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United Kingdom

cree 1200 of August 29, 1986 (see the Winter 1987 issue of *The International Lawyer*). The primary significance of the ratification of Decision No. 220 by Venezuela, therefore, is: (1) to obviate any problems arising from discrepancies between Decree 1200 and conflicting provisions of the more restrictive Decision No. 24; and (2) to provide a legal framework for even further liberalization of Venezuela's foreign investment regulations in the future.

United Kingdom*

I. Company

A. Financial Services

The Financial Services Act 1986 is now almost all in force, with the important exceptions of section 62 ("Actions for Damages") and part V ("Offers of Unlisted Securities"). Part V and regulations thereunder, which are not now expected to be in force before early 1989, will provide a new regime regulating the offering of securities other than those on The Stock Exchange full list, replacing the prospectus requirements of the Companies Act 1985, and parallel to that for fully listed securities in part IV of the Act. Section 62, which provides that a contravention of any rules or regulations made under the Act, or of the rules of any self-regulating organization, shall be actionable at the suit of anyone suffering loss as a result, will be fully in force on October 3, 1988. This sanction is regarded by some investment businesses as the Act's most important.

B. Proposed New Companies Bill

A new Companies Bill, due to be enacted in about April 1989, is proposed. The new Bill is likely to deal with the following matters: (1) Implementation of the Seventh and Eighth EC Directives on consolidated accounts (including merger accounting and off-balance sheet financing, with a new broadened definition of "subsidiary" and on the regulation of auditors. (2) Abolition, long overdue, of the ultra vires rule. (3) Simpli-

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fication of procedures for submission of annual accounts for the Register of Companies. (4) Revised procedures for the registration of charges. (5) A new regime for small companies, enabling them to opt out of certain internal formalities such as the holding of annual general meetings. (6) Provision for the electronic handling of share certificates via the Stock Exchange. (7) Provision of an option for shareholders to receive only abbreviated accounts, such as are presently issued by Building Societies, instead of the full version—often of little meaning for the nonprofessional investor.

C. Financial Assistance

In the important case of *Brady v. Brady,* [1988] 2 W.L.R. 1308, the House of Lords sought to clarify the difficult "purpose" exception in the Companies Act 1985 to the prohibition on a company providing financial assistance for purchase of its own shares. The prohibition does not apply if "the Company's principal purpose in giving the assistance" is not to give it for the purpose of such acquisition, or to discharge or reduce any liability incurred for such purpose, but is an incidental part of "some larger purpose" of the company, and if "the assistance is given in good faith in the interests of the Company." The House of Lords has restricted the interpretation of "larger purpose," in particular by distinguishing the *purpose* of a transaction from the *reason* for it.

II. Property

A. Unitization

The three main unitization "vehicles" have all suffered setbacks since the last regional update in Fall 1988.

The Barkshire Committee had decided to suspend the promotion of SPOTs (Single Property Ownership Trusts), following the Treasury's refusal to introduce regulations exempting the vehicle from capital gains tax. Without this "tax transparency," SPOTs lose a large part of their attraction for investors.

The second of the vehicles, SAPCOs (Single Asset Property Company), looked to be heading for a good start when the first SAPCO reached the market for trading this summer. Unfortunately this experiment of floating a single asset property vehicle on the London Stock Market was ended when there was an agreed acquisition of this, the only existing SAPCO, in August this year.

The last remaining unitization vehicle, PINCs (Property Income Certificates), now looks to be the most likely vehicle to succeed. The PINCs Association has won a major concession from the Department of Trade and Industry, allowing it to gear up to 75 percent of the capital value of a property. PINCs are still awaiting the final version of the Department of Trade and Industry's regulations and Securities and Investment Board Regulations before heading for the market. It is hoped that these will be forthcoming before the end of the year.

B. Rates

New legislation has been passed to reform the law relating to the finance of local government. Under current law, an occupier of premises must pay rates that are levied according to the rateable value of the premises in question. The rateable value is based on annual rental value, and the local authority sets its poundage rate. The present system meant higher rates were carried by higher spending local authorities, which could be unfair on businesses that had no representation on the Councils.

For business premises, the Government will now set the nondomestic rate for the 1990–91 year. A revaluation of nondomestic property will take place to assess the individual net annual values for 1990. Subsequent changes in the rate will be related to movements in the retail price index after 1990 until 1995 when there will be another revaluation and the rate will be adjusted accordingly. The total yield will be paid into a central fund and then redistributed to the local authorities.

Domestic rates are to be abolished and will be replaced by the Community Charge, which will be set by the local authority.

C. Environmental Assessment

The European Community Directive on Environmental Assessment has now been implemented in the United Kingdom in respect of major projects. Regulations have been made providing that environmental assessment should take place before major projects are approved. Certain major projects will automatically require environmental assessment. These include crude-oil refineries, power stations, chemical plants, motorways, long railway lines, large aerodromes, ports, and projects for the disposal of special waste. Other major projects will require environmental assessment where they would be likely to have significant effects on the environment by virtue of factors such as their nature, size, or location.

An application for planning permission for such a project should be accompanied by an environmental statement. An environmental statement will comprise a document or a series of documents assessing the likely impact upon the environment of the development proposed to be carried out. The environmental statement will describe the proposed development, likely significant effects on the environment, and a description of the measures envisaged to avoid, reduce, or remedy those effects. There should also be a summary in nontechnical language of the information in the environmental statement.

In considering a planning application accompanied by an environmental statement, the local planning authority is required to have regard to all of the environmental information, including that contained in the environmental statement, any comments by those consulted about the development, and comments from members of the public. The local planning authority has sixteen weeks to give its decision.

III. Taxation

Two significant U.K. tax developments affecting companies' international operations have recently emerged. The legislation governing the new company residence and migration rules has been enacted in the Finance Act 1988 and has come into force. These reflect some changes and exceptions from the original rules announced at the time of the 1988 Budget.

There has been a long awaited judgment on the case of *Union Texas International Corporation v. Derek John Critchley (H.M. Inspector of Taxes)*. This case was heard in 1986, but judgment was not given until August 1988. Its eventual outcome will have a significant bearing on international companies.

A. Company Residence and Migration

1. *Significance of Company Residence*

(a) A company that is U.K. resident is subject to U.K. tax on its worldwide income, whether it is remitted to the United Kingdom or not. A company that is not a U.K. resident is only subject to U.K. tax on income sourced in the United Kingdom (e.g. income from a U.K. trade or U.K. assets). Therefore, the residence of a company is one of the most important factors in determining its U.K. taxation position.

(b) Under the previous rules a company was resident for the purpose of U.K. taxation where its higher level management and control was situated, usually where its board met to make management decisions. Section 482 of the Taxes Act 1970 made it unlawful, unless Treasury consent was obtained, for a U.K. resident company to cease to be U.K. resident (subject to certain exceptions and general consents). In the context of the EEC legislation it has been argued that the provisions of section 482 were inconsistent with the requirement in the EEC Treaty that free movements of capital should be permitted.

(c) New rules enacted by the 1988 Finance Act change the test of company residence from the previous higher level control and management test to a test based upon place of incorporation but in which higher level control and management still plays a part. The new rules also change the prohibitions contained in section 482 and introduce a new charge to capital gains tax on migration.

2. *Company Residence—New Rules*

The position under the new rules will be:

(a) Companies incorporated in the United Kingdom on or after March 15, 1988, are U.K. resident on the basis of their U.K. incorporation irrespective of where central control and management is exercised.

(b) Companies incorporated in the United Kingdom before March 15, 1988, which were U.K. resident on the central management and control test immediately before that date are U.K. resident from then onwards on the basis of their U.K. incorporation; the place where central management and control is in future exercised by the directors of such companies will be irrelevant in determining U.K. tax residence for U.K. domestic tax purposes. A company that had applied to H.M. Treasury before March 15, 1988, for permission to migrate will be treated differently [see (e) below].

(c) Companies incorporated in the United Kingdom before March 15, 1988, which were not U.K. resident on the central management and control test immediately before that date, and which have not carried on business at any time before that date are resident in the United Kingdom from March 15, 1988, on the basis of their U.K. incorporation. The meaning of "carried on business"; is not entirely clear. An investment holding company might not be regarded as carrying on business. Clearly a "shelf" company could not be regarded as having carried on business.

(d) Companies incorporated in the United Kingdom before March 15, 1988, which were not resident in the United Kingdom on the basis of the central management and control test immediately before that date and which have carried on business before that date will become U.K. resident by virtue of their U.K. incorporation on March 15, 1993, provided that the central control and management of any such company is not transferred to the United Kingdom on an earlier date. If central management and control of such a company is transferred to the United Kingdom on a date earlier than March 15, 1993, then the company will become U.K. resident on the basis of its U.K. incorporation on such earlier date.

Companies that ceased to be U.K. resident in pursuance of a treasury consent before or after March 15, 1988, however, and that continue to be controlled and managed outside the United Kingdom, will remain non-U.K. resident despite the new provisions.

(e) Non-U.K. incorporated companies will continue to be U.K. resident if centrally managed and controlled in the United Kingdom irrespective of whether they were incorporated before or after March 15, 1988.

3. *Capital Gains Tax on Migration*

A new charge applies where a company ceases to be resident in the United Kingdom. Such a company is deemed to have disposed at market value of all its assets (other than any assets that remain within the charge to capital gains tax because they are connected with a U.K. branch of that company). If the company is a 75 percent subsidiary of a U.K. resident company, an election can be made for postponement of the charge to tax on foreign assets. There is no exception from the new capital gains tax charge for a company that could previously have emigrated without needing special Treasury consent in reliance upon the first general consent (granted to companies incorporated after August 1981 for the purpose of carrying on a new trade or business, with more than 50 percent share capital owned by non-U.K. resident shareholders).

An anti-avoidance provision will prevent companies from taking advantage of double taxation conventions to remove liability to capital gains tax under these new provisions.

4. *Double Taxation Conventions*

(a) To determine the position of a company under the terms of any double taxation convention, it will be necessary to consider the specific provisions within that convention dealing with the question of company residence. For example, the Double Taxation Convention between the United Kingdom and the United States of December 31, 1975, defines the term "resident of the United Kingdom" as it applies to a corporation as "a corporation whose business is managed and controlled in the United Kingdom." A company that is incorporated in the United Kingdom (and so resident in the United Kingdom under the new domestic law rules) could not take advantage of the United Kingdom-United States Double Taxation Convention if its place of management and control was not in the United Kingdom.

(b) Many double taxation conventions contain "tie-breaker" provisions to determine in which of the contracting states a company should be regarded as resident. These provisions only operate for the purposes of the double taxation conventions. Nevertheless, they may offer U.K. resident companies (whether resident by reason of place of incorporation or management and control) which have a substantial presence in another treaty jurisdiction, a measure of relief from the rules of U.K. domestic tax law (although not in respect of the capital gains tax charge on migration, as mentioned above).

B. *UNION TEXAS INTERNATIONAL CORP. v. DEREK JOHN CRITCHLEY (H.M. INSPECTOR OF TAXES)*

Mr. Justice Harman gave judgment on this appeal from the special commissioners on August 31, 1988, some two years after the date of the hearing. The appellant, a U.S. corporation, claimed that it was entitled to the repayment from the Inland Revenue of some £23 million that was withheld from dividend payments from its U.K. wholly owned subsidiary during 1981 and 1984. The appellant's case rested on the interpretation of article 10(2)(a)(i) of the United Kingdom-United States Double Taxation Convention.[1]

Article 10(2)(a) provides for the payment of a tax credit from the United Kingdom equal to one half of the tax credit to which a U.K. resident would have been entitled; and a deduction according to the laws of England of an amount not exceeding 5 percent of the aggregate dividend and tax credit. The appellant's first point was that the payment to which it was entitled was not a tax credit within section 86 FA 1972 and that no deductions at all should have been made from the payment because no provision in U.K. law authorized such a deduction. The appellant's second point was that even if the Inland Revenue were entitled to make a deduction, the Inland Revenue had miscalculated it because it should be 5 percent of the aggregate of the dividend and tax credit actually *paid*. The appellant claimed that some £1 million had been overdeducted. The judge agreed with the Inland Revenue that one should read the convention with a reasonable desire to understand its purpose, which was to fit the system of double tax relief into the system of tax credits on dividends. He suggested that his attitude to construing the convention might have been different had the appellant been a British taxpayer.

The decision in favour of Union Texas on the second point is important as it could lead to similar claims of many millions of pounds. Either party may still appeal, however. There is also a danger of retrospective legislation if the Inland Revenue loses on either or both points, but it is difficult to predict exactly how this would be done as it would probably require the alteration of the wording of the convention.

1. Clifford Chance, Solicitors, acted for the appellant.