

# *Key Tax Issues at Year End for Real Estate Investors 2011/2012*

*An overview of year-end  
to-dos and important  
issues in real estate  
taxation in 35 tax  
systems worldwide.*



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## Introduction

International tax regimes are diverse, complex and variant, and are usually full of fixed dates, terms and deadlines. These dates, terms and deadlines need to be observed carefully in order to avoid penalties and to receive certain tax reliefs or exemptions. At year end these obligations become even more difficult to understand and fulfil, particularly for real estate investors with investments in numerous countries.

This publication gives investors and fund managers an overview of year-end to-dos and important issues in real estate taxation in 35 tax systems worldwide.

Furthermore, it highlights what needs to be considered in international tax planning and the structuring of real estate investments.

Please note that the list of year-end to-dos is not exhaustive. Further matters may have to be relevant.

This publication is merely intended as general information for our clients. Specific action should not be taken without reference to the relevant sources or advice from your usual PwC office. Parts of this publication may not be copied or otherwise disseminated without the prior permission of the publisher.

We hope that you will find “Key tax issues at year-end for real estate investors 2011/2012” a useful reference and source of information. We would be pleased to assist you with any further requests.

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## List of abbreviations

approx.	Approximately
BPT	Business Profit Tax
CCT	Canton and Communal Taxes
CFC	Controlled foreign corporation
CGT	Capital Gains Tax
CIT	Corporate Income Tax
CITA	Corporate Income Tax Act
CITL	Corporate Income Tax Law
CGS	Capital Goods Scheme
COD	Cancellation of debt
DDD	Deemed dividend distribution
DER	Debt-to-equity ratio
DFL-2	Decreto con Fuerza de Ley N° 2
DFT	Direct Federal Tax
DTT	Double Tax Treaty
EBIT	Earnings before interest and tax
EBITDA	Earnings before interest, tax, depreciation and amortisation
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
e.g.	exempli gratia (for example)
EOI	Exchange of information
ETF	Enhanced Tier Fund
etc.	et cetera (and so forth)
EU	European Union

EUR	Euro
FAIA	Computerised Tax Audit File from the Luxembourg VAT authorities
FCDP	Foreign currency denominated bond
FCP	Fonds commun de placement
FCS	Foreign controlling shareholder
FMV	Fair market value
FX	Foreign exchange
FY	Fiscal year
GAAP	Generally Accepted Accounting Principles
GST	Goods and Services Tax
i.e.	id est (that is)
IFRS	International Financial Reporting Standards
incl.	Including
IP rights	Intellectual property rights
IRES	Italian Corporate Income Tax
I&R Directive	Interest and Royalties Directive
IT	Information technology
JPY	Japanese yen
KRW	South Korean won
LTL	Lithuanian litas
LVL	Latvian lats
MREC	Mutual Real Estate Company
MIT	Managed Investment Trusts
NID	Notional interest deduction
NRT	Non-resident trust
NOL	Net operating losses
P&L	Profit and loss
PPM	Provisional monthly payments

OECD	Organisation for Economic Co-operation and Development
RE	Real estate
REIT	Real Estate Investment Trust
RET	Real Estate Tax
RETF	Real Estate Trust Fund
RON	Romanian leu
RUR	Russian ruble
SAF-T	Standard Audit File for Tax Purposes
SICAV	Société d'Investissement à Capital Variable
SIFT	Specified Investment Flow-Trough
SPV	Special-purpose vehicle
SRF	Singapore resident fund
TL	Turkish lira
TMK	Tokutei Mokuteki Kaisya
TOFA	Taxation of financial agreements
TP	Transfer pricing
TPCA	Tax Preferential Control Act
UK	United Kingdom
USD	United States dollar
VAT	Value Added Tax
vs	versus
WHT	Withholding Tax

# Europe

## 1 Austria

### Fiscal unity

In order to form a tax group between companies inter alia, a written application has to be signed by each of the group members prior to the end of the fiscal year of the respective group member for which the application should become effective.

***Make sure the written application has been signed by each group member.***

### Losses carried forward

Tax losses may be carried forward for an unlimited period of time and may be set off in the amount of 75% of the total amount of the annual taxable income. However, any direct or indirect transfer of shares may lead to a partial/total forfeiture of losses carried forward.

***In order to avoid negative tax consequences regarding tax losses carried forward, any transfer of shares should be reviewed in detail.***

### Depreciation of buildings

As a rule, the annual depreciation rate for buildings is between 2% and 3% as stipulated in the Austrian Income Tax Act. However, a higher annual depreciation rate can be applied if an expert opinion confirms that the useful life of the building in question is a shorter period.

***An expert opinion is necessary to make use of a higher annual depreciation rate for buildings.***

### Substance requirements

General substance requirements need to be met by foreign companies receiving Austrian income (e.g., loan interest or dividends paid by an Austrian corporation to a foreign shareholder) in order to be recognised by the Austrian fiscal authority. The disregarding of foreign companies may result in non-deductibility of expenses or a withholding tax burden.

***It should be ensured that Austrian substance requirements are met.***

### Transfer pricing

Generally, all business transactions between affiliated companies must be carried out under consideration of the arm's length principle. In the case that a legal transaction is deemed not to correspond with the arm's length principle, or if the appropriate documentation cannot be provided, the transaction price would be adjusted for tax purposes. Additionally, the adjustment may trigger interest payments and fines.

***The arm's length principle should be duly followed and documented in order to avoid negative tax consequences.***

### Thin capitalisation rules

There are no explicit thin capitalisation rules according to Austrian tax law. As a rule, group financing has to comply with the general arm's length requirements.

***Therefore, an Austrian group entity being financed by an affiliated entity must be able to document that the financing structure is in line with the arm's length principle.***

### Austrian private Foundations

Since 2011, the time limitation of ten years for taxation of real estate property sales for Austrian private Foundations was partially eliminated. The sale of real estate property will be subject to taxation without any time limitation in case the donor or the subsequent donor is a corporate entity (also foreign comparable corporate entity).

In accordance with the draft of the Federal Budget Act 2012, the contribution or purchase of real estate by donors to foundations will be subject to real estate transfer tax and no longer to the foundation entrance tax as of January 1st 2012. The applicable tax rate (3.5%) has not been changed.

***In case of missing consideration or in case of a consideration under 50% of the fair market value, an additional tax rate of 2.5% (equivalent to the foundation entrance tax) will be applied.***

### Pension accruals

At the end of every business year, at least 50% of the amount of the pension accrual shown in the (tax) balance sheet at the end of the preceding business year must be covered by certain securities in the company's assets.

***In order to avoid negative tax consequences, securities coverage should be monitored.***

### Transfer of hidden reserves realized by Austrian private foundations

With regard to the sale of substantial shareholdings by an Austrian private foundation, it is possible to transfer hidden reserves so as to avoid taxation. The condition here is that a new investment (of more than 10%) in a domestic or foreign corporation must be made within the year of the sale of the substantial shareholdings.

Provided that no transferral takes place during the calendar year of the sale of the substantial shareholdings, this may result in the formation of a tax free amount which may be transferred to a newly procured investment within 12 months as from the sale of the substantial shareholdings. The one-year period during which the transferral may take place starts to run as from the disclosure of the hidden reserve.

Additionally, a comparable legislation with regard to the sale and acquisition of real estate property is existent for natural persons.

***A review of all sales done in 2011 should be executed to avoid taxation.***

## 2 Belgium

### Advance tax payments

Unless a company pays its Belgian corporate income taxes by means of timely tax prepayments (four due dates: April 10th, July 10th, October 10th and December 10th [if accounting year equals calendar year]), a surcharge on the final corporate tax amount will be due (2.25% for assessment year 2012).

If tax prepayments are made, a credit ('bonification') will be granted which can be deducted from the global surcharge. This credit depends on the period in which the prepayment was made.

***The company should verify whether any tax prepayments should be performed in order to avoid a possible tax surcharge.***

### Provisions for risks and charges

Provisions for risks and charges are in principle to be considered as taxable. Provisions for risks and charges can however be tax-exempt under certain conditions; the most important conditions are summarised as follows: (i) the provisions are recorded in order to cover a loss that is considered likely due to the course of events; (ii) the charges for which a provision is established must be deductible as business charges; (iii) the provision must be included in one or more separate accounts on the balance sheet.

Specific attention should be paid to provisions for major repairs. These provisions can only be tax-exempt to the extent that the following conditions are met: (i) the repairs must be manifestly necessary at least every ten years; (ii) the repairs must be major; (iii) any renewal is excluded.

***By the year-end date, the company should book all necessary provisions for risks and charges relating to the assessment year.***

### Notional interest deduction (NID)

Belgian companies are allowed to claim a tax deduction for their cost of capital by deducting a notional (deemed) interest on equity and retained earnings. The equity is the amount reported in the Belgian GAAP balance sheet at the end of the preceding year.

The NID rate depends on the ten-year government bond interest rate of the calendar year two years prior to the tax year. The NID rate for tax year 2012 (i.e. financial years ending December 31st 2011) amounts to 3.425%.

The excess NID can be carried forward for a maximum of seven years if there is insufficient tax capacity in the year of the deduction.

#### ***Possible NID optimisation:***

- ***Recapitalisation of the company***
- ***The company has the faculty to renounce (definitively) totally or partially to the benefit of the NID (e.g. in order to fulfil the conditions imposed by CFC legislation);***
- ***Tax planning opportunities exist in order to avoid a forfeiture of the carried-forward NID after seven years by increasing the taxable basis of the company.***

### Tax losses carried forward

Tax losses can be carried forward indefinitely as long as the company is not formally liquidated or dissolved. Under certain circumstances (e.g. change of the control not meeting legitimate or economic needs), the tax authorities are entitled to adjust the carried-forward tax losses of the company.

As a general rule, the tax authorities are entitled to challenge the carried-forward tax losses for three years as of their utilisation by the company.

In the case of internal group restructuring, it is recommended to ask for a ruling in order to secure the availability of carried-forward tax assets.

***Tax planning opportunities exist in order to avoid a forfeiture of the carried-forward tax losses upon restructuring, for example by increasing the taxable basis of the company.***

## Deferred taxation

The deferred taxation regime allows (provided certain conditions are met) the taxation of a capital gain in proportion with the depreciation booked on the qualifying asset(s) in which the realisation proceeds have been reinvested in due time (period of five years for buildings).

In the event that the commitment has been made to reinvest the total sale proceeds but no (full) reinvestment has taken place within the required period, the capital gain (which has not yet been taxed) will be added to the taxable income of the financial year in which the reinvestment period expires and a late payment interest (currently at a rate of 7% per year) will be due.

Please note that a bill provides for an amendment of tax law to extend the deferral possibility to reinvestments made in assets of EEA member states (planned to be applicable as from assessment year 2012).

***When selling real estate and applying the deferred taxation regime, properly monitor the time frame for reinvestment and tax formalities.***

## Transfer pricing

Generally, all intercompany payments have to comply with the arm's length principle. Failure to do so (incl. failure to have appropriate underlying documentation) might result in the non-deductibility of (some part of) intragroup payments.

***The arm's length principle should be duly followed and documented.***

## VAT

### **VAT on land as from January 1st 2011**

The supply of land that belongs to a new building or part of a new building is to be subject to VAT as from January 1st 2011 so far as the supply of the new building itself is subject to VAT.

In 2011, both the legislator and the Minister of Finance gave chapter and verse on how these rules must be interpreted and how they coincide with regional transfer tax regulations.

***The change can be both an opportunity and a point to heed for investors.***

### **VAT-exempt turnover now included in VAT returns**

Starting in 2010, mixed taxable persons, such as many real estate companies, must report their VAT-exempt (real estate) transactions in a specific box on the VAT return (in principle periodically, but at least once a year in the VAT return for the month of December, to be filed January 20th).

The obligation to declare exempt turnover gives the VAT administration information on how the taxpayer handles input VAT deduction.

***It is important to make sure that exempt turnover is declared correctly and that input VAT deduction (incl. VAT adjustment on capital goods) is calculated properly.***

#### **December advance payment**

Monthly VAT payers need to consider the December advance payment regulations.

VAT payers have two options to comply: either pay the VAT due from the transactions occurring between December 1st and 20th (inclusive); or pay the same amount of VAT due for the month of November.

In both cases, payment must be made before December 24th.

***Monthly VAT payers that are generally in a VAT debit position (in November or December) should assess which option is best in their particular case.***

#### **A farewell to upfront input VAT deduction on privately used (immovable) capital goods**

The upfront deduction of input VAT on immovable capital goods that have been acquired after January 1st 2011 and that are partly rented out free of charge (to a member of the personnel or a company administrator) as from their acquisition is no longer possible for the part of the property that is put at the disposal for free. In October 2011, the Belgian VAT administration gave further explanation on how such situations must be handled.

For such immovable capital goods that have been acquired by companies before January 1st 2011, further administrative explanations are expected following the final ruling in a case currently pending before the European Court of Justice.

***The private use of immovable capital goods triggers a VAT cost. How this VAT cost must be handled depends on the specific circumstance of the case at hand.***

#### **Property concessions at ports, airport and navigable waterways**

In August 2009, the putting at the disposal of property (immovable by nature) in the context of the operation of ports, navigable waterways and airports was by law specifically excluded from the VAT exemption that is generally applicable to the letting or leasing of immovable property in Belgium.

In 2011, the Belgian Minister of Finance gave for the first time chapter and verse on this relatively new disposition.

According to the Minister, this disposition is aimed at any form of putting at the disposal of property (immovable by nature) that is situated in a port area in the framework of operating ports, navigable waterways and airports, regardless of whether the taxpayer in question qualifies as an operator of ports, navigable waterways or airports.

***The disposition and clarification are of immediate importance to anyone ,letting‘ or intending to invest in property in a port area. Also in Belgium real estate can sometimes be operated in a VAT-neutral manner throughout the chain of economic actors.***

## Upcoming changes in 2012

### Upcoming changes

There might be some changes in Belgian tax law that have been announced by the Walloon Socialist Party leader Elio Di Rupo, appointed as 'formateur', in a memorandum dated July 4th 2011.

According to this memorandum, dividends would be subject to a single rate of 25%. As regards the Belgian dividends received, the proposal foresees to extend the minimum holding period to two years. Currently, the dividend received exemption of 95% is granted for dividends received by a parent company that has a shareholding of at least 10% (or with an acquisition value of €2,500,000) for an uninterrupted period of at least one year.

The capital gains tax exemption would be subject to the same conditions as the participation exemption for dividends. Currently, capital gains realised by companies are tax exempt regardless of the percentage of the participation and the holding period.

Finally, the notional interest deduction regime would be improved to control the cost of the system and to combat abuses.

For the time being, it is difficult to predict if, how and when the new tax measures will be implemented.

## 3 Bulgaria

### Transfer pricing

The Bulgarian tax authorities adopted a set of internal transfer pricing guidelines, which indicated the approach they would follow with respect to transfer pricing matters.

Although the guidelines do not impose obligatory transfer pricing rules, such might be regarded as recommendable, as such documents may provide extra certainty in tax audits.

***Material related-party transactions should be checked in view of the Bulgarian transfer pricing rules. Preparation of local transfer pricing documentation can provide more predictability during a future tax audit.***

### Thin capitalisation rules

Under the Bulgarian thin capitalisation rules, interest expenses may not be fully tax deductible if the average between the company's debt-to-equity ratio as at January 1st and December 31st exceeds 3:1. Even if this ratio is not met, the thin capitalisation restrictions would not apply if the company has sufficient profits. Restricted interest expenses may be reversed in the following five consecutive years, under certain conditions.

Interest costs incurred on bank loans and interest elements of finance lease payments are subject to the thin capitalisation rules, not only when the bank loan agreements and the finance lease agreements are concluded between related parties but also when the finance lease/the loan is guaranteed by a related party.

***It should be verified whether the thin capitalisation rules apply to the company and what the potential impact would be.***

### Withholding tax

As of January 1st 2011, the provisions of the Interest and Royalties Directive were partially implemented in the local legislation. Under these rules rate on interest and royalty accrued by local companies to associated EU companies is reduced from 10% to 5% under certain conditions (i.e. 25% direct shareholding for at least 2 years).

***It should be verified whether the requirements for application of the beneficial rate would be met.***

### Beneficial ownership

A special definition of beneficial owner for the purposes of obtaining withholding tax relief was introduced in the Bulgarian tax legislation. Generally, a foreign entity is considered the beneficial owner of income if it has the right to freely dispose about the income and bears the full or a significant part of the risk related to the activity, and is not a conduit company.

The rules set out specific cases in which a foreign company may not qualify as a beneficial owner of Bulgarian source income and may be denied tax relief. For example, this could be the case for pure holding companies and companies which use subcontractors for provision of services to Bulgarian clients.

***The current structures and application of tax treaty relief should be reviewed accordingly. Before setting the holding and financing structure, the requirements for beneficial ownership should be carefully considered in order to avoid adverse withholding tax implications.***

#### Suppliers in offshore jurisdictions

There is a 10% Bulgarian withholding tax on income from services, rights, indemnities and penalties, which is accrued to certain persons in offshore jurisdiction.

***It should be verified whether potential withholding tax liabilities would arise as a result of the implementation of the new tax rules.***

#### Real estate tax

As of January 1st 2011, the tax base for calculating real estate tax is the higher between the gross book value of the property as per the company's balance sheet and the tax value as determined by the municipality where the real estate is located. In the previous year, only the property's gross book value served as a tax base. In the case of a change in the circumstances applicable to the tax rate the taxpayer should declare this change in the municipality where the real estate location is. The period for declaring the change is two months.

***The liability for the real estate tax should be carefully examined.***

#### Garbage collection fee

Companies are obliged to pay garbage collection fees with respect to their real estate. Generally, the fees are based on the gross book value of the real estate properties and could be material for expensive real estate.

Companies may be able to reduce the fees by opting for payment based on the actual waste generated. In order to apply this option, however, the companies should submit applications to the relevant municipality within a specific term. The conditions are determined by the municipality where the real estate is located.

***The possibility of achieving lower garbage collection fees should be checked with the municipality in which the property is located.***

## 4 Cyprus

### Provisional tax return

Where an entity anticipates that it will generate taxable income in the relevant tax year, i.e. 2010, the company is obliged to prepare and submit its provisional income tax declaration form by August 1st and pay the respective tax in three equal instalments on August 1st, September 30th and December 31st of the relevant year, i.e. 2011.

The company may submit a revised declaration at any time up to December 31st of the relevant tax year, i.e. 2011.

### Final tax return for 2009

The entity has the obligation to submit its annual tax return by December 31st following the relevant tax year, i.e. the annual tax return for 2010 should be submitted by December 31st 2011. Any liability per its 2010 annual tax return after the deduction of the provisional tax paid as above should have been paid via self assessment by August 1st 2011.

### Deemed dividend distribution

A Cyprus tax resident company, controlled partly or wholly by Cyprus tax resident persons, must declare 70% of the profits of a particular year within the next two years as dividends to its shareholders, otherwise it will be subject to the deemed dividend distribution (DDD) provisions of special defence contribution at 17%, i.e. 70% of profits from 2009 must be declared as dividends by December 31st 2011.

However, it should also be noted that a Cyprus tax resident entity ultimately held by 100% non Cyprus tax resident shareholders will not come under the scope of the DDD provisions.

### Tax depreciation allowances

Tax depreciation allowance on the capital costs is available both to the individual and the corporate investor at the rate of 3% for commercial buildings, and 4% for industrial buildings. On disposal of the property, a balancing allowance/charge is calculated and taxed accordingly, being the difference between original cost or sales proceeds, whichever is lowest, and the tax written down value.

Finally, land does not attract tax depreciation allowances.

### Tax losses carried forward and surrender of losses in the same tax year

Tax losses may be carried forward indefinitely and set off against future taxable profits of the company.

Group relief (set-off of the tax loss of one company with the taxable profit of another) is also allowed only between Cyprus tax resident companies of a group. A group is defined as:

- one company holding directly or indirectly at least 75% of the shares of the other company,
- or where at least 75% of the shares of the two companies are held by another company (directly or indirectly).

The surrendering company and the claimant company are both members of the same group for the entire year of assessment.

### Immovable property tax

From January 1st 2012, the registered owner of immovable property situated in Cyprus is liable to an annual immovable property tax calculated on the market value of the property as at January 1st 1980, at varying rates as noted in the table below. The first €120,000 of the property value as above is tax-free.

Property value €	Rate %
Up to €120,000	–
€120,001–€170,000	0.4%
€170,001–€300,000	0.5%
€300,001–€500,000	0.6%
€500,001–€800,000	0.7%
over €800,001	0.8%

The immovable property tax is payable by September 30th on the January 1st 1980 value of the immovable property owned by a taxpayer on January 1st of the same year.

#### Dividends and withholding tax

No withholding tax is imposed on dividend payments to investors, both individuals and companies, who are non-residents of Cyprus in accordance with the Cyprus domestic tax legislation, irrespective of the percentage and period of holding of the participating shares.

#### Special defence contribution on rental income

As from July 1st 2011, companies, partnerships, the government or any local authorities that pay rents for immovable property are required to withhold the special defence contribution at source. Special defence contribution is withheld by the tenant on the date of the payment of the rent of the landlord.

The taxpayer is obliged to pay the second instalment of the special defence contribution arising on any rental income earned from immovable property by December 31st 2011 after crediting any such withholding as above. The special defence contribution is calculated as 3% on 75% of the gross rental income.

## 5 Czech Republic

### Thin capitalisation rules

All related-party loans are subject to thin capitalisation rules. Any interest-free loans, or loans from which interest is capitalised in the acquisition costs of fixed assets, are excluded from the thin capitalisation rules.

Thin capitalisation rules are also applicable for any back-to-back financing arrangements in which the provision of a loan by a third party is conditioned by a corresponding loan by a related party to the third party lender.

The debt-to-equity ratio of 4:1 applies for thin capitalisation purposes.

***The company should review the equity ratio and, in the case that the full deductibility of interest is not achieved, we recommend increasing equity in the 2011 period accordingly to mitigate any negative tax implications regarding the deductibility of interest. Please note that for thin capitalisation calculation purposes equity is calculated as the annual weighted average. The current year's profit is not included in equity for thin capitalisation calculations.***

### “Overlimit interest”

“Overlimit interest” (due to thin capitalisation rules), may no longer be reclassified into dividends for tax residents within the EU and the EEA (European Economic Area).

Please note that the reclassification is still applicable for tax residents outside the EU and the EEA unless specifically exempt based on the applicable double tax treaty.

### Corporate income tax rate

Corporate income tax rate is 19% in 2011.

### Binding rulings for repairs

According to the Czech legislation repairs are tax-deductible costs in the year when they were incurred. On the other hand, technical improvements are depreciated during the given period. Companies can apply for binding rulings from the tax authorities with respect to distinguishing between technical improvement and repairs performed on fixed asset property. This should mitigate any potential challenge of the repair to be considered as capital improvement, which are otherwise subject to depreciation.

***When the company has performed high investment into real estate property and the definition of the work done is not clear with respect to whether technical improvements or repairs were executed, then the company may apply for a binding ruling from the tax authorities.***

### Reserve on repairs of fixed assets

Reserves for repairs of fixed assets are tax-deductible only if the corresponding cash amount is deposited in a special escrow bank account.

***The company should ensure that the value of the reserve is deposited in the special bank account at latest by the deadline for filing the corporate income tax return.***

### Tax losses

Tax losses can be carried forward for up to five years since they were incurred. If the company is not able to utilise them, it is possible to suspend tax depreciation.

### Hedge accounting

Use of hedge accounting is based on natural hedges which exist between euro-denominated rental income and financing to defer recognition of any unrealised foreign exchange differences for Czech tax purposes until their actual realisation. The hedge accounting requires that hedge accounting policy and model is implemented which complies with the requirement of the Czech GAAP.

### VAT

It is expected that the reduced VAT rate will grow from 10% to 14% from January 1st 2012. Both rates, reduced and standard, are expected to be unified at 17.5% from January 1st 2013. Draft of the VAT Act is still subject to approval. Increase of reduced VAT rate will have a significant impact on companies active in real estate industry, particularly those:

- Constructing flats/houses for sale to non VAT payers
- Reconstructing the historical buildings
- Supplying construction services subject to reduced VAT rate.

Secondly, local reverse-charge as one of the measures aimed against tax evasion will apply to construction and assembly work with effect from January 1st 2012. The VAT Act amendment newly requires that suppliers and purchasers keep records of supplies which are subject to local reverse-charge and file them within the same period as for filing VAT returns.

## 6 Estonia

### Reduction of corporate tax rate

Estonia is regarded as offering a relatively favourable income tax regime, as all undistributed corporate profits are tax exempt. Estonia levies a corporate income tax only on profits that are distributed as dividends, share buy-backs, capital reductions, liquidation proceeds, or deemed profit distributions. Distributed profits are generally subject to 21% corporate tax (21/79 on the net amount of the profit distribution). According to the changes made to the Income Tax Act, the income tax rate will be reduced to 20% in 2015.

***Consider the possibilities of reinvesting profits and defer the payment of corporate tax upon distribution of dividends after January 1st 2015.***

### Sale of shares in a real estate company

Capital gains derived by non-residents from the sale of shares in Estonian companies would be subject to 21% income tax in Estonia only if the assets of the Estonian company at the time of disposal or at any time during the two-year period prior to disposal consisted directly or indirectly of more than 50% of the immovable property or buildings located in Estonia, and in which the non-resident had at least 10% participation at the time of the sale.

***In case of the sale of shares of an Estonian real estate company, budget for potential 21% income tax to be paid on taxable gains.***

### Transfer pricing

The inter-company transactions must be in accordance with the Estonian transfer pricing regulation, which is generally based on the arm's-length principle that requires the prices charged between related parties to be equivalent to those that would have been charged between independent parties in the same or similar circumstances. Should the transfer prices applied in the inter-company transactions not follow the arm's-length principle, any hidden distribution of profits is subject to Estonian corporate tax (i.e. being subject to monthly 21/79 distribution tax). In addition, from 2011 the term "related persons" has been broadened and includes also persons who have common economic interests or dominant influence over other persons.

***The transfer pricing documentation should be reviewed in the light of changed related persons term.***

### Land tax

Land is subject to annual land tax at rates between 0.1% and 2.5% depending on municipality. Since 2010, generally the land tax is paid by two instalments, by March 31st and October 1st. From January 1st 2012, the rate of land tax will be increased from 1.5% to 2.5% in Tallinn, the capital of Estonia.

***Budget for land tax payments.***

### Permanent establishment

From 2011, the new term of permanent establishment (PE) has been introduced in the domestic legislation, which is wider than the term used in the OECD Model Tax Treaty. The PE is now defined as an enterprise, through which the permanent business activities of the non-resident are conducted in Estonia. A PE is deemed to be conducted as a result of the business activities conducted in Estonia, which are geographically linked or having movable character, or as a result of the business activities of an agent which is authorised to conclude contracts in the name of the non-resident. The undistributed profits of PE will continue to be exempt from annual corporate taxation.

***In the absence of the double tax treaty consider the potential permanent establishment exposure under the new domestic law rules.***

## 7 Finland

### Withholding taxation

A government proposal has been issued on the reduction of the domestic withholding tax rate on dividends, royalties and interest paid to foreign corporate entities. The general withholding tax rate is proposed to be reduced from 28% to 25% as of January 1st 2012. The domestic withholding tax rate on dividends paid to EEA resident companies under certain circumstances is proposed to be reduced from 19.5% to 18.75%.

***Keep track of progress.***

### Capital loss carry forward time period

The Income Tax Act has been amended to prolong the capital loss carry forward period from three years to five years. The amendment concerns individuals and companies that are deemed not to carry out business activity for income tax purposes. The amendment generally applies as of January 1st 2011 but it will be applied to capital losses accrued in 2010 and onwards.

### Budget for 2012 – Changes to corporate income taxation

The budget proposal for 2012 was presented to Parliament on October 5th 2011. The changes are expected to be applicable from January 1st 2012 onwards.

According to the proposal, the corporate income tax rate will be reduced from 26% to 25%.

***Keep track of progress.***

### Distribution from SVOP reserve

According to the government's programme the current tax practice regarding distribution from the "reserve for invested unrestricted equity" ("SVOP reserve") will be implemented into the legislation. Currently, the tax treatment is determined based on the actual origin of the reserve. If the distribution consists of capital contributions made by the shareholders or other investors, the distribution is treated as repayment of capital. In case the distributing company is not able to prove that the distribution originates from capital contributions, the distribution is treated as dividend distribution for income tax purposes.

***Keep track of progress.***

### Loss carried forward and change in ownership

Direct or indirect changes in the ownership of Finnish companies may lead to forfeiture of losses carried forward at the Finnish entity's level. It is possible to apply for an exemption by submitting an application to the tax authority. Tax and court practice regarding real estate companies have been stricter than that regarding companies conducting ordinary business.

### Transfer pricing

Generally, all related-party payments and transactions have to comply with the arm's length principle. This should be duly documented. During the past few years, the Finnish tax authorities have increasingly paid special attention to financing transactions (e.g. interest payments).

***Ensure compliance with transfer pricing rules.***

### MRECs

Typically, Finnish real estate is owned via mutual real estate companies (MRECs). In order for the ownership structure to be tax-efficient, payments between the MREC and its shareholder(s) need to be carefully planned and documented.

### Change of VATable use of premises

In case the VATable use of premises has changed compared to the situation when the real estate investment was taken into use, VAT included in the real estate investment might be subject to adjustment.

***It should be verified whether there have been changes to the VATable use of real estate and determined whether the VAT deductions should be adjusted. The effect can be positive or negative, depending on whether the VATable use has increased or decreased.***

Reverse charge in the construction industry

The VAT provision related to the reverse charge in the construction industry has come into force on April 1st 2011.

***It should be analysed whether the reverse charge regime is applicable to the sale and/or acquisition of services. The contracts relating to construction services should also be reviewed so that the possible implications of reverse charge liability are covered.***

VAT refunds from the year 2008

The entity registered for VAT in Finland is entitled to apply the input VAT of purchases to its VATable business within three years after the end of the accounting period.

***If the accounting period is a calendar year and there is undeducted VAT in the purchases, it can be investigated whether it is possible to apply the refund before the end of the year.***

According to the Finnish VAT Act, real estate management services are considered taken into own use when the real estate owner or holder is performing services in respect of the real estate by using own employees, if the real estate is used for non-deductible purposes. However, the holder or the owner of the real estate is not liable to pay tax, if he/she uses the real estate as a permanent home or if the wages and salary costs including social benefit costs relating to these services, during a calendar year, do not exceed the set threshold.

***Until December 31st 2010 the threshold was €35,000, but as of January 1st 2011 the threshold is raised to €50,000. Considering that, it may be relevant to make sure that the exceeded threshold of costs is observed.***

## 8 France

### Extension of thin capitalisation regime

The French thin capitalisation regime has been extended to now also include bank debt which is secured against a guarantee provided by a related party (unless an exemption is available).

Companies should undertake an impact assessment of their thin capitalisation position to maximise tax deductibility of interest expenses.

***Ensure before year-end that the thin capitalisation limitations are met as there may be time for remedial action if required.***

### Tax losses

Tax losses brought forward from earlier fiscal years can now only be used to shelter the first €1m taxable profit of a company and 60% of taxable profits exceeding this amount.

With respect to the carry-back of tax losses, this is now restricted to the lower of the taxable profits of the directly preceding fiscal year or an amount of €1m. Any unused surplus will be carried forward (as discussed above).

For companies which are part of a French tax group, the limitations mentioned above will also apply both to pre-entry tax losses of the individual members of a tax group and at the level of the group itself.

These new rules apply to fiscal years ending after September 21st 2011.

***Specific attention to be given to companies which have large pools of tax losses carried forward, as they may suffer cashflow difficulties if not adequately prepared for the changes.***

### Participation exemption

Starting January 1st 2011, the French participation exemption in respect of capital gains on qualifying shareholdings will be reduced from 95% to 90%. Based on the standard French corporate income tax rate of 34.43%, this will result in an effective tax rate on such gains of 3.44%.

***Ensure groups are aware of the change in the French participation exemption regime.***

### Worldwide tax consolidation

The worldwide tax consolidation regime, which allowed relevant companies to use losses incurred overseas to shelter taxable profits realised in France will cease to be available for fiscal years ending on or after September 6th 2011.

***Few companies currently benefit from the worldwide tax consolidation regime, thus the impact of this amendment is limited.***

### Luxury hotel tax

Introduction of a new 2% tax on the turnover of “luxury” hotel rooms, i.e. where the nightly rate (excluding VAT) amounts to €200 or more. The reporting and payment of this new tax mirrors the VAT regime and will be applicable to all income on which VAT is due on or after November 1st 2011.

***The impact of the new tax is to be monitored for companies operating in the luxury hotel sector, as well the knock-on impact for businesses involved in hotel reservations (travel and tour operators).***

### Registration duties on acquisition of real estate company shares

Acquisitions of shares in real estate companies are subject to payment of registration duties calculated as 5% of the net value of the shares acquired, less any liabilities of the real estate company itself.

It is proposed, as part of Finance Bill 2012, that the 5% registration duty should be computed on the gross value of the shares, less the original acquisition debt only (i.e. relating to the original acquisition of the property/property rights by the company). This should be monitored closely going forward.

### Other areas of interest

A number of other issues have been debated recently by the French Parliament and/or have been proposed as part of draft Finance Bill 2012. Some of these areas may be of significant impact going forward, for groups with French interests. We would advise that due regard is given to these issues so that groups are properly prepared for future changes to these regimes.

### Conditional deduction of expenses linked to shareholding

#### Current provision

There is currently no provision in French tax law that limits the deduction of expenses connected to shareholdings, per se.

#### Proposed amendment

The deductibility of expenses linked to shareholdings held by a French company may be denied in the event that the taxpayer is unable to demonstrate (by any means) that it is an autonomous decision-making centre for the purpose of managing its shareholdings. This new obligation would have to be fulfilled at all phases of the investment, i.e. acquisition, management or retention of the shares.

***Though this amendment was recently removed from the draft Finance Bill 2012, we are of the view that the debate regarding this topic will be revisited soon – as such, due attention to be given to ensuring French investment holding companies have sufficient substance and are able to evidence their respective roles and decision-making powers.***

### SIIC – Listed French REIT

#### Current position

Distributions made by a French SIIC (and derived from the tax exempt income of the SIIC) are subject to 20% WHT in France when such income is treated as tax exempt at the level of the shareholders, unless the shareholders benefit from a similar REIT regime. This provision only applies in respect of shareholders holding a stake of at least 10% in the SIIC.

#### Proposed amendments

The first amendment proposed was for the WHT to be increased from 20% to 33.33%.

Secondly, it has also been proposed that the scope of the WHT should be extended to include all distributions made to corporate shareholders irrespective of their stake in the SIIC.

It has also been proposed that the French participation exemption regime should be extended to distributions received from SIICs, to ensure that such distributions are not subject to tax twice, i.e. as WHT on the distribution, and corporate income tax in the hands of the recipient.

The exemption relating to shareholders benefiting from a similar REIT regime was maintained.

***Though these amendments have been removed from draft Finance Bill 2012, the debates heard during the drafting of the Finance Bill suggest that the SIIC regime may face changes in the future.***

**Hot topic**

In addition to the above, it should be noted that there are no plans to extend the application of the reduced rate of CIT (19%) applicable, broadly, on disposals of real estate assets to French REITs (i.e. OPCI SPPICAV and SIICs). The benefit of this regime will thus not be applicable as from January 1st 2012.

## 9 Germany

### Interest capping rules

Where an entity is not able to limit its net interest to below the €3m threshold, other escape clauses (non-group escape clause or group escape clause) might be applicable. According to the group escape clause, interest expenses paid in 2012 may be fully deductible only where the equity ratio of the German business equals or is higher than that of the group (2% tolerance) as at December 31st 2011.

***It should be verified whether the equity of the tax paying entity equals that of its group. If it stays below the quota of the group by more than 2% additional equity may be injected in order to ensure interest deductibility in 2012.***

### Special depreciation

As of January 1st 2011, requirements for small and medium sized companies to apply a special depreciation were tightened.

***It should be verified whether special depreciation could be applied also in 2011.***

### NOL planning

According to new tax accounting rules, an impairment to a lower fair market value may be waived.

***In a loss situation impairment may be waived to avoid an increase of net operating losses.***

### NOL planning for partnerships

Net operating losses of a partnership are allocated to a limited partner only up to the amount of its equity contribution.

***Inject equity before year end in order to benefit from losses exceeding the current equity contribution.***

### Losses carried forward

Any direct or indirect transfer of shares/interests (or similar measures, e.g. in the course of restructurings) may lead to a partial/total forfeiture of losses and interest carried forward at the German entity's level. Exemptions may apply for tax privileged restructurings (restrictive requirements).

***It is strongly recommended to explore structuring alternatives where you intend to reorganise your investment structure.***

### Trade tax status

Investments relying on no trade tax due to the non-existence of a German trade tax permanent establishment, or a preferential trade tax regime under the extended trade tax deduction, must fulfil strict requirements. The requirements of the extended trade tax deduction must be met for a complete fiscal year.

***It should be verified whether the requirements are met from January 1st 2012 onwards (if the fiscal year equals the calendar year) in order to mitigate trade tax on income derived in 2012.***

### Tax prepayments

In the case of declining profits, an application can be made to reduce current income and trade tax prepayments.

***Cash flow models and profit forecasts should be checked in order to improve liquidity by applying for tax prepayment reductions and/or refunds.***

### Substance requirements

General substance requirements need to be met by foreign corporations receiving German income in order to be recognised by the German fiscal authorities. This inter alia may ensure the deductibility of interest expenses borne in connection with German investments. Where (constructive) dividends are distributed by a German corporation to a foreign shareholder, section 50d subsection 3 of the German Income Tax Act (special substance rule) is applicable. This provision limits the tax exemption on dividends. The German government plans to reduce the strict substance requirements probably at the year end 2011.

***It should be ensured that German substance requirements are met. If the proposed changes of the special substance rule will come into force, substance of dividend receiving foreign companies may be decreased from 2012 onwards.***

### Transfer pricing

Generally, all related-party cross-border payments have to comply with the arm's length principle. Failure to present appropriate documentation to the tax administration might result in the non-acceptance of group charges and penalties for tax purposes.

***The arm's length principle should be duly followed and documented.***

### Fiscal unity

The acceptance of an income tax fiscal unity is subject to strict observation of certain legal requirements. The profit transfer agreement needs to be registered with the commercial register before December 31st 2011 in order to become effective for the fiscal year 2011. If companies do not obey the requirements during the minimum term of five years, the fiscal unity will not be accepted from the beginning.

***Where a fiscal unity shall be established in future, the profit transfer agreement needs to be registered in time. Furthermore, additional requirements, such as the above-mentioned minimum term, must be dealt with carefully.***

### Land tax

For vacant buildings and buildings rented subject to low conditions land tax up to 50% of the land tax is refunded upon application of the land lord.

***Apply for land tax 2011 refund before April 1st 2012.***

### Land tax

In 2006, an amendment to the constitution gave the federal states the right to set the real estate transfer tax (RETT) rate themselves instead of applying the uniform federal RETT rate of 3.5%. Several federal states have already increased their RETT rate, others are about to follow. As of November 15th 2011, the following federal states have increased their RETT rate: Baden-Wuerttemberg (5%), Berlin (4.5%), Brandenburg (5%), Bremen (4.5%), Hamburg (4.5%), Lower Saxony (4.5%), North-Rhine Westphalia (5%), Saarland (4%), Saxony-Anhalt (4.5%) and Thuringia (5%).

Schleswig-Holstein and Rhineland-Palatinate are going to increase their RETT rate to 5% in 2012. Berlin might increase its RETT rate from 4.5% to 5% as of April 1st 2012. This has however not been decided on yet.

***Proper timing is necessary to avoid increased RETT rates. SPAs have to be concluded before January 1st 2012 in Schleswig-Holstein and before March 1st 2012 in Rhineland-Palatinate to avoid increased real estate transfer tax rate of 5%.***

## 10 Ireland

### 10.1 VAT

#### Capital Goods Scheme

A Capital Goods Scheme (CGS) for property was introduced in Ireland on July 1st 2008, resulting in various adjustments for certain properties, including a possible annual adjustment for owners with a partial right of VAT deduction.

This is very important for property developers who first let residential property after July 1st 2008. The first annual adjustment for the VAT-exempt letting of the property may fall due at the end of this year.

Finance Act 2010 introduced a possible CGS adjustment to properties completed before July 1st 2008 where, on or after February 23rd 2010, they are first used, or where the use of the properties has changed (if that use does not relate to taxable supplies).

***Review taxable use of property in the previous year and where appropriate make a relevant CGS adjustment.***

***Review your property portfolio to ensure that any CGS adjustment payable on the first use or changed use of a relevant property was made.***

#### Waivers of exemptions

Various VAT provisions have been introduced since July 1st 2008 in relation to waivers of exemptions with a view to limiting the scope and application of the waivers going forward.

***Where a taxpayer has a waiver of exemption, the continuing application of the waiver should be determined and also if it is advisable to voluntarily cancel the waiver at this time.***

### 10.2 Stamp duty

#### Rate change

The top rate of stamp duty for non-residential property is now 6% (applies to instruments executed on or after October 15th 2008).

#### Anti-avoidance provisions

Anti-avoidance provisions concerning resting on contract, licences and long agreements for lease have been introduced but not commenced. These provisions seek to impose a stamp duty charge once 25% of the consideration has been paid, with a carve-out for public private partnerships and certain tax-based property investments. The ministerial order required to implement this legislation has not yet been issued.

#### Introduction of e-stamping

Anti-avoidance legislation to counteract the “artificial” use of debt to reduce stamp duty on a conveyance of shares has been introduced. Where in connection with a conveyance of shares the purchaser “procures” the discharge of a debt of the target, the discharge of the debt becomes a stampable consideration. Certain planning is still possible.

E-stamping has been introduced in Ireland. This is a quick and convenient way to claim relief and to pay stamp duty electronically via the Irish Revenue’s online service. In many cases Irish Revenue will no longer need to see the stampable document.

## 10.3 Other

### Windfall tax

New legislation imposes a special 80% rate of tax on profits or gains accruing to individuals and companies on the disposal of land, to the extent that the profit or gain resulted from the rezoning of the land and the rezoning decision was made on or after October 30th 2009, or where the gain resulted from a decision made on or after February 4th 2010 to grant planning permission for a development that materially contravenes the development plan for the area. Losses attributable to the rezoning of land may only be used against profits subject to the windfall tax.

There is an exemption from the special 80% rate of tax on the disposal of sites of less than one acre, provided the market value of the site at the time of disposal is not greater than €250,000.

### Profits and losses from dealings in residential development land

The special 20% reduced rate of tax that applies to profit earned by individuals and companies from the sale of residential development land was abolished under the Finance Act 2009. For individuals, such profits will now be liable to income tax under the normal rules. For companies, profits arising are liable to corporation tax at the 25% rate.

New rules were also introduced under the Finance Act 2009 to deal with the treatment of trading losses arising on residential development land. These new rules apply to losses arising before January 1st 2009 where the claim for loss relief is received by the Revenue Commissioners on or after April 7th 2009. The new rules effectively ensure that tax relief for those losses may only be claimed on a value basis by converting the loss into a tax credit calculated at the 20% rate of income tax (or corporation tax). Prior to this amendment, tax relief for those losses could be claimed on a “euro-for-euro” basis. For trading losses arising on residential development land on or after January 1st 2009, tax relief may be claimed on a euro-for-euro basis. Restrictions also apply to group relief and terminal loss relief claims where the loss arises in a trade of dealing in residential development land.

### Private hospitals, nursing homes, convalescent homes and mental health centres

In 2009, it was announced that the capital allowances schemes for private hospitals, nursing homes, convalescent homes and mental health centres would be terminated on December 31st 2009 subject to transitional measures.

The transitional measures provided are as follows:

- For work not requiring planning permission, the termination date is extended to June 30th 2010 where at least 30% of the total construction or refurbishment expenditure was incurred by December 31st 2009.
- For work requiring planning permission, the termination date is extended to June 30th 2011 where a valid application for full planning permission for the work was lodged by December 31st 2009 and the planning authority acknowledged that the planning application was received by that date. In the case of private hospitals, the termination date is extended to December 31st 2013 so far as this condition is satisfied.

### Mid-Shannon Corridor Tourism Infrastructure Investment Scheme

This capital allowances scheme was introduced as a three-year scheme and was due to terminate on May 31st 2011. It has been extended by two years to May 31st 2013. In order for a project to qualify under the scheme, an application for approval in principle had to be submitted to the Mid-Shannon Tourism Infrastructure Board by May 31st 2009. That deadline was extended to May 31st 2010.

## 11 Italy

### Interest capping rule

The Italian interest capping rule allows the deduction of interest expenses for corporate income tax (IRES) purposes, within the limits of interest revenues, and subsequently within the limit of 30% of the EBITDA.

The interest expenses that are not deducted after the application of the interest capping rule can be carried forward and deducted in the following fiscal years without time limitations. Only, however, up to the interest revenues that exceed the interest expenses of the year, if any, and up to 30% of the EBITDA, provided that in that same FY the amount of interest expense (net of interest revenues) is less than 30% of the EBITDA.

In addition, starting from fiscal year 2010 (for companies following the calendar year), any “excess” 30% EBITDA (i.e. the amount matching the net of that fiscal year) can be carried forward and used to increase the 30% EBITDA of the following fiscal years.

These rules do not apply to interest expenses that have been generated from loans/debts guaranteed by mortgages on real estate up for lease, to interest expenses capitalised on assets (to the extent admitted) and to implicit commercial interest.

***Check if there are any interest expenses that can be excluded from the capping rule.***

***Check if there are any interest expenses from previous years that have been carried forward; if so, check that they can be deducted based on the procedure explained above.***

***Evaluate the possibility of a tax group so that the non-deductible interest from each company can be used to lower the consolidated income, provided that other consolidated entities have “unused” 30% EBITDA in the same fiscal year.***

### Tax losses carry-forward

Pursuant to recent amendments to the carry-forward rules (Law Decree No 98/2011), tax losses will be carried forward without any time limit as from 2011 (in the previous regime, the tax losses could be carried forward for only 5 years, with the exception of losses incurred in the first three years following the incorporation of the company which, under certain conditions, could be carried forward without any time limitation). However, they can be used to offset only 80% of the taxable income of any following year; the remaining 20% must be taxed according to the ordinary rules (current IRES rate: 27.5%).

An exception to this limitation is represented by tax losses incurred in the first three years following the incorporation of the company (provided that they derive from the launching of a new activity) which can entirely offset future taxable income.

In both cases (i.e. previous and new regime), the carry-forward of tax losses may be limited in the case of transfer of shares representing the majority of voting rights in the company’s general meetings, together with a change of the business activity from which such tax losses derived are in place.

The new rules do not affect the carry-forward of tax losses in partnerships.

On the basis of a doctrine interpretation, the new 80% limitation would be applicable also to tax losses incurred before tax year 2011. As a result, the 2011 taxable income (and onwards) could be entirely offset only with tax losses of the first three tax periods, if any; otherwise, only 80% of the taxable income could be offset by available tax losses, this resulting in a kind of a “minimum corporate tax”. In this respect, Italian tax authorities’ clarifications/confirmations are needed.

***Check if there are any tax losses that can be carried forward and define their regime of carry-forward.***

***Check if the company has tax losses incurred in the first three years of activity: it could be suitable to use at first these tax losses, since they totally offset the taxable income.***

***The company should consider that new tax losses carry-forward rules may imply higher current taxes and a lowest reversal of deferred taxes.***

“Dummy company” rules postulate that if an “expected minimum” amount of revenue (calculated as a percentage of the average book value of the assets over a three-year period) is not reached (“operative test”) the company is deemed to be “non-operative”, with the consequence that taxation for both corporate income tax (IRES) and regional production tax (IRAP) will not follow the ordinary rules, but will be based on an “expected minimum” amount of revenue, calculated as a percentage of the book value of the assets owned.

Other implications for dummy companies include limitations to the tax losses carry-forward and to VAT credit refunds/offsets.

Recently, a new case of “non-operative” status has been introduced. In fact, independently from the result of the “operative test”, companies which have declared a fiscal loss for three consecutive tax periods or, in a three-year period, have declared a fiscal loss for two years and in the other year their proceeds did not reach the “expected minimum” amount of revenues, are deemed to be “non-operative” in the following fourth year.

According to the wording of the law, this new rule will be effective starting from 2012. However, it is not clear if it will affect FY2012 tax return or if 2012 will be the first year of the three-year period under “monitoring”.

It is also unclear if the presence, in one of the consecutive three years, of any exclusion provided by law from the “dummy company” regime prevents from the attribution of the “non-operative” status. Scholars have recently given a negative interpretation on this point.

Italian tax authorities’ clarifications are needed.

For dummy companies the IRES rate is increased to 38%.

**Check if any of the exclusion from “dummy companies” legislation provided by law is applicable.**

**Check if the actual proceeds allow to comply with the “operative test”.**

**If not, ask for the non-application of the “dummy companies” regime by ruling, provided that objective circumstances prevented to reach the “expected minimum” proceeds.**

**Even if the test shows a positive result, check if the company has a fiscal loss for three consecutive tax periods or a fiscal loss for two periods and for one year is “non-operative”. In this case, according to new dispositions, the company may be considered “non-operative”.**

**Consider the implications on the tax losses carry-forward and on VAT refunds/offsets.**

#### VAT credit refunds and offsetting

From 2010, VAT credits cannot be refunded or used to offset any other taxes for more than €10,000 before the annual VAT return, which shows this credit, is filed. These offsets require the filing of the tax payment forms via the tax authorities’ electronic platform.

For VAT credits greater than €15,000, refund/offsetting is allowed only after the certification of the VAT return by authorised subjects (“visto di conformità”).

In addition, starting from September 17th 2011 the ordinary VAT rate is increased from 20% to 21%.

In general, the new rate is applicable for operations performed and payments/invoices executed/issued from September 17th 2011; transactions performed before and payments/invoices already executed/issued are not subject to any adjustments.

**Check that all requirements are fulfilled, in order to claim a VAT credit refund/offset.**

**Consider that VAT credit 2011 cannot be used for more than €10,000 before the filling of the VAT return of the same year (i.e. from February 2012).**

**Consider that VAT credit 2010 can be used until the filing of the 2011 VAT return.**

**Check the date of execution of operations, in order to apply (or not apply) the new VAT rate of 21%.**

#### VAT communications

Starting from 2010, VAT operations exceeding €3,000 (net of VAT) will have to be annually reported to the tax authorities by the end of April of the following year. This does not refer to operations already reported for other purposes (i.e. mortgage loans, purchase contracts of RE assets, intra-EU operations already monitored via “Intrastat” form or “VIES” system, operations with “black list” countries, etc.). For 2010, the threshold is exceptionally stated in €25,000 (net of VAT) and the relevant deadline is December 31st 2011.

### New rules on transfer pricing

#### ***Check if there are VAT operations to be reported to tax authorities.***

The setup of the TP documentation according to certain parameters allows avoidance of civil penalties in case of assessment on transfer pricing matters carried out by Italian tax authority (penalties range from 100% to 200% of the higher tax). The existence of such documentation has to be declared in the annual income tax return.

Transfer pricing documentation can be prepared also for previous open years, provided that they are not already subject to tax audit on this area.

#### ***Mapping the intra-group transactions and evaluate the tax penalty profile of TP policies not fully compliant with the arms' length criteria, and act accordingly.***

### Reporting of transactions with "black list" countries

The new rules on monitoring VAT transactions with "black list" countries (i.e. countries with a taxation level that is significantly lower than that in Italy) dictate that all VATable transactions with "black list" countries (starting from July 1st 2010) have to be reported to the tax authorities on a monthly or quarterly basis, depending on the size of the transactions.

#### ***Check if there are transactions falling under this obligation; if so, file the relevant reporting forms.***

## 12 Latvia

### Reinvestment of profit

The law encourages shareholders to reinvest profits in the development of their company, rather than take them out in dividends. Businesses are able to reduce their taxable income by a notional amount of interest that a taxpayer would have to pay on a loan equal to his prior-year's undistributed profit. This adjustment is calculated by multiplying the annual weighted average rate of interest on loans in LVL issued to non-financial Latvian businesses as determined by the Bank of Latvia for the tax period and undistributed profits from previous periods beginning after December 31st 2008.

***Consider the possibilities of reinvesting profits in order to benefit from this clause.***

### Losses carried forward

To support companies investing considerable amounts in business development and suffering resultant tax losses over a long period, the loss carry-forward period is extended from five to eight years from the tax period beginning in 2010. Change of control may lead to a forfeiture of losses at the Latvian company's level.

There is also possibility to transfer the current year's losses to another company forming a 90% tax group.

***It is strongly recommended to explore structuring alternatives where you intend to reorganise your investment structure.***

### Deductibility of interest payments

There is restriction for the amount of interest that may be deducted for CIT purposes.

One of the criteria for deductibility of the interest payments is the amount of the company's equity at the beginning of the tax year, i.e. low or negative equity at the beginning of the tax year will restrict deductibility of interest payments for the year.

***If relevant, consider options for improving equity before year end in order to improve deductibility of interest next year.***

### Sale of shares in a real estate company

The sale of shares in a real estate company is subject to 2% withholding tax (WHT), if at least 50% of the assets in this company at the beginning of the year of disposal or in the previous year are formed by real estate.

***In case of the sale of shares is planned in 2012, budget for potential 2% cash outflow.***

### Payments to EU or EEA residents

Dividends to an EU or EEA resident are free of tax, and interest/royalties for the related company benefit from a reduced WHT rate. The receiver has to submit to the payer certain documents that confirm the shareholder's compliance with certain legal forms, ownership of shares and that corporate income tax is being paid in the country of its residence.

Starting from July 1st 2013 there will be no WHT on interest/royalty payments to related EU/EEA companies.

***Provide the Latvian company with the required document in order to benefit from reduced WHT rates.***

Residence certificates	<p>Some payments to non-residents, e.g. management fees, interest and royalties are subject to WHT. However, WHT rates may be reduced under provisions of the respective tax treaty. In order to apply for a more favourable rate, the non-resident has to provide the payer with a residence certificate before payment is made.</p> <p><b>Given the fact that settlements are often made at year end, the Latvian payer should obtain this certificate from the income recipient. Otherwise, WHT should be applied under Latvian CIT Law (and later may be refunded through a special procedure) or this expense will not be deductible for CIT purposes.</b></p>
Declining method depreciation for fixed assets	<p>The declining balance depreciation of 10% for real estate should be used for tax purposes.</p> <p><b>Consider acquiring assets before year end in order to benefit from the declining balance depreciation already in 2010.</b></p>
Provision for bad debts	<p>Increases in provisions for bad debts that are included in a company's expenses are non-deductible for CIT purposes.</p> <p>New provision has been introduced in the CIT Act allowing to postpone CIT payment for the provisions for bad debts made during 2011–2013 if certain requirements are met.</p> <p><b>Opportunities to recover bad debts should be considered to decide how much provision for bad debts is necessary.</b></p> <p><b>The company should seek to meet all requirements that are necessary to treat the reserves for bad debts deductible for tax purposes.</b></p>
Write-offs for bad debts	<p>Bad debts must comply with certain criteria in order to be deductible if written off.</p> <p><b>Consider whether the particular debt complies with these criteria.</b></p>
Transfer pricing	<p>Generally, all related-party cross-border payments have to comply with the arm's length principle. Failure to present appropriate documentation to the tax administration might result in the non-acceptance of group charges and penalties for tax purposes. There is possibility to use corresponding adjustment if counterparty has made a TP adjustment and appropriate proof can be provided.</p> <p><b>The arm's length principle should be duly followed and documented.</b></p>
Real estate tax	<p>Companies have to pay annual real estate tax (RET). The standard RET is 1.5% of cadastral value.</p> <p><b>Budget for RET payments.</b></p>
VAT grouping	<p>The VAT grouping facility came into force on January 1st 2010. It helps related companies reduce their administrative burden and improve cash flows, as their mutual transactions no longer attract VAT and a single VAT return can be filed covering all group companies. This especially benefits group companies with both taxable and exempt supplies and companies that have extensive sales outside Latvia.</p> <p><b>Consider the option of creating a VAT group.</b></p>

## VAT

The other amendments state that from January 1st 2010 the sale of development land attracts the standard VAT rate (previously exempt). Development land is defined as a piece of land that is covered by a permit issued under construction law for building development, engineering communications or access roads. Land is considered as development land if a permit is issued after December 31st 2009. Land is not considered as development land if permit was issued before December 31st 2009 and then prolonged.

***Heed the requirement to have a permit in order to apply the correct VAT rate.***

## VAT legislation regarding sale of real estate in Latvia

The definition of unused real estate, the sales of which attract VAT, has been clarified so that from October 1st 2011 unused real estate will mean:

- Newly constructed buildings or structures (including any fitted stationary equipment) that are not used after completion;
- newly constructed buildings or structures (including any fitted stationary equipment) that are used and sold for the first time within a year after completion;
- buildings or structures that are not used after completion of renovation, reconstruction or restoration (RRR) work;
- buildings or structures that are used after completion of RRR work and sold for the first time within a year after completion;
- incomplete construction items; and
- buildings or structures undergoing RRR before completion.

***Make sure that VAT for the sale of unused real estate has been applied correctly.***

## 13 Lithuania

Corporate income tax rate	Since January 1st 2010, the corporate income tax (CIT) rate is 15%. Small entities (i.e. entities with fewer than ten employees and less than LTL 500,000 [approx. €145,000] gross annual revenues) can benefit from a reduced corporate income tax rate of 5% with certain exceptions.
Withholding tax on the sale of real estate	Income from the sale of real estate situated in Lithuania and derived by a foreign entity is subject to a withholding tax of 15%. Withholding tax on income sourced in Lithuania must be withheld and paid to the state budget by both Lithuanian entities and permanent establishments in Lithuania.
Withholding tax on interest	As of January 1st 2010, interest paid from Lithuanian companies to foreign companies established in the EEEA and in countries with which Lithuania has a double tax treaty are not subject to WHT in Lithuania and no holding requirements are applied.
VAT	The standard VAT rate is 21% (applicable from September 1st 2009). The reduced VAT rates are 5% and 9%. The sale of new buildings is subject to VAT at the standard rate while the sale of buildings used for more than 24 months is VAT-exempt. A sale or any other transfer of land is exempt (except for land transferred together with a new building that has been used for less than two years and land for construction).
Land lease tax	Users of state-owned land are subject to land lease tax. The minimum tax rate is 0.1% and the maximum rate is 4% of the value of the land. The actual rate is established by the municipalities.
Real estate tax	Real estate tax is levied on the value of immovable property owned by legal entities. The real estate tax rate ranges from 0.3% to 1% depending on the local municipality. The taxable period is a calendar year.
Transfer pricing	All related-party cross-border payments have to comply with the arm's length principle. Legal entities the turnover of which exceeds LTL 10,000,000 (approx. €2,896,000) should have transfer pricing documentation for the transactions with related parties. Failure to present appropriate documentation to the tax administration may result in the non-acceptance for tax purposes of group charges and penalties.
Thin capitalisation rule	Interest on the debt in excess of the debt-to-equity ratio of 4:1 is non-deductible for corporate income tax purposes if the company cannot substantiate that interest is at the fair market value. This is applicable in respect of the debt capital provided and/or debt capital guaranteed by a related party.
Losses carried forward	Operating tax losses can be carried forward for an unlimited period of time. Losses incurred from the disposal of securities can be carried forward for a period of five years and can only be offset against income of the same nature.  Current year operating losses incurred after January 1st 2010 can be transferred to another legal entity of the group if certain conditions are met.
Permanent establishment	Investigation of the activities of foreign companies in Lithuania is currently a "hot topic" for the Lithuanian tax authorities. The main focus is on foreign companies performing activities in Lithuania without registering as local taxpayers. If an enterprise is recognised as a permanent establishment, the tax authorities may calculate tax amounts payable in Lithuania, late payment interests and fines.

## 14 Luxembourg

Corporate tax rate	The combined tax rate is 28.80% since January 1st 2011 (i.e. applicable rate for Luxembourg City).
Minimum corporate income tax	<p>Tax resident entities whose activity does not require a business licence or the approval of a supervisory authority are, since January 1st 2011, liable to a minimum €1,575 corporate income tax in cases where the sum of financial assets, transferable securities and cash at banks exceeds 90% of the total balance sheet.</p> <p>For tax consolidated entities, the above measure only applies at the level of the parent company.</p> <p>Luxembourg special-purpose vehicles (SPV) which own real estate assets are in the scope of the minimum €1,575 corporate income tax. Luxembourg intermediate holding and financing companies with real estate fund structures are also likely to incur this charge. Luxembourg companies holding real estate assets through transparent entity are liable to this tax.</p>
End of the 1929 Holding Company regime	The transitional regime governing 1929 Holding Companies has ended on December 31st 2010. Since then, the 1929 Holding Companies became fully taxable companies. There is a broad spectrum of solutions offered by Luxembourg's legislative environment in response to investors' needs and constraints.
Transfer Pricing	<p>On January 28th and April 8th 2011, the Luxembourg tax authorities issued two circulars providing guidance on transfer pricing for Luxembourg companies that are mainly engaged in intra-group on-lending activities financed by borrowings. The circulars provide for the compliance with certain substance requirements, a minimum amount of equity at risk and the preparation of a transfer pricing documentation in line with the OECD transfer pricing guidelines. The deadline to comply with the requirements of the circulars is December 31st 2011. Although this new transfer pricing guidance might represent a time-consuming development involving additional costs, the changes will mean, in the long term, that Luxembourg companies that move to the new approach will be in good conformity with OECD transfer pricing norms, this also being a benefit for their counterparties to the financing arrangements. Furthermore, these Luxembourg companies will be well placed to demonstrate sound and appropriate levels of economic and operational substance and beneficial ownership. Both of these are attributes that are of growing importance in a global fiscal environment that increasingly focuses on tax treatments that are congruent with the underlying business economics.</p>
VAT: implementation of Standard Audit File for Tax Purposes (SAF – T) in Luxembourg	<p>Starting with the reporting period 2011, any taxable person with an electronic accounting system may be required to provide the Luxembourg VAT authorities with its accounting records in electronic format, using a SAF-T standard file („Standard Audit File for Tax“). This obligation is postponed for some categories of taxpayers. This temporary exclusion applies, for example, to entities not obliged to file accounts under the standard chart of accounts („PCN“ format), entities subject to the simplified VAT regime, entities with an annual turnover not exceeding €112,000.00 and entities whose accounting transactions do not exceed a „reasonable“ level of transactions (threshold provided by the Luxembourg VAT authorities is +/- 500 transactions). In general, SAF-T is designed to contain reliable data extracted from accounting systems with standardised layout and format that make it easy to read by e-auditing software used by the VAT authorities. This should allow the Luxembourg VAT authorities to carry out efficient and effective electronic VAT audits.</p>

In this context, the Luxembourg VAT authorities have released detailed recommendations and further information on their website (<http://www.aed.public.lu/FAIA/index.html>).

#### New allocation of the tax offices

This information includes general guidance on how electronic VAT audits should be carried out and how the Luxembourg SAF-T for VAT purposes (FAIA) should be structured and communicated. On October 2011, the Luxembourg VAT authorities published further information on the content of FAIA.

Since January 1st 2011, the Luxembourg VAT authorities' tax offices have been reorganised. The aim being to have specialised VAT offices. Based on the ministerial regulation dated November 4th 2010, the tax office dedicated to the real estate sector is tax office Diekirch II. Tax office III is now dedicated to the financial sector. The jurisdiction of tax office Luxembourg X remains unchanged so that it is still responsible for the taxable person established abroad carrying out a taxable activity in Luxembourg.

## 15 Malta

### Depreciation on buildings

Depreciation is allowed in the form of wear and tear allowances of industrial buildings or structures including hotels, provided the assets are used or employed in the production of taxable income. With respect to industrial buildings or structures, an initial allowance amounting to 10% of the cost of the asset is deducted in the year the asset is first brought into use and a 2% deduction on cost is allowed as an annual allowance.

***On the disposal of an asset in respect of which wear and tear allowances would have been claimed, the transferring taxpayer is required to submit a balancing statement setting out the original cost of the asset, the extent of wear and tear allowances claimed and the amount received on disposal. The excess of the amount received on disposal over the original cost of the transferred asset less wear and tear allowances claimed is charged to tax but the amount is capped at the extent of wear and tear allowances claimed. On the other hand, any excess of the cost of the transferred asset less wear and tear allowances over the amount received on disposal is available as a further deduction in the year of transfer.***

### Transfer pricing

Specific transfer pricing legislation is noticeably absent from Maltese legislation. However, Maltese tax law does not ignore the arm's length principle and reference to this principle can be found in some instances in Maltese tax law.

***Although Maltese legislation does not embody the OECD transfer pricing legislation, Malta has adopted aspects of the OECD TP legislation through the inclusion of Art. 9 of the OECD Model Convention in most of Malta's double tax treaties.***

### Thin capitalisation rules

Maltese tax legislation does not contain any thin capitalisation rules or guidelines and therefore Maltese tax law does not impose any limitations relating to the proportion between capital and debt required within a Maltese company as long as the tax deductibility rules under Maltese tax law are satisfied.

### Tax losses carried forward

Relief for trading losses is available by way of deduction. Trading losses may be set off against taxable income derived in the same accounting period. Any remaining losses may also be carried forward indefinitely to be set off against taxable income accruing in subsequent accounting periods. Trading losses may be surrendered to group companies subject to the satisfaction of certain statutory conditions. Unabsorbed wear and tear allowances may be carried forward indefinitely to be set off against trading profits accruing in subsequent accounting periods. Such unabsorbed wear and tear allowances cannot be surrendered to group companies. Capital losses may be set off against capital gains realised in the current/or subsequent accounting periods. Such capital losses cannot be surrendered to group companies.

***The carryback of losses is not allowed under Maltese law.***

### Dividends and withholding tax

There is no Maltese withholding tax on the distribution of taxed profits by a Maltese company, and on untaxed profits, provided in the case of the latter, that the ultimate shareholders are not resident in Malta for income tax purposes and are not controlled by, directly or indirectly, nor act on behalf of an individual who is ordinarily resident and domiciled in Malta. Furthermore, there is no withholding tax on the payment of interest and royalties by a Maltese company to non-Maltese tax resident persons, provided that a number of statutory conditions are satisfied.

### Property transfers tax

The Maltese taxation of immovable property underwent a radical overhaul in 2005 and a transfer of immovable property is now generally subject to a tax flat rate of 12% on the higher of the market value of the property and the consideration paid or payable for the transfer.

***The law provides for a number of instances where a transferor of immovable property is subject to tax under the old tax regime, where tax is chargeable on the difference between the consideration and the cost of acquisition of the immovable property together with other allowable deductions.***

### Deductions

For Maltese tax purposes, expenses may be deducted for tax purposes to the extent that they are wholly and exclusively incurred in the production of taxable income. A recent amendment to Maltese tax law disallows the deduction of interest, discounts or premiums paid to a non-resident by a related person where such payment arises upon any form of credit to finance, directly or indirectly, the acquisition, development, construction, refurbishment, renovation of immovable property situated in Malta or any right thereon and the particular interest, discount or premium is exempt from tax under Maltese law.

***Malta has recently enacted rules entitled **Securitisation Transactions (Deductions) Rules** which provide for tax neutrality in respect of a securitisation transaction. Indeed, in terms of such Rules, the income derived by a securitisation vehicle in respect of a securitisation transaction may effectively not be subject to any Maltese income tax.***

### VAT in the construction sector

The Maltese Value Added Tax Act treats the transfer of immovable property as an exempt without credit supply.

### High Net Worth Individuals Rules

Malta has recently published rules under which individuals who are not domiciled in Malta are treated as tax resident in Malta and are subject to a tax flat rate of 15% on income and capital gains arising in Malta and on income arising outside Malta (excluding capital gains) that are remitted to Malta, subject to a minimum annual tax liability of €20,000 for EU applicants and €25,000 for non-EU.

***There are a number of conditions which need to be satisfied by an applicant, including the acquisition by the applicant of immovable property in Malta having a certain minimum value or alternatively renting property of a certain annual rent value as well as a minimum period of stay in Malta.***

## 16 Netherlands

### Thin capitalisation

Based on thin capitalisation rules interest deduction on group loans may be (partly) denied. In short, if the debt to equity ratio of a company exceeds 3:1, the amount of interest that relates to the debt in excess may not be deducted. If the company's debt to equity ratio is higher than 3:1 but lower than the debt to equity ratio of the whole group, thin cap limitations on interest deduction will not be applied. Assessment is based on the average debt and equity during the relevant fiscal year with reference dates January 1st and December 31st.

***Due to recent or upcoming losses a company's equity may be diminished, which may cause the debt to equity ratio to exceed the allowed ratio or group ratio. By regulating the amount of equity before the fiscal year-end, the application of thin cap rules may be avoided.***

### Loss carry back

Tax losses may in principle be carried back for one year and carried forward for nine years. In temporary measures following the credit crunch, it has been allowed for 2009 and 2010 to extend the loss carry back period from one year to three years, with a maximum of €10million to be carried back in each of the extra added years. As a consequence the loss carry forward period will be limited from nine years to six years.

***The temporary measure has not been extended for 2012 in the 2012 Dutch tax package. Applying for this provision is done through the corporate income tax return.***

### Functional currency

Based on functional currency rules, a company may opt to file its tax return in a currency other than the euro. A choice for the use of a functional currency is in principle set for a period of ten years.

***If the company's fiscal year concurs with the calendar year, the request for application of this provision from 2012 onwards needs to be filed ultimately on December 31st 2011.***

### Separation from fiscal unity

As opposed to the request for formation of a fiscal unity, the separation of a fiscal unity will not have retroactive effect.

***If it is desired that one or more companies are separated from the fiscal unity per January 1st 2012, the request for separation needs to be filed ultimately on December 31st 2011.***

### Reinvestment reserve

In case a fiscal reinvestment reserve has been formed using profits made in the disposition of a business asset, the imposed three year period for reinvestment needs to be taken into account. For example, the three year period may end per December 31st 2011 if you have formed a reinvestment reserve with respect to the disposition of a business asset in 2008.

***If in this case reinvestment does not take place before the year-end, the amount of the reinvestment reserve is released and subject to taxation.***

## 2012 Dutch Tax Package

In September 2011, the Dutch government has published the 2012 tax package. This package contains amendments of the Dutch corporate income tax act that are also of importance to the real estate industry, such as a restriction on the deduction of (group and third party) interest on acquisition debt in a fiscal unity and an object exemption for results generated through a permanent establishment. As the legislative process runs until December 2011, the plans may of course still change. Most proposals included in package are set to take effect on January 1st 2012. We refer to the separate chapter elsewhere in this booklet.

***Be aware of the fact that as a result of the 2012 tax package a change of law is expected which will also affect the real estate community. Action may be needed before year-end to cope with these changes.***

## 17 Poland

### Transfer pricing

Transactions concluded with related parties – both cross-border and domestic – should comply with the arm's length principle. Taxpayers are obliged to report and prepare statutory transfer pricing documentation related to transactions exceeding certain thresholds on an annual basis. Failure to comply with this requirement may result in the assessment of additional income subject to taxation at the rate of 50%.

***Compliance with Polish transfer pricing regulations and documentation requirements should be ensured.***

### Potential increase in the VAT rate

As of July 1st 2012, the standard VAT rate in Poland will automatically rise from 23% to 24% in case the public debt as at December 31st 2011 exceeds 55% of GDP.

***The potential increase in the tax rate should be taken into account while planning any investments, as this impacts funding needs and cash flows.***

### Simplified corporate income tax advance payments

Taxpayers may opt for the “simplified method” of making advance corporate income tax (CIT) payments. As such, the taxpayer pays monthly advances equivalent to 1/12 of the tax liability resulting from the annual CIT reconciliation filed in the previous year rather than advances based on actual income for the given tax year. This simplifies the monthly CIT reconciliation process, and may optimise cash flows during the year.

***If the simplified monthly CIT reconciliation method is chosen, the taxpayer is obliged to notify the local tax office by February 20th 2012.***

### Method of recognising foreign exchange differences

Polish tax law recognises foreign exchange differences differently than accounting regulations. However, some taxpayers are entitled to choose the accounting regulations as the basis for tax under certain conditions.

***Taxpayers should assess which method of recognising foreign exchange differences is more suitable. If the accounting method is to be chosen, the tax authorities must be notified by January 31st 2012.***

### Losses carried forward

Tax losses may be carried forward for five consecutive tax years. However, no more than 50% of the tax loss from any previous tax year may be utilised in any single subsequent year.

***It is important to check whether any unutilised tax losses will expire at year end. If so, the timing of the transactions expected to generate taxable income should be considered.***

### Step-up in tax value of assets

A tax neutral step-up in the tax value of Polish property may be achieved through the liquidation of a Polish holding company and transfer of the property as liquidation proceeds up the structure. This mitigates capital gains taxable in Poland on subsequent sale of the property.

***If you intend to dispose of an investment, performing restructuring via liquidation may allow a step-up in the tax value prior to sale.***

### Optimisation of Polish investment structure

An investment structure involving close-ended investment fund that results in increased return rate on the investment due to elimination of taxation of rental profits, as well as capital gains is available. Additionally, it provides flexibility on the exit route and is based directly on the provisions of the law rather than rulings of the tax authorities.

***If you are planning substantial real estate investments in Poland, or already have Polish investments but would like to optimise returns on your portfolio, implementing this structure is worth considering.***

### Refund of Polish CIT paid by investment funds based in the European Economic Area.

As of January 1st 2011, CIT exemption for foreign investment funds – based in the countries belonging to the European Economic Area – meeting certain criteria was introduced in order to end discriminatory treatment of such investment funds. Additionally, there are grounds to claim that taxation of these funds in previous years contradicted European law, hence was unlawful. Consequently, application for refund of tax paid may be considered.

***If your investment fund paid Polish CIT, you should consider whether you may be entitled to request refund of tax paid. If the CIT liability was paid for the tax year 2005, the deadline to file the refund request lapses on December 31st 2011.***

## 18 Portugal

### Losses carried forward

Any direct transfer of at least 50% of the share capital or of the majority of voting rights as well as the change in business activity, may lead to a total forfeiture of tax losses carried forward at the Portuguese entity's level. Exemptions may apply in the case of intragroup corporate restructurings. Otherwise, waiver of such forfeiture may be available (restrictive requirements).

***Prior to the transfer of shares, transfer of the majority of voting rights or change in business activity, it may be necessary to file a request with the Portuguese Ministry of Finance.***

***It is recommended to explore structuring alternatives where you intend to reorganise your investment structure.***

### Tax prepayments

In the case of declining profits, the taxpayer can opt for suspending or reducing the tax prepayments, but only following the first prepayment. However, if the final tax due is 20% higher than the tax prepayments that should have been made, late assessment interest arises.

***Cash flow models and profit forecasts should be checked in order to improve liquidity by reducing the tax prepayment amounts.***

### Transfer pricing

All related-party transactions have to comply with the arm's length principle. Failure to present appropriate documentation to the tax authorities may result in the challenging of such transactions and penalties for tax purposes.

***The arm's length principle should be duly followed and documented.***

### Cross-border financing

As a general rule, interest due to non-resident entities is subject to withholding tax (WHT) in Portugal. Reduced WHT rates may be available when the beneficiary can apply a double tax treaty or the Interest and Royalty Directive (I&R Directive) provisions. Under the I&R Directive, Portugal may still levy 5% on interest due/ payment until June 30th 2013. From July 1st 2013 onwards, no WHT will be levied. Financing is, as a general rule, also subject to stamp tax, although some stamp tax exemptions are available.

Some alternatives may be structured to mitigate the WHT and/or the stamp tax issues on cross-border financing.

As a general rule, thin capitalisation rules are not applicable when the debt is obtained from a related entity resident for tax purposes in an EU member state.

***Careful analysis of the tax impact of the various financing alternatives should be sought beforehand.***

### Local GAAP and tax rules as from 2010

Portugal, as from January 1st 2010, has aligned its accounting rules applicable to statutory accounts with the IFRS guidelines. These changes went into force on January 1st 2010.

With the introduction of these new rules, real estate investment assets shall be booked as investment properties. It is possible to keep them booked at cost, or at fair value. Tax depreciation charges are not allowed in the case of real estate booked at fair value.

**Accounting policies should be duly analysed, as different tax consequences may be triggered in 2010 and/or future years.**

Real estate taxes

Real estate municipal tax (IMI) (and other charges related to real estate ownership) are due by the real estate owner as per December 31st of each year (and paid on the following year).

**In case a direct investment is completed before the end of 2011, it should be taken into consideration that the owner of the real estate on December 31st 2011 is responsible for the payment of the amount for the entire year (and not only from the period after the real estate is acquired).**

VAT claw-back rules

In the case of recovery of input VAT related to real estate construction or acquisition of real estate, and where a subsequent VAT exempt transaction is entered into (e.g. a VAT-exempt lease agreement), VAT claw-back rules are triggered, and thus a VAT payment back to the Revenue is required. Other situations may also trigger the VAT claw-back rules. If so, they all should be included in the December VAT periodical return (filed and paid by February 10th or 15th 2012).

**Before year end, it should be verified whether the VAT claw-back rules will be triggered and, if so, the correspondent VAT adjustment should be paid back to the Revenue in February of the following year.**

Expected changes in tax law as of 2012

Further to the release of the Portuguese budget law proposal for 2012, several changes are expected that may directly affect real estate investments.

These measures are still to be approved at Parliament. We highlight below the most relevant measures:

- The time limit to report tax losses should be extended from four to five years. Additionally, tax losses carried forward can only be offset up to 75% of the taxable profit of the year.
- The state surtax rates and brackets will be increased: 3% applicable to the taxable profit exceeding €1.5 million up to €10 million and 5% on the excess (currently the rate is 2.5% applicable to the taxable profit exceeding €2 million).
- The minimum and maximum IMI rates applicable to urban real estate will be increased by 0.1%, leading to an IMI rate ranging between 0.5% and 0.8% for real estate still appraised under the previous rules and between 0.3% and 0.5% for real estate already appraised under the IMI rules.
- IMI rate for real estate held by tax residents of black-listed jurisdictions, i.e. tax havens, will be increased to 7.5% (currently 5%);
- All real estate located in Portugal should be appraised under the IMI rules until the end of 2012.

## 19 Romania

### Interest capping rules

Romanian interest capping rules restrict the deductibility of interest expenses on **loans taken from entities other than banks and financial institutions**, as follows:

**Safe Harbour rule** – deductibility is limited to the interest rate level of 6% in case of loans denominated in foreign currency. The current threshold applicable to loans denominated in local currency equals the National Bank of Romania's official reference rate for local currency loans (the rate was decreased from 6.25% to 6%, effective November 3rd 2011). Any amounts above these thresholds will be non-deductible and cannot be carried forward. This rule applies irrespective of the maturity of the loans.

**Thin capitalisation rule** – if the borrower's debt-to-equity ratio is more than 3:1 or negative, the entire interest expenses and net foreign exchange losses in relation to long-term loans (i.e. maturity of over one year) will be non-deductible; however, the expenses may be carried forward indefinitely and deducted once the debt-to-equity ratio meets the above criteria.

***Companies should review their debt positions to determine whether adjustments are necessary to maximise interest deductions for 2011 or going forward.***

### WHT exemption

Exemption of Withholding Tax (WHT) on interest and royalty payments Starting January 1st 2011, Romania implemented in the local tax legislation the provisions of the EU Interest and Royalties Directive. In this respect, the WHT on interest and royalty payments arising in an EU/EFTA member state is exempt, provided a direct minimum 25% stake in the Romanian income payer's share capital is held for an uninterrupted minimum two-year period at the moment of the payments. These provisions apply equally to affiliated companies.

***Companies should review whether the EU Interest and Royalties Directive requirements are met, in order to optimise the WHT payments.***

### Losses carried forward

Fiscal losses accumulated starting with financial year 2009 can be carried forward for seven consecutive years (previous years losses can only be carried forward for five years). Further to amendments to the Romanian Fiscal Code, 2010 was split in two different fiscal periods (i.e. January 1st 2010 – September 30th 2010 and October 1st 2010 – December 31st 2010). Hence, the second fiscal period in 2010 is considered the first year when carrying forward the fiscal losses incurred in the first fiscal period of 2010.

***Companies should review their tax loss position to determine if any carried forward losses expire and consider methods to refresh if appropriate.***

### Losses incurred by a permanent establishment

From 2010 onwards, losses incurred by a permanent establishment located in an EU or EFTA member state, or in a state that has a double tax treaty concluded with Romania, may be included in the overall taxable basis of the taxpayer.

### Tax credits

From 2010, foreign tax credits may only be claimed for taxes paid in countries with which Romania has concluded double tax treaties.

***If incurring foreign taxes in a non-treaty jurisdiction, the position should be reviewed to find ways to maximise available credits.***

**Tax prepayments**

Starting January 1st 2013, taxpayers may choose to declare and pay in advance, on a quarterly basis their annual corporate income tax; once the option is made, it becomes mandatory for at least two consecutive fiscal years. This amendment to the Romanian Fiscal Code is effective January 1st 2012.

***Companies should continue to calculate and pay corporate income tax based on actual results, on a quarterly basis until December 31st 2012.***

**Tax incentives**

Starting January 1st 2010, the accounting profits reinvested in the production or acquisition of technological equipment are exempt from the 16% corporate income tax. However, the exemption is granted within the limits of the corporate income tax due for the period in question and such profits reinvested are not to be counted towards the tax base of the asset. Thus, since the asset cannot be (fully) depreciated for tax purposes, the measure involves only a temporary tax benefit. Additionally, this measure is to be applied to accounting profits registered as of October 2009.

An additional tax incentive introduced refers to additional 20% depreciation for research and development expenses that qualify based on certain conditions. Implementation norms have been published.

Furthermore, distributed dividends are exempt from taxation if they are reinvested in the same or in another Romanian company's share capital. To benefit from this exemption, dividends must be reinvested to preserve and increase the number of employees and to develop the company's registered object of activity.

***Companies should review whether any of the above incentives may be available and utilised effectively.***

**Depreciation methods for movable fixed assets**

Accelerated balance depreciation or declining balance depreciation is available for certain categories of assets such as equipment and machinery. Buildings can only be depreciated using the straight-line method.

***Companies should review their real estate and related incorporated fixed assets to determine whether any assets can be separated and depreciated separately from the buildings for quicker recovery.***

**Revaluation of real estate property**

Companies are required to treat part of the revaluation reserve as a taxable item together with each depreciation expense (quarterly) or with the asset expense (if the asset is sold or written off). Thus, in substance, revaluations are not recognised for tax purposes.

***To the extent that real estate has been revalued for accounting purposes, the company should review to confirm that correct adjustments were made for tax purposes.***

**Transfer pricing rules**

Previously, all related-party cross-border payments had to comply with the arm's length principle. Failure to present appropriate documentation to the tax office may result in the non-acceptance for tax purposes of group charges and penalties.

Additionally, as of May 2010, the transfer pricing documentation requirements have been explicitly extended to include transactions between Romanian related parties. We anticipate that this provision will lead to increased tax authority scrutiny of such domestic transactions, especially in cases where one of the taxpayers benefits from a different tax regime (e.g. is in a fiscal loss position).

***Companies should review their transfer pricing policies and ensure that appropriate documentation, including a local transfer pricing file if necessary, is available for all related-party transactions including those between Romanian parties.***

#### Property taxes

The general building tax rate ranges currently between 0.25% and 1.5%. However, starting January 1st 2012, the rate may increase to between 10% and 20% for buildings not revalued during the last three years and to between 30% and 40% for buildings not revalued during the last five years.

Additionally, starting January 1st 2012, the following amendments will be enforced:

- The building tax rate used for computing the local taxes due for buildings with touristic destination not operating during the calendar year is of minimum 5% applicable to the inventory value of such buildings.
- The local taxes due by hotels is established at 1% (previously, the applicable rate was set between 0.5% and 5%).
- The 50% reduction of local taxes due by legal entities for the buildings and land used for touristic services over a period of at least 6 months during a calendar year will be restricted only to those immovable assets located on the Black Sea shore (such restriction was not in force previously)

***Companies should check the status of their property taxes and consider revaluations if appropriate.***

#### Social security contributions

The Fiscal Code has been recently amended and new provisions have been introduced regarding the tax treatment of income derived from trust agreements in which the involved parties are Romanian income tax payers.

If structures based on trusts involving Romanian income tax payers are in place, it is advisable to review them from Romanian tax perspective implications.

Provisions have been introduced detailing conditions under which independent working relationships (such as IP rights, civil conventions and commercial contracts) can be reclassified into dependent relationships (i.e. employer–employee). Thus it is expected that tax authorities will closely scrutinise contractual arrangements in order to identify dependent relationships. In the case of such a reclassification, employer and employee social security contributions are due.

***Companies employing independent consultants should review these arrangements to determine what impact or additional risks the change in the relevant regulations creates.***

#### VAT

In Romania, the standard VAT rate is of 24%. However, for certain operations expressly provided by the Romanian VAT legislation, the reduced rate of 5%, respectively 9% is applicable.

The reduced VAT rate of 5% applies to housing delivered as part of social policy, including old people's homes, retirement homes, orphanages and rehabilitation centres for children with disabilities. The category also includes buildings and parts thereof supplied as housing with a maximum useful surface of 120 square metres, excluding outbuildings. The reduced rate applies if the value of the housing acquired by any single person or family is less than RON 380,000 exclusive of VAT. The reduced VAT rate will also apply to the supply of the land beneath the housing on the condition that it does not exceed 250 square metres, including the footprint of the housing. Any unmarried person can purchase a house under the social policy,

provided that she/he did not acquire in the past another house with 5% VAT. Also, any family can purchase a house under the social policy, provided that the husband or the wife, separately or together, did not acquire a building in the past with 5% VAT.

As of March 1st 2011, the VAT deduction right is granted also for acquisitions of goods from inactive or temporarily inactive taxpayers in debt enforcement proceedings, where the supply is considered taxable.

During 2011, new rules regarding the registration procedure for VAT purposes for taxable persons established in Romania were introduced. Under the new procedure, further to the taxable persons' request and supporting documents provided, the National Authority for Fiscal Administration will issue a decision approving or rejecting the registration request, as compared to the period preceding this law amendment, when the VAT registration was validated without a thorough analysis. Under these circumstances, the verification procedure of the applicants will consist in certain eliminatory stages and if the special conditions will be met, the taxable person will be evaluated based on specific criteria with respect to the headquarters of the economic activity and the directors and/or shareholders.

A decision was issued in April 2011 by the Romanian Central Fiscal Commission in order to clarify how the VAT for taxable supplies of building and land is determined. Therefore, if the parties have agreed that the VAT is not included in the value of the supply or have not agreed anything in this respect, the VAT rate will be applied on top of the value of the supply and if the parties have agreed to include the VAT in the value of the supply, the gross-up method should be applied.

No major amendments are expected for real estate investors for 2012.

***Companies should review the impact of the increased VAT rate on their operations, and consider ways to minimise the impact, including analysing the impact of forfeiting recovery of input VAT when the rate was 19% compared to charging the new 24% rate for sales and rentals occurring after the rate increase.***

## 20 Russia

### Some of the latest amendments of the Russian tax legislation in 2011

#### Actual tax privileges

The Federal Act 395-FZ of December 28th 2010 “About an amendment of the Tax Code, Part II and amendments of several Russian Federation Acts” has introduced a number of tax benefits. The amendments came into force on February 1st 2011.

#### Corporate tax exemption in Skolkovo

- Ten years corporate tax exemption for companies that reside in the high-technology center Skolkovo.

#### VAT exemption for sales of certain state-owned real property

- VAT exemption on sales of state-owned and municipality-owned real property subject to given legal procedures (as of Federal Act 159-FZ “About specifics of state and municipality real property sales if rented to small and medium-sized enterprises together with amendments of several Russian Federation Acts” as of July 22nd 2008).

#### Investment purpose tax credits (tax holidays)

Based on the Federal Act No. 229-FZ from July 27th 2010 limits of so called „investment purpose tax credits“ were increased from 30 to 100 percent of the value of assets acquired by a taxpayer. This is an additional incentive promoting the purchase of assets by postponement of tax payments (similar to the German provision in par. 7g of the German Income Tax Act). The postponed tax payments are payable retroactively in installments. Such tax credits may be used for corporate tax as well as for certain regional taxes. The promoted assets must be used only for purposes given by the incentive rules (provisions of Article 67.1 of the Russian Federation Tax Code, e.g. research and development, purchase of production equipment, investments into energy efficient equipment).

#### Tax relief upon the sale of shares/ interests in Russian entities

A zero tax rate will apply now to capital gains from the sale or other disposal (including redemption) of shares in Russian entities (interests in Russian entities’ charter capital), provided that, as of the sale date, they had been continuously held by the taxpayer on the basis of a right of ownership or another proprietary right for more than five years. One of the following three conditions must be met in order to apply a 0% tax rate:

- The shares have been unlisted securities over the entire period of the taxpayer’s ownership of such shares or the shares are listed securities, and the shares have been those of the high technology/innovative sector of the economy over the entire period of the taxpayer’s ownership of such shares.
- As of the date of acquisition by the taxpayer, the shares qualified as unlisted securities and, as of the date of their sale by said taxpayer or of another disposal (including redemption) by said taxpayer, they are listed securities of the high-technology/innovative sector of the economy.
- The procedure for classifying listed securities as shares of the high technology/innovative sector of the economy must be determined by the Russian government.

The beneficial tax treatment applies only to securities and interests in charter capital acquired by taxpayers after January 1st 2011 (Article 7 of Federal Law No. 395-FZ of December 28th 2010).

#### Property tax benefits

On June 7th 2011, Russian President Dmitry Medvedev signed the Federal Law No. 132-FZ, which introduced property tax benefits for properties with high levels of energy efficiency.

Companies are eligible for property tax exemption with regard to newly acquired fixed assets with (a) a high level of energy efficiency in accordance with the Russian government's list of such assets, or (b) a high class of energy efficiency if specific classes of energy efficiency are defined for such assets.

The exemption is granted for a period of three years from the day eligible assets are registered.

***Companies that operate properties with high levels of energy efficiency (high class of energy efficiency) should look at the feasibility of using the new benefits and, if necessary, prepare relevant documented substantiation.***

#### Withholding tax exemption

In accordance with law No. 132-FZ, capital gains from disposals of shares (interest) in Russian companies and relevant derivatives are now exempt from withholding tax if these shares qualify as publicly listed securities under Article 280 of the Tax Code.

#### New refinancing rate

#### Deductibility of interest expenses

As from May 3rd 2011, the Bank of Russia raised the refinancing rate from 8% to 8.25% (compare order of April 29th 2011 No. 2618-U „On the refinancing rate's level of the Bank of Russia“).

The raise of the refinancing rate also led, among other things, to a change of the interest cap rules for shareholder loans. The deduction of interests for shareholder loans is restricted, if they are paid to tax residents as well as to non-residents. As of now, they are, according to Russian Tax Code Art. 269 1.1, tax-deductible to the amount of

- 0.8 x the refinancing rate of the Bank of Russia for foreign currency loans;
- 1.8 x the refinancing rate of the Bank of Russia for loans in RUB,

I.e. taking the current refinancing rate as a basis, the tax-deductible interest expenses are 6.6% in case of foreign currency loans and 14.85% in case of loans in RUB.

According to the law text, the previous rules of the Russian Tax Code will take effect again starting January 1st 2013 whereupon interest for loans in RUB will be tax-deductible up to 1.1 of the refinancing rate of the Bank of Russia and foreign currency loans will be tax-deductible up to 15%, provided no other draft law will be passed until January 1st 2013. However, there could be another change of the law until 2013 providing other requirements or thresholds.

***The above mentioned thresholds should be considered when elaborating the financing structure for Russian investments. Existing loan arrangements may need to be revised to avoid inefficiencies. Regarding thin capitalisation rules, investors should keep track of developments in Russian law and practice.***

## New bill on transfer prices

### New bill on transfer prices

In July 2011, the Russian Parliament adopted the law on the new Russian transfer pricing rules (Federal law No. 227-FZ of July 18th 2011). The new rules become effective on January 1st 2012 and contain significant changes, including new transfer pricing methods, reporting and transfer pricing documentation requirements, special transfer pricing audits and penalties as well as advance pricing agreements.

### Introduction of reporting and transfer pricing documentation requirements

### Arm's length principle

The main changes are as follows:

- Abolishment of the “safe harbour” provision (the 20% fluctuation of controlled transaction prices from market prices that is currently allowed);
- Introduction of the arm's length principle as the fundamental principle of Russian transfer pricing rules;
- Formally introducing a functional analysis as one of the comparability factors;
- Significant reduction of the list of transactions where the Russian tax authorities may control prices for tax purposes;
- Introduction of reporting and transfer pricing documentation requirements;
- Expansion of the list of related parties;
- Burden of proof that prices of controlled transactions do not correspond to the market will rest with the Russian tax authorities;
- Expansion of the list of sources of information for determining market prices;
- Introduction of new methods for determining market prices, i.e. transactional net margin and profit split methods;
- Introduction of special transfer pricing audits to be performed by the Federal Tax Service;
- Introduction of penalties for non-compliance with reporting and transfer pricing documentation requirements. However, for the transitional period of 2012–2013, no penalties can be assessed in case of transfer pricing adjustments;
- Introduction of unilateral and multilateral advance pricing agreements (APAs) for Russian companies registered as so-called “largest” taxpayers.

***The introduction of new transfer pricing rules will require that companies doing business in Russia analyse and tailor their transfer pricing policies to comply with the new rules. Since preparing for new legislation is likely to be time-consuming, we recommend that taxpayers begin doing so well before January 1st 2012.***

## 21 Slovakia

### Depreciation of fixed tangible assets

There are four tax depreciation groups for assets (purchase price more than €1,700), with depreciation periods ranging from four to 20 years. Most buildings of a permanent nature fall into the fourth group, and are depreciated over 20 years using a straight-line or accelerated method of tax depreciation. Tax depreciation charges of fixed tangible assets can also be deferred to the future resulting in an increase of tax base in the current year. It is not possible to depreciate land. It can be expensed through profit and loss accounts up to the sales price in a year of sale.

***Review the company's fixed assets register to ensure correct depreciation. The taxpayer can decide to interrupt (defer) tax depreciation of tangible assets for one or several tax periods. The depreciation period is then prolonged by the number of taxable periods in which the asset was not depreciated.***

### Tax losses carried forward

Tax losses incurred in the current tax year can be carried forward and utilised over the next seven years. Each year's tax loss is considered separately and can be utilised over its own seven-year utilisation period starting with the tax period immediately following that in which the taxpayer reported the tax loss. If the taxpayer reports another tax loss during the utilisation period, he can carry this forward as well, together with the earlier tax loss within the following seven years.

***Optimise the tax base by maximum utilisation of the tax losses from previous years.***

### Tax advances

The entity is obliged to pay corporate income tax advances based on the previous year's tax liability. In the case of declining profits, current tax advances may be reduced on application. To reduce the tax advances, approval of the tax authorities is necessary.

***Cash flow models and profit forecasts should be reviewed in order to improve liquidity by applying for tax advance reductions.***

### Transfer pricing

Generally, all related-party cross-border payments have to follow the arm's length principle. Failure to present appropriate documentation to the tax authorities might result in the non-acceptance of group charges and penalties for tax purposes. Full documentation is required from the entities reporting under IFRS, otherwise limited documentation is sufficient.

Review the level of management fees and other group charges (e.g. royalties) to see if they can be decreased within benchmarks for transfer pricing purposes.

***The arm's length principle should be followed and the appropriate documentation should be in place for tax assessment. Changing a business model by transferring some functions to a company and thus increasing its profits may provide an opportunity to utilise tax losses carried forward. Proper transfer pricing review and planning is crucial.***

### Withholding tax

There is no withholding tax on dividends paid by Slovak entities out of profits arising in 2004 and subsequent years. The distribution of profits arising in earlier periods can be subject to a withholding tax of 19%, which is reduced under most double tax treaties or the EU Parent-Subsidiary Directive.

Payments in respect of the royalties and interest are subject to the Slovak withholding tax of 19%. Under most double tax treaties, the withholding tax on royalties is reduced, often to 5% or 10%, and most double tax treaties also reduce the withholding tax on interest to nil. However, under the EU Interest and Royalties Directive there is no Slovak withholding tax on royalties paid by a Slovak company to a related company seated in another EU member state that is the beneficial owner of the royalties, provided certain conditions are met.

Withholding tax is deducted when payment is made to the recipient. To claim the corresponding costs, the foreign recipient should file a Slovak corporate income tax return where the profit rather than income from interest/royalties is reported. This profit is taxed at the corporate income tax rate of 19%, and the withholding tax withheld from the gross income is treated as advance.

***Payments in respect of royalties or interest need to be in accordance with the relevant double tax treaty to avoid the withholding tax of 19% or the lower tax rate of 5% or 10% respectively. The tax burden can be optimised via allocation of corresponding costs to the interest/royalty income.***

#### Financial year

Usually the tax year is equal to the calendar year. However, the entity can change the tax year from the calendar year to the financial year, which is a 12-month period. Generally, a corporate income tax return needs to be filed within three months following the end of the taxable period together with the Financial Statements (income statement, balance sheet and notes). The deadline for submission of the financial statements to the general meeting for approval is 6 months after the end of the financial year. Once they are approved there is a 30 day period for filing them with the Slovak Collection of Deeds.

***Consider the statutory and group reporting to choose the most appropriate tax year. Consider also trends in sales and profits and possibility to utilise tax losses against these profits.***

#### Extension of filing deadline

There is an automatic extension of the deadline for filing a tax return upon advance notification to the tax office (i.e. a filing deadline of June 30th instead of March 31st after the end of the tax period).

***Consider the deadline for filing a tax return which will be automatically extended by the Slovak Tax Office. Tax is payable by the same deadline.***

#### Foreign currencies

Generally, a company can opt to exclude foreign exchange (FX) differences that arise during the year-end revaluation of assets and liabilities in foreign (non-EUR) currencies from its tax base. These “unrealised” FX differences shall be included in the tax base in a year when the underlying asset or liability is settled (e.g. payment of US\$ interest). The option to exclude unrealised FX differences applies to both FX gains and losses.

***A company can exclude “unrealised” FX differences from its tax base and defer tax deduction by filing a written request with the Slovak Tax Office before calendar/financial year end.***

#### Business combinations

In 2010, two alternatives were introduced for the tax treatment of the following transactions: In-kind contributions to a company’s share capital mergers and demergers.

Under the first alternative, the recipient of an in-kind contribution, or the legal successor in a merger or demerger, records the assets and liabilities at their fair values for tax purposes. Any related revaluation differences arising on revaluation of the transferred assets and liabilities to their fair values will be taxable or tax-deductible for the contributor (in-kind contribution) and the legal successor (merger or demerger).

The second alternative requires the recipient of an in-kind contribution, or its legal successor, to continue to use the original tax book values of the assets and liabilities of the contributor, or the company wound up without liquidation through the merger or demerger. In this case any revaluation difference arising at the time of the in-kind contribution, merger or demerger is not taxable or tax-deductible.

***Companies should consider the impact of the step-up for tax purposes using fair values, or using original tax book values.***

#### Value added tax (VAT)

Transactions within real estate are either subject to VAT of 20%, or are VAT exempt. Renting of real estate is generally exempt from VAT, but the charging of an exempt rental fee limits the lessor's ability to deduct the related input VAT. Thus, in certain circumstances, the lessor can opt to charge 20% VAT on the lease provided to taxable person.

The transfer of real estate is VAT exempt, except for transfers made within five years after the official completion of construction, or within five years from the day when the building was put into use for the first time. The transferor can opt to charge 20% VAT on transfer (sales) of real estate. Also, transfers realised as a result of a finance lease contract are generally subject to 20% VAT. Transfers of land are VAT exempt, except for construction land.

The period for adjustment of the input VAT deduction on immovable property, in the case of change of its intended use, was extended from 10 to 20 years. The period for archiving invoices received in relation to such immovable property has also been extended to 20 years.

***The Company registered for Slovak VAT purposes can decide to charge VAT on the lease and sales of real estate.***

#### VAT group

It is possible to create a VAT group in Slovakia that enables those persons connected economically, organisationally and financially, with their seat, place of business or fixed establishment in Slovakia to register for Slovak VAT as a single VAT payer.

***The Company should consider an option of creating the VAT group in Slovakia.***

#### Changes to the Slovak Accounting Act from January 1st 2011

New accounting methods were introduced for situations relating to the acquisition or construction of real estate. In the case of made-to-order construction of real estate for sale and the constructions held for sale, as well as other costs for repairs, technical improvements and other related costs necessary for the construction to be available for sale, are booked as inventory on a separate account. Impairment and description of the construction need to be evidenced in the notes to the financial statements.

***The new rules should be taken into consideration in FY 2011 financial statement.***

**E-filing**

From January 1st 2012, Slovak VAT payers are obliged to file all correspondence (incl. corporate income tax return, financial statements, requests, announcements) with the Slovak tax authorities and customs authorities electronically. This can be done using an advanced electronic signature, or according to a written agreement with the local tax office on electronically filing documents.

***Companies need to implement a selected electronic filing method as soon as possible before the 2011 year end.***

**Real estate tax (local tax)**

Real estate tax is divided into three groups; land tax, building tax and apartment tax. The local municipality sets the real estate tax rates in a local regulation on a yearly basis. 2011 real estate tax return should be filed by January 31st 2012 in any changes occurred in 2011.

***Budget for additional payments in relation to the real estate tax (local tax).***

## 22 Spain

### Transfer pricing

In general, all intercompany transactions should be at market value and should be supported by appropriate transfer pricing documentation.

Documentation should be prepared and maintained by the taxpayer. The documentation should be submitted to the tax administration upon request in the event of a tax inspection. Failure to present appropriate documentation to the tax administration might result in the non-acceptance of related charges and penalties for tax purposes.

***The arm's length principle should be duly followed and documented.***

### Substance requirements

Dividends and interest distributed out of Spain may be eligible for withholding tax exemptions. Anti-abuse provisions apply where ultimate investors or effective lenders are non-EU residents.

The success of claiming and supporting the withholding exemptions will depend on the real business and material presence.

In addition, a valid certificate of residence of the parent company and the lender issued by the relevant tax authorities shall be provided in order to claim the exemptions. In-force residency certificates should be made available to the Spanish entities on a regular basis.

***It should be ensured that Spanish substance requirements are met.***

### Thin capitalisation rules

Interest from related-party loans on the portion that exceeds a 3:1 debt-to-equity ratio is not deductible if the debt is sourced directly or indirectly from outside the EU.

Both the net remunerated borrowing and fiscal capital will be reduced to their average level during the tax period.

***Balance and P&L forecasts should be checked in order to verify that the 3:1 ratio is respected in those structures where internal debt is caught by thin capitalisation rules.***

### Withholding tax on rents

Withholding tax on rents could be avoided if the landlord provides the tenant with the corresponding tax certificate issued by the relevant tax authorities. This certificate shall be issued depending on the business tax status of the landlord.

***The lessor should ask the tax administration for a valid certificate and provide it to the lessee.***

### VAT recovery ratio

Exempt activities may have an impact on the VAT recovery ratio. A full deductibility ratio is necessary not only to recover input VAT on the acquisition of goods and services, but it is also a requirement to opt for VAT in connection with second transfers of real estate.

Taxpayers may apply for a special recovery regime in order to limit the adverse effects of non-VAT transactions in their real estate activities. Applications are due in December.

***A strict control on non-VAT transactions is advisable in order to avoid any adverse effect on input VAT deductibility.***

### Impairment test

Real estate assets may be subject to depreciation due to the current market conditions. Even though temporary, the impairment test may lead to an accounting provision that may reduce the annual corporate income tax (CIT) charge. A valid technical appraisal should support the accounting depreciation for CIT purposes.

***It is recommended to review the valuation of the real estate assets. Technical appraisals should be carried out before the end of the tax period.***

### Corporate income tax and VAT grouping

The application for a CIT group regime is due before year end in order to have effect in the following tax periods (assuming that the CIT period coincides with the calendar year). The application for a VAT group is due in December.

For CIT unity purposes, it should be noted that the insolvency status of a member may lead to de-grouping. Therefore the financial situation of each member should be reviewed, and, if appropriate, the necessary rebalancing actions should be taken before year end.

In addition, the dominant entity shall communicate to the tax administration the members of the existing CIT group before year end.

***Application for this option and other regular grouping communications are due before year end.***

## 23 Sweden

Stamp duty	When acquiring Swedish real property, stamp duty (transfer tax) has to be paid by the purchaser based on the higher of the consideration and the tax assessment value of the property. As of January 1st 2011, stamp duty on commercial real property has been raised from 3% to 4.25% of the tax assessment value.
Limitation of deductions on capital loss	Deduction of capital losses on real property is limited to capital gains from real property. Companies with capital losses due to the sale of real property can hence not deduct the loss against income from other sources. Such a loss is, however, carried forward indefinitely if not used.  <b><i>If capital losses are to be deducted, ensure that capital gains on real property exist in the same fiscal year.</i></b>
Group taxation	To benefit from Swedish group consolidation for tax purposes, the companies giving and receiving the group contribution must have been parts of the group for the entire fiscal year. Notwithstanding this, newly started businesses and off-the-shelf companies can give and receive group contributions to and from other Swedish group companies from the day they commence business.  <b><i>Ensure that any acquisition is completed before the end of the current fiscal year to benefit from the group contribution rules the following fiscal year.</i></b>
Losses carried forward	Mergers and acquisitions which imply a change of control (at times even if the indirect ownership does not change) over a company can limit the possibility to utilise losses in the following years. Exemptions can apply if the companies were parts of the same group before as well as after the acquisition or reorganisation.  <b><i>Look into what limitations will be applicable in the specific case.</i></b>
Tax allocation reserve	Companies can delay tax payments for up to six years on 25% of the annual profit by means of a tax allocation reserve. This can benefit liquidity and balance out occasional annual losses since the latent tax debts can be used against future losses for the upcoming six years. Companies using this reserve will, however, be taxed annually for a hypothetical income/interest. The income/interest is calculated by multiplying the reserve by 72% of the interest rate on governmental loans (normally between 2% and 5%).  <b><i>Cash flow models and profit forecasts should be checked to assess the situation.</i></b>
Limitation of interest deduction	Swedish rules on limitation of interest deduction apply to restructuring involving internal acquisition of one or more companies resulting in interest payments to other companies in the group. If the beneficial recipient of the interest is not taxed by a minimum of 10% and the restructuring as well as the occurring debt cannot be justified for business reasons (rather than tax reasons), the interest will not be deductible.

The Swedish government is at the moment reviewing the Swedish rules on limitations of interest deductions. The government will most likely propose a new system that will replace/amend the current rules. One alternative that is being assessed is the possibilities to introduce thin capitalisation rules. At this stage we do however not know to what extent such rules will be implemented. The committee that has been put in place to review the rules will present its proposal at the end of 2013; the rules will however not come into force before 2014 at the earliest.

***If there is (or will be) a structure that involves interest flows due to an internal acquisition, make sure that the beneficial owner is taxed by at least 10% or that the restructuring and debt can be justified by business reasons rather than tax reasons. Any additional limitations in the deduction of interests have to be monitored going forward once the Swedish government has presented its proposal.***

#### Transfer pricing

Cross-border transactions between related parties have to be carried out in accordance with the arm's length principle. If this principle is not complied with, or if one fails to present appropriate documentation to the Swedish tax authority, the taxable income can be changed to the taxpayer's disadvantage. Other penalties may also occur.

***Duly follow the arm's length principle, monitor applied prices on intragroup charges and transactions and ensure documentation of cross-border activities.***

## 24 Turkey

### Corporate tax

Resident companies in Turkey are subject to corporation tax on their worldwide income at a rate of 20%. Corporate income tax law (CITL) states exemptions which can be beneficially utilised by corporations (upon meeting certain conditions), such as dividend income received from resident or non-resident companies, earnings of corporations derived from their foreign establishments of representatives or 75% of capital gains derived from the sale of property or participation shares which are held by corporations for more than two years.

***When filing the corporate tax return, it should be ensured that the taxpayers can benefit from the aforementioned tax exemptions, and that CITL requirements are fulfilled.***

### Transfer pricing

If a taxpayer enters into transactions regarding the sale or purchase of goods and services with related parties, the parties should follow the arm's length principle. Transfer pricing regulations stipulate documentation requirements for taxpayers, who should complete the transfer pricing form every year and submit it as an appendix with the corporate tax returns. Taxpayers are also required to prepare an annual transfer pricing report including supporting documents for their domestic and international related-party transactions.

***It should be ensured that Turkish transfer pricing documentation requirements are met.***

### Thin capitalisation

If the ratio of the borrowings from related parties exceeds three times the shareholders' equity of the borrower company, the exceeding portion of the borrowing will be considered as thin capital. Interest and other payments relating to thin capital and the related foreign exchange losses are non-deductible expenses while calculating the corporate tax base.

***A thin capitalisation analysis should be made by the taxpayer during the preparation of the corporate tax return if companies receive shareholder loans.***

### Controlled foreign corporation

Corporations that are established abroad and are at least 50% controlled directly or indirectly by tax resident companies are considered controlled foreign corporations (CFC) when certain requirements are met, for example being subject to an effective income tax rate lower than 10% in its home country, having a gross revenue more than TRY 100,000 in the related period and having passive income (at least 25% of gross revenue). CFC profits would be included in the corporate income tax base of the controlling resident corporation irrespective of whether it is distributed or not.

***CFC profits should be included in the tax base of the Turkish resident company if the foreign corporations meet the conditions of being a CFC.***

### Depreciation

Depreciation may be applied by using either the straight-line or declining-balance method at the discretion of the taxpayer. However, please note that once the taxpayer has started to apply the straight-line method, it is not possible to change the method in the following years, although the opposite is possible. While the applicable rate for the declining-balance method is twice the rate (determined by Ministry of Finance) of the straight-line method, the maximum applicable rate for the declining-balance method is 50%.

***Interest and foreign exchange costs regarding the financing of fixed assets should be added to the cost of fixed assets until the end of the year in which assets are taken into account. The depreciation method should be selected for the fixed assets which are purchased in the related year.***

#### Foreign currency revaluation

Assets and liabilities denominated in foreign currency are revalued at year end based on the exchange rates announced by the Ministry of Finance.

***Foreign currency asset and liability accounts in foreign currency should be evaluated in each quarter.***

#### Prepaid income

If corporations receive income in advance from future fiscal years, such as advanced rental income, these amounts should be followed in the balance sheet accounts and should be taken into consideration as income in the fiscal year with which the income is related.

***During the calculation of the corporate tax base, it should be determined whether the income of corporations includes advanced income or not.***

#### Doubtful receivables

Receivables which are relevant to the acquisition of commercial income and at the litigation stage or administrative action can be written as doubtful receivables in the year that the litigation process started. Provisions may be accounted for the doubtful receivable at the disposable value on the day of valuation.

***It should be determined whether doubtful receivable provision amounts meet the conditions to be considered a deductible expense during the calculation of the corporate tax base.***

#### Significant coming changes

The Turkish Commercial Code has been regulating business life in Turkey for almost 55 years; it has now been replaced with the New Turkish Commercial Code (the “New Law” or “TCC”). The New Law has been enacted to respond to major changes and developments in the local and global business environment.

The code aims to integrate the Turkish Commercial Code with EU law, improve transparency, protect minority rights and strengthen corporate governance principles.

The New Law and the relevant Law on Enactment will enter into force on July 1st 2012 (January 1st 2013 for certain articles). This means there are six months left to prepare and when the important changes the law brings are considered, this period should be fully evaluated both by public and other companies to ensure they understand the process ahead and ready themselves accordingly.

It is also worth mentioning that tax laws are also expected to be amended to be in line with the provisions of the New Law.

## 25 United Kingdom

Due to the system of taxation in the UK that applies to non-resident landlords, there is not a specific focus on the year end as a key time to consider tax issues.

Typically, investors who acquire UK property invest through non-UK resident companies and are required to submit a UK income tax return for a fiscal year which runs from April 6th to April 5th. It is therefore common that the accounting year does not correlate with the fiscal year.

For these reasons there is generally no requirement to undertake specific actions at year end to secure certain tax treatments. However, it is important that the following issues are considered in relation to existing investments in UK real estate on at least an annual basis.

### Arm's length nature of financing

Shareholder financing which is used for a UK property investment business should be provided on arm's length terms to comply with the UK transfer pricing rules.

***Support for the level of shareholder financing and the terms on which this financing is provided should be retained. It should be considered what support is available for the shareholder financing for each UK property investment.***

### Capital allowances

Capital allowances provide tax relief for capital expenditure in the UK.

***Each UK property investment should be reviewed to ensure the maximum entitlement to capital allowances is being claimed.***

# Asia Pacific

## 1 Australia

### Thin capitalisation

The Australian thin capitalisation rules can restrict the deductibility of interest expense in an income year. The thin capitalisation rules generally apply to Australian inbound and outbound investments. Broadly, the acceptable level of debt is 75% of the net assets (i.e. 3:1 debt-to-equity ratio) of an entity that is subject to Australia's thin capitalisation rules. Only where this condition is satisfied may interest expenses paid be fully deductible.

***Given the reduction in real estate values in recent years, it is critical that the thin capitalisation rules are considered in some detail in order to determine whether there are any adverse tax consequences under those rules. Taxpayers should also ensure that the interest rate on related-party loans satisfies transfer pricing requirements (where relevant).***

### Tax losses

Any change in direct or indirect interests in an entity (e.g. in the course of restructurings) may lead to a partial/total forfeiture of tax losses at the Australian trust level. Broadly, a trust must maintain a 50% continuity of ownership in order to recoup prior year losses. Listed trusts can also rely on the same business test.

***The tax loss rules must be considered prior to the recoupment of prior year and current year losses. Also, the tax loss rules must be considered in light of transactions that result in significant changes to ownership.***

### Reduction in distributions

Many trusts reduced their distributions in recent income years and we expect that this practice may continue in the future. The impact of this, in light of the trust deed, needs to be considered. If not managed properly it could cause the trustee to be taxed at 46.5%.

***It is strongly recommended that the trust deed is considered in detail and the process of reducing the distribution must be managed properly in order to avoid the trustee being taxed at 46.5%.***

### Public trading trust sales

Generally, Australian real estate is held by trusts in order to access certain tax advantages, e.g. flow-through tax treatment. However, a trust is taxed in a similar manner to a company if it is classified as a public trading trust for a year of income. A public trading trust is a trust that is a public unit trust (i.e. listed trust or widely held) and a trading trust. A trading trust is a trust that carries on a trading business at any time during an income year. In the context of land, a trading business is any activity other than investing in land primarily for the purpose of deriving rent.

***The activities of a public trust should be monitored on an ongoing basis in order to ensure that the activities do not constitute a trading business.***

### Taxation of Financial Agreements (TOFA) – Stages 3 and 4

The objectives of the newly enacted TOFA rules are to identify what gains and losses from financial arrangements are subject to tax and to determine when those gains and losses should be brought to account for tax purposes (having greater regard to

a transaction's economic substance). This fundamentally changes the way certain financial transactions are taxed (e.g. certain financing, hedging and investment transactions). The TOFA rules applied to taxpayers from July 1st 2010.

***It is therefore critical that an analysis is performed to determine how TOFA may apply to certain financial arrangements of affected entities.***

## Current tax concessions

### Managed investment trusts

Trusts that meet the requirements of a managed investment trust (MIT) are eligible for certain tax concessions. Broadly, these concessions are currently:

- a. A 7.5% withholding tax rate on taxable distributions to residents of exchange of information (EOI) countries or 30% for residents of non-EOI countries.

***The list of EOI countries is growing. Investors should monitor this.***

- b. The ability to make an election to have gains on certain assets (including real estate) taxed as capital gains rather than ordinary income. The key advantage is that an MIT will be able to access the capital gains tax 50% discount on eligible assets with absolute certainty (not available in respect of distributions to non-resident investors).

***For trusts that made the irrevocable election to have gains on certain assets taxed as capital gains, the trust must ensure it continues to meet the eligibility requirements to be classified as an MIT in light of any changes to the trust's investor base or circumstances.***

## Disclosure requirements

MITs must meet certain disclosure requirements each year for distributions to investors with an Australian address or non-residents with a permanent establishment in Australia.

***MITs must make sure that they are aware of their compliance obligations and provide appropriate statements to investors containing the required information by the due date.***

## Reform of the taxation of trusts

A new regime governing the tax treatment of MITs will be introduced (start date still uncertain). The objective of the new regime is to modernise the taxation of trusts and remove uncertainty by codifying longstanding industry practices. At this stage draft legislation has not been released.

A number of other initiatives have been announced but have yet to be introduced which may affect Australian real estate investment trusts. These include the design of a new collective investment vehicle regime and introducing an investment manager regime. These proposals are designed to attract overseas investors into Australian funds.

***Trusts should consider the impact of the proposed changes as the rules develop.***

## 2 Japan

### Election of consumption tax status

Consumption tax (a type of VAT) is imposed on the purchase of a building and on certain other purchases of goods and services. Often a new company has “exempt” status which means that, unless an election to be a consumption taxpayer is filed, it is unable to claim a credit for the consumption tax paid.

The election is due by the last day of the fiscal year in which the company was formed. Accordingly, investors should review the consumption tax status of their Japanese companies to determine whether or not any elections need to be filed (and, for existing companies, review that status in case a new application or changes are needed).

***This is an issue for all corporations that purchase property in 2011 or are planning to do so in 2012.***

### Election of simplified method for calculating input consumption tax credit

A corporation can elect a simplified method in calculating the input consumption tax credit by filing a tax report. Under the simplified method, the input consumption tax credit is calculated by using a deemed purchase ratio against the taxable sales. The ratio varies depending on the type of taxable sales.

For real estate holding businesses, the rate would generally be 50% against rental revenue and 60% against sale proceeds of real estate. Once the tax report is filed, the simplified method will apply from the next fiscal year (or the current fiscal year if the corporation commences its business activity in Japan from the current fiscal year) if the taxable sale for the base period (the two years before the fiscal year) was equal to JPY 50m or less and the corporation is a consumption taxpayer for the fiscal year.

Note, however, that if the election of the consumption taxpayer is made and the fixed assets are purchased during the two-year period, the taxpayer might not be allowed to change its status for three years from the taxable period of the purchase. The taxpayer cannot apply the simplified method during such three-year period.

***It should be checked whether requirements to apply the simplified method will be met for the next year (or current year). In addition, cash flow projections or profit forecasts should also be reviewed in order to judge which method (the standard method or simplified method) is preferable.***

### Major change in tax law as of 2012 – Real estate acquisition tax

#### Changes to acquisition tax rate

A transfer tax is imposed upon the acquisition of real property. TMKs and J-REITs enjoy special reduced rates. These special reduced rates have been changed for 2012.

An updated table, showing the new acquisition tax rates, follows (Numbers are rounded to two decimal places):

<b>Applicable acquisition tax rates</b>			~ March	~ March	~ April
Timing of acquisition			31st 2012	31st 2013	1st 2013
Land	Ordinary corporation		1.50%	4.00%	4.00%
	TMK/J-REIT(*1)		0.60%	1.60%	4.00%
Building	Residential	Ordinary corporation	3.00%	4.00%	4.00%
		TMK/J-REIT <sup>1</sup>	1.20%	1.60%	4.00%
	Non-residential	Ordinary corporation	4.00%	4.00%	4.00%
		TMK/J-REIT(*1)	1.60%	1.60%	4.00%

<sup>1</sup> A taxpayer must meet certain qualifying requirements to enjoy this rate

## 3 Singapore

### Share deal vs asset deal

The acquisition tax costs associated with an asset deal and share deal are substantially different. In addition, an asset deal or share deal may give rise to a different income tax outcome during the holding period and upon exit and should be carefully evaluated upfront.

### Goods and services tax

A goods and services tax of 7% is levied on the purchase of property but there may be exemptions when certain conditions are met. Hence, it is important to evaluate whether an exemption applies as this could help ease cash flow and, in some cases, even help in saving interest costs.

### Stamp duty

A stamp duty of 3% is levied on the purchase of property whereas only 0.2% applies on share purchase. Hence the tax benefit of an asset deal should be more than the stamp duty cost, having regard to the investment intentions (i.e. short-term v.s. long-term) and anticipated exit strategies.

### Interest deduction rules

Singapore does not have any thin capitalisation rules. However, interest expenses incurred on loans that are specifically used to purchase shares are not tax-deductible. Withholding tax at 15% applies to interest payments to non-residents, but this may be reduced with proper planning.

### Exit

Currently, exit is most tax-efficient through a share sale but this is not always possible. Although Singapore does not impose capital gains tax, gains on the sale of real estate may be taxed as trading gains at the prevailing corporate tax rate (currently 17%). With proper planning at the point of acquiring the property (which would involve proper review of the relevant documentation), it should be possible to reduce the tax exposure on the gain on sale.

### Capital allowances

Capital allowances are a much disputed area with the Singapore tax authorities. Therefore a proper capital allowance study should be undertaken to maximise and substantiate capital allowance claims during holding period. This may also be helpful in facilitating a share sale upon exit.

### Withholding tax

Intercompany loans are subject to Singapore's transfer pricing rules. Hence it is important that a proper benchmarking study is performed on any intercompany loans to substantiate that interest rates charged are at arm's length. As mentioned above, withholding tax applies on interest payments to non-residents (e.g. shareholder loans) but this can be reduced with proper planning. Where a reduced rate under a treaty is adopted, it is important to make sure that certain administrative procedures are adhered to. Otherwise, the reduced rate may not apply and, penalties may be imposed. An assessment of whether these procedures have been adhered to should be conducted at year end.

### Tax incentives

A suite of fairly generous tax incentives is on offer in Singapore for funds managed by Singapore-based fund managers as well as the funds themselves. Under three schemes, known commonly as the Offshore Fund Scheme, the Singapore Resident Fund (SRF) Scheme and the Enhanced Tier Fund (ETF) Scheme, funds can enjoy a variety of safe harbour rules tailored for their needs. This includes the ability to use a Singapore-based fund that has access to Singapore's wide network of tax treaties. Managers who manage or advise funds that are approved under these schemes can enjoy a concessionary rate of tax of 10% on their fee income.

### Year end reporting

For fund managers who look after funds that enjoy any of the above schemes, there are certain annual reporting requirements that need to be observed and, in the case of the ETF and SRF, tax returns that may need to be filed for the fund entity.

## 4 South Korea

Corporation income tax rate	The basic corporate tax rate is 11% on the first KRW 200m of the tax base and 24.2% for the excess including 10% surtax. According to the proposal of tax amendment to be effective as from January 1st 2012, the corporate income tax rate is to be 11% on the first KRW 200m of the tax base, 22% on KRW 200m ~50b and 24.2% for the excess, including 10% surtax.
Losses carried forward	Under the Corporate Income Tax Act (CITA), net operating losses (NOL) carry-forward is newly allowed for ten years in calculating the tax base for the fiscal year commencing on or after January 1st 2009 compared to five years for the prior years. However, carry-back is still not allowed other than the qualified small and medium-sized companies.
Depreciation rules	According to the CITA, a depreciation method should be determined based on characteristics of the fixed asset, and a taxpayer may select the useful life of depreciable assets within a range from 75% to 125% of the standard useful life. Generally, the practical standard useful life of a building is 40 years (2.5% depreciation rate).  <b><i>A selected depreciation method should be consistently applied.</i></b>
Tax exemption on interest income on foreign currency denominated bonds	According to the Tax Preferential Control Act (TPCA), there is no Korean withholding tax on interest payments on qualified foreign currency denominated bonds (FCDB) issued by a Korean company to a non-resident or foreign company.  <b><i>The issue of FCDBs in excess of \$30m shall be reported to Ministry of Strategy and Finance for approval. If the total amount is \$30m or less, it is only required to be reported to a foreign exchange bank.</i></b>
Transfer pricing	A transaction between a Korean company and its foreign related party should be made on an arm's length basis under the Korean transfer pricing regulations.  <b><i>The method used and the reason for adopting a particular method of arm's length pricing must be disclosed to the tax authorities by a taxpayer in his annual tax return.</i></b>
Thin capitalisation rules	A Korean company's borrowings from its foreign controlling shareholder (FCS) (or borrowings from a third party guaranteed by the FCS) should not exceed three times (or six times in the case of a financial institution) of the equity invested by the FCS. The interest expense on the portion of the borrowings exceeding the 3:1 (or 6:1) debt-to-equity ratio will not be deductible against taxable income and be deemed to be a distribution of dividends to the FCS subject to withholding tax.  <b><i>It should be verified and submitted to tax authorities through an annual tax return whether the debt to equity ratio is maintained within the safe harbour thin capitalisation ratio of 3:1 (or 6:1).</i></b>
Amendment of the Tax Preferential Control Act for REITs and RETFs	Both real estate investment trusts (REIT) and real estate trust funds (RETF) are eligible for a 30% exemption on acquisition/registration tax for the real estate acquired before December 31st 2012 in accordance with the amendment of the Tax Preferential Control Act (the previous exemption rate was 50%).
Amendment of Local Tax Act	In accordance with the new amended Local Tax Act, which is effective as from January 1st 2011, the acquisition tax applies at the rate of 4.6% including surtax upon the real estate acquisition. The registration tax will not be applied separately.

# America

## 1 Argentina

### Sale of stock by non-residents

Gains derived by foreign shareholders from the sale of their interest in Argentinean corporations (sociedades anónimas or SA) are currently tax-exempt pursuant to decree 2284/91.

***It is usually recommended to consider this decree in structuring projects.***

### The use of real estate trusts

The use of real estate trusts is regulated by law 24.441, which provides a very flexible legal framework. It has been the preferred vehicle for real estate projects in Argentina and is commonly used in building construction, especially in structures where small and medium-sized investors are involved. There are no major taxation differences compared to other corporate entities.

***Real estate investment trusts should be examined as an alternative to structure real estate projects in Argentina.***

### Transfer pricing

All related-party cross-border payments have to comply with the arm's length principle. Failure to present appropriate documentation to the tax administration may result in the non-acceptance of group charges and penalties for tax purposes.

***The arm's length principle should be duly followed and documented.***

### Thin capitalisation rules

This rule is applied in the case of loans given by foreign related parties to an Argentinean company in the following cases: i) a withholding tax rate of 35% is not applied; ii) the amount of the loan is more than two times the equity of the Argentinean company. If the rule is applied, the non-deductible interest will be treated as a dividend.

***It is important to consider possible implications of this disposal in the project financing process. Also ensure before every fiscal year end that thin cap rules limitations are met as there is room for improvement if needed.***

### Tax prepayments

In the case of declining profits, an application can be made to reduce current tax prepayments.

***Cash flow models and profit forecast should be checked in order to improve liquidity by applying for tax prepayment reductions and/or refunds.***

### Tax treaty network

Argentina has concluded tax treaties for the avoidance of double taxation with various countries, under which reduced withholding tax rates can generally be applied on dividends, interest, royalties and certain capital gains. Currently, there are 18 double tax treaties signed by Argentina.

***It is strongly recommended to verify substance requirements to apply double tax treaty benefits.***

### Tax losses carried forward

Losses may be used to offset Argentinean profits arising in the same company. Any amount of tax losses that could not be used in the year in which they were incurred can be carried forward for five years. Tax losses cannot be carried back. Losses in transfers of shares generate specific tax loss carry-forwards and may only be used to compensate profits of the same origin.

***It is important to monitor taxable profits and losses during the project and when you intend to reorganise your investment structure.***

### Foreign exchange control regulations

Incoming flows of currency (as financial loans or capital contributions) are subject to a compulsory one-year temporary deposit, for which 30% of funds granted brought by non-resident to Argentina must be kept in a reserve (“encaje”) for the term of 365 calendar days. This bank deposit is made in US dollars and does not earn interest. Direct investments, such as interest in Argentinean companies (minimum 10%) or the purchase of real estate and certain financial loan transactions, are not subject to this rule.

As regards outflows of capital, the following remittances abroad do not require authorisation from the Central Bank of Argentina:

- Remittances for portfolio investments up to US\$2m per calendar month
- Loans repaid after at least 365 days (contract needed)
- Dividends (supported by audited financial sheets)
- Payments of services duly documented (invoice, contract, etc)
- Non-residents in Argentina can transfer abroad the sale of a direct investment or partial or complete liquidation (minimum duration of the investment: 365 days)

***It is important to carefully analyse incoming and outgoing flow effects in each project.***

## 2 Brazil

### Preface

Historically the property market in Brazil was considered less a financial asset and more as a physical asset that could better protect investors from economic instability, inflation and occasional political uncertainty. However, it is common sense that this concept of investment in real estate in Brazil has undergone a significant change. In fact, the decline in Brazil's interest rate and risk level, along with the reduction in external debt and inflation, allied to the regulatory and tax legislation amendments currently in place (mainly those that upgrade the quality of the information available to the investor and those that reduced the latter's tax burden), are universal attractions for real estate investment. Specifically, regarding foreign investors, who may be subject to certain tax benefits, Brazil is in an excellent competitive position relative to other emerging markets in the realty sector.

### Investment in Brazilian property

Corporate and individual investors (mainly foreign investors which could apply for certain tax benefits) will have different options for better structuring their investments in Brazil.

The choice of the best alternative for structuring investments in property sector will depend on the characteristics of the investment to be proceeded.

As a result, in the following sections, we describe different possibilities for investing in real estate in Brazil: (i) indirect acquisition, i.e. through a vehicle (an entity or an investment fund), or (ii) direct acquisition, i.e. the direct acquisition by the future owner of the real estate.

Current legislation establishes that non-resident taxpayers owning assets or rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, known as an Individual Taxpayer Register, or *Cadastro de Pessoa Física* (CPF).

Current legislation also establishes that non-resident legal entities owning goods and rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, or *Cadastro Nacional da Pessoa Jurídica* (CNPJ).

### Indirect acquisition through a Brazilian entity

#### Indirect acquisition: Corporate taxes for a Brazilian entity

Income tax (IRPJ) and social contribution on net profits (CSLL) or "Corporate taxes" can be paid on a real profit basis or on a presumed profit basis.

The real profit basis is obtained through net accounting profit adjusted by certain additions and exclusions and subject to a rate of 15%, with a surcharge of 10% on annual taxable income in excess of around US\$150,000 (using an exchange rate of BRL 1.60 to US\$1). CSLL is a federal contribution levied on a similar basis, at a rate of 9%.

In this case, the costs or expenses incurred on the improvement of the real estate, for example, can be deductible from the net accounting profit (either at the sale of the units, if the costs incurred were incorporated at the asset value or if accrued direct to P&L), and, as a consequence, from the calculation basis of IRPJ and CSLL.

IRPJ and CSLL can be paid on an annual basis, through monthly prepayments, or on a quarterly basis.

The presumed profit basis is applicable for companies with gross income lower than around US\$30,000,000 (using an exchange rate of BRL 1.60 to US\$1) a year and it involves the application of a presumed rate depending of the activity of the company on the gross income of the company for the means of calculating a presumed net income, over which the above referred tax rates will be applicable.

This basis plus other revenues, such as financial revenues, will be subject to the rate of 15%, with a surcharge of 10%. CSLL is a federal contribution levied on a similar basis, at a rate of 9%.

Basically, the choice of one or other basis will depend on the Brazilian entity's profit expectations.

#### Indirect acquisition: Transactional taxes for a Brazilian entity (PIS and COFINS)

Revenues earned with real estate (selling, rental and others) will be subject to the Employees' Profit Participation Program (PIS) and Social Contribution on Billings (COFINS):

PIS and COFINS are contributions levied on gross revenue, thus considered the sum of the company's total revenue, less unconditional discounts, cancelled sales, goods and service export revenue and other deductions legally established.

Depending on the choice adopted, the real profit or the presumed profit bases, the calculation of PIS and COFINS will also change.

In fact, if the Brazilian entity adopts the real profit basis, the company will be automatically subject to the payment of PIS and COFINS in accordance with the non-cumulative system.

In accordance with this non-cumulative system, the financial revenues are subject to a rate of 0%.

If a Brazilian entity decides to apply for presumed method, all the revenues obtained will be submitted to the PIS and COFINS cumulative system, i.e. all the revenues will be taxed without the possibility of deduction of credit, however, the rates will be lower.

As from January 2008, the Brazilian „social contribution due on cash flows (CPMF) rule“ was revoked.

In the place of CPMF, certain transactions, mainly related to loans or to exchanging amounts can trigger the tax on financial operations (IOF).

Certain foreign investors, whenever investing through resolution CMN 2689, for variable income assets traded in financial and capital markets, will be taxed by IOF at 2% on the inflows of resources in the country and 0% on the outflow.

Other foreign investments in Brazilian financial and capital markets through resolution CMN 2689, mainly fixed income assets, will be taxed by IOF at 6% on the inflow and 0% on the outflow. However, if acquiring a Brazilian asset directly (not through 2689), foreign investors will be taxed by IOF on the inflows and outflows of resources at 0.38%.

### Indirect acquisition: Remittance of profits by a Brazilian entity

The profit from real estate activity (selling or rental) can be remitted as dividends or interest on net equity (INE).

The dividend will not be subject to withholding tax (WHT).

The payment of INE will be subject to the WHT. However, since a Brazilian entity adopts the real profit basis, it will be allowed to deduct the expense relating to INE from its IRPJ and CSLL if paid up to the limits established by law.

Please note that as from 2010, Brazil started to impose thin capitalisation rules in relation to the loans between affiliated entities and specifically more conservative rules applicable for loans with parties located in a tax haven jurisdiction.

### Indirect acquisition: Capital gains on disposal of a participation in Brazilian entity

#### Non-residents

Brazilian non-residents are generally subject to withholding tax at the same rate as Brazilians (unless payments are made as a result of an employment relationship or of a service contract) levied on the payment or credit of Brazilian-source income, except that tax relief is provided by treaties to avoid double taxation.

It should be noted that income paid, credited, remitted, etc, to a beneficiary domiciled in a tax haven country/territory will be subject to a less favourable rate. For Brazilian tax purposes, a tax haven is considered to be a country that taxes income at a rate lower than 20%.

Capital gains realised by non-residents are generally determined as being the difference between the sales price and the cost basis of the asset or right sold, which must be substantiated by the corresponding document usually issued when the acquisition takes place. If the cost cannot be substantiated in this manner, the acquisition amount will be determined, in some instances, based on the capital amount registered with the Brazilian Central Bank related to the purchase of the asset or right. In all other instances, the cost will be deemed to be zero.

And finally, Brazilian legislation is not clear in reference to the method of calculation of the capital gain in Brazilian currency or foreign currency registered at the Brazilian Central Bank (BACEN).

The outflow for remitting capital gains derived from investments generated through Law 4,131 (private participation into a Brazilian entity) will trigger IOF at 0.38% of the amount remitted.

#### Corporations

Corporate capital gains arising from the sale or exchange of fixed assets are treated as ordinary income and taxed at the regular rates. Due to the fact that Brazil no longer monetarily restates fixed assets for purposes of inflation, the amount of the capital gains will be determined as being equal to the positive difference between the sale price and the disposed asset's original investment value less the accumulated depreciation/amortisation (please refer to the new rules of depreciation above).

## Individuals

Capital gains recognised by Brazilian individuals on the sale of real property will be subject to Brazilian income tax at a rate of 15%. The gain is determined as the difference between the sales price and the acquisition cost duly reported on the seller's annual income tax return.

## Indirect acquisition through a Brazilian investment fund

Depending on the structure to be adopted, the most applicable investment fund on real estate investment structuring are: (i) Real estate investment Fund or FII (whose portfolios encompass real estate), (ii) Participation investment fund or FIP (whose portfolios encompass interest in entities which can own properties), and (iii) Receivables investment fund or FIDC (whose portfolios can encompass real estate receivables). Other funds can be applicable, as Stock investment fund (for further information, please access the contact person in charge listed in the section 'Country Contacts').

## Indirect acquisition: Corporate and transactional taxes for an investment fund

Fund quota holders are subject to withholding tax on profit distribution, quota redemption or quota sales.

Investment fund portfolios are not subject to IRPJ, CSLL, PIS or COFINS.

If the quota holder redeems the investment prior to 30 days of the acquisition, tax or financial transactions (IOF) will be due.

## Indirect acquisition: Remuneration of quotes of investment funds

A taxable event for the owner of a participation in an investment fund is remuneration of the quotes. The tax treatment applicable will vary in accordance with the characteristics of the investor, as described below.

## Non-residents

Non-residents who participate in investment funds, in accordance with resolution 2689, and if not resident or domiciled in a tax haven jurisdiction, are submitted to a beneficial treatment in terms of WHT levied on the remuneration of quotes. Others are submitted to the same rules applicable to Brazilian residents.

Remuneration of FIP is tax exempt if the rules regarding concentration are accomplished (provided the investment is in accordance with Resolution 2689 and the investor is not located in a tax haven jurisdiction).

Under certain conditions, it is possible to consider that capital gains on the sale of some assets through an exchange are not submitted to WHT.

## Corporations

The operation of inflows of amounts for acquiring quotas will trigger IOF at 2%. Remuneration of quotes will be subject to WHT varying in accordance with the holding period. WHT can be offset by IRPJ due by the quota holder.

## Individuals

Remuneration of quotes will be subject to WHT varying in accordance with the holding period. WHT cannot be offset with IRPJ due by the quota holder.

## Direct acquisitions

### Direct acquisitions for non-residents

Capital gains on the disposal of real estate are subject to beneficial rates, unless the investor is resident in a tax haven jurisdiction. Income derived from real estate (such as rental) is also subject to withholding tax.

There is a controversy in relation to the capital gains under the disposal of real estate from one non-resident to another non-resident.

#### Direct acquisitions for resident corporations

Income arising from real estate will be subject to corporate and transactional taxes as described above under 'Indirect acquisition: Corporate taxes for a Brazilian entity' and 'Indirect acquisition: Transactional taxes for a Brazilian entity (PIS and COFINS)'

Capital gains will be taxable, for corporate tax purposes, at 34%.

#### Direct acquisitions for resident individuals

Income arising from real estate will be subject to a progressive rate which can vary from 0% to 27.5%.

Capital gains will be subject to 15%. Also as from October 2005 onward, the capital gain earned by a resident individual on the sale of residential real estate is exempt of such tax, if the seller, within 180 days from the sale, uses the earnings to buy a new house in the country. This rule is only applicable for determined individuals after a gap of five years between the transactions.

Gains derived from the sales of real estate acquired by the seller before 1970 are also tax exempt for Brazilian residents. Proceeds from the sale of real estate acquired by the seller between 1970 and 1988 have a progressive reduction of the capital gains tax levied on them.

As of October 2005, there is also a reduction factor applicable to the calculation basis of the capital gain on the sale of residential real estate by resident individuals.

## 3 Canada

### Specified investment flow-through (SIFT) rules

The specified investment flow-through (SIFT) rules impose a tax on distributions paid by publicly traded trusts and partnerships. The tax applies to SIFTs that were previously grandfathered starting January 1st 2011. A real estate investment trust (REIT) will be exempt from this tax if certain conditions are met. In some cases, private partnerships and trusts may be considered SIFTs and therefore subject to tax.

***Consider the implications of investing in Canadian public and/or private partnerships and trusts.***

***REITs should ensure they continue to meet the conditions to not have the tax apply.***

### Corporate tax rates on the decline

Corporate income and capital tax rates are generally on the decline. Combined federal and provincial corporate income tax rates in 2011 range from 26.5% to 32.5%, depending on the province. By 2014, however, these rates will have declined to 25% for most provinces. Also, as of January 1st 2011, capital taxes (imposed on the debt and equity of a corporation) have been eliminated in all jurisdictions except the province of Nova Scotia.

***Permanent tax savings can be realised by deferring dispositions or revenues to future periods or incurring expenses in earlier periods.***

### Non-resident trust rules and tax-exempt investors

Under previous draft legislation, the participation of Canadian investors, including tax-exempt investors, could potentially have resulted in all or a portion of certain types of foreign investment funds becoming liable for Canadian tax. Under revised draft provisions, exceptions have been included to ensure that participation by Canadian tax-exempt entities should not cause this result.

***The inclusion of Canadian tax-exempt investors in a foreign investment fund should not cause the non-resident trust rules to apply.***

### Thin capitalisation rules

The Canadian thin capitalisation rules restrict the deductibility of interest paid by a Canadian corporation on interest-bearing debts owed to specified non-resident shareholders where the debt-to-equity ratio exceeds 2:1. All related-party interest must be reasonable in order to be deductible, and, in cross-border cases, the related-party interest should be supported by a transfer pricing study. Such interest must also be paid within two taxation years following the year it is incurred, or, subject to a possible election to deem the interest paid and loaned back, the unpaid interest will be reversed into income of the debtor.

***Ensure debt-to-equity ratios comply with the thin capitalisation rules and that the arm's length principle is followed and properly documented with respect to interest charged on related-party debt. Ensure that outstanding interest is paid on a timely basis.***

### No withholding tax on arm's length debt

While withholding taxes continue to apply on interest payments to non-resident related parties (subject to certain treaty exemptions), withholding taxes no longer apply to interest payments made to arm's length parties regardless of whether the lender is domestic or non-resident.

***Ensure that the appropriate withholding taxes have been remitted to the tax authorities.***

### Section 116 clearance certificates

Non-residents are taxable on their gains from dispositions of “taxable Canadian property” and the purchaser is generally required to withhold tax from the gross amount paid unless the non-resident vendor has obtained a clearance certificate under section 116 of the Income Tax Act (Canada) (the “Act”). Taxable Canadian property includes, among other things, real or immovable property that is situated in Canada and certain shares, partnership interests and trust interests the value of which is, or was within the previous 60 months, derived principally from Canadian real or immovable property. In 2010, the definition of taxable Canadian property was narrowed to exclude certain transactions from the clearance certificate requirement, but also modified in a manner such that interests in certain non-resident entities could be included where previously they were not. The transactions excluded, however, generally do not involve real or immovable property situated in Canada or an interest in entities that derive their value therefrom. Similar Quebec provincial rules apply and Quebec clearance certificates must also be obtained in respect of such property situated in Quebec.

***When disposing of real or immovable property situated in Canada or an interest in an entity that derives its value therefrom, be mindful of clearance certificate requirements in order to reduce withholding tax requirements.***

### Regulation 805 waivers/section 216 undertakings

Generally, when rent is paid to a non-resident person, the payer (or the non-resident’s agent receiving rental payments) is required to withhold and remit 25% of the gross rent to the Canadian tax authorities. If the rent is considered business income, the non-resident can apply for a waiver from withholding, under regulation 805.1 of the Act, since the income will be subject to regular Canadian income tax. If the rent is not business income, the non-resident and a Canadian agent responsible for receiving rental payments can make a joint undertaking to file an income tax return and pay tax, under section 216 of the Act, on the net income from its Canadian real property, in which case withholding tax remittances can be reduced to 25% of the net cash available to be distributed to the non-resident from such properties.

***Ensure that regulation 805.1 waivers are received from the Canadian tax authorities or section 216 undertakings are filed with the Canadian tax authorities before the first rental payments are due for the following year.***

### Elimination of partnership deferral

A partnership is not a taxpayer; rather, the income or loss of a partnership is allocated to its partners, who include their share of the partnership’s income or loss in computing their own taxable incomes or taxable incomes earned in Canada. Previously, income earned by a corporation as a member of a partnership was included in the corporation’s income for the corporate taxation year in which the fiscal period of the partnership ended. If the fiscal year of the partnership differed from the taxation year of a corporate partner, this difference could defer income and tax by up to one year. Legislation was introduced in 2011 to limit the ability of a corporation to defer the taxation of income earned through a partnership by requiring the corporation to accrue partnership income for the period up to the end of the corporation’s taxation year in cases where the partnership’s fiscal year differs from that of a corporate partner, and the partner (together with affiliated and related parties) exceeds a 10% income or asset entitlement threshold. The rules apply only to income of a partnership. Partnership losses will not be subject to such an accrual.

***Where investments have been structured through partnerships, consider whether additional income needs to be accrued to account for the elimination of the deferral previously available through partnerships.***

## 4 Mexiko

### Book vs tax depreciation

For book purposes, assets can be depreciated using different methods. For income tax purposes, fixed assets are depreciated on a straight-line basis applying the rates established by law. In addition, tax depreciation is adjusted for inflation, resulting in differences with the amount of the book depreciation.

**Review book and tax depreciation, including the adjustment for inflation in the latter, and determine whether the tax depreciation rates are the highest allowed. For taxpayers in a tax loss position a decrease in the depreciation rates could be analysed.**

### Income tax vs flat tax deduction for assets

For income tax purposes, fixed assets are depreciated on a straight-line basis (5% maximum depreciation rate for buildings, land does not depreciate). For flat tax purposes the deduction for the full amount is claimed when fixed assets are already paid.

**Review if the deduction for flat tax purposes corresponds to fixed assets already paid during the year.**

### Asset impairment

Impairments are allowed under Mexican GAAP. However, impairments are not deductible for income tax purposes.

**Check that no tax deduction from impairment of the assets is being taken by the company.**

**Confirm that impairment adjustments are not from obsolescence of fixed assets, because a tax deduction may be included.**

### Goodwill

Any amount paid in excess of the fair market value of the real estate is considered as goodwill, which is non-deductible for Mexican tax purposes (neither for income tax nor for flat tax purposes). In addition to the amount being not deductible, the depreciation as well as any interest related to the goodwill will also become non-deductible.

**Check if there is an amount related to goodwill, if such amount is being deducted, and whether the related amounts to depreciation and interest are being deducted.**

### Classification of real estate acquisitions

Real estate must be classified for both book and tax purposes as inventory or fixed assets, depending on whether it is acquired for subsequent sale or for development. This will impact the way in which the real estate is deducted: as cost of goods sold (inventory) or via depreciation (fixed assets).

**Review how the real estate is classified and determine how it must be deducted and whether this classification makes sense with respect to the business.**

### Use of losses

Losses generated for income tax purposes cannot be used to offset the flat tax liability. Similarly, the credit for the excess of flat tax deductions (including from fixed asset acquisitions) over flat tax income may not be credited against the income tax of the same taxable year in which the flat tax credit originated.

***Review that the flat tax credit is not being applied against income tax.***

***Taxpayers in a tax loss position should carefully analyse how they will use tax losses. Tax losses expire after a period of ten years and no carry-back is allowed.***

#### Thin capitalisation

Interest derived from debts granted by foreign related parties of the taxpayer that exceed three times its shareholders equity will not be deductible (several special rules apply).

***Review the thin capitalisation position of the company and also the computation to determine the non-deductible interest, if this is the case.***

#### Informative returns

Taxpayers are obliged to file informative returns related to several different matters. In general, the deadline to file said informative returns is February 15th of the following year, except for the informative return of transactions with related parties, which is filed together with the annual tax return.

***Prepare the documentation and ensure that the informative returns are duly filed, as it is a deductibility requirement for expenses and acquisitions made.***

#### Transfer pricing

Mexican income tax regulations require that taxpayers conducting transactions with related parties (1) determine the price or value of such transactions at arm's length conditions and, (2) secure the corresponding contemporaneous documentation. Otherwise, the tax authorities may determine the price or value that would have been used by independent parties in comparable transactions.

***Prepare a transfer pricing study covering each transaction carried out with related parties.***

***Analyse if the mark up currently used can be adjusted based on the transfer pricing study.***

## 5 United States

### Pending changes in tax rates

The tax cuts enacted under the Bush administration were originally extended through 2012. However, as part of a plan to raise US\$1.5 trillion in new tax revenue, President Obama recently unveiled a proposal that would in part increase the tax obligations of higher-income taxpayers starting in 2013, including individuals, trusts and estates. Based on the most current proposal, the maximum tax rate on ordinary income would revert to 39.6% and on capital gains to 20%.

***Non-corporate taxpayers should monitor the action in Congress following President Obama's recent proposed tax increases. Since some foreign pension funds are taxed as trusts, they will be affected by what Congress does – or does not do.***

### Carried interest legislation

The taxation of “carried interests” or “promotes” frequently used in real estate fund and partnerships has attracted significant publicity in recent years, but the fate of proposals to tax all or a portion of such income as ordinary income remains uncertain.

***General partners and fund sponsors with carried interests will continue to keep a close watch on Congress for signs of a revival of interest on this topic.***

### Foreign Account Tax Compliance Act („FATCA“)

Starting in 2013, FATCA will impose a 30% withholding tax on any U.S. sourced income and the gross proceeds from the sale of investments that produce U.S. sourced proceeds or dividends received by an offshore fund or foreign financial institution („FFI“). Withholding is avoided if the FFI enters into an agreement with the US government and agrees to comply with documentation requirements, due diligence procedures and reporting obligations.

***Implications for U.S. fund managers include increase in withholding activity tax such as gross proceeds payments, swap payments, and offshore intermediaries; expansion of entities responsible for tax information gathering, withholding and reporting; increased business risk from third party distribution parties and service providers; increased tax documentation requirements on direct and indirect investors; and modifications to internal policies, procedures, controls and systems.***

### Section 892 Proposed Regulations

On November 3, 2011 the U.S. Internal Revenue Service published proposed regulations (the „Proposed Regulations“) under Section 892 of the U.S. Internal Revenue Code (the „Code“). Section 892 of the Code generally exempts foreign governments and their controlled entities (including certain pension funds) from US tax on dividends and interest received from (and gains realised with respect to) non-controlled US entities, provided the controlled entity is not engaged in commercial activities anywhere in the world. The Proposed Regulations make a number of significant changes to the circumstances in which a controlled entity of a foreign government would be considered to be engaged in commercial activities that would prevent access to the benefits of Section 892 of the Code. These changes generally make it easier for a controlled entity to avoid being considered to be engaged in commercial activities.

Specifically, if finalised in their current form, under the Proposed Regulations a controlled entity would not be considered to be engaged in commercial activities if it only conducts „inadvertent“ commercial activity; the determination of whether an entity is engaged in commercial activities would be made on an annual basis; whether an activity constitutes a commercial activity or a non-profit or governmental activity would be determined on an objective basis, without regard to the intent of conducting the activity; investments in financial instruments, while not producing income considered exempt under Section 892, generally would not be considered to be a commercial activity; and the disposition of a United States real property interest, while not producing income considered exempt under Section 892, would not be considered to be the conduct of a commercial activity.

***The Proposed Regulations will not be effective until final regulations are published in the Federal Register, though the preamble to the Proposed Regulations states that taxpayers are permitted to rely on the Proposed Regulations until they are finalised.***

## Middle East

### 1 Saudi Arabia

#### Acquisition, construction and disposal of depreciable assets

50% of the acquisition or construction costs of newly acquired or constructed assets should be added to the depreciation basis in the year of acquisition/completion. The remaining 50% should be added in the subsequent year. Such deferred recognition should apply regardless of the actual acquisition/completion date of an asset.

***Hence, profitable entities should try to acquire beneficial ownership/complete construction before year end to claim depreciation for the full financial year. Loss making entities on the other hand should try to delay the acquisition/completion until after the balance sheet date.***

#### Capitalising costs for repair and maintenance in excess of 4% of depreciation basis

Repair and maintenance expense in excess of 4% of the remaining depreciation basis at year end of the corresponding asset group should not be tax deductible. Instead, the excess amount would be added to the depreciation basis and depreciated at the rates of the respective asset group.

***To the extent possible major repair projects should be broken down into several smaller projects or deferred over two or more financial periods.***

#### Losses carried forward

Certain direct and indirect transfers of shares/interests (or similar measures, e.g. in the course of restructurings) may lead to a forfeiture of tax losses carried forward.

***It is strongly recommended to explore structuring alternatives where you intend to reorganise your investment structure. In case a forfeiture of losses cannot be prevented, loss utilisation strategies before the restructuring should be explored.***

#### Advance tax payments

In the case of declining profits, an application can be made to reduce current tax prepayments.

***Cash flow models and profit forecasts should be checked in order to improve liquidity by applying for tax prepayment reductions and/or refunds.***

#### Transfer pricing

Generally, all related-party payments have to comply with the arm's length principle. Failure to present appropriate documentation to the tax administration might result in the non-acceptance of group charges and penalties for tax purposes.

***The arm's length principle should be duly followed and documented. It should be noted, that arm's length principles and documentation requirements in Saudi Arabia differ fundamentally from OECD standards.***

#### Distribution of retained earnings and refinancing short-term liabilities

Companies which are entirely or partly owned by shareholders from GCC countries are subject to Zakat. Retained earnings, undistributed dividend and any other short-term liabilities which have been outstanding more than one Hijri year at the balance sheet date would be added to the Zakat base.

***Companies whose financial year ends on December 31st should distribute retained earnings and refinance short-term liabilities before December 20th unless the respective amounts have been invested into Zakat deductible long-term assets.***

Documentation of write-offs

Provisions should, basically, not qualify as tax and Zakat deductible expense. Write offs, however, should be allowed for tax and Zakat purposes. Tax and Zakat payers have to meet onerous documentation requirements, though, to actually be allowed a deduction.

***Write offs should be thoroughly documented.***

New double tax treaties entering into force as of 2012

As of January 1st 2012 several new double tax treaties should become effective (e.g. treaties with Japan and Singapore) which might reduce the withholding tax exposure in relation to a number of cross-border transactions.

***To the extent possible payments to beneficiaries in the respective treaty countries should be delayed until after December 31st 2011.***

Filing tax returns and auditing financial statements in time

Tax and Zakat returns have to be filed in relatively tight deadlines (i.e. 120 days after the end of the fiscal year for companies and 60 days for consortia). Entities which are at least partly owned by GCC nationals are required to file audited financial statements along with their respective returns. Late filing of returns and payment of tax should result in noteworthy penalties.

***The tax/Zakat position should be reviewed in time and the statutory audit started as early as possible.***

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