IBM Japan is accused of trading its shares with IBM AP Holdings (which wholly owns IBM Japan), causing large losses to the latter. IBM Japan then offset those losses with its own profits, thereby underreporting its income, according to a March 18 report on the Mainichi Daily News Web site. Japanese tax authorities have reportedly decided that in this instance such actions constitute tax avoidance. (For prior coverage of the tax consolidation scheme, see *Tax Notes Int'l*, Nov. 9, 2009, p. 410, *Doc 2009-24260*, or *2009 WTD 212-2*.)

The consolidation scheme was reportedly implemented by Japan's National Tax Agency in April 2002 in an attempt to boost the international competitiveness of Japanese corporations.

IBM AP Holdings is wholly owned by the IBM Corp.

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# Libya

## Government to Establish New Tax-Free Zone

Libya's parliament, the General People's Congress, on February 1 passed a law establishing a new tax-free zone to be situated along 100 kilometers of the Libyan coast from its border with Tunisia, according to media reports.

Saadi Qadhafi, son of Libyan leader Muammar Qadhafi and likely director of the zone's board of directors, announced the planned tax-free zone on January 31 in anticipation of the parliament's decision. The younger Qadhafi said the zone will allow free movement of capital goods and will have its own courts and stock exchange, according to a January 31 Reuters report.

Firms operating in the zone will be exempt from all taxation for their first 10 years of operation. Libya assesses corporate tax in two stages — when a company submits its records, and after it has been evaluated by the tax authorities (sometimes as much as two years later). There is no VAT, but there is a 4 percent jihad tax that funds national defense.

Tripoli reportedly sees the new tax-free zone as a way to help move the country out of its recent diplomatic and economic isolation by enticing more international firms to set up shop in Libya, and as a vehicle for the transfer and dissemination of technology. A key goal is to reduce Libya's dependency on oil and natural gas for government revenue.

"Although Libya has other resources, we still depend primarily on oil. We have to take care of industry, foreign investment, tourism and we also have to search for other sources . . . anything that makes Libya depend on sources other than oil," Saadi Qadhafi said in the Reuters report.

The tax-free zone previously was approved by the Basic People's Congress of each affected municipality, as well as by the elder Qadhafi and his other son, Saif al-Islam, the country's second-most powerful figure. With political power residing in the municipal congresses, anything enacted by those bodies is automatically passed by the General People's Congress.

The new tax-free zone reportedly will be in place for 50 years, and may then be extended.

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# Portugal

## Austerity Package Includes New Individual, Capital Gains Tax Rates

The Portuguese government on March 15 presented its stability and growth program for 2010 to 2013, which proposes the elimination of several tax incentives for individuals, a new 45 percent tax rate for high-income individuals, and a new 20 percent capital gains tax rate.

The plan has received praise from the presidents of the Eurogroup and the European Commission. However, it may be a harder sell domestically.

Besides eliminating several tax incentives for individuals, the plan proposes two particularly controversial measures: a 45 percent tax rate for taxpayers with personal incomes above €150,000, and a 20 percent tax rate for capital gains earned by individuals with the onerous transfer of shares, which are currently either not subject to tax (whenever the shares are held longer than 12 months) or are subject to a 10 percent tax rate.

### New Personal Income Tax Rate

The first measure would introduce a new tax rate of 45 percent for taxpayers with annual personal incomes above €150,000. The current maximum tax rate is 42 percent for taxable incomes above €64,110. The measure would apply to less than 1 percent of taxpayers, according to several press releases.

It also would apparently not affect the nonhabitual resident personal income tax regime, which was introduced by the Investment Tax Code in September 2009

as a way to attract qualified expatriates and other high-net-worth individual investors by providing a favorable tax regime for those who take up Portuguese tax residency. Individuals who qualify for the regime (that is, who qualify as Portuguese tax resident and have not been taxed as a resident in Portugal in the five years preceding that qualification) could continue to benefit from a flat tax rate of 20 percent on Portuguese-source employment and business income arising from high-added-value activities and from the application of the exemption method (with progression) on foreign-source income, namely passive income, capital gains, income from property, and business profits and pensions.

### New CGT Rate

The second measure would repeal the Personal Income Tax Code rule that now exempts from tax capital gains derived from the alienation of shares, held for more than 12 months, of bonds and of other debt securities. It would also introduce a new, uniform tax rate of 20 percent applicable to such gains that are now subject to a 10 percent tax rate.

It is assumed the measure will not affect the tax incentive in the tax benefits statute that exempts from personal and corporate tax capital gains earned by nonresident individuals or entities from the alienation of shares, other securities, or autonomous warrants issued by entities resident in Portuguese territory and traded on regulated stock markets.

When the capital gains are earned by taxpayers resident in states that Portugal has a tax treaty with, their taxation is subject to the terms of the applicable treaty. The treaties usually allow the gains to be taxed only by the state where the individual is a resident.

### Entry Into Force

The plan doesn't say when the proposed measures would enter into force (though Minister for Finance Fernando Teixeira dos Santos has said the capital gains measure would be postponed until the markets are more stable). However, since the Portuguese Constitution forbids taxation with retroactive effect, any rule that provides for the measures' application to ongoing or closed transactions would be challenged.

♦ *Francisco de Sousa da Câmara and Andreia Gabriel Pereira, Morais Leitão, Galvão Teles, Soares da Silva & Associados, Lisbon*

# Russia

## New Model Tax Treaty Tightens Antiabuse Safeguards

The Russian government has adopted a new model tax treaty that is significantly more comprehensive than its predecessor. The drafters seem to have set out to incorporate internationally known antiabuse concepts found in the latest OECD, U.S., and U.N. models and in some existing bilateral tax treaties.

The overall impact will likely be a significant extension of the taxing rights of the source states in treaties Russia concludes or renegotiates in the future. This is a reflection of the fiscal authorities' desire to increase tax collections on repatriated income from inbound investments.

Decree No. 84 approving a draft model income tax treaty was adopted February 24. The new model supersedes the model adopted by Government Decree No. 352 of May 28, 1992. (For prior coverage, see *Doc 2010-4739* or *2010 WTD 43-4*.)

Decree No. 84 will be used as the basis for negotiating and concluding new income tax treaties with Russia and, strictly speaking, concerns only future tax treaties. However, through the execution of treaty protocols, existing treaties might be amended along the lines of the new model treaty when it is used as a basis for renegotiation (as has recently occurred with Russia's tax treaties with Cyprus, Germany, and the Czech Republic).

Broadly, the new model treaty follows the same pattern as its predecessor. Most of the changes reflected in the model treaty are to existing articles, although some new articles have been introduced.

Russia is party to 74 tax treaties, most of which are based either on the OECD or the U.N. model treaties. The standard articles of the new model treaty can be found in the majority of the existing treaties in one form or another. A notable exception is a completely new article concerning rules limiting the availability of treaty benefits by narrowing the scope of entities subject to treaty protection, known as limitation on benefits provisions.

### Changes to Preexisting Articles

#### Permanent Establishment (Article 5)

Decree No. 84 provides clarification regarding the identification of a permanent establishment providing cross-border services. In particular, the article provides that an enterprise of one state will be deemed to have a PE in the other state if:

- that enterprise performs services in the other state through an individual who is present in that other