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Home: OECD > March 2003 Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials

## March 2003 Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials



Argentina : does not allow the deductibility of bribes to foreign public officials since only expenses covered in the tax laws are deductible and the tax laws do not include a specific reference to bribes.

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

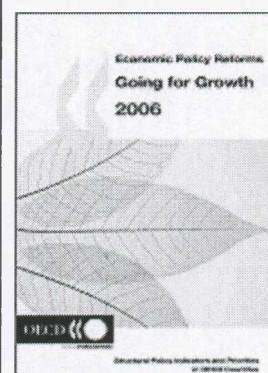
- an amount is incurred in providing a benefit to another person; and
- the benefit is not legitimately due to that person; and
- the amount is incurred with the intention of influencing a foreign public official in the exercise of the officials duties in order to obtain or retain business or an advantage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

Austria: Legislation was passed by Parliament in late October 1998. Section 20 paragraph 1 subparagraph 5 of the Income Tax Act, which already provided for non-deductibility of payments subject to criminal prosecution under certain conditions, was

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amended by deleting those former conditions. According to this new legislation any cash or in kind remuneration whose granting or receipt is subject to criminal punishment is not deductible from taxable income. Already in August 1998 the Criminal Code had been amended in a way which extended criminal prosecution also to bribes granted to foreign officials. Since this Act entered into force on 1st October 1998, bribes paid to foreign officials became generally no longer deductible for income tax purposes as soon as the new income tax legislation entered into force.

Belgium: Legislation aiming at the criminalisation of bribes to foreign public officials and at denying the deductibility of so called "secret commissions" paid directly or indirectly in order to obtain or maintain public contracts or administrative authorisations has been adopted and entered into force on 3 April 1999. « Secret commissions » paid for contracts other than public contracts may be deductible provided that such commissions do not exceed reasonable limits, that they are necessary to fight against foreign competition, and that they are recognised as a normal customary practice in the relevant country or sector (i.e., necessary usual and normal in the given economic sector). The taxpayer must present a request and disclose to the tax administration the amount and the purpose of the commissions for the tax administration to appreciate whether the commission is deductible or not. In any case, a tax equal to at least 20,6 percent of the commission must be paid. If these conditions are not simultaneously fulfilled, the deductibility of the commissions is denied and they are added back to the taxable income of the payer. If the payer is a company, it is liable to a special tax equal to 309 percent of the amount of the bribe

Brazil does not allow tax deductibility of bribes to foreign public officials.

Bulgaria: Bulgarian tax legislation does not allow the deductibility of bribes to foreign public officials.

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

Chile: not available

Czech Republic does not allow deductions of bribes paid to foreign public officials. Deductibility is not possible even in cases where the bribe could be treated as a gift. Gifts are deductible only in exceptional cases under two specific conditions. The gift must be

made for one of the following specific purposes: science, education, culture, fire protection and some other social, charitable or humanitarian purposes; and the gift must not be over a strictly determined percentage of the tax-basis. Only if both conditions are fulfilled, can the gift be treated as deductible for tax purposes. Under an amendment to Income Taxes Act No. 586/1992 Coll. ratified by the Czech parliament on 12th of December 2000 is stipulated, that for tax purposes a discharge provided to foreign public official or to a foreign public authority or with their agreement to another person, in relation with their office shall not be recognised as expense incurred in generating, assuring and maintaining income, even in the cases, concerning a foreign public official or a foreign public authority of the state, where provision of such discharge is tolerated or is not considered to be an offence or is usual.

Denmark: The Danish Parliament has adopted a bill from government denying the deductibility of bribes to foreign public officials. The new legislation entered into force on 1 January 1998. Up to 1997 Denmark did not allow deductions for bribes paid to foreign officials, except where bribes were recognised as a customary business practice in the country of the recipient. The burden was on the taxpayer to establish that bribes are a customary business practice in a foreign state. The acceptance of the bribe by a foreign public official was not enough to establish a customary practice. In practice Danish enterprises requested the deduction of bribes in only a small number of cases. The Danish tax authorities were also reluctant to grant deductions because of the difficulty of certifying the deduction.

Finland: Since 2001, the Finnish Government has been planning to present to Parliament proposals to amend the Act on the Taxation of Business Profits and Income from Professional Activities including a provision which expressly denies the tax deductibility of bribes. This presentation has just been postponed due to elections. Up to now Finland had no statutory rules concerning bribes paid to foreign officials. Corresponding payments to domestic public officials have been non-deductible on the basis of case law and practice of the tax authorities. The same rule was expected to apply to bribes paid to foreign public officials in case law and the same rule is applied already in the practice of the tax authorities.

France: The French Parliament passed legislation (article 39-1 of the French Tax Code) denying the tax deductibility of bribes to foreign public officials on 29 December 1997 as part of the Corrective Finance Bill for 1997. For contracts concluded during tax years

opened as of the entry into force of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, amounts paid or advantages granted, directly or through intermediaries, to public officials within the meaning of article 1 § 4 of the convention or to a third party in order that this official act or refrain from acting in the performance of his official duties, in order to obtain or retain a contract or other improper advantage in international business transactions, are not admitted as a deduction of taxable profits". The law authorising the ratification of the Convention was adopted on 25 May 1999. The engagements of the Convention were transplanted into domestic law on 20 June 2000 with a change to the tax legislation adopted in 1997. The denial of tax deductibility of bribes to foreign public officials will apply immediately after the entry into force of the Convention whatever the date of signature of the contract. The instrument of ratification of the Convention was deposited on 31 July 2000. The Convention shall enter into force on the sixtieth day following that date that is on 29 September 2000. Bribes to foreign public officials will not be deductible as of that day.

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

Greece does not allow the deductibility of bribes to foreign public officials.

Hungary does not allow the deductibility of bribes to foreign public officials since only expenses covered in the tax laws are deductible and the tax laws do not include a specific reference to bribes.

Iceland does not allow the deductibility of bribes to foreign as well as domestic public officials and officials of international organisations on the basis of law from June 1998. Previously, bribes to foreign officials were not deductible except if they were considered as a customary business in the country of the recipient.

Ireland does not allow deductions for bribes paid to foreign officials. On the basis of legal advice received, bribes paid to foreign public officials would not be deductible on public policy grounds. It is also considered that the conditions in the Irish Taxes Acts for deductibility of expenses could never be met



in the case of bribes paid to foreign officials. Accordingly, it has not been considered necessary to introduce specific legislation to deny a deduction

Italy even in the absence of specific provision of law, tax deductibility of bribes has never been permitted since costs connected to illicit activities are not included among the negative items referred to in Title I, Chapter VI (Business Income) of the Italian Income Taxes Consolidated Text (Presidential Decree 917/86 as subsequently amended). Moreover, since the cost concerned is connected with fraudulent activities – and such connection has also been recognized by the judgement of the Court of Cassation No. 2001 of 23 September 1994, concerning the corruption of a foreign citizen – it is excluded that such cost is “relevant” to the activity carried out; consequently, the absence of this prerequisite does not permit its deductibility under Article 75, paragraph 5 of the above-mentioned Consolidated Text (“Expenses and other negative items... shall be deductible if and to the extent to which they relate to activities or assets which produce revenue or other receipts which are included in income”). Moreover, the non deductibility of bribes has been formally stated in the recent 2003 Finance Act (Law No. 289 of 27 December 2002) which, in its Article 2, paragraph 8 states: “In assessing the income... costs or expenses connected to facts, actions or activities which may be qualified as crimes are not deductible...” As far as this last issue is concerned (qualified as crimes), it must be stated that Law No. 300 of 29 September 2000, which implemented in the Italian legislation the 1997 Bribery Convention, equated the bribery of public officials and persons exercising a public function in another State with the bribery of national public officials and persons exercising a public function.

Japan does not allow deductions for bribes paid to foreign officials. Bribes are not deducted for tax purposes as entertainment expenses under Japanese law. In addition, expenses whose recipients are not identified are not only non-deductible but also subject to additional tax. In practice Japan treats bribes of foreign public officials in the same way as bribes of domestic public officials and therefore as non-deductible.

Korea does not allow deductions for bribes paid to foreign government officials since they are not considered to be business-related expenses.

Luxembourg: Legislation denying deductibility of bribes was adopted by Parliament on 14 December 2000. Previously Luxembourg allowed deductions for bribes paid to foreign

public officials as any business expense. To be deductible the recipient of the bribe had to be clearly identified. Payments to companies domiciled in tax havens and to persons, which were not clearly identified, were not deductible.

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

Netherlands: The Netherlands incorporated the provisions of the Convention on Bribery into Dutch law by amending the Penal Code. This amendment entered into force on 1 February 2001. The Netherlands implemented the Convention by extending the offences under the Penal Code of bribing a domestic public servant and bribing a domestic judge to the bribery of "persons in the public service of a foreign state or an international institution" and "a judge of a foreign state or an international institution" respectively. The Netherlands has ratified the Convention relatively late due to the desire to produce an omnibus Bill that implements several anti-corruption related international instruments, rather than to take a piecemeal approach to implementing its international obligations in this regard. As to the non tax deductibility of bribes, the relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. Instead they deny the tax deductibility of expenses related to "crimes" where there has been a conviction by a Dutch court or a settlement by payment of a fine, etc., with the Dutch prosecutor to avoid criminal prosecution. Pursuant to a tax directive there is an obligation on tax inspectors to report suspected crimes, including the bribery of a civil servant, to the head of the Fiscal Information and Investigation Services, who is obliged to report in turn to the prosecution authorities. On 9 February 2001, however, the Council of Ministers approved the intention of the State Secretary of Finance to prepare a Bill amending the fiscal treatment of bribes. Pursuant to this Bill, tax officials will be able to refuse the deduction of certain expenses where they are reasonably convinced based on adequate indicators that the expenses consist of paid bribes (in the Netherlands or abroad), thus removing the requirement of a conviction. On 12 July 2002 the Bill was sent for advice to the Council of State. The Bill should be sent to the Dutch Parliament in April 2003.

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

Norway does not allow deductions for bribes paid to foreign private persons or public officials, on the basis of a law passed by the Norwegian Parliament on 10 December 1996. Before this law was enacted, the deduction was disallowed except where bribes were recognised as a customary business practice in the country of the recipient of the bribe.

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

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

Slovak Republic does not allow deductions of bribes to foreign public officials or private persons. Bribes are not considered as business-related expenses. Recipients of bribes are liable to criminal prosecution. Expenses that are related to any bribes are not deductible for taxation purposes.

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

foreign public officials. The bill invokes specifically the OECD 1997 Convention on Bribery.

Sweden does not allow deductions for bribes paid to foreign public officials. A bill explicitly denying the deductibility of bribes and other illicit payments was adopted by the Parliament on 25 March 1999. The new law on tax non-deductibility entered into force on 1 July 1999. Up to then Sweden was dealing with the issue on a case by case basis. Bribes may resemble fees or entertainment expenses. If they were assimilated to a fee, the deductibility was determined as for any other business expense. The burden of proving that it was a necessary expense was on the taxpayer and the fact that bribes were recognised as a normal customary practice in the country of the recipient was likely to have some impact on the deductibility. If the bribe resembled an entertainment expense, it was deductible provided it did not exceed reasonable limits.

Switzerland A bill denying the deductibility of secret commissions to Swiss or foreign public officials was adopted by the Federal Chambers on 22 December 1999 after consultation of the Cantons and other interested parties. The new law was enacted and came into force on 1 January 2001.

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

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

United States does not allow deductions for bribes paid to foreign government officials if that bribe is a criminal offence. Both before and after the United States criminalised bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of 1977, tax deductions were



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

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