Taipei Representative Office in the Netherlands signed an agreement for the avoidance of double taxation. This agreement does not have the status of a treaty but its contents strongly resembles the contents of tax treaties for the avoidance of double taxation. The agreement entered into force on 16 May 2001 and its provisions apply from 1 July 2001 with respect to withholding taxes and from 1 January 2002 with respect to the other taxes.

Press release Netherlands Trade and Investment Office 28 February 2001 and Decree of 25 April 2001, Stb. 2001, 213

The tax treaty between the Netherlands and Croatia which was signed on 23 May 2000 entered into force on 6 April 2001 and its provisions apply from 1 January 2002. From that date the provisions of the tax treaty between the Netherlands and former Yugoslavia ceased to apply. The treaty for the avoidance of double taxation of profits deriving from a shipping enterprise signed by the Netherlands and Hong Kong on 2 November 2000 entered into force on 17 October 2001. The tax treaty between the Netherlands and Moldavia signed on 3 July 2000 entered into force on 1 June 2001; its provisions apply from 1 January 2002. The tax treaty between the Netherlands and Kuwait which was signed on 29 May 2001 has been ratified by the Netherlands on 6 October 2001. The provisions of the tax treaty between the Netherlands and Belgium which was signed on 5 June 2001 should apply from 1 January 2003. On 31 October 2001 the Netherlands signed a tax treaty with Armenia. On 26 November the Netherlands and Austria concluded a new protocol to the existing tax treaty and signed an inheritance and gift tax treaty.

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January 2002

UNITED STATES - SEC Issues Guidelines for Registrant Self-Reporting of Material Misstatements and Omissions

by MARCUS J. WILLIAMS

In times of economic uncertainty, publicly traded companies find themselves dealing increasingly with the question whether to report - and how to report - unpleasant operational and financial issues. Among these difficult disclosures are corrections to previous reports filed under the Securities Exchange Act of 1934 due to recent discoveries of previously unknown circumstances and facts that make inaccurate one or more matters disclosed in the earlier reports. Not uncommonly, companies find themselves in this situation because they were misled by their own employees' misstatements. In the past, one's diligence in making timely, accurate disclosure of newly discovered problems often was rewarded with SEC investigations and enforcement actions. However, a recent SEC release provides guidance for public companies to avoid or minimize sanctions for Exchange Act violations that result from employee misconduct.

Public Company Liability for False or Misleading Reports Caused by Employee Misconduct
The Private Securities Litigation Reform Act of 1995 protects public companies from civil litigation where unforeseen developments vary from management's previously expressed expectations where the statements were made with a reasonable basis in fact and were clearly identified as expectations rather than assurances. That statute does not, however, provide a shield from liability for misstatements of past performance, whether or not made in good faith.

In this time of economic unrest, which follows closely on the heels of unprecedented technological and economic expansion, public companies may discover that they have over-reported revenues, understated expenses, or misstated a description of material contracts, pending litigation, or various other matters.

This misreporting may have resulted from facts and circumstances that were previously unknown and perhaps even intentionally concealed by employees. For example, a number of registrants have encountered problems where sales employees overstated their sales commitments which resulted in the registrant having "booked" orders that did not exist, or that were recognized in the wrong reporting period. Employees who have deliberately falsified revenue and expense items or who have concealed significant mistakes may well have caused their employers to make inadvertent but material misstatements in their SEC filings and exposed their employers to both civil liability and enforcement actions.

The SEC generally will pursue enforcement actions - and in some cases, criminal prosecutions - against employees whose misconduct perpetrates a fraud or serves as a "manipulative or deceptive device or contrivance" in connection with securities registration or reporting. The enforcement staff also may sanction the public company based on the notion that the employer should be held responsible for employees' misconduct that results in the company's filing false or misleading Exchange Act reports. Many registrants facing this situation have thus found themselves in a quandary because voluntarily reporting newly discovered problems might trigger an inquiry from the SEC enforcement staff and in many cases can result in enforcement actions. However, a recent SEC release may relieve registrant's of some of the tension in facing this conundrum.

New Enforcement Staff Guidelines Afford Registrants an Opportunity to Avoid or Minimize Enforcement Action and Sanctions
In October 2001 the SEC's Division of Enforcement clarified the criteria it uses to evaluate whether to take enforcement action against a reporting company for violations resulting from employee misconduct. The SEC decided not to take action against Seaboard Corporation where an employee of one of Seaboard's subsidiaries had booked improper revenue and expense entries and had concealed the errors from Seaboard and the subsidiary. Seaboard discovered the concealment in 2000 and promptly began an internal investigation into the matter, which involved more than $7,000,000 in misstatements over a five-year period. These misstatements had been included in Seaboard's Securities Exchange Act filings covering that same period, and caused Seaboard to fail to comply with its Exchange Act record keeping and reporting obligations.

After concluding an internal investigation of the matter, Seaboard contacted the SEC, issued a press release, filed a Current Report Form 8-K describing and quantifying the problem, and restated its earnings to account for the discrepancies. Stephen M. Cutler, the SEC's Acting Director for Enforcement, issued a press release approving Seaboard's response, stating that "crediting those who seek out, self-report and rectify illegal conduct is critical to achieving the Commission's goal of 'real-time enforcement.' We hope that, by setting forth a framework for exercising its prosecutorial discretion, the Commission will encourage companies to address unlawful conduct swiftly and meaningfully and to cooperate with law enforcement authorities. The result will be more efficient and effective enforcement of the securities laws."

The SEC went on to identify four factors that will play an important role in the staff's decision to pursue criminal or administrative sanctions against the issuer:

- Self-policing. Registrants that have established effective compliance and internal audit programs, including setting the "appropriate tone" from the top down, are less likely to encounter problems from employee misconduct and more likely to discover surreptitious actions that might otherwise go undiscovered.
- Self-reporting. When a reporting company discovers misreporting, it should conduct a thorough review of the nature, extent, origins and consequences of the problem and act affirmatively to disclose the problems "promptly, completely and effectively" to the SEC, the listing stock market, and the investing public.
- Remediation. The issuer must take corrective action to discipline or dismiss wrongdoers, and should modify and improve internal controls and procedures to prevent recurrences of similar problems. The company also should "appropriately compensate" those adversely affected by the erroneous reports.
- Cooperation. The reporting company must provide the SEC and other law enforcement authorities with all information relevant to the underlying violations and must describe thoroughly its remedial efforts.

Where the registrant acts with these goals in mind, the SEC has indicated that it will give "credit for cooperative behavior," which may include bringing reduced charges, seeking lighter sanctions or, in exemplary cases, "the extraordinary step of taking no action at all." By following these guidelines aggressively, including establishing appropriate procedures before problems are discovered, public companies may thus discover problems early - in some cases before a misstatement or omission occurs - or may minimize the damage that otherwise might occur.

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UNITED STATES - Clickwrap Agreement Found Valid and Controlling Over Written Purchase Order

Over the past five years, courts have recognized the validity of shrinkwrap and clickwrap, or click-and-accept, software license agreements. Most of these cases, however, have involved transactions where the shrinkwrap or clickwrap license was the only written document involved. For example, the seminal case on the issue, *ProCD v. Zeidenberg* (1996), involved a consumer transaction with an end-user purchasing the product in a retail store and no other written document. (See our July 1996 Intellectual Property Bulletin for more on the *ProCD v. Zeidenberg* case.)

But what should the result be where the user sends out a purchase order, and then receives software with a shrinkwrap or clickwrap license containing additional or different terms? Until this month, this question had never been answered by any court.

The United States District Court for the District of Massachusetts has now provided an answer. In *I.LAN v. Netscout Serv. Level Corp.*, Civ. No. 00-11489-WGY (D. Mass. January 2, 2002), Chief District Judge Young determined that a clickwrap agreement not only was valid and enforceable, but also that it, and not the buyer's purchase order, controlled the transaction. The buyer, a value added reseller of the software, sent a purchase order which specified that the requested software would be purchased with the right to perpetual upgrades and support. The seller subsequently sent software containing a clickwrap agreement providing different support terms, as well as a limitation capping the seller's liability at the amount of the license fees paid by the buyer. When the buyer sought to enforce its right to receive perpetual upgrades under the purchase order, the seller refused, citing the clickwrap agreement, and the buyer sued.

The court held that the clickwrap agreement was an enforceable contract. In fact, the court determined that enforcing a clickwrap agreement was even an easier question than enforcing a shrinkwrap agreement. With shrinkwrap, the buyer implicitly provides its assent by opening a package, or keeping or using the product. With a clickwrap agreement, the buyer accepts the terms explicitly by clicking and accepting the license or contract itself. According to the court, such explicit acceptance of terms forms a binding contract.

Regarding the limitation of liability, the court held that the clickwrap must control. The court observed that the valid and enforceable clickwrap agreement had been accepted by both parties, where the terms of the buyer's purchase order had never been accepted by the seller. In addition, the court read the language of the clickwrap to take precedence over any points on which a purchase order was silent. Given that the purchase order did not place any limitation on liability, the clickwrap agreement contained no expressly conflicting terms and the court enforced the more detailed and explicit clickwrap agreement. While a question still remains over how a court would settle disputes where the purchase order and the clickwrap both had express terms in direct opposition to each other, the rationale in *I.LAN* weighs in favor of enforcing the clickwrap agreement to which both parties have assented.

The court considered an alternative view of the case, in which the purchase order itself was a contract and the seller attempted to add additional terms through its clickwrap agreement. The court reached the same result under that view, based on some special circumstances arising from the history of the relationship between the parties.

Some buyers have anticipated just such a result, and have provided expressly in their master purchase agreements that the terms of those agreements cannot be superseded by clickwrap or shrinkwrap agreements contained in the software that they are licensing, or the packaging for such software. The effect of such provisions remains to be seen. However, without such an express provision dealing with this issue, courts can be expected to look closely at the terms clicked and accepted by the buyer when installing the software. The classic "battle of the forms" is thus likely to be won by that final electronic step.

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