



**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON FISCAL AFFAIRS**

Working Party No. 8 on Tax Avoidance and Evasion

**UPDATE ON THE TAX TREATMENT OF BRIBES TO FOREIGN PUBLIC
OFFICIALS**

(Note by the Secretariat)

The present note is submitted FOR INFORMATION under Item XII of the agenda to Working Party No8 at its meeting of 11-12 October 2000.

For further information please contact: Ms. Martine Milliet-Einbinder; Tel: 33 1 4524 7842 ;
Fax: 33 1 4430 6351 ; Email: martine.milliet-einbinder@oecd.org

95584

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

**TAX TREATMENT OF BRIBES TO FOREIGN PUBLIC OFFICIALS
(UPDATE 20 SEPTEMBER 2000¹)**

Argentina: not available

Australia: Earlier this year, 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 will 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 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: A bill 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

1. Recent developments are in bold

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. For the period 1988-1992, 109 applications for authorisation were made to the Belgian Ministry of Finance.

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.

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 does not have statutory rules concerning bribes paid to foreign officials. Corresponding payments to domestic public officials are non-deductible on the basis of case law and practice of the tax authorities. The same rule is 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: It is the view of the Revenue Commissioners, on the basis of legal advice received, that bribes paid to foreign public officials are not deductible in principle. It is also doubtful that the conditions for deductibility could ever be met in practice in Ireland. Accordingly, it has not been considered necessary to introduce specific legislation to deny a deduction.

Italy does not allow deductions for bribes paid to foreign officials. Legislation enacted in 1994 made moreover gains from illicit sources taxable. The non-deductibility of bribes remained unaffected.

Japan does not allow deductions for bribes paid to foreign officials. Bribes are treated as an "entertainment expense" under Japanese law, which expenses are not deductible. 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: The Minister of Justice and Budget has prepared draft legislation that would criminalise bribes to foreign public officials as well as deny their tax deductibility. Presently Luxembourg allows deductions for bribes paid to foreign public officials as any business expense. The tax administration is starting to pay greater attention to the control of such payments to discourage them. To be deductible the recipient must be clearly identified. Payments to companies domiciled in tax havens and to persons, which are not clearly identified, are not deductible. The general issue of bribery is under review in a broader context than taxation. According to information provided in **September 2000**, the bill has not been passed yet.

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: A new law entered into force as of 1st January 1997 which denies the deductibility of expenses in connection with illicit activities if a criminal court has ruled that a criminal offence has been committed. The bribery of a national public official constitutes a criminal offence. There is however no jurisprudence with regard to the question whether the bribery of a foreign public official constitutes a criminal offence according to Dutch criminal law. It is a well-established opinion that bribery of a foreign public official committed outside the territorial jurisdiction of the Netherlands constitutes - if certain

conditions are met - the criminal offence of falsification of documents or fraud or imposture. Until the entry into force of the criminal law incorporating the provisions of the Convention on Bribery into Dutch law, bribes to foreign government officials will remain deductible unless these conditions are met.

New Zealand: will introduce legislation to disallow tax deductions for bribes paid to foreign public officials in business transactions after enactment of new criminal offences outlawing such bribes. A Bill incorporating the proposed criminal offences was introduced into the New Zealand Parliament on 7 September 1999. The Bill was referred to a Parliamentary Select Committee which called for public submissions by 3 March 2000. **The bill to amend the Crimes Act is not progressing fast, although enactment is still expected later this year. It seems likely, however, that it will not be passed in time to include the tax amendment in the October bill. Most likely, therefore, would appear to be inclusion in a bill to be introduced around March 2001.**

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 deductions for bribes paid to foreign officials were allowed if they were documented and the bribe was shown to have contributed directly to the realisation of income (a standard not frequently met). If the bribe was entered as an undocumented expense, it was not deductible and taxed at a rate of 25 percent.

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.

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 draft bill on denial of deductibility of secret commissions to Swiss or foreign public officials was submitted in spring 1998 to cantons and other interested parties for consultation (matters of direct taxation are mostly within the competence of the Cantons). The bill was then submitted to

Parliament and was adopted by the Federal Chambers on 22 December 1999. **The bill will enter into force and become effective as of January 1 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 does not allow deductions for any bribe paid to foreign officials, if that bribe is a criminal offence, contrary to the Prevention of Corruption Acts. If any part of the offence is committed in the United Kingdom, for example the offer, agreement to pay, the soliciting, the acceptance, or the payment itself, it would be caught by the corruption laws and would then not qualify for tax relief. The UK Finance Act of 1993 disallows tax deductions for all payments -- the making of which constitutes a criminal offence. In addition, UK tax laws also deny relief for all gifts and hospitality given, whether or not corrupt.

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 feign 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.