3. TAX ASPECTS OF THE FORMATION OF A HOLDING COMPANY

3.1. Creation by contribution of shares

3.1.1. Contribution of domestic shares by a resident (individual or company)

3.1.1.1. Contributions to a domestic holding company

3.1.1.1.1. Taxation of capital gains

Capital gains realized upon the contribution of domestic shares by a corporate entity to a domestic holding company are exempt from capital gains tax provided the shares qualify for the dividend deduction (see 5.1.). In general, shares in a domestic company will qualify for the dividend deduction, and, accordingly, the capital gains realized or recognized upon their contribution to a Belgian holding company will be fully exempt from CIT. If this test is satisfied, the exemption applies irrespective of the percentage of shares held by the transferring company in the company whose shares are being contributed, and also irrespective of the percentage of shareholding in the holding company.

Capital gains realized by individuals upon the contribution of shares to a domestic holding company are, as a rule, exempt from personal income tax. Note however that such capital gains will trigger a tax liability in case the Belgian Revenue can establish that the individual has acted with a "speculative intent" (Art. 90(1) Income Tax Code (ITC), see 5.4.1.).

3.1.1.1.2. Registration tax

Unless the contribution represents (part of) a qualifying substantial shareholding (see below), a one-time registration tax of 0.5% of the value of the contributed shares is due if the consideration for the contribution is represented by shares of the holding company.

Art. 117(3) of the Reg. TC as introduced by Art. 65 of the Law of 22 December 1998 provides, however, for a full exemption of this capital tax under the following conditions:

- the holding company and the company whose shares are being contributed both have their registered office or their place of management and control within the European Union;
- the contribution is made in consideration for the issuance of new shares by the holding company and the cash settlement, if any, does not exceed 10% of the nominal value of the shares; and
- the holding company acquires at least 75% of the share capital of the company whose shares are being contributed and this is explicitly mentioned in the deed of contribution, as well as in a special report of the auditor.

This exemption is granted if all of the above conditions are met. The exemption is not subject to a condition that the holding company must hold the contributed shares for a minimum period of time after the contribution.

The capital tax will be reduced to 0% as from 1 January 2006.

3.1.1.2. Contributions to a foreign holding company

3.1.1.2.1. Taxation of capital gains
Capital gains realized by a corporate entity follow the same rules as under 3.1.1.1.

Capital gains realized by an individual upon the contribution of domestic shares to a foreign holding company are, as a rule, exempt from personal income tax, provided:
- the individual concerned does not own at the time of the contribution or during the 5 preceding years directly, indirectly or constructively more than 25% of the share capital of the company whose shares are being contributed; and
- the individual is not acting with "speculative intent" (see 5.4.1.).

Based on the general anti-abuse provision of Art. 344(2) of the ITC (see 7.1.1. through 7.1.3.), certain transfers of shares by corporate entities or by individuals to foreign holding companies that are not subject to CIT or which are, with respect to the income derived from the transferred shares subject to a tax regime which is (deemed to be) substantially more advantageous than the Belgian tax regime, can be disregarded by the Belgian revenue authorities.

3.1.1.2.2. Registration tax
Registration tax is not applicable.

3.1.2. Contribution of foreign shares by a resident (individual or company)
3.1.2.1. Contributions to a domestic holding company
3.1.2.1.1. Taxation of capital gains
This follows the same rules as under 3.1.1.1.

3.1.2.1.2. Registration tax
This follows the same rules as under 3.1.1.1.

3.1.2.2. Contributions to a foreign holding company
This follows the same rules as under 3.1.1.2., except that the rule on substantial participations held by individuals does not apply with respect to shares held in a foreign company.

3.1.3. Contribution of domestic shares by a non-resident (individual or company)
3.1.3.1. Contributions to a domestic holding company
3.1.3.1.1. Taxation of capital gains
Capital gains realized or recognized upon the contribution of domestic shares by non-resident corporate or individual shareholders are, as a rule, not taxable, unless the shares are attributable to a permanent establishment of the non-resident transferor in Belgium and the "subject-to-tax" test (see 4.1.3.) is not met. As stated earlier, the "subject-to-tax" test will generally be deemed to be met with respect to domestic shares.

3.1.3.1.2. Registration tax
This follows the same rules as under 3.1.1.1.

3.1.3.2. Contributions to a foreign holding company
This follows the same rules as under 3.1.1.2.
If the shares are either held by an individual and constitute (part of) a substantial participation within the definition given in 3.1.1.2., or the individual acts with speculative intent, the capital gains realized or recognized upon the contribution are taxable at the flat rate of 33% (substantial participation) or 16.5% (speculative intent). Note that in these cases, the Belgian capital gains tax will not effectively apply if the individual resides in a tax treaty country and the treaty concerned contains a clause corresponding to Art. 13 of the OECD Model Convention whereby the right to tax these gains is attributed to the country of residence of the person realizing the capital gain.

3.2. Creation by sale of shares to a holding company
3.2.1. Sale of domestic shares by a resident (individual or company)
3.2.1.1. Sale to a domestic holding company
3.2.1.1.1. Taxation of capital gains
This follows the same rules as under 3.1.1.1.
3.2.1.1.2. Registration tax
No registration tax is due upon the sale of shares to a domestic holding company.

For registration tax purposes, the concept of "informal capital", as developed for example in the Netherlands, has not (yet) been developed in Belgium. Therefore, the sale of shares in consideration for a fully subordinated perpetual and interest-free loan or indebtedness of the holding company should not give rise to capital tax, save for the possible application of the "sham doctrine" or a requalification of the transaction under Art. 18 of the Registration Tax Code (Reg. TC).

3.2.1.2. Sale to a foreign holding company
This follows the same rules as under 3.1.1.2.

3.2.2. Sale of foreign shares by a resident (individual or company)
3.2.2.1. Sale to a domestic holding company
3.2.2.1.1. Taxation of capital gains
This follows the same rules as under 3.1.2.1.
3.2.2.1.2. Registration tax
This is not applicable.

3.2.2.2. Sale to a foreign holding company
This follows the same rules as under 3.1.2.2.

3.2.3. Sale of domestic shares by a non-resident (individual or company)
3.2.3.1. Sale to a domestic holding company
3.2.3.1.1. Taxation of capital gains
This follows the same rules as under 3.1.3.1.
3.2.3.1.2. Registration tax
This is not applicable.

3.2.3.2. Sale to a foreign holding company
This follows the same rules as under 3.1.3.2.

3.3. Creation by contribution of assets (other than shares)

3.3.1. General

As a general rule, capital gains realized or recognized upon the contribution or sale of assets other than shares by a Belgian-based transferor (resident or non-resident company) will be taxable to the transferor at the full corporate income tax rate of 40.17%. With respect to tangible or intangible assets which have been held for professional purposes by the transferor during at least 5 years prior to the sale, a rollover relief is available if the full sales price is reinvested in qualifying assets within 3 or 5 years (depending on the nature of the reinvestment) from the first day of the taxable period during which the sale was made.

Subject to the conditions outlined under 3.3.2.1., assets and liabilities can be contributed on a tax-free basis by a Belgian-based transferor (whether a Belgian company or a non-resident company with a permanent establishment in Belgium) to a Belgian holding company. The potential tax liability on the capital gains relating to these assets is rolled over to the receiving company, as explained below.

The contribution of certain intangible assets may give rise to the recognition of so-called informal capital contributions at the level of the holding company. Generally speaking, informal capital is the general term for a contribution made by a shareholder to a company whereby the contribution is made in excess of the amount of capital contribution to which the shareholder has legally committed himself and which is not remunerated by the issuance of shares. For accounting and company law purposes, the contribution cannot be considered as a real (formal) capital contribution. For tax purposes, and subject to obtaining an ad-hoc ruling, the contribution can be treated as a contribution to share capital and the corresponding assets (almost invariably intangibles, such as goodwill, technical know-how, client base, brand name, etc.) can be depreciated over a 5- to 10-year period, resulting in a substantial decrease of the taxable income of the company to which the informal capital contribution is made.

The statutory basis for the informal capital rulings seems to be vested in Art. 24 ITC that deals, inter alia, with under valuation of assets, as well as on the generalized ruling practice as introduced by the Law of 24 December 2002. The Belgian Ministry of Finance is currently drafting a circular letter to introduce the notion of informal capital in Belgian tax law and to clarify some of the issues that are still left unanswered, as well as to confirm the practice that has developed over the last couple of years.

The informal capital ruling practice is tailored to attract both so-called skill-centres, i.e. centres rendering certain activities such as research, publicity, general purchase activities for the group or more general activities traditionally rendered by headquarters and companies carrying out commercial or industrial activities. Therefore, in general, a pure holding company will not qualify for informal capital treatment. So-called mixed holding companies that also render certain research, publicity and purchasing activities may qualify for informal capital treatment depending on the merits of each case.