

UPDATE OF COUNTRY DESCRIPTIONS OF TAX LEGISLATION ON THE TAX TREATMENT OF BRIBES TO FOREIGN PUBLIC OFFICIALS

1 October 2007

Australia

In early 2000, the Australian Parliament enacted the *Taxation Laws Amendment Act (No.2) 2000* which provided that bribes paid to public officials (whether foreign or not) would not be deductible expenses for the purposes of Australian tax laws. The amendments implement the OECD's recommendations that member countries should deny tax deductibility for such bribes. The amendments apply to the 1999/2000 and later years of income. In essence, that Act amends the *Income Tax Assessment Act 1997* to disallow deductions for bribes made to public officials. *Schedule 4* provides that a taxpayer will be regarded as having made a bribe to a foreign public official to the extent that:

- an amount is incurred in providing a benefit to another person; and
- the benefit is not legitimately due to that person; and
- the amount is incurred with the intention of influencing a foreign public official in the exercise of the officials duties in order to obtain or retain business or an advantage in the conduct of business.

Taxation Laws Amendment Act (No. 2) 2000 (58 of 2000)

Schedule 4 Non-deductibility of bribes to foreign public officials

26-52 Bribes to foreign public officials

(1) You cannot deduct under this Act a loss or outgoing you incur that is a * bribe to a foreign public official.

(2) An amount is a bribe to a foreign public official to the extent that:

(a) you incur the amount in, or in connection with:

(i) providing a benefit to another person; or

(ii) causing a benefit to be provided to another person; or

(iii) offering to provide, or promising to provide, a benefit to another person; or

(iv) causing an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person (see subsection (6)); and

(c) you incur the amount with the intention of influencing a * foreign public official (who may or may not be the other person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (7)).

The benefit may be any advantage and is not limited to property.

Payments that are legal in foreign public official's country

(3) An amount is not a bribe to a foreign public official if no person would have been guilty of an offence against the law of the * foreign public official's country if the benefit had been provided, and all related acts had been done, in that country.

Facilitation payments

(4) An amount is not a bribe to a foreign public official if it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.

(5) For the purposes of this section, a routine government action is an action of a * foreign public official that:

(a) is ordinarily and commonly performed by the official; and

(b) is covered by any of the following subparagraphs:

(i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;

(ii) processing government papers such as a visa or work permit;

(iii) providing police protection or mail collection or delivery;

(iv) scheduling inspections associated with contract performance or related to the transit of goods;

(v) providing telecommunications services, power or water;

(vi) loading and unloading cargo;

(vii) protecting perishable products, or commodities, from deterioration;

(viii) any other action of a similar nature; and

(c) does not involve a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business; and

(d) does not involve encouraging a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business.

Benefit not legitimately due

(6) In working out if a benefit is not legitimately due to another person in a particular situation, disregard the following:

(a) the fact that the benefit may be customary, or perceived to be customary, in the situation;

(b) the value of the benefit;

(c) any official tolerance of the benefit.

Advantage in the conduct of business that is not legitimately due

(7) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

(a) the fact that the advantage may be customary, or perceived to be customary, in the situation;

(b) the value of the advantage;

(c) any official tolerance of the advantage.

Duties of foreign public official

(8) The duties of a * foreign public official are any authorities, duties, functions or powers that:

(a) are conferred on the official; or

(b) the official holds himself or herself out as having.

In 2006, the *Income Tax Assessment Act 1997* (ITAA) was amended to align the definition of facilitation payments to the definition in the Criminal Code to allow deductibility only for facilitation payments and Division 70 (Foreign Bribery) of the Criminal Code was amended to clarify that the defence in section 70.3 of the Code applies only where the law of the foreign country states that the advantage in question is permitted or required and that the offence can be made out regardless of the results of the payment or the alleged necessity of the payment, and amend the corresponding provision of the *Income Tax Assessment Act*

Austria

Legislation was passed by Parliament in late October 1998. Section 20 paragraph 1 subparagraph 5 of the Income Tax Act, which already provided for non-deductibility of payments subject to criminal prosecution under certain conditions, was amended by deleting those former conditions. According to this new legislation any cash or in kind remuneration whose granting or receipt is subject to criminal punishment is not deductible from taxable income.

Belgium

On 8 June 2007, came into force the law adapting the Belgian legislation countering bribery. The law transposed into Belgian law, some of the recommendations of the OECD Working Group on Bribery which are included in the 2005 Phase 2 Report concerning the implementation by Belgium of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and 1997 Recommendation on Combating Bribery in International Transactions.

The law includes in particular a general exclusion of deduction of money amounts and benefits dedicated to the bribery of foreign and international public officials.

The law introduces a new article 53, 24° of the Belgian Income Tax Code which in particular imposes the non deductibility, as business expenses, of commissions, brokerage fees, commercial discounts, benefits in kind etc. which are granted, directly or indirectly, as elements of public bribery of a person performing a public function in a foreign state or in an organization of international public .

This provision applies to the tax imposed on individuals as well as companies and tax imposed on non residents.

Canada

No deduction can be made in respect of an outlay made or expense incurred for the purpose of bribing a foreign public official or conspiring to do so.

Article 67.5 Federal Income Tax Act

In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act or any of sections 119 to 121, 123 to 125, 393 and 426 of the Criminal Code or an offence under sections 465 of that Act as it relates to an offence described in any of those sections.

Czech Republic

Under an amendment to Income Taxes Act No. 586/1992 Coll. ratified by the Czech parliament on 12th of December 2000 is stipulated, that

Par. 1 For tax purposes, the following shall not be recognized as expenses (costs) incurred in generating, assuring and maintaining income:

f) payments (benefits) provided to a foreign state official (public servant) or public representative or, with their consent, to another person in connection with performance of his office, even if this concerns an official or public representative in a country (state) where the granting of such payments (benefits) is tolerated or not regarded as a crime or is common (usual);

Denmark

The Danish Parliament has adopted a bill from government denying the deductibility of bribes to foreign public officials. The new legislation entered into force on 1 January 1998 and reads as follows : "Illegal payments cannot be deducted, namely the expenses resulting from acts that are prohibited by the Penal Law, even if they have occurred abroad."

Finland

As of 1 January 2006, Finland has the following rule in force in its tax legislation (Article 16 subparagraph 8 of the Act on the Taxation of Business Profits and Income from Professional Activities):

"Non-deductible are: (...) 8. bribes and benefits being bribes by nature". Up to recently, Finnish tax legislation did not expressly prohibit the deductibility of bribe payments. Corresponding payments to domestic public officials were non-deductible on the basis of case law and practice of the tax authorities. The same rule was expected to apply to bribes paid to foreign public officials in case law and the same rule is applied already in the practice of the tax authorities

France

The French Parliament passed legislation (article 39-1 of the French Tax Code) denying the tax deductibility of bribes to foreign public officials on 29 December 1997 as part of the Corrective Finance Bill for 1997. "For contracts concluded during tax years opened as of the entry into force of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, amounts paid or advantages granted, directly or through intermediaries, to public officials within the

meaning of article 1 § 4 of the convention or to a third party in order that this official act or refrain from acting in the performance of his official duties, in order to obtain or retain a contract or other improper advantage in international business transactions, are not admitted as a deduction of taxable profits". The Convention entered into force on 29 September 2000. Legislation prohibiting the tax deductibility of bribes has been adopted by the French Overseas Territories of Mayotte and New Caledonia.

Germany

Under previous German tax law, deductions for bribes were not allowed if either the briber or the recipient had been subject to criminal penalties or criminal proceedings which were discontinued on the basis of a discretionary decision by the prosecution. New legislation adopted on 24 March 1999 deleted these procedural conditions and denied the tax deductibility of bribes.

The new law provides for a general prohibition to deduct bribes from tax if the benefit constitutes active, unlawful granting of a benefit or bribe; prohibition of tax deductibility will no longer depend on punishment in respect of such crimes. The prohibition of deductibility also covers benefits to foreign recipients where in accordance with the Act on the Convention dated 17 December 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions (IntBestG, Federal Law Gazette Part I p. 2327) foreign public officials are treated equally to domestic public officials where acts of bribery have been committed.

Pursuant to section 4(5) of the Income tax Act, tax authorities are obligated to provide information regarding suspected bribery payments to the public prosecution office or competent administrative office. Statistical information concerning the number or nature of offences reported pursuant to this obligation is not available.

Greece

In December 2006, Greece adopted legislation denying the deductibility of bribes. Law 3522/2006 has added a new article 31 to the Income Tax Code (Law 2238/1994), which has as follows: "Payments in cash or in kind are not considered deductible expenses from the company gross income when such payments constitute a criminal offence, even when payable abroad". The new provision applies for the financial year 2007 onwards. In Circular no. 1027178/10254/B0012/ POL.1052/15-3-2007 it is further clarified that the new provision has been adopted in application of the OECD Convention.

Until this legislation was adopted bribes were not deductible based on the principle that Article 31 of Act 2238/1994 which states as a general principle that any expenditure not directly related to the business of the enterprise is non-deductible. The same Act expressly lists deductible expenditures, and bribes are not listed.

Hungary

The Corporate Tax Law was amended to make a specific reference to bribery. From January 2002 the Corporate Tax Law in its Paragraph 8(1) subparagraph d) states: *the profit before taxation has to be raised by the sums accounted as costs if they are not in connection with the entrepreneurial activity, considering especially the content of Enclosure Nr. 3. Enclosure Nr 3, part A subparagraph 8 further says: Cost, input incurred in the interest of, or in connection with criminal act as bribery, trafficking with influence, bribery in international relations or trafficking with influence in international relations.* The Personal Income Act also contains the necessary element to exclude bribery from the possibility of deduction. Previously the deductibility of bribes to foreign public officials was not allowed since only expenses covered in the tax law were deductible and the tax laws did not include a specific reference to bribes.

Iceland

does not allow the deductibility of bribes to foreign as well as domestic public officials and officials of international organisations on the basis of Section 52 of Act 75/1981 as amended by Act N°95/1998.

Ireland

does not allow deductions for bribes paid to foreign officials. On the basis of legal advice received, bribes paid to foreign public officials would not be deductible on public policy grounds. It is also considered that the conditions in the Irish Taxes Acts for deductibility of expenses could never be met in the case of bribes paid to foreign officials. Accordingly, it has not been considered necessary to introduce specific legislation to deny a deduction

Italy

The Italian tax legislation does not allow the tax deductibility of bribe payments.

In fact, art. 2(8) of Law 27 December 2002, no. 289 (2003 Finance Act) provides that “in determining income, [...] costs and expenses resulting from facts, actions or activities which may be qualified as criminal are not deductible”.

This provision is applicable to bribery of foreign officials by virtue of article 3 of Law 29 September 2000, no. 300, which ratified the OECD Bribery Convention into the Italian legislation, that equates public officials and persons exercising a public function in another States with national public officials and persons exercising a public function. Therefore, bribe payments to public officials, both national and foreign, are not deductible since they are deemed as crimes.

Moreover, also before the entry into force of the above mentioned provision, the tax deductibility of bribes was not allowed. In fact, on the basis of a constant and consolidated guidance of the tax administration, illicit payments were considered not deductible, since they were not included within the deductible costs admitted by the tax legislation and they were connected with the tax fraud.

This orientation has been confirmed by the jurisprudence of the Supreme Court (see, inter alia, Decision of Court of Cassation, Criminal Division III, 23 September, 1994 no. 2001), which excluded that illicit payments could be qualified as legitimate business expenses.

Japan¹

Bribes to foreign public officials are not tax deductible because they constitute “entertainment and social” expenses, which under article 61-4 of the Special Taxation Measures Law are not deductible. Paragraph 3 defines “entertainment and social” expenses as “entertainment, reception, secret expenses and other expenses which are disbursed by a corporation to receive, entertain, or comfort its customers or suppliers, or sending gifts to them or doing similar things...” In addition expenses whose recipients are not identified are not only non-deductible but also subject to additional tax. In practice Japan treats bribes of foreign public officials in the same way as bribes of domestic public officials and therefore as non-deductible.

NOTES:

¹ For more information, please see <http://www.mof.go.jp/english/tax/bribe.htm>.

- Bribes paid to domestic and foreign public officials cannot be included in expenses in income tax calculations. Article 37 of the Income Tax Law provides that deductible items are expenses directly necessary for gaining revenue, but illegal expenditures such as bribes cannot be considered as expenses directly necessary for gaining revenue.
- Small corporations can deduct 90% of ‘entertainment and social expenses’ up to 4 million yen. (This does not mean deduction of ‘bribes’ is allowed up to the said limitation.)
- In the courts, inclusion in expenses of expenses such as expenditure prohibited by law is not permitted.
- In November 2004, the NTA issued an instruction to tax auditors to clarify this treatment.

In February 2006, the government of Japan submitted to the Diet a bill amending the tax laws which includes new provisions with regard to the tax treatment of bribes. This bill is expected to be passed by the end of March and come into force on the 1st day of April, if everything proceeds according to the ordinary schedule.

The bill includes new provisions that explicitly deny tax deductibility of bribes and are applicable to any corporations and individuals, as follows:

Corporation Tax Law: Paragraph 5 of Article 55

“The amount of bribes (as specified in the Criminal Law and Unfair Competition Prevention Law) paid by a company to a domestic or foreign public official shall not be treated as deductible expenses when calculating that company’s taxable income”.

Income Tax Law: Paragraph 2 of Article 45

“The amount of bribes (as specified in the Criminal Law and Unfair Competition Prevention Law) paid by an individual to a domestic or foreign public official shall not be treated as deductible expenses when calculating that individual’s taxable income”.

Korea

In February 2007 Korea passed its tax code to expressly disallow the tax deductions of bribes. Consequently, according to the Income Tax Act and the Corporate Tax Act, ‘money, assets other than money and economic benefits corresponding to bribes under the Criminal Act including bribes paid to foreign public officials are non-deductible’ . Prior to the enactment of this express prohibition, according to the Korean tax authorities, bribe payments to foreign public officials were not deductible because they do not constitute “expenses or losses that are related to business and commonly recognized as ordinary and normal” pursuant to article 19(2) of the Corporate Tax Act (CTA) and the Income Tax Act (with respect to individual taxpayers). A ruling issued by the National Tax Service in February 1996 prohibited the deduction for money or valuables given as bribe payments.

Luxembourg

Legislation denying deductibility of bribes was adopted by Parliament on 14 December 2000. It establishes that Pursuant to article 12.5 of the December 1967 Income Tax Law bribes are not deductible. According to that Article:

“advantages of any nature and the expenses incurred in obtaining a pecuniary or other advantage from any person in a position of public authority or enforcement or responsible for a public service either in the Grand Duchy of Luxembourg or in another State Community officials and members of the Commission of the European Communities the European Parliament the Court of Justice and the Court of

Auditors of the European Communities [...] and officials or agents of any other public international organisation.”

Previously Luxembourg allowed deductions for bribes paid to foreign public officials as any business expense. To be deductible the recipient of the bribe had to be clearly identified. Payments to companies domiciled in tax havens and to persons, which were not clearly identified, were not deductible.

Mexico

does not allow the deductibility of bribes to foreign public officials since they would not meet the general requirements to qualify as deductible expenses, which have to be strictly essential for the purposes of the taxpayers, activities and formally documented. Considering that bribes are treated as illicit activities, such payments cannot meet the requirements set forth in the Mexican Commerce Code. Therefore the payment of a bribe is not a business activity and is not a deductible item.

Article 31 of the Tax Code specifically disallows the deductibility of expenses by legal persons such as bribes (including gratuities, gifts, entertainment allowances, etc.) under the rationale that bribes are not expenses strictly related to the taxpayer's activity. Article 32 lists non-allowable expenses which include gifts and courtesies, representation expenses, *per diem* or travel expenses when not for lodging, meals, transport, etc., payments for customs services other than fees to custom brokers and expenses incurred by the latter, etc. Article 172 (applicable to natural persons) [...] disallows deductions of expenses that are not strictly necessary for obtaining the revenue on which tax is payable. Article 173 states that non-deductible expenses include consumption in bars or restaurants, payments for custom services other than fees to and expenses incurred by agents, or by entities organised by such agents in the term of the Customs Law, the use or advantage of automobiles, investments in houses for residence, in aircraft or vessels, etc.

Netherlands

Tax legislation in line with the OECD-Recommendation on the non- tax deductibility of bribes was enacted in April 2006. Regarding entrepreneurs, the new provision in Article 3.14, paragraph 1, sub h of the Law on Income Tax reads as follows:

“In determining the operating profits, expenses related to the following items are not deductible:

...

h. expenses relating to donations, promises and services, *if it is established²* that they relate to a criminal offence referred to in articles 126, para. 1, 177, 177a, 328 ter, para 2 or 328quater, para 2, 177, 177a and 178 of the Penal Code.”

New Zealand

New Zealand enacted the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 in early May 2001. Legislation making bribes paid in business non-deductible for tax purposes has been introduced in New Zealand on 3 December 2001. The new law adopted 17 October 2002 makes bribes paid to foreign and domestic public officials in the conduct of business non-deductible.

² Italics added for emphasis.

19 New section DJ 22 inserted

(1) After section DJ 21, the following is inserted:

“DJ 22 No deduction for bribes paid to public officials

“(1) This section applies if a person corruptly gives, offers, or agrees to give a bribe to another person with intent to influence a public official to act, or fail to act, in his or her official capacity, whether or not the act or the failure to act is within the scope of the official’s authority, in order to—

“(a) obtain or retain business; or

“(b) obtain any improper advantage in the conduct of business.

“(2) This section applies even if the bribe was given, offered or agreed to be given outside New Zealand and was not, at the time it was given, offered or agreed to be given, an offence under the laws of the foreign country in which the principal office of the person, organisation or other body for whom the foreign public official is employed or otherwise provides services, is situated.

“(3) A person is not allowed a deduction for the amount of the bribe given or offered.

“(4) **Subsection (3)** does not apply to an amount paid for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action and the value of the benefit is small.

“(5) In this section—

“**benefit, foreign country and foreign public official** have the meanings set out in section 105C of the Crimes Act 1961

“**bribe** has the meaning set out in section 99 of the Crimes Act 1961

“**public official** means—

“(a) a member of Parliament or a Minister of the Crown; and

“(b) a judicial officer, a law enforcement officer or an official, as those terms are defined in section 99 of the Crimes Act 1961; and

“(c) a foreign public official

“**routine government action** has the meaning set out in section 105C of the Crimes Act 1961.”

(2) **Subsection (1)** applies to bribes paid on and after the date this Act receives the Royal assent.

Norway

does not allow the deductibility of bribes to foreign public officials (1995 legislation)

The Norwegian law 1911 Section 44§1a) sub paragraph 5 states that:

Bribes and similar payments are not tax deductible if they were made to obtain “wrongful consideration”.

Wrongful consideration means not only illegal consideration according to the penal code but also general business ethics and ethics in the public administration of Norway Tax deductibility is denied where the consideration is wrongful in Norway or in the place where such consideration was given or expected to be given.

Poland

does not allow the deductibility of bribes to foreign public officials. According to Polish law, bribery is illegal and an offence for both the briber and the recipient of the bribe and both are punishable. The provisions of the Corporate Tax Act and Personal Income Tax Act are not applicable to illegal activities: Therefore gains and expenses connected with the offence of bribery cannot be taken into account by the tax authorities. As a result, the taxpayer is not allowed to deduct from his income expenses concerning bribes to foreign officials.

Portugal

does not allow the deductibility of bribes to foreign public officials. The Parliament has adopted on 20 December 1997 new legislation effective 1st January 1998 to disallow any deduction referring to illegal payments such as bribes to foreign public officials. Previously payments to foreign officials were never accepted as a deductible business expense.

Article 26.9 of the Decree Law no. 127-B/97 of 20 December which provides for personal income tax states as follows:

Article 26 Income derived from freelance work: deductions

9 - Illicit expenses, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be deductible, even if these occurred outside the territorial reach of its application.

Article 23.2, which provides for corporate income tax, states as follows:

Article 23 Costs or losses

2 - Illicit expenditures, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be accepted as costs, even if these were incurred outside the territorial reach of its respective application.

The Portuguese authorities state that bribes are non-tax deductible as giving a bribe constitutes a violation of "Portuguese criminal legislation"

Slovak Republic

The Slovak Republic does not allow deductions of bribes to public officials (regardless of their residence - foreign or domestic). According to Section 25 of the Income Tax Law N°366/1999 "expenses to obtain an undue advantage" are not deductible. Expenses, that are related to any bribes, are not deductible for taxation purposes. Providers or recipients of bribes are liable to criminal prosecution. The OECD Convention against Bribery of Foreign Public Officials in International Business Transactions was implemented into the Slovak legislation by amendment of the Criminal Code. The Slovak Republic has designed a draft legislative provision designed to expressly deny the tax deduction of bribes and other undue advantages.

Spain

does not allow deductions for bribes paid to foreign public officials. A bill aiming at the criminalisation of bribes paid to foreign public officials (including those working for international organisations) has been passed on 11 January 2000 and entered into force the following day. Such bribes are now considered a criminal offence as provided by the new article 445 bis added to the Penal Code. This reinforces the traditional position of not allowing tax deductions for bribes paid to foreign public officials. The bill invokes specifically the OECD 1997 Convention on Bribery.

The *Companies Tax Law* does not expressly deny the tax deductibility of bribes given to foreign public officials. Article 14 of that Act lists non-allowable expenses, which include under paragraph 1.e “gifts and generosity”. There are exceptions to the non-deductibility of gifts, including the following:

- “expenses derived from public relations with clients or suppliers”; and
- expenses “derived from the direct or indirect promotion of the company the selling of goods or the rendering of services”.

In addition, paragraph 2 of article 14 allows the deductibility of expenses in relation to “payments made and the book value of goods donated where they are related to the fulfilment of the purposes of the following recipient companies:

- (a) Companies involved in regional industrial development.
- (b) Spanish sport federations, local federations, and sports clubs where the amount is received from public sport companies for the promotion and development of non-professional sport activities. In order for this category to apply, there must be a contract for valuable consideration between the donor and the recipient “necessary to perform the purpose and aim of those federations and sport clubs”.

Although it would appear that certain bribes to foreign public officials could be covered by these categories of exceptions to the non-allowable expenses, the Spanish authorities state it is impossible to allow the tax deductibility of an expense that is incurred in the commission of a crime. They provide in support thereof a decision of the Supreme Court of Spain⁴³ in which the central government appeals the decision of the Superior Court of Justice of the Region of Valencia to allow the tax deductibility of expenses that had been disallowed by the Tax Investigation authorities. The expenses related to costs incurred by a company in advertising and promoting gaining activities, the advertisement thereof which is prohibited by article 39 of the Gaming Regulations. Pursuant to article 39.2 of the Regulations, the unauthorized advertising of such activities constitutes “serious misconduct”. In its decision, the Supreme Court of Spain overturns the decision of lower court and upholds the decision of the Tax Investigation authorities, in which it was stated that to acknowledge the expenses as tax deductible “would be tantamount to accepting as legal, in the domain of taxation, behaviour expressly prohibited” by law.

Pursuant to article 26 of the Personal Income Tax Law, the provisions under the Corporation Tax Law also apply to natural persons in determining their income from economic activities.

Furthermore, on 5 March 2007, Spain issued a Report, for public knowledge, which constitutes the Spanish official approach on this matter, applicable to the construction of the Companies Tax Law. This Report is publicly available at the website of the Ministry of Economy and Finance forming part of the Spanish tax doctrine.”

⁴³Decision of the Supreme Court, Bench Three, Section Two, which reviews the Remedy of Appeal 3065/1992, lodged by the Central Government against the judgement given on December 31, 1991 by the Contentious-Administrative Bench of the Superior Court of Justice of the Region of Valencia, in Appeal 1734/1990, the appellants being “Begomatosa, SA”, in relation to the Corporation Tax, for a sum of pesetas 1,515,785.

Sweden

A bill explicitly denying the deductibility of bribes and other illicit payments was adopted by the Parliament on 25 March 1999. A new provision on tax non-deductibility was originally inserted into the Municipal Income Tax Act (1928:370) and entered into force on 1 July 1999. The provision read "Deductions may not be made for expenditure on bribery or other improper award". This act was abolished and replaced by the Income Tax Act (inkomstskattelagen, 1999:1229) as from 1 January 2000. The new provision, Chapter 9 Section 10 of the Income Tax Act reads "Expenditure on bribes or other improper awards is not deductible". The change of legislation does not entail any substantive modification.

Switzerland

According to Article 27 al 3 of the Federal Income Tax Act and Article 10 al 1 bis of the Federal Law on the harmonisation of direct taxes of cantons and communes, "*secret commissions according to Swiss criminal law paid to Swiss or foreign public officials, are not deductible.*" The new law came into force on 1 January 2001.

Turkey

does not allow deductions for bribes paid to foreign officials because there is no explicit rule allowing the deductibility of bribes.

United Kingdom

Since 14 February 2002, the UK has jurisdiction over bribery offences by UK nationals and UK companies abroad. The UK Finance Act 2002 Part 3, chapter 2, section 68 on Expenditure involving crime (which received royal assent at the end of July 2002) extends the applicability of Section 577A Income and Corporation Taxes Act 1988 to payments that take place wholly outside the United Kingdom. The new legislation provides that tax relief shall not be available in respect of any payment made outside the United Kingdom "where the making of a corresponding payment in any part of the United Kingdom would constitute a criminal offence there". This section applies in relation to expenditure incurred on or after 1st April 2002.

68 Expenditure involving crime

(1) In section 577A(1) of the Taxes Act 1988 (no deduction to be made for expenditure incurred in making a payment the making of which constitutes a criminal offence)-

(a) after "incurred" insert "(a)", and

(b) at the end, insert ", or

(b) in making a payment outside the United Kingdom where the making of a corresponding payment in any part of the United Kingdom would constitute a criminal offence there."

(2) This section applies in relation to expenditure incurred on or after 1st April 2002.

United States

Does not allow deductions for bribes paid to foreign government officials if that bribe is a criminal offence. Both before and after the United States criminalised bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of

1977, tax deductions were disallowed for payments that were made to an official or employee of a foreign government and that were either unlawful under US law or would be unlawful if US laws were applicable to such official or employee. The denial of the tax deduction did not depend on a conviction in a criminal bribery case. After the United States criminalised bribery of foreign government officials, US tax laws were changed to disallow tax deductions for payments if made to foreign government officials or employees and if unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). With respect to US tax provisions for Controlled Foreign Corporations, any payment of a bribe by a foreign subsidiary is treated as taxable income to the US parent. Also, to the extent relevant for US tax purposes, bribes of foreign officials are not permitted to reduce a foreign corporation's earnings and profits. US denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offence. Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA.

Section 162 1 C) Internal Revenue Code

1) Illegal payments to government officials or employees

No deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977. The burden of proof in respect of the issue, for the purposes of this paragraph, as to whether a payment constitutes an illegal bribe or kickback (or is unlawful under the Foreign Corrupt Practices Act of 1977) shall be upon the Secretary to the same extent as he bears the burden of proof under section 7454n(concerning the burden of proof when the issue relates to fraud).

(2) Other illegal payments

No deduction shall be allowed under subsection (a) for any payment (other than a payment described in paragraph (1)) made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment under any law of the United States, or under any law of a State (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer. The burden of proof in respect of the issue, for purposes of this paragraph, as to whether a payment constitutes an illegal bribe, illegal kickback, or other illegal payment shall be upon the Secretary to the same extent as he bears the burden of proof under section 7454 (concerning the burden of proof when the issue relates to fraud).

OBSERVERS

Chile

The Income Tax Law does not expressly prohibit the deduction of bribe payments made to foreign public officials. Article 31 of the law allows the deductibility of "expenses necessary to generate income". It further provides for a list of various types of deductible expenses, including compensation for services rendered, expenses incurred in introducing new goods into the market, hospitality expenses and certain donations.

The Director of the Internal Revenue Service (*Servicio de Impuestos internos*, SII) issued an internal instruction (*oficio*) interpreting article 31 in 2005 and providing for the non deductibility of bribes.³ The instruction takes the form of an internal message from the Director of the SII to the Undersecretary of the Economy and is not on the SII website.⁴

³ See Oficio Ord. No. 4037 of 19 October 2005.

⁴ The SII website has a section entitled Circulars and Legislation, but it does not include *oficios*. Nor does there appear to be a collection of *oficios* available online. A website search for the *oficio* using its number was unsuccessful.