



FRESHFIELDS BRUCKHAUS DERINGER

Transfer pricing and international tax disputes





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International Tax Review 2008

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Tax Law Firm of the Year
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Introduction to transfer pricing

Transfer pricing is probably the single biggest tax issue facing multinational businesses.

Tax administrations have become more innovative and aggressive in challenging cross-border transfer pricing and profit attribution. Each tax administration wants to secure what it considers to be its 'fair share' of taxable income. However, the administrations act in a relatively unco-ordinated way – it is rare to find a co-ordinated approach that matches transfer pricing adjustments in one jurisdiction with corresponding adjustments in another. This leaves businesses exposed to parallel investigations and potential double taxation charges.

Our clients have to step up to this challenge and we are well positioned to help. International co-ordination, exchange of knowledge and a crisp legal analysis can be critical in avoiding and resolving international transfer pricing investigations and related disputes – pure economic analysis is no longer sufficient.

Freshfields Bruckhaus Deringer is a leading international law firm offering first-class tax and dispute resolution expertise. We are currently advising on large-scale transfer pricing disputes for multinationals. We also advise in conjunction with accountancy firms.

This brochure explains the challenges that international businesses face in transfer pricing enquiries in some of the key jurisdictions in which we operate. It also outlines other 'hot topics' in the field of tax disputes in each of our key jurisdictions.

For further information, please get in touch with the relevant partner listed in the enclosed contact card.

Our transfer pricing experience

We have extensive experience in advising multinationals on large-scale transfer pricing enquiries and disputes, including advising on:

- technical questions about the construction of domestic and international law and practice on transfer pricing;
- the interaction of transfer pricing rules in different jurisdictions (including under double taxation treaties);
- the interaction of transfer pricing and controlled foreign company rules;
- recharacterisation arguments (eg if tax authorities seek to ignore a transaction altogether on the basis that it would never have been concluded between unrelated parties);
- 'thin capitalisation' issues;
- the allocation of intellectual property and other intangible assets within a group;
- cost-sharing agreements and international cash-pooling structures;
- transfer pricing and exit tax issues on business re-organisations, including outsourcing or offshoring business support functions, downsizing and secondment or agency arrangements;
- the availability of local tax deductions for international stock option plans and remuneration schemes;
- transfer pricing methodology, including the use of the 'transactional net margin' and 'profit split' methods;
- analysis of functions and risks within a multinational group as a basis for the determination of defensible transfer prices;
- the development of global documentation procedures and policies in a multinational group to satisfy the requirements of multiple jurisdictions;
- the extent to which information, including documents subject to legal privilege or held by overseas entities, can be legitimately withheld from the tax authorities during informal enquiries or a formal tax audit;
- challenging formal document requests that are unfocused or disproportionate to the potential tax to be recovered and/or seeking a direction from the courts to force tax authorities to conclude an enquiry or audit that is the subject of undue delay;
- preparing appeals against transfer pricing assessments, including tactical and legal questions (eg whether to appeal against the assessments under domestic law or accept the assessment but seek a corresponding adjustment under double taxation treaties or arbitration arrangements such as the EU Arbitration Convention);
- using external experts in an appeal and the status of any advice provided;
- the degree of certainty and finality that can be achieved through the use of advance pricing agreements (APAs), particularly bilateral APAs to which foreign tax authorities are party;
- disputes arising from the interpretation of settlement agreements when the validity of a settlement agreement is later contested; and
- the application and legality of penalties and criminal sanctions imposed in relation to transfer pricing disputes.

'In a highly competitive field, being the only firm to receive the *Who's Who Legal* Law Firm of the Year Award for Corporate Tax is an outstanding achievement. Freshfields' continuing success is reflected in the consistently positive feedback we received, recognising the firm's exceptional individual and collective talent. We have no hesitation in once again declaring Freshfields Bruckhaus Deringer to be the leading firm in the world in this area.'

***Who's Who Legal* 2008**

'Dispute resolution is an area in which Freshfields dominates internationally.'

***PLC Which Lawyer?* 2008**





Our tax disputes experience

Our more general international tax disputes experience includes advising:

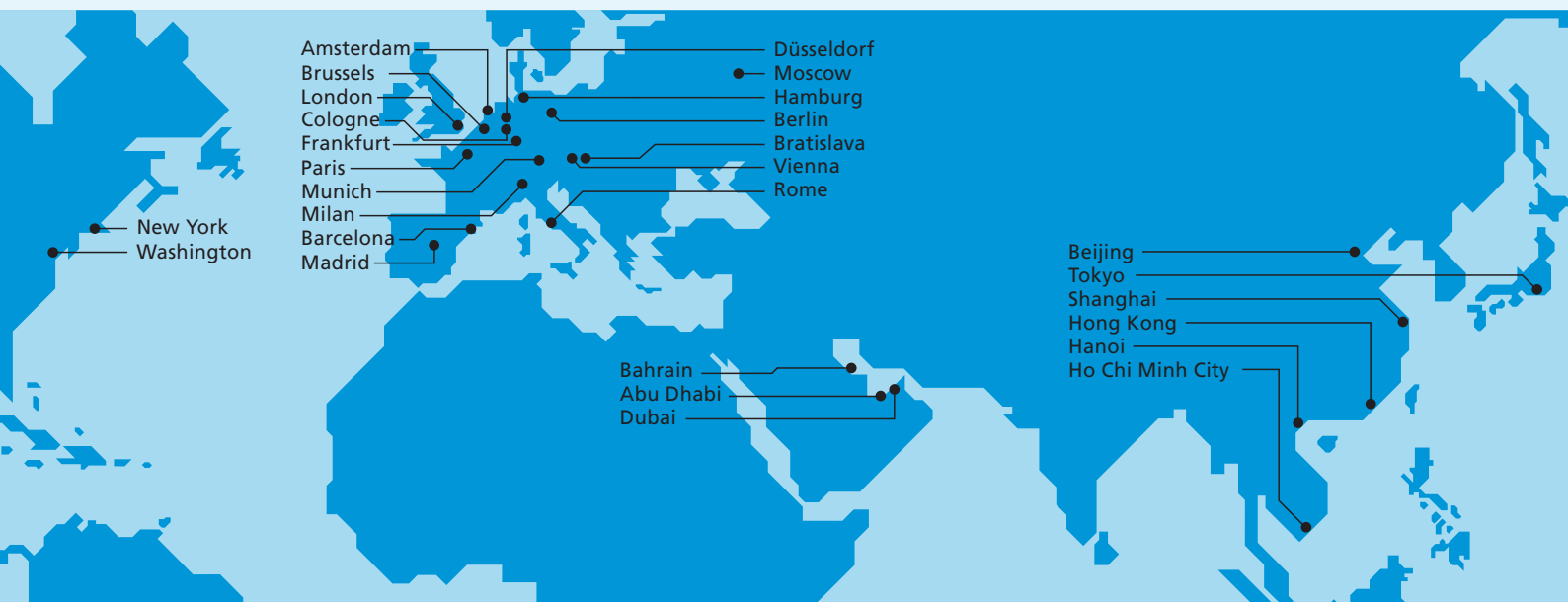
- on transfer pricing disputes (including under double taxation treaties and the EU Arbitration Convention) and disputes on the cross-border allocation of profits;
- on investigations and disputes over tax-structured finance arrangements, employee benefit and pension arrangements and other forms of tax planning;
- on refunds of withholding taxes levied on dividends following the decisions of the European Court of Justice (ECJ) in *Denkavit* and *Amurta*;
- on disputes involving captive insurance companies;
- on disputes with the Italian tax authorities on the refund of certain imputation tax credits and dividend withholding taxes;
- financial institutions on third party document requests, including in relation to offshore bank accounts;
- on disputes with the Italian tax authorities over the tax treatment of medium-to-long-term loans and the determination of the taxable goodwill on the transfer of an Italian business;
- on investigations into the attribution of profits to permanent establishments;
- on disputes with the French tax authorities concerning debt pushdown legislation and carrying forward losses;
- on the first-ever true securitisations of French tax refund claims and Italian VAT refund claims;
- a private equity firm in a dispute with the Italian tax authorities on the beneficial ownership of Italian source dividends and interest;
- German corporates on their successful appeals to the German Federal Fiscal Court over group taxation and loss utilisation cases;
- a car manufacturer on VAT disputes with the Italian tax authorities;
- French and international investors (including private equity investors) on French interest deduction disputes;
- a German bank on its successful appeal to the German Federal Fiscal Court over the tax accounting of hybrid instruments;
- the Austrian waste management industry in defending its non-profit status for income tax purposes in the Supreme Tax Court;
- Camas on its successful appeal to the UK Court of Appeal over its claim to deduct expenditure incurred in evaluating a potential acquisition;
- Hutchison Whampoa in a lead case for the telecommunications sector against the introduction of a wireless tower tax before the Austrian Constitutional Court;
- JT International and RJ Reynolds on proceedings before the European Court of First Instance, the ECJ and national courts challenging EU tax revenue claims on tobacco products;
- O2 in the UK and tele.ring in Austria on VAT proceedings before domestic courts and the ECJ over 3G mobile licences;
- Powergen in judicial review proceedings in the UK House of Lords over alleged double taxation arising under the rating regime for power stations;
- Transco on its successful appeal against the UK tax authority's challenge of the revenue nature of certain expenditure; and
- Vienna Insurance Group on proceedings before the Austrian Constitutional Court about corporate income tax levied on insurance business.

Our international network

Freshfields Bruckhaus Deringer is an elite international law firm. We have market-leading tax and dispute resolution specialists located across Europe, the US and Asia. This enables us to provide comprehensive advice to national and multinational corporations, financial institutions and governments.

We also have good relationships with individual lawyers and law firms in those jurisdictions in which we do not have offices. We typically co-ordinate the work of local law firms to ensure that our clients receive a seamless service with a single point of delivery.

We would be happy to provide further information on our international tax disputes capabilities in jurisdictions that are not covered in this brochure if it would be of interest to you.





Austrian Tax Firm
of the Year
*International Tax
Review 2007*

Austria

Transfer pricing

Transfer pricing issues for cross-border business have become increasingly important for the Austrian tax practice. This is due to the high number of Austrian enterprises that are connected to international businesses, both inbound and outbound.

Austrian transfer pricing is generally based on the 'arm's-length principle'. However, the application of this principle is not regulated in detail by Austrian domestic law. Instead, it is primarily based on the international concept of the arm's-length principle as developed by the Organisation for Economic Co-operation and Development (OECD) and in tax treaties. The practical relevance of the OECD transfer pricing guidelines is that they were adopted into national law by administrative guidelines in 1996. Furthermore, because the Austrian tax authorities generally follow a 'dynamic' approach to OECD developments, transfer pricing work done by the OECD since 1996 is also considered to be relevant. The interpretation by the Austrian tax authorities is, in most cases, in line with the OECD's reports.

In practice, transfer pricing adjustments are mainly based on the bilateral double taxation conventions concluded by Austria, which generally follow the OECD Model Tax Convention. There is some additional domestic transfer pricing legislation but this merely implements general tax treaty principles. International transfer pricing disputes are usually resolved under the available (and sometimes not very effective) tax treaty mechanisms: ie the 'mutual agreement procedure'. In addition, for EU cases, the EU Arbitration Convention can be invoked.

There are no specific documentation requirements regarding transfer pricing under Austrian law. Documentation requirements therefore follow the general rules on documentation required for tax purposes. However, increased co-operation is expected from the taxpayer in clarifying the relevant circumstances in a cross-border situation. Furthermore, the Austrian tax authorities use the OECD documentation requirements to interpret the general domestic provisions. The EU code of conduct on transfer pricing documentation, which aims to standardise multinationals' obligations, is not formally adopted or referred to in Austrian law but in practice is likely to be accepted by the tax authorities.

Other hot topics in the tax disputes field

Interaction with European law

The Austrian Supreme Court has recently denied that EU law provides international portfolio dividends with exemption from withholding tax. Austrian investors are seeking ways to protect themselves from the resulting double taxation, such as claiming a credit for underlying foreign taxes. Also, following the decision of the European Court of Justice (ECJ) in *Cadbury Schweppes*, Austrian controlled foreign company legislation is being scrutinised for compliance with European law.

Debt push-down structures

The Austrian tax authorities are challenging intra-group debt push-down structures (where intra-group debt is allocated to local group companies to reduce their local tax bases) more aggressively either on the basis of abuse of law arguments or through thin capitalisation principles.



Implementing the group taxation regime

The Austrian group taxation regime, introduced in 2005, allows a deduction for foreign group subsidiaries' losses on a basis even more favourable to the taxpayer than that under the ECJ's *Marks & Spencer* doctrine. The tax authorities are starting to tackle international holding structures designed to benefit from the regime. The group taxation regime also allows for the amortisation of goodwill from share acquisitions over 15 years. The requirements for this relief are being tested in detail by the Austrian tax authorities.

How can we help?

We have significant experience in high-profile tax matters as a result of the tax advice that we have provided to major international and domestic businesses. Our tax experts, who are well recognised in the market, advise on all aspects of transfer pricing and tax disputes.

When structuring the tax aspects of a transaction, our advice will be built on a thorough analysis of the facts and an experienced judgement of the law. Our advice is intended to withstand testing by the tax authorities and deliver sustainable benefits for our clients. When litigation does result from a tax question, we represent our clients before the relevant Austrian Supreme Courts (both the Supreme Tax Court and the Constitutional Court) as well as before Lower Tax Courts. We have also represented clients before the ECJ. We advise clients subject to a tax audit or in negotiation with the tax authorities, both locally and with the federal tax administration.

Contact partner

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Tax Law Firm of
the Year
*Belgium Legal
Awards 2007*

Belgium

Transfer pricing

Transfer pricing in cross-border business has become increasingly important in the Belgian tax practice. This is because of the large number of Belgian enterprises that are connected to multinational businesses and recent initiatives by the Belgian government and tax authorities.

Belgian transfer pricing rules generally follow the 'arm's-length principles' adopted by the Organisation for Economic Co-operation and Development but these were formally adopted in Belgium only in 2004. Before then, the arm's-length principle was only indirectly reflected in the law. The pre-2004 provisions are still applicable and can be used to challenge a Belgian tax payer's transfer pricing policies. The rules include the general prescriptions on the deductibility of business expenses.

Compared with some other jurisdictions, the documentation requirements that have been introduced are relatively light. There is no legal requirement to document the basis on which transfer prices with related parties have been decided. The administrative guidelines, however, urge taxpayers proactively to document their transfer pricing and urge tax inspectors to carry out in-depth transfer pricing audits if the taxpayer fails to provide documentary evidence of the efforts it has made to fix arm's-length inter-company prices. Belgium supports the EU initiative for a European transfer pricing documentation system that consists of a master file and country-specific documentation.

In the past few years, the tax authorities have adopted a more co-ordinated approach to transfer pricing. They have established a transfer pricing audit team, which provides specialist assistance to inspectors engaged in transfer pricing audits. Members of the team often participate in large taxpayers' tax audits or are consulted by tax inspectors engaged in transfer pricing disputes.

Taxpayers can request advance pricing agreements (APAs) on a unilateral basis from the Belgian ruling commission. Taxpayers can also ask for APAs bilaterally or multilaterally (involving cross-border cases if one or more other jurisdictions are involved).

Other hot topics in the tax disputes field

Excess profit rulings

From 2004, Belgian law has contained a provision allowing for a unilateral adjustment to Belgian taxable profits if the profits of an enterprise that is a member of a multinational group are different from what they would have been for an equivalent independent enterprise. The benefit resulting from this difference is not allocated to the Belgian enterprise and therefore is not taxable in Belgium. The underlying rationale is that the 'excess profit' forms part of the profits of the foreign related party, although it is not necessary that these profits are actually taxed abroad. A taxpayer can benefit from excess profit adjustments only if it has obtained a ruling from the Belgian ruling commission.

Ruling commission revision of its view on the capitalisation of a Belgian financing company

In the recent past, the Belgian ruling commission has issued rulings allowing a Belgian financing company to reduce the taxable profits it realises in Belgium to an



absolute minimum. This has been achieved through, among other things, transfer pricing concepts and locating important risks and functions outside Belgium. However, the Belgian ruling commission is expected to have issued a revised 'viewpoint' on its practice in early September 2008.

Structured finance audits

Following a number of court cases, it is more likely that structured finance transactions, particularly those that incorporate a tax benefit, will come under detailed scrutiny from the Belgian tax authorities.

Business re-organisations after takeovers

The structuring of acquisition transactions has evolved significantly and reflects increasingly sophisticated practices. These transactions, especially post-acquisition restructuring, often have a tax element. The tax authorities are starting to challenge the deduction of interest payments that they claim are not on an arm's-length basis, as well as other aspects of these deals. We expect an increased level of litigation in this area.

Criminal investigations initiated by the Belgian tax authorities

The Belgian authorities are stepping up efforts to fight fiscal fraud and/or schemes that they consider to be solely tax-motivated or tax-driven. We are aware of the tax authorities taking an increasingly aggressive approach and pressing for criminal charges against companies and individuals. This may be a tool to put more pressure on taxpayers to increase their willingness to enter into a settlement with the authorities.

How can we help?

We have broad experience in negotiating rulings and bringing cases before the Belgian ruling commission. Ours is one of the few Belgian tax practices with long-standing experience in advising financial institutions and corporate clients on structured finance transactions, so our expertise in this area is unrivalled. We are also particularly well placed to advise on tax audits and to provide potentially decisive input to challenges by the tax authorities.

We also have wide experience in handling tax litigation, both in the administrative phase and before the Belgian courts. As tax lawyers, bound by tight legal privilege rules, we can assist clients in tax audits, hearings or settlements, as well as when criminal charges may be pressed. We can also provide guidance on the legal privilege defence to document disclosure requests from the tax authorities.

Contact partner

BRUSSELS

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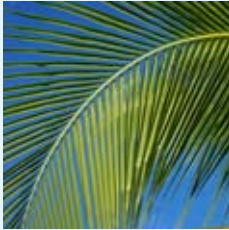
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'Commentators underline "strong analysis and excellent communication with the French tax administration" as reasons for choosing Freshfields for tax matters.'

Chambers Global 2008

'Freshfields Bruckhaus Deringer's tax practice is "excellent and very transaction-oriented".'

Legal 500 EMEA 2008

France

Transfer pricing

The French transfer pricing rules generally apply to French businesses that control, are controlled by or are under common control with entities established outside France. The French tax authorities (FTA) are entitled to charge tax on the deemed income that a French undertaking transfers indirectly to related foreign entities, irrespective of the form of such transfer (eg non-'arm's-length' purchase or sale prices). The French transfer pricing rules are based on the 'arm's-length principle' and generally follow Organisation for Economic Co-operation and Development principles.

A taxpayer may enter into bilateral agreements with, or seek prior approvals from, the FTA concerning its transfer pricing policies as a way of preventing any future dispute. In the absence of such a prior approval, the FTA may exercise a wide range of transfer pricing audit powers, including the possibility of requesting from a French taxpayer, during an audit procedure, all information and documents describing the taxpayer's cross-border pricing methods.

The FTA are reportedly planning to impose more stringent transfer pricing documentation obligations on companies with annual sales in excess of €50m. Such companies would be requested to have full and detailed transfer pricing documentation ready at all times and in any case before any tax audit. The precise content of this reform, which could be included in the Finance Bill for 2009, has not yet been made public.

Other hot topics in the tax disputes field

Dawn raids (*perquisitions fiscales*)

The FTA have wide-ranging search powers, which may be exercised upon authorisation by a judge. These powers enable the FTA to access all documents about the VAT, income tax or corporate income tax position of a taxpayer that are kept on any business premises of the taxpayer's located on French territory. There are 200 to 250 searches per year. The FTA take an increasingly focused and aggressive approach to dawn raids, particularly targeting 'permanent establishment dawn raids'. Following the recent wave of inbound investments by international private equity and real estate funds, the FTA have begun raiding the offices of French portfolio companies and asset managers to determine whether the (often foreign incorporated) intermediary companies that hold the French investments may really be managed from France – and thus have a French taxable presence.

Leveraged buy-outs (LBOs) – interest deduction issues

The French tax rules on interest deductions have been toughened recently. In particular, the thin capitalisation rules in effect since 1 January 2007 are much more sophisticated and restrictive than previous legislation. The new legislation, and the accompanying guidelines published by the FTA on 31 December 2007, is open to interpretation on various points that are crucial in all leveraged structures. As a result, we expect that over the next few years the FTA will be increasingly watchful of, and will initiate enquiries into, transactions relying on internal leverage. Challenges over interest deductions are likely, based on a combination



of the FTA's aggressive uses of the thin capitalisation legislation and the anti-debt pushdown rules. More generally, enquiries are expected into the arm's-length character of related party financings.

Leveraged buy-outs – management packages

Executive compensation structures – especially management packages in relation to LBO transactions – have been on the FTA's agenda for years. It is very likely that, following recent highly publicised management exits in the context of secondary LBOs, the FTA will step up their efforts to challenge structures that they think are 'just too tax efficient'. In the light of recent statements by government officials who are very averse to share-based compensation structures, it is expected that the FTA will be very aggressive in challenging management packages (most likely on anti-abuse grounds, with the associated steep penalties) in an effort to inhibit share-based structures.

Structured finance tax audits

Following a string of adverse cases decided by the French supreme tax court, it is more and more likely that structured finance transactions, particularly those that incorporate a tax benefit, will come under higher scrutiny by the FTA, with tighter requirements as regards economic substance, beneficial ownership and 'substance over form' issues. (This trend has already materialised, with several of those cases freezing the market on various, previously high-volume, types of products.)

Effect of EU law

EU law has an increasingly decisive effect on domestic tax disputes, in a growing number of areas (VAT, corporate income tax, withholding taxes). As members of one of the very few truly integrated international tax practices, our French tax lawyers have developed an expertise in this field and routinely provide guidance to international clients on the effects of EU law and European Court of Justice case law on their French tax situations.

Monetisation of tax claims

Our Paris tax lawyers can help French and international clients identify and handle any tax refund claims (based, for instance, on the illegality of French taxes on non-compliance with EU law) that they may hold against the FTA. Our tax and finance teams can also provide an integrated service of identifying and implementing opportunities to monetise such claims and we advised on the first ever securitisation of French tax refund claims.

How can we help?

We have extensive experience representing French and international clients in the context of transfer pricing-related disputes in France. We can help define a strategy to handle enquiries and disputes and provide assistance in negotiating settlement terms with the FTA. We can also help set up transfer pricing documentation in anticipation of tax disputes and advise on the best strategic utilisation of this documentation during tax audits and court litigation.

Our tax lawyers also have practical experience of all the hot topics listed above, having assisted a variety of clients (corporates, funds and financial institutions) in the course of ‘permanent establishment’ dawn raids, interest deductibility disputes, the structuring and implementation of executive compensation and management packages and cross-border financial products. Equally crucially, as members of a firm with a very strong record of advising on cross-border funds structuring, investments and financial products, our tax lawyers have a clear understanding of how the relevant structures are (or should be) designed and run and thus are able to identify and manage risk areas effectively.

Contact partner

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German Tax Firm
of the Year
*International Tax
Review 2007*

'One of the largest teams in the country, this group has the capability to address tax issues from any of its offices in Frankfurt, Cologne, Munich, Düsseldorf and Hamburg. Particularly reputed among competitors in relation to its structured finance and transactional work, it was described by one client as "a tremendously capable department that can integrate cross-office work efficiently".'
Chambers Global 2008

Germany

Transfer pricing

Transfer pricing has become a key priority in Germany. Today, transfer pricing rules are, to a much greater extent than in the past, detailed and governed by statutory rules. The legislative environment has, in particular, been changed by the introduction of statutory documentation requirements and, more recently, the introduction of specific provisions over the determination of transfer prices and the taxation of business restructuring. In addition the German Federal Ministry of Finance has published extensive decrees on transfer pricing documentation requirements and a regulation on cross-border transfers of business operations.

The German transfer pricing rules are generally based on the 'arm's-length principle'. The basic rules (eg regarding constructive dividends) apply equally to domestic and international transactions. However, there are additional substantive and procedural rules that apply to international transactions only. In the light of the recent case law from the European Court of Justice (ECJ), it is questionable whether some of the rules on international transactions are in line with European law.

Under the statutory documentation obligations, taxpayers have to document the economic and legal context of a transaction to establish the arm's-length price. If a taxpayer does not provide any (or only insufficient) proof of the chosen method's appropriateness, justifying the actual transfer price, the tax authorities can impose tax on the basis of an income estimate. In addition to potential double taxation, the taxpayer is faced with the risk of penalties of up to 10 per cent of the income adjustment.

Following the latest tax reform, the general principles governing the determination of transfer prices have been written into law and specified. The new law provides for the statutory priority of the 'comparable uncontrolled price' method, the 'resale price' method and the 'cost plus' method in determining transfer prices. In addition, as a response to the favourable case law from the German Federal Fiscal Court, the legislature has significantly tightened the rules governing adjustments to the actual transfer prices. If the actual price is outside the range of arm's-length prices, adjustments are made to the range's median. If neither fully nor partly comparable arm's-length prices can be found, a hypothetical one has to be determined.

For the first time, the new law provides for special rules on business restructuring. A business restructuring is defined as a relocation of entrepreneurial functions. The definition of a function is very broad: it includes both intangible and tangible assets as well as opportunities, risks and other advantages. When a function is relocated, the taxpayer has to determine a hypothetical value for the 'function as a whole'. Under the new law, it will be necessary to make a valuation for a so-called 'transfer



package' – that is, not only for the function itself but also for any intangible value attached to it. The tax authorities have published draft regulations to flesh out the new law but in some respects these go beyond the wording of the legislation.

Lastly, advance pricing agreements (APAs) are an important area. Historically, the German tax authorities have not issued binding rulings on transfer pricing matters. In 2007, the German Ministry of Finance formally repealed that position and, for the first time, issued guidelines on the procedure for obtaining APAs. In the meantime the number of multilateral APAs has significantly increased. In particular, in light of the tightened regulatory environment, they have become an attractive international tax planning instrument.

Other hot topics in the tax disputes field

Treaty shopping rules

In recent years, German tax courts have often interpreted German anti-abuse provisions in a manner more favourable to taxpayers than to the tax authorities. However, as a reaction to this case law, Germany's anti-abuse rules – especially in relation to withholding tax relief under a tax treaty or EU directive – have been significantly tightened. The application of the new rules gives rise to technical difficulties and uncertainties that have only partly been addressed in a recent guidance letter from the tax authorities.

Permanent establishments

The taxation of permanent establishments is one of the most challenging issues of international taxation. In addition to issues arising from the creation of a permanent establishment (in particular, the distinction between a permanent establishment and an independent agent), the allocation of profits within a multinational enterprise is very complicated. The German administrative principles on permanent establishments, dating from 2000, have been much modified by more recent guidance letters, such as those dealing with the allocation of capital by financial institutions. The tax treatment of a shift of functions between the head office and a permanent establishment is often subject to dispute. No clear guidance yet exists for moving functions to permanent establishments, as opposed to between separate entities.

International employee stock option schemes

The German rules on the taxation of stock options have recently been confirmed in an administrative decree on the taxation of employment income under double taxation treaties. Nonetheless, the decree falls short of addressing some important questions, such as the effects of mergers and demergers on the taxation of stock options. Accordingly, the treatment of international stock option schemes still

poses particular challenges. Differing concepts across jurisdictions on vesting stock options or the deductibility of expenses can result in the risk of double taxation.

Group taxation and cross-border loss relief

The general principle introduced by the ECJ in the *Marks & Spencer* case – that tax losses must always be usable somewhere – was confirmed in the recent *Lidl Belgium* case. Following the rationale established by the ECJ, a taxpayer may claim for the deduction of losses incurred by their permanent establishment in another member state, provided these losses can no longer be used in the member state where the permanent establishment in question is situated. It is not yet clear to what extent German taxpayers can take advantage of this judgment. In particular, questions such as whether losses can be used in the year in which they are incurred or when they become final still need to be considered.

CFC rules after *Cadbury Schweppes*

As a reaction to the ECJ's judgment in *Cadbury Schweppes*, the German controlled foreign company law has been amended with effect from 2008. However, even after the change of law, there are still considerable doubts about its conformity with European jurisprudence.

Hybrid instruments and hybrid entities

The use of hybrid instruments (such as silent partnerships or profit-sharing rights) is one of the most complex fields in international tax planning and is increasingly subject to tax disputes. Following the OECD Partnership Report, in 2007, the German Ministry of Finance has published a draft guidance letter on the application of double taxation treaties to partnerships. Recently, the Federal Fiscal Court has also ruled on a number of international partnership cases. In light of these recent developments, international partnership structures may need to be reconsidered.

How can we help?

We have extensive experience advising our clients on international business restructuring and our network of offices has a particularly strong record in implementing cross-border restructuring. If required, we can also provide any necessary corporate law advice.

We represent financial institutions and multinationals that are subject to tax audits and transfer pricing-related disputes. In particular, the tax implications arising in the context of shifting functions require a thorough factual and legal analysis, in which our experienced tax lawyers can add value. In addition, we often provide assistance in negotiating settlement terms with the German tax authorities.

Capitalising on our wide experience in group restructuring, acquisitions, post-acquisition restructuring and structured finance, we are in a position to advise on any kind of dispute arising from such transactions.

Contact partner

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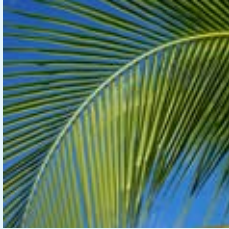
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'This "creative and responsive" set continues to impress clients and peers with its tax work on some of the country's most complex financial transactions, despite being a comparatively small team. Cross-border transactions and structured finance are areas of expertise.

The quality of this eight-member team is underlined by one client, who describes its level of service as "similar to the tax boutiques, but with the advantage of an international network".'

Chambers Global 2008

Italy

Transfer pricing

Transfer pricing is one of the most difficult international tax issues facing multinational enterprises and is one of the most important areas of investigation by the Italian tax authorities.

The Italian transfer pricing system applies to cross-border transactions carried out by Italy-resident companies with non-Italy-resident related counterparties if, directly or indirectly, the counterparty controls or is controlled by the Italian company or if they are both under common control. For transfer pricing purposes, 'control' includes all situations involving potential or actual economic influence.

Under the Italian transfer pricing rules, taxpayers must value their transactions with related counterparties at fair market value. If the revenues or expenses derived from such transactions are, respectively, lower or higher than those that would be agreed by independent parties, taxpayers must make corresponding adjustments in their income tax returns.

According to the official regulations on transfer pricing, issued by the tax authorities in the early 1980s (a possible update is under consideration), the Italian 'fair market value' concept reflects the 'arm's-length principles' described by the Organisation for Economic Co-operation and Development (OECD) in its 1979 report *Transfer pricing and multinational enterprises*. This report has been periodically updated and amended to reflect the progress of the OECD's work on transfer pricing. In particular, the OECD issued a new report in 1995, *Transfer pricing guidelines for multinational enterprises and tax administrations*. The 1995 report has not been explicitly incorporated into any official rules issued by the Italian tax authorities. However, it is generally believed that the guidelines provided in the 1995 report should be applicable in Italy and this approach has been adopted in practice by the tax authorities.

Legislation enacted in 2003 (the so-called 'international tax ruling') governs the arrangements that multinational enterprises can agree with the Italian tax administration. These relate mainly, but not exclusively, to transfer pricing, dividends, interest, royalties and other international tax issues. Transfer pricing arrangements concluded under the international tax ruling procedure can be treated as unilateral advance pricing agreements (APAs) even though the Italian tax authorities are required to send a copy of the agreement to the relevant foreign tax authorities. They are binding for three tax years unless there are changes in the factual and legal circumstances under which the agreement was made. Due to its complexity and uncertainties in various aspects, the international tax ruling procedure has not been very successful so far.



Other hot topics in the tax disputes field

Residence of individuals and corporations

The Italian tax authorities have been successful in raising tax assessments against well-known Italian individuals (sportsmen, singers etc) who had fictitiously moved their domicile and tax residency to outside Italy. Additionally, the residence rules for individuals have recently been tightened up.

The Italian tax authorities have also been successful in raising assessments against companies that were allegedly tax resident outside Italy but had their places of effective management inside Italy. In addition, Italian 'deemed-residence' rules presume foreign companies are tax residents in Italy if they hold a controlling stake in Italian subsidiaries and are either controlled by Italy-resident persons or managed by a board of directors mainly composed of Italy-resident individuals. The scope of these rules has been extended very recently so that the presumption now applies to foreign companies with assets mainly invested in Italian real estate closed-ended funds that are also controlled by Italy-resident persons.

Beneficial and tax ownership

The Italian tax authorities have recently focused their attention on tax treaty shopping schemes and the beneficial ownership clauses. Establishing beneficial and tax ownership of assets that generate Italy-sourced income (for example, dividends, royalties, interest etc) for foreign investors is crucial to determine the applicable withholding tax regime and to ascertain whether withholding tax reliefs or reductions, under Italian domestic or treaty provisions, apply.

The beneficial and tax ownership analysis is becoming more significant in the light of the Italian tax authorities' increased sophistication in this area.

International Financial Reporting Standards

Following an amendment introduced by the Italian Finance Act 2008, corporate income tax law now follows International Financial Reporting Standards on the qualification, classification and imputation of items of income. A number of opportunities could arise from structured finance deals (for example, the tax treatment of structured notes and closely related embedded derivatives).

Interest expenses issues

The Italian tax rules on interest expenses have been amended by the Italian Finance Act 2008 and by Decree 112 of June 2008. The previous tax laws were open to interpretation on various points that are crucial to certain kinds of financial transactions. The effect of the new rules on existing leveraged buyout structures and structured financial transactions should be carefully considered.

Stock option plan

The beneficial tax regime for stock option plans was repealed by Decree 112 in June 2008. Accordingly, an urgent review of executive compensation schemes and management packages is advisable.

Dividend withholding taxes and effect of EU law

The Finance Act 2008 sets a 1.375 per cent withholding tax rate (instead of the standard 27 per cent rate) on dividends distributed to companies and entities resident and subject to tax in the EU and in the European Economic Area (EEA). The European Court of Justice (ECJ) decisions allow such EU/EEA-resident shareholders to request refunds of dividend withholding taxes suffered on Italy-sourced dividends and levied in violation of the EU law.

Anti-avoidance and effect of EU law

Italy does not have a general anti-avoidance rule. Instead, there are several anti-avoidance provisions that apply to specific transactions. However, the Italian Supreme Court has ruled in various recent decisions that there is a general principle of ‘abuse of law’ in the Italian system, which can be gathered from the principles of EU law and applies to all sectors of Italian law. Such decisions refer to the ECJ’s judgment in the so-called *Halifax* case (joined cases C-255/02, 419/02 and 223/03) and to the concept of abuse of law ruled therein.

The concept of abuse of law, as defined by the ECJ and accepted by the Supreme Court, says we must analyse the underlying contracts and actions in relation to a given transaction. This is to determine whether the transaction is essentially aimed at obtaining a tax advantage and hence is an abuse of law. Alternatively, there may be economic reasons that explain the transaction’s rationale. On the basis of the recent Italian Supreme Court decisions, the assessment of genuine commercial reasons for a given transaction – which should not be merely marginal or incidental – is becoming even more crucial in anti-abuse analysis.

How can we help?

We advise on unusual and highly sophisticated transfer pricing issues and we have recent experience of advising multinational companies on cost-sharing arrangements, ‘cash-pooling’ agreements and business restructuring involving transfer pricing matters.

In recent years, we have developed expertise in all kinds of tax litigation and tax investigations, both in the administrative phase and before the Italian tax courts. We have handled disputes on business re-organisations, tax-structured finance

transactions, imputation credit and withholding tax refund claims, VAT and other indirect tax issues. We have broad experience of drafting and filing rulings with the Italian tax authorities on all aspects of tax law.

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Netherlands

Transfer pricing

Dutch transfer pricing policy generally adheres to the 'arm's-length principle' adopted by the Organisation for Economic Co-operation and Development (OECD). This policy was codified in 2002. The Dutch tax authorities have agreed in their published guidance that all methods described in the OECD transfer pricing guidelines may be applied.

Compared with some other jurisdictions, relatively 'light' documentation requirements have been introduced. A taxpayer has to document the basis on which transfer prices with related parties have been established and that documentation should allow conclusions to be drawn about whether these transfer pricing arrangements are comparable to those prices that would have been agreed between unrelated parties. There are no detailed rules on how this documentation should be laid out. The Netherlands generally supports the EU approach for a European transfer pricing documentation system consisting of a master file and country-specific documentation.

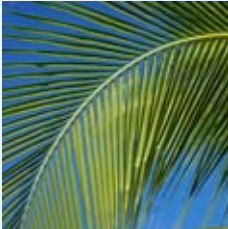
The burden of proof that transfer pricing arrangements are contrary to the arm's-length principle rests, in principle, on the tax authorities. However, if the required transfer pricing documentation is not made available to them within a reasonable period of time, the burden of proof may reverse.

The tax authorities have established a central transfer pricing knowhow and co-ordination team. Members of that team often participate in large corporations' tax audits or are consulted by tax inspectors in transfer pricing disputes. Taxpayers can request advance pricing agreements (APAs) on a unilateral basis (essentially a ruling for one taxpayer), bilaterally or multilaterally (involving cross-border cases if one or more other jurisdictions are involved).

Case law on transfer pricing issues is, as yet, rather scarce and the tax authorities have lost some of the more interesting cases. The cases that they have won are not considered to involve surprising decisions.

In cases where the taxpayer has taken a reasonable approach to transfer pricing, penalties should not normally be imposed. Under general rules, only in a case of gross negligence or intent to defraud the tax authorities should any penalties be due.

In cross-border transfer pricing disputes, the Dutch Ministry of Finance, with the assistance of the tax authorities, generally takes a proactive role in resolving double taxation problems, either on the basis of a bilateral taxation treaty or on the basis of the EU Arbitration Convention.



'Clients note that the Amsterdam tax team has "excellent and deep knowledge of the issues".'

Legal 500 EMEA 2008

The firm has a 'small but very fine corporate tax practice' and a 'responsive team'.

Chambers Europe 2008

Dutch Tax Firm of the Year
International Tax Review 2007



Other hot topics in the tax disputes field

Unreasonable requests for information

Taxpayers may be able to challenge an unreasonable use of investigative powers by the tax authorities. However, there are risks attached to not complying with requests for documentation or information even if they are unreasonable.

Agreements with the tax authorities

Consideration must be given to whether to conclude APAs with the tax authorities or to rely on independent transfer pricing studies. It is also necessary to compare the advantages of negotiating in the framework of the mutual agreement or international arbitration procedures in the first instance, compared with initially appealing against assessments in a domestic tax court.

Transfer pricing methodologies

The tax authorities may argue for the use of generic economic models to determine transfer prices and thus completely recharacterise transactions concluded between related parties even if they have been adequately benchmarked on a transaction-by-transaction basis.

Interest deductibility

As a result of a revision of the interest deductibility rules some years ago, disputes are arising on the 'business purpose' test whereby tainted interest payments, generally relating to intra-group transactions, are nevertheless deductible if there is a sufficient business purpose for the transaction and the funding method. There are also issues over the interpretation of some important elements of the 'thin capitalisation' rules introduced at the same time – for instance, what constitutes a 'group' and how minority interests should be treated.

Challenges to structured finance transactions

The tax authorities are changing their policy and approach to tax-enhanced structured finance transactions. This is expected to result in a substantial increase in high-profile litigation in this area. To defend their positions, taxpayers will need to combine a clear presentation of the facts with a reasoned analysis of the technical issues.

Real estate depreciation charges

The tax authorities have systematically challenged tax-deductible real estate depreciation charges in cases where, in their view, the fair market value of the real

estate exceeds the book value for tax purposes. These disputes relate to prior tax years because a recent change in the law means that a statutory calculation method now applies.

How can we help?

There is a misconception that only accountancy firms are equipped to deal with transfer pricing issues. In some disputes, not taking a strictly legal position may be appropriate but, in many other disputes, having a strong legal foundation may bring the taxpayer better results, even if the case is ultimately settled. We are qualified tax advisors (*belastingadviseur*) as well as lawyers (*advocaten*) and therefore are equipped to handle the technical tax and transfer pricing issues at stake while ensuring the strongest possible legal position. We advise on the types of tactical and legal issues discussed above and have experience in handling tax audits and transfer pricing disputes. We provide advice separately and in conjunction with accountancy and specialised transfer pricing firms. If the tax authorities use their extensive investigating powers or threaten the taxpayer with fines or criminal prosecution, having a joint team of tax lawyers as well as specialists who work for an accounting firm is often prudent, especially if the taxpayer acted on earlier advice from the accounting firm.

We also advise on a range of other tax investigations and disputes and we have particular expertise in cross-border tax planning (including structured finance transactions, mergers and acquisitions and post-acquisition restructuring).

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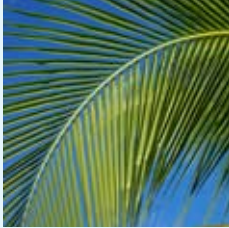
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'This highly experienced three-partner tax group wins praise from peers and clients alike for its wide-ranging expertise and its "adept handling of complex, international tax matters". "One of the best for international and high-end domestic transactional work, due in part to its fantastic team for complex M&A tax structuring."' *Chambers Europe 2008*

40 under Forty Award (Silvia Paternain and Miguel Lorán) *Iberian Lawyer 2007*

Spain

Transfer pricing

Spanish transfer pricing rules underwent a major overhaul at the end of 2006. New rules now apply to tax periods starting after 1 December 2006. The changes to the regime were a response to the generally held view that Spanish rules needed to be brought into line with Organisation for Economic Co-operation and Development (OECD) directives and with the work of the EU Joint Transfer Pricing Forum.

Under these new rules, taxpayers have a duty to value their transactions between related parties at 'arm's-length' whereas previously valuation at arm's-length was a power that the tax authorities could exercise, but only provided that the initial valuation resulted in a reduction or deferral of the tax due in Spain. Other significant features of the new rules include the specific inclusion of 'secondary adjustments' (ie corresponding adjustments for the other party to a transaction that has been transfer priced) and documentary obligations. The precise nature of these documentary obligations still needs to be spelled out in a further amendment to Spanish tax regulations. A penalty regime has also been enacted to punish failure to fulfil these obligations.

As a result, we expect a significant increase in the administrative burden of groups of companies. Because the new transfer pricing rules are based on OECD guidelines, international groups should find that transfer pricing compliance for their Spanish operations has some familiar features. However, unlike some other jurisdictions, Spain will now impose penalties for lack of documentation, even if an inquiry ultimately results in no transfer pricing adjustments.

This represents a major change for Spanish taxpayers. They are required to update their transfer pricing policies and, for the first time, to document them. Moreover, significant shifts in intra-group pricing policies are likely to attract the tax authorities' attention. The combined result of the new Spanish transfer pricing regime is an increase in taxpayers' duties and the enactment of more effective enforcement tools in the hands of Spanish tax authorities, which are undoubtedly opening an area of active, complex and often fierce litigation.

Other hot topics in the tax disputes field

Business restructuring

In our experience, the Spanish tax authorities now view business restructuring with increased suspicion. They have informally indicated that they will more actively pursue and review the motivation of such restructuring. Examples include cases of fully fledged operations transforming into contract manufacturers, limited-



risk distributors or commissionaire structures. In tax audits, the authorities are increasingly likely to bring restructuring under scrutiny. The tax authorities are currently relying on domestic provisions designed to provide them with more effective powers (eg transfer pricing rules) and using traditional provisions (eg interest deduction limitations, deemed goodwill transfers, ‘permanent establishment’ clauses or wider anti-abuse clauses) to examine structures. Tax audits are becoming more sophisticated and complex so that they require an integrated approach across jurisdictions to ensure an efficient defence.

Leveraged buy-out structures

In recent years and in line with the position followed by many tax authorities in other EU states, the structuring of acquisitions has evolved significantly, giving rise to an increasingly sophisticated market. In Spain, this evolution has occurred over a short period of time. The financial element often built into these structures requires a co-ordinated approach in the jurisdictions involved in the transaction. It also needs an understanding of the issues arising from particular transactions and the concerns of the investors involved (which are frequently funds). The tax element of these transactions often leads to scrutiny by the tax authorities. Spanish tax authorities are carefully reviewing their practices. Several recent administrative and court precedents have resulted in an excessively restrictive approach to post-acquisition restructuring, sounding alarm bells in the market and indicating an increased level of litigation in this area.

How can we help?

We advise on the transfer pricing issues highlighted above and we have recent experience advising multinational companies on cost-sharing agreements and business restructuring. We also have wide experience advising on structured finance transactions, group restructuring, acquisitions and post-acquisition restructuring. We can provide, with our offices in other jurisdictions, a co-ordinated response to challenges to these structures.

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UK Tax Firm of the Year
International Tax Review
2007/2008

UK Tax Firm of the Year
*Euromoney/International
Tax Review* 2006

'This "phenomenal" tax team has the resources to deliver "exactly the service we require", agreed sources. The firm's high-profile clients laud the "slick delivery" and "exceptional technical expertise" that have placed this team in the vanguard of corporate and finance work.'
Chambers UK 2008

United Kingdom

Transfer pricing

The transfer pricing environment has become more difficult for companies participating in cross-border transactions. Many of these companies view transfer pricing as the most serious tax issue facing their groups.

The UK transfer pricing rules are based on the 'arm's-length principle' and are intended to be read consistently with the Organisation for Economic Co-operation and Development transfer pricing guidelines. They can, in certain circumstances, impose the arm's-length provision that would have been made between independent enterprises in place of the actual provision made or imposed between associated persons (or between persons acting together on financing arrangements). They may also justify Her Majesty's Revenue and Customs (HMRC) in arguing that the relevant transaction would not have occurred at all if the parties had been unconnected. The exception for intra-UK transactions was removed in 2004 in response to the threat of an EU challenge.

As a subset of the transfer pricing rules, the UK has complex provisions on 'thin capitalisation' that are often difficult to interpret and apply.

Since 2004, HMRC has adopted a more co-ordinated and risk-based approach to transfer pricing enquiries and the cross-border allocation of profits, and has recruited a number of transfer pricing specialists. As a result, many multinationals are becoming the focus of intrusive document and information requests and HMRC is encouraging real-time engagement on these issues. Its approach during enquiries is becoming more sophisticated and there is an increased focus on legal issues rather than pure pricing issues (including recharacterisation and controlled foreign company arguments). In addition, settlements are increasingly hard to achieve and disputes are having to be settled through litigation.

HMRC published in 2007 a statement of practice on advance thin capitalisation agreements and on 10 June 2008 new guidelines for the conduct of transfer pricing enquiries. A key point is that HMRC has committed to an 18-month deadline for settling transfer pricing enquiries or making a decision to litigate (this is extended to 36 months for the most complex cases). The guidelines aim to standardise the



enquiry process by reference to a series of 'stage gate' decision points. Discussions on thin capitalisation will generally take place over a shorter timescale and by a different process.

Other hot topics in the tax disputes field

New HMRC powers

The UK Finance Act 2008 has increased the range of documents that taxpayers are required to retain. It has also increased HMRC's powers to obtain information and documents from taxpayers and third parties and to inspect business premises. This is intended to enable HMRC to engage with taxpayers on a 'real time' basis – not just after a tax return has been submitted. The new rules take effect from April 2009 but affect current transactions. Revisions to the interest regime on over- and under-paid tax and further revisions to the penalties regime are expected in the Finance Act 2009.

HMRC litigation strategy

As part of its 'risk-based' approach to compliance, HMRC published its *Litigation and Settlements Strategy* in June 2007. This sets out the factors that HMRC will take into account when selecting cases for litigation and in negotiating settlements. The goals are to reduce the perceived 'tax gap' and change taxpayer behaviour. A key point is that HMRC says disputes will be dealt with on their merits – so good cases will be litigated and weak cases will be conceded. HMRC also says that no 'package deals' will be agreed. The strategy's effect is being felt in practice and understanding HMRC's approach is critical in managing the progress of an investigation or dispute.

Tax litigation process

The tax tribunals system is being revamped and a new system will apply from April 2009. This will affect the process and procedures for tax litigation. In addition, two recent House of Lords decisions have potentially far-reaching effects on the timing and quantity of tax claims. In *Sempra Metals*, the House of Lords opened the door for taxpayers to claim compound interest in relation to overpaid tax. In *Fleming/Condé Nast*, the House of Lords overturned certain limitation periods applying to VAT claims and cast doubt on the validity of equivalent limitation periods applying for direct tax purposes.

Residence and permanent establishment issues

The UK's residence and domicile rules for individuals have been tightened up by the Finance Act 2008. In addition, there have been a number of recent cases relevant to corporate tax residence (including *Wood v Holden*, *News Datacom* and *Trevor Smallwood*). More cases are expected and the HMRC spotlight remains firmly on this area, partly as a result of recent high-profile corporate emigrations from the UK. Going forward, questions on the existence of permanent establishments and allocation of profits to them will come under increasing scrutiny.

Avoidance

HMRC has been accused of waging a war against tax avoidance and this is in part borne out in practice. There is a raft of new and proposed anti-avoidance rules and avoidance cases are increasingly being targeted for litigation. There is a particular focus on tax-structured finance (including cross-border transactions and leasing), employee benefit arrangements, tax loss planning and other tax shelters (including planning involving capital allowances and other deductions) – and HMRC is having some success before the courts.

European law

The supremacy of EU law continues to provide opportunities for challenging UK tax rules in the European Court of Justice (ECJ) and has a significant effect on the conduct and outcome of UK tax appeals. Many high-profile cases have been taken before the ECJ in recent years arguing that various aspects of the UK tax regime (and equivalent measures in other EU jurisdictions) are discriminatory and in conflict with EU law. The effect of the various ECJ decisions is still being determined by the UK courts and recent UK decisions in *Vodafone 2*, *Marks & Spencer*, *Sempra Metals* and *Fleming/Condé Nast* (among others) have been hitting the headlines.

How can we help?

Our tax and dispute resolution experts advise on all kinds of tax litigation and tax investigations, from the first enquiry to final hearing or settlement. We have advised on tax cases at all levels in the UK and before the ECJ. We have experience in handling large-scale transfer pricing enquiries and disputes for multinationals. We

are also advising on a range of other tax investigations and disputes, including on tax-structured finance arrangements, the controlled foreign company rules, tax credit claims, employee pension and benefit arrangements, payments on termination of employment, non-discrimination claims, VAT reclaims and the effects of the *Sempra Metals* and *Fleming/Condé Nast* decisions.

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'The firm's highly experienced lawyers provide innovative and pragmatic solutions to commercial tax issues, domestically and internationally. The composition and geographical spread of the firm's international team puts the firm in a unique position to provide seamless and integrated advice from a single source for complex multinational transactions and multinational tax dispute resolution.'

Chambers USA 2008

United States

Transfer pricing

The need to co-ordinate the evolving transfer pricing schemes in the US with the transfer pricing regimes in other countries makes transfer pricing one of the most challenging areas of US international tax law. Many multinational corporations view transfer pricing as the most significant and difficult US tax issue they face. The US Department of the Treasury and the US Internal Revenue Service (IRS) count transfer pricing among their top international priorities. Most tax treaty disputes submitted to the US competent authority also relate to transfer pricing.

The US transfer pricing system operates on an 'arm's-length basis' standard. Unlike the Organisation for Economic Co-operation and Development (OECD) model and the law of many countries, the US regulatory scheme does not rank transfer pricing methods. Instead, it requires taxpayers to use the transfer pricing method that provides the most reliable measure of an arm's-length result in each transaction (the 'best method'). Other unusual concepts in US transfer pricing include a 'commensurate-with-income' standard for transfers of intangible assets, the use of methods with 'comparable third party entity' or 'line of business profit' benchmarks and transfer pricing penalties based on reduced standards of fault.

The US Department of the Treasury and IRS have issued a number of important transfer pricing regulations. In response to the increased amount and complexity of cross-border activity in recent years, temporary regulations were issued in 2006 that made significant changes to the rules regarding services transactions and cost-sharing agreements involving intangible assets. The US Department of the Treasury and IRS have indicated that this regulatory guidance and long-proposed global securities dealing regulations will be finalised soon.

Late in 2007, the US Department of the Treasury also issued a report setting transfer pricing improvements as a key priority for the US government. This report indicates that increasing levels of government review of transfer pricing strategies and methods are likely. The report focuses on specific transfer pricing issues related to cost-sharing arrangements, services and global securities dealing operations.



Other hot topics in the tax disputes field

Challenges to structured finance transactions

In addition to transfer pricing, the US Department of the Treasury and IRS rank transactions structured to generate US foreign tax credits and transactions involving hybrid instruments in their top tier of international issues. In 2007, the US Department of the Treasury and IRS issued proposed regulations aimed at preventing the use of particular structured transactions to generate US foreign tax credits. These regulations are expected to be finalised in the near future. The IRS has also made structured finance transactions a focus of its international enforcement efforts. Agents in the field are instructed to analyse all transactions generating US foreign tax credits and/or involving hybrid instruments that are identified during an audit. In recent months, the IRS has released a series of internal memoranda setting forth the arguments deployed against these structures.

Treaty issues

The US and its treaty partners continue to revise and update their network of bilateral taxation treaties. New treaties and protocols with a number of European jurisdictions have recently come into force. Other protocols and treaties are pending ratification and the last few US treaties that do not contain 'limitations on benefits' articles are under negotiation. Updated treaty provisions present opportunities as well as challenges for multinational corporations and international investors. Among the current issues are the availability of a nil withholding rate for dividends from direct investment, the tightening of 'limitations on benefits' articles and the introduction of arbitration provisions in certain treaties. Multinational corporations have also been giving attention to the possible US consequences of important developments in the OECD concept of 'permanent establishment' and the attribution of profits to a permanent establishment. These raise concerns for businesses that previously could assume that they did not have a US permanent establishment.

How can we help?

Transfer pricing is a very dynamic area of US international tax law. We advise on the transfer pricing issues listed above and we have recent experience advising multinational companies on cost-sharing agreements and business restructuring. We provide advice separately and in conjunction with accounting firms.

We have extensive experience advising on structured finance transactions and we are able to advise clients on all aspects of these transactions, including restructuring or unwinding existing structures and responding to enquiries from the IRS. We have also been retained as expert witnesses on international tax arbitrage transactions.

We have broad experience in advising on the treaty issues facing non-US corporations and funds investing in the US. In co-operation with our colleagues in the firm's leading international arbitration practice, we are well qualified to deal with the first taxation treaty arbitration proceedings.

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Our transfer pricing and international tax disputes team

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Autumn 2008





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Jan has been a partner since 2004 and works in the Frankfurt office. He is a member of our international tax practice group and specialises in the tax structuring of corporate re-organisations, especially in the banking sector; mergers and acquisitions (M&A); tax-optimised financings; taxation of banks and investment products; and international tax law.

Jan graduated from the University of Constance, from which he holds a doctor of law degree. He also earned a diploma in tax law from the College of Fiscal Affairs, Nordkirchen, Germany, and a master of law degree from the University of Oxford. Jan is qualified as a certified tax adviser. He joined the firm in 1999.



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Helen is a tax partner in London and jointly heads our tax disputes group. She specialises in structured finance, particularly tax-based structured finance, tax disputes, oil taxation and insolvent restructurings. In addition to her specialist interests, she maintains a wider practice.

Helen is a graduate of Balliol College, Oxford. She joined the firm in 1996 and has been a partner since 2007.



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Gillian is a partner in our financial institutions disputes group and jointly heads our tax disputes group. She specialises in international regulatory and litigation issues that typically affect banks, pension funds, insurers and reinsurers and other professional advisors and intermediaries.

Gillian was educated at Worcester College, Oxford, and joined the firm in 1990. From 1995 to 1997 she was seconded to the litigation department of Davis Polk & Wardwell in New York. She has been a partner since 2000.



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Axel heads our Brussels tax practice and is a leading tax practitioner in Belgium. He has a specialised tax practice advising corporate and financial clients on Belgian and international tax issues, including bank taxation, stock options, tax transparent entities and transfer pricing. He is the author of numerous publications on international and national tax issues. Axel is listed as a leading individual in *Chambers Global*, *European Legal 500*, *Global Counsel 3000*, *IFLR 1000* and *Euromoney's Guide to the World's Leading Tax Advisers*.

Axel was admitted to the Belgian bar in 1985 and became a partner in Loeff Claeys Verbeke in 1988. He joined the firm in 2000. He was educated at the University of Leuven (law and business degree), Columbia University in New York (masters in law) and has a PhD from Leuven on tax transparency. He is a professor in tax law at the University of Leuven.



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Machiel heads our Amsterdam tax practice. He is a *belastingadviseur* (tax advisor) and registered as an *advocaat* (member of the Amsterdam bar). He specialises in international taxation with expertise in the areas of group finance structures and the telecommunications, media and technology sector (particularly tax structuring of international telecoms and e-commerce projects). He has particular experience in cross-border projects in Spain and Switzerland, where he practised for several years.

Machiel also has expertise in formal tax law aspects, including litigation in tax matters and representation of clients in tax criminal matters.

Machiel is a frequent contributor to periodicals and regularly speaks at seminars on Dutch domestic and international taxation.

Machiel is mentioned consistently over the years in *Chambers (Global, tax)*, *European Legal Experts (tax)*, *European Legal 500*, *Global Counsel Handbook* (highly recommended tax practitioner), *Who's Who Legal* (corporate tax) and the annual survey of *International Tax Review* (world tax guide).

He studied at Leiden University. Before joining the firm in October 1999, Machiel was a partner at Loyens & Volkmaars.



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Miguel is a partner in our Spanish tax practice. He specialises in corporate tax planning, advising clients on a range of transactional corporate finance work, mostly in private and public M&A, demergers, restructurings and leveraged buy-outs, both on the debt and equity sides.

Miguel is a member of the firm's private equity sector group and advises regularly in the field of investment fund tax planning and partnership taxation. On the finance side, he advises on the Spanish tax aspects of structured finance, securitisations and product development.

Miguel has a law degree from the Barcelona University and a masters degree in taxation from ESADE and has been a member of the Barcelona bar association since 1993. He is also member of the Asociación Española de Asesores Fiscales and the International Fiscal Association. He joined the firm in 1999.



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Greg heads our US tax practice group. He has extensive experience with international tax planning for corporate groups and investment funds, capital markets transactions and structured finance. In recent tax planning, he has developed a structure for a multinational company's new line of business, structured public-private infrastructure improvement projects and advised a foreign sovereign entity on a US joint venture investment. Recent structured finance transactions include asset and business securitisations, tax arbitrage transactions and structured investments in US equities. Greg also has experience with tax audits and tax controversies.

Greg is a member of the Permanent Scientific Committee of the International Fiscal Association and has served as chair of the Financial Transactions Committee of the American Bar Association Tax Section. He is listed as a leading tax lawyer in *Chambers Global*, *Chambers USA*, *International Who's Who of Corporate Tax Lawyers*, *PLC Which Lawyer?* and *Euromoney's Guide to the World's Leading Tax Lawyers*.

Greg received his JD from Harvard Law School, where he was editor of the *Law Review*, and his AB from the College of William & Mary in Virginia. Before entering private practice, he served as a law clerk to Justice Powell on the US Supreme Court. Before joining the firm as a partner, he was head of the tax department at Milbank Tweed Hadley & McCloy.



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Vittorio is a principal consultant* in the Milan office and joined the firm in 2001. He advises on the tax aspects of financial and derivative products, structured finance transactions, securitisations, domestic and cross-border financing and M&A transactions.

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*Principal consultants are members of the firm with status equivalent to that of a partner, who – for regulatory reasons – are not partners in the firm.



VIENNA

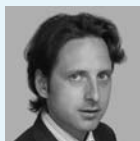
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Claus is a member of our international tax practice group and specialises in corporate tax planning, M&A transactions, structured finance, estate planning and tax litigation. He advises industrial enterprises, banks and insurance companies, international investment banks and private equity funds.

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Cyril is a member of our international tax group and is the head of our French tax practice. He advises a range of French and international clients on the tax-related aspects of domestic and cross-border public and private mergers, acquisitions and re-organisations, leveraged buy-outs and property transactions. He also has extensive experience in the taxation of structured finance, securitisations and tax-enhanced financial products.

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