

UPDATE ON TAX LEGISLATION ON THE TAX TREATMENT OF BRIBES TO FOREIGN PUBLIC OFFICIALS IN COUNTRIES PARTIES TO THE OECD ANTI BRIBERY CONVENTION

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Argentina

The Income Tax Law, which is applicable to the taxation of both natural and legal persons, provides for lists of deductible and non deductible expenses. Neither list expressly refers to bribes. The Argentinean authorities state that deductible expenses are only the ones that are enumerated in the Income Tax Law. However, Argentina considers that a suspicious deduction, such as an overtly large agent's commission, can be determined by the tax administration to be impermissible on the basis that it does not correspond to “the principle of economic reality” laid down in art. 2 of Law 11.683. (SQ 51) It further considers that the onus always rests on the taxpayer to prove deductibility with adequate documentation. (GQ 17.1.iii; SQ 50) In addition, art. 37 of the Income Tax Law provides that deduction is to be refused for “expenditure lacking documentation or for which it cannot be proven by other means that because of its nature it must have carried out to obtain, maintain and keep taxed gains” (the expenditure, once deduction is refused, is then subject to a 35% tax rate).

In mid-June 2008, Argentina published a new external note (no. 02/08) in the Official Journal that refers to the issue of the non deductibility of foreign bribes. The new document is aimed at raising awareness, but it refers only to the requirements of the OECD Anti-bribery Convention, and does not explicitly describe Argentinean tax law.

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 official's 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

The Belgian Parliament adopted two Acts to meet the requirements of the OECD Convention and modernize the Criminal Code's provisions on bribery. The first is the Bribery Prevention Act of 10 February 1999, which amends the provisions contained in Title IV of the Criminal Code in Articles 246-252 of Chapter IV on "The Bribery of Public Officials". The second Act is that of 4 May 1999, which establishes the criminal liability of legal persons, henceforth subject to the provisions the Bribery Prevention Act of 10 February 1999.

This Act of 4 May 1999 was adapted by the Act of 11 May 2007 concerning the adaptation of the legislation about the combat against bribery. The goal of this law was to transpose the recommendations made by the OECD into Belgian Law. For that end the law changed the previous law on 3 main pressure points, by inserting: a general prohibition to the tax-deduction of all benefits granted to a foreign public official; a functional approach to the definition of a foreign public official, whereby the function is decisive and not the statute of the person; and a more effective extraterritorial jurisdiction of Belgian Courts by an active principle of personality.

The law 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. The new law also abolished the system of "secret commissions", under which it was possible to deduct commissions from the tax base without revealing the identity of the recipient.

Brazil

The applicable tax laws in Brazil do not expressly deny the tax deductibility of bribes to foreign public officials. However, the Brazilian tax authorities strongly maintain that law and practice in Brazil do not allow the deductibility of bribes in any circumstances.

Brazil refers to Decree 3 000 of 26 March 1999 as the relevant tax law on this matter. There is no reference in any way to the legality of expenses under criminal law as a criterion for non deductibility. Instead, article 299 of the Decree (see Appendix 3) lays out the criteria which must be met for an expense to qualify as an operational expense, eligible for tax deductibility:

- Article 299 states that operational expenses are those needed to the company's activities and the maintenance of the corresponding producing source. There is therefore concern that bribe payments may fulfil this criterion because a bribe to a foreign public official could be considered necessary to maintaining a company's activities and resources.
- Article 299(1) further states that these expenses must be paid to carry out the transactions or operations required by the company's activities. There is concern that again, a bribe payment in

an international business transaction could be considered as required if it could be established that the payment of a bribe was necessary to carry out business.

- Article 299(2) specifies that the operational expenses admitted are the usual and ordinary ones in the kind of transactions, operations or activities of the company. Although this criterion provides a safeguard against deducting unusual expenses, there is concern that it could be argued that, where bribe payments are a common feature either of the industry the company is active in, or of the foreign market where the company operates, bribe payments are justifiable operational expenses.

Bulgaria

There is no provision in the Corporate Income Tax Code expressly denying the deductibility of bribes paid to foreign public officials. Instead, article 23 (3) of the Corporate Income Tax Code lists items that may be deducted from the financial accounting results. This list includes donations to, for example, educational and healthcare institutions, religious faith societies, and scholarships to students. It also provides deductions for items such as dividends received as a result of the distribution of profits by legal persons and unregistered partnerships.

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.

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.

A binding decision issued in November 2007 (Circular / 56) confirms that bribes to foreign officials are not necessary expenses for gaining revenue. Therefore, they are non-deductible expenses for income tax purposes.

Czech Republic

The Czech Republic enacted legislation explicitly denying the tax deductibility of bribes paid to foreign public officials.

An amendment to the Income Tax Act (Act No. 586/1992 Coll.), which was ratified by the Czech parliament on 12th of December 2000, explicitly prohibits the tax deductibility of bribes paid to foreign public officials pursuant to Article IV of the Revised Recommendation. Specifically, “[e]xpenses that are given to a foreign state official or foreign public official or, with their consent, to another person in

connection with performance of his office, even if this concerns an official or public official in a country where the granting of such benefits is tolerated or not regarded as a crime, are not deductible...”

Denmark

Denmark has a legislative provision in place expressly prohibiting the tax deductibility of bribe payments to foreign public officials, which was introduced by Act No.1097 of 29 December 1997. Section 8D of the Danish Tax Assessment Act (DTAA) reads:

In the statement of the taxable income no deduction shall be granted for the cost of bribes of the type referred to in Section 144 of the Danish Criminal Code to an individual who has been employed, appointed or elected to carry out services or duties in legislative, administrative and judiciary agencies, be it for Denmark, the Faroe Islands or Greenland or a foreign state, including local authorities or political branches, or for an international organisation which has been constituted by states, governments or other international organisations

Estonia

Since 1 January 2004, the Estonian Income Tax Act provides for an express disallowance of the deductibility of bribes and gratuities. Section 34(11) of the Act provides that “gratuities and bribes shall not be deducted from business income” of natural persons. Also excluded from deduction are “the cost of gifts or donations” (subsection 8). Costs of entertaining guests are not part of the list of exclusions.

Concerning legal persons, a company shall pay income tax on “expenses not related to the business”, among which bribes and gratuities are expressly mentioned (Section 51 of the Act). Pursuant to Section 49, legal persons are as a general rule also compelled to pay income tax on gifts, donations and costs of entertaining guests. There are exceptions that are specifically listed in the law, e.g. income tax is not charged on gifts and donations made to a person who owns a hospital, to a state or local government scientific, cultural, educational, sports, law enforcement or social welfare institution, or a manager of a protected area, in a total amount that does not exceed 3% of the amount of the payments subject to social tax.

Finland

As of 1 January 2006 according to Finland’s tax legislation (Article 16 subparagraph 8 of the Act on the Taxation of Business Profits and Income from Professional Activities), “bribes or benefits that are similar to bribes” are expressly not tax-deductible. Previously, , 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 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 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 states: "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". Circular no. 1027178/10254/B0012/POL.1052/15-3-2007 clarified that this provision was 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

Hungary's Corporate Tax Law was amended to make a specific reference to bribery. As of January 2002 the Corporate Tax Law states in Paragraph 8(1) subparagraph d: *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

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 No. 95/1998. Section 50(6) of the Act on Income Tax (90/2003) states “cost because of payments, gifts or other illegal things in accordance with section 109 of the Penal Code, 19/1940, to persons that are hired or elected for governmental employment in the fields of legislation, judgement or administrations, either in Iceland or other states or with international organizations and institutions that nations, governments or international institutions are party to” cannot be counted as an operating expense or a as a deduction from taxable income. Reference to “persons that are hired or elected for governmental employment... in Iceland or other states or with international organizations...” (emphasis added) complies with the Recommendation I(i) of the 2009 Tax Recommendation (and Recommendation VIII(i) of the 2009 Recommendation) by explicitly disallowing the tax deductibility of bribes to foreign public officials.

Ireland

Under section 41 of the Finance Act for 2008, Ireland has expressly clarified that bribe payments to foreign public officials are not tax deductible. Ireland has adopted a provision which explicitly denies a tax deduction in computing the amount of any income chargeable to tax under the Taxes Consolidation Act 1997 for any payment the making of which constitutes a criminal offence, or, in case of a payment made outside the State, where the payment, if made in the State, would constitute a criminal offence.

Israel

Israel confirms that bribes are not recognised as expenses for the determining of income tax. Israel’s Income Tax Ordinance 1961 does not expressly deny the deduction of bribe payments. However, through the contribution of interpretative notes and case law, it appears that bribes to foreign public officials would not be deductible in Israel.

Article 17 of the Income Tax Ordinance sets out the general principles regarding deductible expenses incurred to generate income. In its Collection of Interpretations of the Income Tax Ordinance (“Habak”), the Income Tax Authority has ruled that payments made as a result of a criminal offence will not be considered deductible for the purpose of Article 17. Case law has clarified that payments made “in violation of the law”, including bribe payments, are similarly not deductible.¹ The Tel Aviv District Court recently held, in *Company Ltd v The Netanya Assessing Officer*, that bribery expenses paid to authorities of a foreign State to expedite a transaction may not be considered deductible for tax purposes.² The Income Tax Ordinance will in the near future expressly state that any “payment, in money or money’s worth, which the assessing officer has a reasonable basis to believe constitutes a violation of any law” in the list of prohibited deductions under Article 32 of the Ordinance. On 18 January 2009 the anti-bribery legislation has been approved by the Israeli Government and is now waiting for the approval of the Parliament.

Italy

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

¹ *Alarbia Hotels Ltd v Jerusalem Assessment Officer*, Income Tax Appeal 54/84 (1997).

² *Company Ltd v The Netanya Assessing Officer*. Income Tax Appeal 1015/03 (2008).

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.

Japan³

In 2006, Article 45 of the Income Tax Law and Article 55 of the Corporate Tax Law were amended to expressly deny the tax deductibility of bribes to domestic and foreign public officials (in force as of 1 April 2006).

These articles read 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”.

Prior to 2006, bribes to foreign public officials were not deductible expenses as constituting “entertainment and social” expenses, which under article 61-4 of the Special Taxation Measures Law are not deductible. In practice Japan treated bribes to foreign public officials in the same way as bribes to domestic public officials and therefore as non-deductible.

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, bribe payments to foreign public officials were not deductible because they did 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

³ For more information, please see <http://www.mof.go.jp/english/tax/bribe.htm>.

issued by the National Tax Service in February 1996 prohibits 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.”

A Law was adopted on 1st August 2007 to approve the UN Convention against Corruption. This law also expands the scope of non deductible expenses according to article 12.5 of the December 1967 Income Tax Law to cover expenses paid to persons having a position on a judicial body of another state, even if the persons exercise this judicial function without having a professional status or to persons exercising an arbitration function submitted to the regulation of arbitration of another State or public international organization recognized by the Grand Duchy of Luxembourg.

Mexico

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

The Mexican Tax Administration Service (SAT) is currently working on a proposal to include a provision in the Income Tax Law to explicitly disallow the tax deductibility of bribes to foreign public officials. Although these regulations, particularly in articles 31 and 172, disallow deductions of expenses that are not strictly related to the source of the taxpayer’s activities, and in articles 32 and 173 enlist the non-deductibility expenses, this initiative aims to comply the 2009 Council Recommendation on Tax Measures of Further Combating Bribery of Foreign Officials in International Business Transactions of the OECD. 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 established⁴* 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, which introduced legislation making bribes paid to foreign and domestic public officials in the conduct of business non-deductible for tax purposes.

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

⁴ Italics added for emphasis.

“**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

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

Poland amended its legislation to confirm that bribes to foreign public officials are not tax-deductible. On the 1st of January 2009 regulations of the Act of 6 November 2008 on the amendment of the Act on personal income tax, the Act on corporate income tax and certain other Acts (Journal of Laws No 209, item 1316) came into force introducing in both the Acts on income tax a new provision which states that incurred expenses as well as the value of given things, rights or services resulting from activities which cannot be a subject matter of a legally effective contract are not regarded as allowable expenses. These regulations clearly confirm that expenses incurred in connection with a ‘bribe’ do not constitute allowable expenses and are not tax-deductible.

Portugal

Portugal does not allow the deductibility of bribes to foreign public officials. On 20 December 1997, the Parliament adopted 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 1997, which provides for personal income tax states:–“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:–“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.”

Portuguese authorities state that bribes are non-tax deductible since giving a bribe constitutes a violation of “Portuguese criminal legislation”.

Russian Federation⁵

The Russian Tax Law does not specify possible deduction from the tax base for the Enterprise Profits Tax of expenses incurred in connection of bribes paid to foreign officials.

⁵ Signatory of the OECD Anti Bribery Convention but not yet a Party.

The RF Criminal Code establishes criminal responsibility (Article 291) for a bribe given to a public official directly or indirectly (via an intermediary) “which is a fine up to Two Hundred Thousand Rubles or equals the amount of the wage or any other income of the abuser due thereto for the period up to eighteen months, or corrective works from one to two years, or arrest for the period three to six months, or confinement for up to three years”. If a bribe is given for the “obviously unlawful actions (no action)”, the size of the maximum sanction is increased up to eight years of imprisonment.

The Russian Criminal Code does not differentiate between Russian and foreign officials. Thus, the Russian taxpayer does not have an opportunity to charge money spent on bribes to the public officials (Russian or foreign) to his/her expenses and moreover he/she may be brought to criminal responsibility.

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 tax 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.

Slovenia

Slovenia has included an express provision in its tax legislation that classifies bribes as non-deductible expenses for tax purposes. Slovenia recently enacted a new Corporate Income Tax Act, which entered into force on 1 January 2007, replacing the 2005 Corporate Income Tax Act reviewed during Phase.

The new law applies to all legal persons, as well as natural persons conducting economic activities, pursuant to article 48(2) of the Personal Income Tax Act¹⁵. The 2007 Corporate Income Tax Act includes a provision drafted in exactly the same terms as the 2005 Act, prohibiting the tax deductibility of bribes.

Article 30 of the 2007 Corporate Income Tax provides a list of non-deductible expenses, referred to as “non-recognised expenditures for tax purposes”. Included in the list of non-deductible expenses is an item that includes “bribes” and “other forms of material benefit given to natural or legal persons in order to bring about or prevent a certain event which would otherwise not arise, such as in order for a certain action to be performed more quickly or favourably omitted.”

South Africa

As of 1 January 2006, the Income Tax Act 1962 has been amended to provide for the express non deductibility of bribe payments. In terms of section 23(o) of the Act no deductions shall in any case be made in respect of any expenditure incurred -

(i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or

(ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic.”. [emphasis added]

Section 5 on the foreign bribery offence, as well as related offences in respect of corrupt activities relating contracts and the procuring and withdrawal of tenders all fall under Chapter 2 of the PCCA. South Africa points out that “payment of that expenditure” should be interpreted in the widest possible manner, as this provision clearly refers to “an activity contemplated in Chapter 2 of the PCCA”. Chapter 2 of the PCCA deals with offences in respect of corrupt activities, including the foreign bribery offence (section 5) and refers to the giving of a “gratification”. Gratification is broadly defined, and includes bribes in the form of services or other intangible benefits. Notwithstanding, South Africa acknowledges that, where the bribe is in the form of a service or other intangible benefit, it may be more difficult to quantify it and/or refuse its deduction.

South Africa indicates that, in their view, no conviction is required to deny a tax deduction for a bribe to a foreign public official, as reference is made in the provision only to disallowing a deduction in relation to specific activities, including the payment of bribes. The provision is not aimed at a criminal conviction for bribery but simply the disallowance of expenditure related to such activities. However, because of the general rule applicable under South African law that “he who alleges must prove”, the onus of proving that a payment constitutes a PCCA offence and is therefore not deductible will be on the State.

Spain

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) entered into force on 12 January 2000. Bribes to foreign public officials 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 Spain 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.”

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 of 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 of the Federal Income Tax Act and Article 10 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

The non-deductibility of bribe payments is not explicitly addressed by Turkish Law. However, any person who claims a deduction has the burden to prove it. Article 3 of the Tax Procedure Code states that:”...in the assertion of a case that does not conform to the economic, commercial or technical requirements; or that is not normal or familiar in relation with the real event, the assertor has the burden of proving it...”

Article 40 of the Income Tax Law and Article 8 of the Corporate Tax Law allow certain types of deductions. Non-deductible expenses are listed in Article 41 of the Income Tax Law and Article 11 of the Corporate Tax Law. The Income Tax Law and Corporate Tax Law do not contain any regulation that permits the deduction of bribe and/or any other illegal payments and the Turkish authorities state that domestic tax legislation. Article 40(1) of the Income Tax Law allows taxpayers who deal with “exportation, construction, montage, repairing and transportation abroad” to deduct, as a lump sum, and as an addition to the allowable and documented expenses, [undocumented] expenses up to the 0,5% of their foreign exchange earnings which incurred from these operations abroad.

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 1 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

The 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).