



# Tax Planning International **European Tax Service**

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# Letter from the Editor

**W**elcome to the May issue of European Tax Service.

The last month has been a very eventful one for UK, the country having experienced one of the most exciting election battles in recent political history leading to a rare coalition government in decades. What will this power sharing deal at a national level translate into in at the taxpayer's level? Christopher Groves answers these question in the first article.

The Greek economy is in a very fragile state and the country is undergoing civil unrest and facing protests from demonstrators. Extreme times demand extreme measures and the new tax changes are a step to restore order in chaos. The tax team at Zepos & Yannopoulos present a vivid report of changes within the country's broad economic spectrum.

Giuseppe Galeano & Giorgio Orlandini have made a critical analysis in the third article on the recent crucial changes to the CFC regime in Italy.

Next, this month's *In Brief* section carries some very interesting developments in Austria, France, Finland, Greece, Ireland, Italy and Ukraine.

From the *ECJ*, Susana Caetano and Ana Costa discuss the recent referral to the ECJ, of interesting questions on the national VAT legislation and compatibility issues with the Sixth VAT Directive on the issues of samples distributed in the course of business.

Lastly, on *VAT*, the French Parliament has recently brought into force new regulations to bring French law in conformity with EU Directives on the application of VAT to sale of homes and building land. David Anderson looks at these changes and consequences.

Any suggestions or any articles or news reports can be sent by email at [jdialani@bna.com](mailto:jdialani@bna.com) or by telephone at +44 (0) 20 78475807.



- Finally, the purpose of the possibility to make deductions is to secure the future pension payments and not to eliminate double taxation as in the *Maninen* case. Also, at a general level, the withholding taxation applied to foreign pension funds is justifiable especially because this way the consistency of the tax system is assured.

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## FINLAND

### State aid: Commission approves tax exemptions for Finnish Real Estate Investment Trusts (REITs)

The European Commission has authorised, under EU state aid rules, the introduction of "Real Estate Investment Trusts" (REITs) in Finland that will be exempted from corporate income tax in order to encourage investment in affordable rental housing. After receiving assurances on a few changes, the Commission is satisfied that the scheme does not involve state aid as any profits made by the trusts will be subject to tax at shareholders' level very much like the profits made by individual investors investing directly in the real estate market.

*"The introduction of "Real Estate Investment Trusts" in Finland will encourage investment in affordable rental accommodation without unduly distorting competition," said Competition Commissioner Joaquín Almunia.*

The objective of the measure is to encourage investment in the Finnish rental housing market, so as to increase the supply of affordable rental accommodation. The proposed measure is modelled on the widespread model of "Real Estate Investment Trusts". According to the scheme notified by the Finnish authorities, to benefit from corporate tax exemption REITs will be publicly-listed, no single shareholder will own, directly or indirectly, more than 9.99 %. REITs will only operate in the field of rental accommodation with at least 80 % of their gross income coming from rents. Moreover, REITs will distribute at least 90% of their annual profits to shareholders as dividends.

The Commission's investigation found that the scheme contained no state aid, because the exemption from corporate income tax is linked to the requirement of immediate distribution of annual profits to shareholders, at the hands of which taxation then takes place. Thus, this mechanism puts the tax treatment of an investment in a REIT at par with the taxation of direct investments by individuals in real estate.

However, the Commission considered that a provision allowing REITs to use up to 30% of their annual profits to create tax exempt re-investment reserves would constitute incompatible aid. Following the

Commission's concerns, the Finnish authorities made the commitment not to put in force this provision.

European Commission, Brussels

Press Release IP/10/559

May 12, 2010

## FRANCE

### Under the table payments: Recent French court case,

Foreigners buying property in France may be told that it is normal and acceptable for some of the purchase price to be paid "under the table" outside France. It is very much an idea put to foreigner buyers, probably because French buyers are more likely to spot the pitfalls.

#### Advantages of "sous la table"

The advantages of not declaring the full purchase price fall into two categories, those for the buyer and those for the seller. For the buyer, paying a lower 'official' purchase price means that the *notaire's* fees and the Property Transfer Tax (5.09 percent) will be lower. In a limited number of cases, the lower 'official' price may keep the purchaser outside the wealth tax net. For the seller, a lower sale price means less capital gains tax and, if they have been declaring a lower value for the purposes of wealth tax, less likelihood of having to back-pay additional wealth tax. However, as set out below, the advantage for the buyer is potentially a double edged sword. This is why "under the table" payments are usually suggested by the seller.

#### Recent French case

A recent court decision by the *Cour de Cassation* (equivalent to the Supreme Court in England and Wales) makes undisclosed payments more dangerous. The facts were that a sale deed was signed on August 3, 2000 by a British couple as purchasers and a French couple as sellers. They had previously come to an agreement that an additional purchase price, not mentioned to the *notaire*, would be paid via a Geneva-based Swiss lawyer. The English purchasers on February 18, 2003 brought proceedings against the French sellers on the grounds that they had hidden the true sale price and that they wanted the "under the table" price refunded. The *Cour de Cassation* decided in favour of the English couple. This somewhat surprising turn of events was achieved by the application of various rules relating to evidence. The lesson to be learnt by parties purchasing or selling in France, and this regardless of their nationality is that "under the table" payments are very risky and should not be attempted.

In the past, parties could rely on a French legal rule that if an "under the table" payment had been agreed verbally, no evidence could be put before a French court to overturn the presumption that the price recorded in the *notaire's* sale deed was the true price. However, the *Cour de Cassation* decided that because an "under the table" payment constitutes fiscal fraud, proof can be brought by all means. In other words,

verbal evidence of a "Swiss payment" from the buyer which contradicts the price in the *notaire's* conveyancing deed is admissible in evidence.

### Risks for buyers

The English couple in bringing proceedings against the selling couple were informing on the selling couple that they had committed tax evasion, and were also publicising the fact that they had done the same. The risk for a purchaser is that the tax authorities may re-qualify the purchase price at a higher level, leading to the payment of additional Property Transfer Tax (5.09 percent of the purchase price) and other penalties. These penalties include:

- A civil penalty: the nullity of any side-letter;
- A fiscal penalty: interest for the late payment of the Property Transfer Tax and an increase of 80 percent of the tax due; and
- A criminal penalty: a three years-prison sentence and a fine of EUR45,000 plus associated penalties.

Even if the purchaser is not caught out or does not bring proceedings, issues do arise. The downside of participating in "under the table payments" is that the purchase price will be deemed to be that declared in the sale deed and not the true price paid. This means that on the sale of the property, the purchaser will, in effect, have to pay tax on a far larger capital gain. The seller might have been trying to avoid paying a larger capital gains tax bill. Also, in the event that the sellers are subject to French wealth tax, by hiding a portion of the price, it may avoid calling into question the price at which the property has been declared for the purpose of wealth tax in previous years.

Mitigating tax in France is often possible with careful planning. There are structures which can help with mitigating both the 3 percent tax and wealth tax.

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## GREECE

### Additional tax measures to cope with the Greek fiscal crisis

Further to the most recent tax law, L. 3842/2010 (explained in the article in detail in this issue) as a series of new tax bills were submitted to the Parliament on May 3 and 4 to facilitate the disbursement of the proposed financial aid to Greece.

The most important tax provisions include the increase of VAT rates, the increase of excise duties and the increase of rates applicable to luxury tax, the imposition of a (one time) special tax on enterprises with profits over EUR 100,000 for income earned in 2009 (fiscal year 2010) and the imposition of a special tax on TV commercials. The new measures can be summarised as follows:

### Imposition of a one-time tax (special contribution) on the net profits exceeding EUR 100,000 of corporate taxpayers

A special, lump-sum, one-time tax shall be imposed on the net income of corporate tax payers for the fiscal year 2010 (profits arising from January 1 to December 31, 2009). The tax will be based on the net income of enterprises that will be reported in the respective income tax returns provided that such income exceeds the amount of EUR 100,000. If an enterprise keeps accounting books according to the IFRS, the profits occurring according to the IFRS shall be taken into account for the calculation of the aforementioned tax, if the amount of such profits is higher than the amount of the net income of the enterprise.

The base for such tax on 2009 profits is capped. Thus, the amount of net income, which will be taken into account for the calculation of the tax may not exceed the average amount of net income for 2007 and 2008, multiplied by two.

### Tax rates

The calculation of the tax shall be made on the basis of a progressive tax scale applicable on specified taxable brackets, so that the higher bracket of net income shall be subject to a higher tax rate.

Taking into account that no tax shall be imposed if the net income of enterprises does not exceed the amount of EUR 100,000, but if the net income exceeds such amount the tax shall be imposed as of the first Euro, the applicable rates shall be as shown in Table A.

Table A (all amounts in Euro)				
Bracket of net income	Rate	Tax of Bracket	Amount of income up to	Total amount of tax
300,000	4%	12,000	300,000	12,000
700,000	6%	42,000	1,000,000	54,000
4,000,000	8%	320,000	5,000,000	374,000
Excess	10%			

### Adjustments to the tax applicable to the lowest bracket

The amount of the tax shall be reduced to be equal to the amount of the net income minus EUR 100,000.

The said one time tax, which is not deductible for income tax purposes, is payable in 12 monthly installments. The first installment is due on January 2011. In case of a lump-sum payment, a 2 percent discount applies.

### No double counting and subsequent refund

Taxpaying enterprises are entitled to a refund as long as the amount of net income, on the basis of which the tax was calculated, does not incorporate the net income of other (subsidiary) enterprises, which have also been subject to such tax.