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In this issue:

Australia: Update on environmentally based tax reforms 1
France: Changes to participation exemption 3
Greece: Impending deadline for shipping companies to request exemption from offshore tax 4
Honduras: Minimum tax introduced 5
Indonesia: Tax audit procedures changed 5
Luxembourg: Mutual agreement signed on tax treatment of German commuters 6
In brief 7
Tax treaty round up 7
Are You Getting Your Global Tax Alerts? 9

Australia:
Update on environmentally based tax reforms

The Australian government recently announced three tax-based initiatives that will address environmental concerns: the carbon price mechanism, tax breaks for "green" buildings and the Carbon Farming Initiative.

Carbon price mechanism

The Multiple-Party Climate Change Committee (MPCCC) was established in 2010 to explore options for the implementation of a carbon price and to develop an approach on how the country should respond to the challenges of climate change. The MPCCC considers a carbon pricing mechanism to be the most cost effective and economically responsible way to reduce Australia's carbon pollution.

On 24 February 2011, the MPCCC announced the broad architecture of a proposed carbon price mechanism:

- A fixed price period (lasting between three and five years) with the price increasing annually at a predetermined rate, followed by
- Conversion to a flexible price cap-and-trade emissions trading scheme.

The announcement indicated that the transition from a fixed price period to a flexible cap-and-trade emissions trading scheme may be deferred within 12 months of the end of the fixed price phase and may be influenced by certain factors, including:

- The international carbon market, with consideration given to the availability, integrity and price of international units;
- The pricing of carbon in key competitor economies;
- Whether Australia is meeting its internationally agreed targets; and

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- The results of purchasing internationally accepted emissions units as part of a cost under the budget and the impact on fiscal policy.

A commencement date as early as 1 July 2012 is indicated, subject to the legislation passing in both houses of Parliament this year.

The carbon price mechanism could cover a broad range of emissions, including emissions in the stationary energy sector, the transport sector and the industrial processes sector. It may also cover fugitive emissions (other than from decommissioned coal mines) and emissions from non-legacy waste. Agricultural emissions covered by the Carbon Farming Initiative would be excluded.

The proposed mechanism would not permit liable parties to use international emissions units for compliance during the fixed period. The use of international emissions units is being considered in respect of the flexible price period.

Although the announcement has provided some high level guidance regarding the proposed mechanism, specific details on how the mechanism would operate are yet to be determined. Key issues include:

- The starting price for the mechanism;
- Nature and scope of associated assistance arrangements for households, communities and industry;
- Nature and scope of support for low emissions technology and innovation;
- How to maintain and enhance the carrying capacity of the landscape;
- Provision of economic value to activities that store or reduce carbon in the land sector; and
- How to maintain the competitiveness of Australian industries at domestic and international levels.

Tax breaks for green buildings

The federal government announced on 21 April 2011 that a one-time bonus tax deduction will be provided to certain businesses as from 1 July 2012. To obtain the tax deduction of 50%, businesses will need to invest in eligible assets or capital works that improve the energy efficiency of existing buildings from "two stars" or lower to "four stars" or higher. The bonus tax deduction will be available for:

- Retrofits of existing commercial buildings, as well as office buildings, hotels and shopping centers that currently are covered by the National Australian Built Environment Rating System (NABERS) scheme. The retrofit will have to be assessed by an accredited NABERS assessor before and after the project; and
- Eligible capital expenditure incurred as part of a qualifying retrofit of an existing commercial building.

The retrofit projects must be undertaken between 1 July 2012 and 30 June 2015. New buildings do not appear to be covered by the incentive. The nature and scope of eligible capital expenditure is being determined through discussions with environmental, industry and government stakeholders.

Carbon Credits (Carbon Farming Initiative) Bill 2011

The federal government has announced the Carbon Farming Initiative that will legislate clear rules for the recognition of carbon credits for the agricultural and forestry sector, which currently accounts for approximately 23% of Australia's carbon pollution. Under the scheme, the government would help facilitate the sale by landholders of carbon credits both domestically and internationally on the world carbon credit market. Projects eligible for the scheme include:

- Reforestation, legacy waste emissions from landfill sites, manure management in intensive livestock production and savannah fire management (that could be developed, assessed and approved by December 2011);
- Forestry projects where rigorous methodology is already established (which may be able to backdate crediting to 1 July 2010); and
- Fertilizer use and reduced forest degradation (which could be developed, assessed and approved by December 2012).

While the scheme is still in the final stages of being passed, it is expected to commence as from 1 July 2011.

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France:
Changes to participation exemption

France's Budget Act for 2011 introduced several changes to the participation exemption, which were passed into Law on 30 December 2010. While the revised rules are designed to prevent abuse of the participation exemption and generally restrict the benefits available for dividends, they have expanded the scope of the participation exemption benefit for capital gains and potentially facilitate certain post-acquisition restructurings.

Dividends

The participation exemption for dividends was reduced from potentially a full exemption (in the absence of charges and expenses of the parent company) to a fixed percentage of 95% as from 1 January 2010 (for companies with a 30 December fiscal year-end).

Before 30 December 2010, dividends received by a French parent company that held at least 5% of the share capital and voting rights of a qualifying subsidiary were fully exempt from corporate income tax. However, a portion of the dividends deemed to cover expenses – equal to 5% of the gross amount, but capped at the amount of actual costs incurred by the parent company – were added back to the taxable results of the parent company for the relevant year, giving rise to an effective corporate income tax rate of 1.72%. Thus, in practice, 5% of the dividends could be taxed and as much as 100% could be exempt if the parent company did not incur any expenses and charges during the year. To optimize the exemption, the recipient of dividends was often a parent company with no or minimal expenses and charges.

According to the change introduced by the Budget Law, for dividends received by French parent companies with a fiscal year closed on or after 31 December 2010, a dividend inclusion is no longer capped by reference to actual costs; instead, expenses are deemed to be equal to 5% of the dividends. However, a full exemption is still available within a French tax consolidated group (the 5% taxable dividends is eliminated under the group rules, except for dividends paid by a subsidiary during the first year it is in the group). The new rule will particularly affect French parent companies engaged merely in holding activities that could have expected a 100% tax exemption in the absence of tax-deductible expenses.

Capital gains

The Budget Law 2011 modifies the rules relating to the participation exemption for capital gains derived from an intragroup sale of a qualifying participation as from 1 January 2010 (for companies with a 30 December fiscal year-end).

Normally, qualification for the participation exemption on capital gains is subject to the shares being held for 24 months. If the shares are held for less than that period, the gains are fully taxable at the standard corporate income tax rate (with the exception of gains on the sale of shares between companies that file a consolidated income tax return), and if held for more than two years, the capital gains are 95% exempt.

However, for fiscal years closed on or after 31 December 2010, a French parent company can avoid taxation of gains on the disposal of shares even if the transfer takes place within the 24-month period if the shares are transferred to a related party. In such cases, the French parent company can elect to defer the recognition of the gain until the shares are sold outside the group. If the shares have not been transferred to an unrelated party at the end of the 24-month period, but are still owned by an affiliated entity (whether or not resident), the French parent can benefit from the participation exemption on the gains.

The downside of the new rules is that capital losses incurred on an intragroup sale of shares are no longer immediately deductible even if the sale takes place within 24 months of the acquisition of the shares; instead, such losses become deductible only if the shares are sold to an unrelated party within 24 months of the initial acquisition. The recognition of the loss is deferred for two years, and if the shares have not been sold to an unrelated party within that period, the capital loss

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cannot offset ordinary income. It may then only be used to offset long-term capital gains realized in the same year (i.e. gains from the disposal of shares that have been held for 24 months or more).

The primary reason for the change is to prevent certain transactions designed to trigger a loss within the 24-month period that could be used to offset ordinary income. It was not uncommon for groups to "shuffle" their participations to enable the recognition of a loss before the 24-month holding period had elapsed and to use those losses to reduce taxable income. Under the amended rules, the recognition of capital losses on an intragroup sale of a qualifying participation is deferred and may be used only to offset ordinary income if a sale to an unrelated party actually takes place within 24 months of the initial acquisition.

These new rules create a mismatch between book income and taxable income. French companies should be aware of the potential consequences of the rules from the perspective of their employee profit sharing plans that are based on taxable income. For example, a French company may be in a loss position from a book perspective as a result of the sale of the shares to an affiliate and still be in a position to make profit sharing distributions to its employees because the loss was not tax deductible.

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Greece:
Impending deadline for shipping companies to request exemption from offshore tax

The Greek Ministry of Finance has announced the procedure and documentation that must be submitted by ship-owning companies and shipping companies with "Law 89" offices in Greece to be exempt from the annual Special Real Estate Tax ("offshore" tax) levied at a rate of 15% on the tax value of real property owned or leased by certain companies.

According to the law introducing the offshore tax, an exemption is available to ship-owning companies and shipping companies with Law 89/67 offices in Greece with respect to self-used property and property leased to other shipping companies to be used exclusively as offices or warehouses for business purposes. The exemption applies retroactively as from 1 January 2010.

According to the circular, to qualify for the exemption, affected companies must submit an application (which represents the statutory declaration required by law) to the competent tax office, accompanied by supporting documentation, no later than 10 February of each year. For 2011, however, the application and supporting documentation must be submitted no later than 29 June 2011. For ship-owning and shipping companies that were leasing property to shipping companies on 1 January 2010 to qualify for the exemption, the application and relevant documentation also must be submitted by 29 June 2011. Any offshore tax paid for 2010 will be refunded, provided the taxpayer meets all the requirements for the exemption. (The deadlines were extended due to a delay in implementing the procedure, with the Minister of Finance issuing the procedure in late June 2011.)

To qualify for the exemption after 2011, an on-site inspection of the property by the competent Tax Office will be required, in addition to the application and documentation.

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Honduras:
Minimum tax introduced

The Honduras government has issued a decree (Executive Decree No. 42-2011, published in the Official Gazette on 13 June 2011, but with an official date of 31 May) introducing a mandatory minimum income tax for entities and individuals. The minimum tax will be levied in an amount equal to 1% of gross income.

A taxpayer will be subject to the minimum income tax if the combined total of the taxpayer's income tax and temporary social contribution tax due at year end is less than 1% of the taxpayer's fiscal year gross income (calculated as total fiscal year income minus allowed deductions such as discounts). The tax may even apply to taxpayers reporting tax losses at the end of the fiscal year. The minimum tax rate will be reduced from 1% to 0.5% of gross income for taxpayers whose operations are based on prices regulated or legally set by the Honduran government.

Notably, income tax in Honduras is levied at a rate of 25% on net profits and the rate of the temporary social contribution tax payable by taxpayers whose net income exceeds HNL 1 million is 10% for fiscal years 2010 and 2011, progressively phasing out by 2015.

The following taxpayers are exempt from the new minimum tax:

- An individual that only receives income from wages and salary;
- An entity or individual whose annual gross income is equal to or less than HNL 10 million;
- A company that is still within the first two years of its creation or is still in its pre-operation stage; and
- An entity or individual with tax losses arising from natural disasters, war or similar events, provided the loss has been certified by the Honduras tax authorities. This exemption is effective for the fiscal year in which the loss is incurred and the two following fiscal years.

The minimum tax applies to fiscal years that begin on or after the official date of the Executive Decree (i.e. 1 June 2011). While the statutory tax year in Honduras generally runs from 1 January through 31 December, taxpayers may elect to use a different tax year by giving notice of the election to their local tax authorities.

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Indonesia:
Tax audit procedures changed

Indonesia's Ministry of Finance issued a new regulation on 3 May 2011 that updates and amends the tax audit procedures to ensure more transparency and better protect taxpayer rights. The salient changes, which generally apply as from the date of issuance, are as follows:

- Tax audit period – If there is an indication of non-arm's length transfer pricing and/or manipulation of financial transactions that would require a longer period for the tax auditor to conduct a more thorough examination, the period for a field tax audit may be extended to up to 20 months. The tax auditor must explain (in writing) to the taxpayer the reason the audit period is being extended.
- Obligations of tax auditor – The tax auditor is required to incorporate the following additional procedures into an audit: (1) provide the taxpayer with a questionnaire so the taxpayer can evaluate the tax audit process; and (2) arrange a meeting with the taxpayer to explain the taxpayer's rights and obligations and the taxpayer's right to request a review by the quality assurance team if the auditor and the taxpayer have differing opinions during the closing conference on the results of the tax audit. The tax auditor also must document the results of the meeting.
- Quality assurance team – The team is responsible for reviewing any differences of opinion between the taxpayer and the tax auditor at the time of the closing conference, as well as providing conclusions and decisions on such differences of opinion, which will be used as the basis for the issuance of the tax audit result.

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- Taxpayer response to tax audit result – The deadline for a taxpayer to respond to the results of a tax audit have been extended by up to three additional business days. To obtain an extension, the taxpayer must notify the tax office (in writing) before the expiration of the normal seven business day deadline. The extension does not require the approval of the tax authorities.
- Closing conference – The tax office must send a written invitation to the taxpayer to attend the closing conference to discuss the results of the audit. The invitation must be sent within three business days from the date the taxpayer's response to the Tax audit result is received or within three business days after expiration of the deadline for the taxpayer to submit a response. (Previously, the taxpayer had the right to attend the conference during the period for submitting a response.) The closing conference must be settled by no later than three weeks from the date of the conference as stated in the invitation letter (previously one month).

The clarifications in the new regulation on the timing and deadlines relevant to the tax audit process should provide taxpayers with more certainly as to their rights and obligations and enable them to better manage the tax audit process.

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Luxembourg: Mutual agreement signed on tax treatment of German commuters

After several months of discussions between the German and Luxembourg tax authorities, on 26 May 2011, the Finance Ministers of the two countries finally reached an agreement about the tax treatment of wages of German commuters working in Luxembourg. The consensus was set up under the mutual agreement procedure in the 1958 Luxembourg-Germany tax treaty. The mutual agreement is effective as from 27 May 2011 and is applicable to all cases not finally assessed before that date.

Under the treaty, the salary of a German resident employed by a Luxembourg company is taxable in Luxembourg if the individual carries out the employment in Luxembourg. However, the salary is subject to tax in Germany to the extent the individual carries out any professional activities outside Luxembourg. Thus, salary earned on activities performed outside Luxembourg should be exempt from tax in Luxembourg.

The agreement permits a tax buffer of up to 19 working days per calendar year for cases where the employee works in the country of residence (Germany) or in a third country without being taxed in Germany, provided the salary income is subject to taxation in the country in which the activities are performed (Luxembourg). Thus, salary income relating to 19 work days is tax-exempt in Germany. If the employee works 20 days or more during the calendar year in the country of residence (Germany) or in a third country, the taxation of salary income relating to these working days is allocated to Germany.

The distribution of wages between the country of residence and the country of activity will be based on the "agreed working days" according to the employment contract. Thus, vacation days, weekend days (or alternative rest days) and public holidays are not taken into account in computing the pro rata of income taxable in each state.

Payments with respect to maternity leave and sick leave (the "unproductive" days that have made it difficult for the two sides to reach a consensus) are taxed in the state where the work is carried out. Consequently, these types of salary income are tax exempt in the state of residence. However, unpaid sick days will reduce the agreed working days.

The agreement also establishes a number of rules for calculating the agreed working days and the division ratio, which include the following:

- Working time spent in a third country should be taxed in the country of residence (Germany);
- Overtime must be considered separately;
- Work on a non-agreed working day with a compensation holiday (i.e. without payment of a separate cash amount) should be taken into account to compute the agreed working days;

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- Lump-sum payments for no more than 10 years' previous active service are proportionately attributable to the activity in the state of residence and in the state of activity using the above principles; and
- Holiday allowances and payments for unused vacation days are included in the division ratio; for holiday payments related to vacation days of a previous year, the division ratio of the year concerned is applicable.

The agreement resolves a long-standing period of uncertainty for German residents working in Luxembourg and is good news in this respect. The division ratio, the calculation of the agreed working days and the calculation of the Luxembourg wage tax will likely raise questions for which it would be helpful for the Luxembourg tax authorities to issue guidelines in the near future.

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In brief

Colombia – A withholding tax has been introduced for companies that provide goods or services to major exporters (specifically foreign marketing of goods produced in Colombia). The withholding tax is 75% of the VAT amount and 50% for large taxpayers.

Thailand – The tax authorities published Notifications No. 198 and 199, respectively, providing detailed measures regarding tax computation and filings for the exemption from corporate income tax on net profits derived from an International Procurement Center (IPC) or from the sale of carbon credits under qualified projects for reducing carbon dioxide emissions. Specifically, the company must compute the net profit derived from the IPC/sale of carbon credits separately from the net profit of other business activities (expenses that cannot be specifically assigned can be allocated based on the revenue of each business activity); the IPC's/emissions project's net losses can only be applied to offset future profits from the IPC's/project's business activities; and the company must file an income tax return for the IPC/emissions project separate from other business activities by reporting a separate income statement for each business activity (although the company may file a combined balance sheet that includes all business activities). For an IPC's business activity, however, the company must file a half-year income tax return within two months from the end of the first six months of each accounting period (plus the regular return for the accounting period). In addition, employees working for an IPC must have at least a high school, vocational certificate or similar level of education.

United States – The Internal Revenue Service released Notice 2011-54 on 16 June 2011, extending the deadline for 2009 and prior year Report of Foreign Bank and Financial Accounts (FBAR) filings for certain individuals with signature authority over, but no financial interest in, a foreign financial account. Individuals who properly deferred filing their 2009 and prior year FBARs in reliance on prior notices (specifically Notices 2009-62 and 2010-23) have until 1 November 2011 to file their 2009 and prior year FBARs. Calendar year 2010 FBARs must still be received by 30 June 2011. Notice 2011-54 does not, however, impact recent FBAR guidance from the Financial Crimes Enforcement Network that extended the deadline for 2010 and prior year FBARs for certain qualifying individuals until 30 June 2012.

Uruguay – The government is considering a reduction in the 20% standard rate of VAT as a measure to achieve a redistribution of income.

Tax treaty round up

At the end of each month, the World Tax Advisor provides an update on recent tax treaty developments, with a focus on items that directly affect the withholding tax rates of the key jurisdictions covered by the Deloitte International Tax Source (DITS). Additional coverage may include stated negotiating priorities and other important tax treaty trends. For updates on tax information exchange agreements, visit our DITS special feature.
URL: http://www.dits.deloitte.com
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Unless otherwise noted, the developments discussed are not yet in force.

China-Zambia – When in effect, the treaty signed on 26 July 2010 provides for a 5% withholding tax on dividends and royalties and a 10% rate on interest.

France-Sint Maarten – The 2010 treaty entered into force on 1 May 2011 and applies retroactively as from 1 January 2010. The 0% rate applies to dividends paid to a company (other than a partnership) that holds directly at least 10% in the payer company; otherwise, the rate is 15%. The rate on interest is 10% and royalties are exempt.

Germany-Luxembourg – See article this issue.
URL: http://newsletters.usdbriefs.com/2011/Tax/WTA/a110624_6.html

Indonesia-Iran – Indonesia's Director General of Taxation issued a Circular Letter on 20 May 2011 confirming that the 2004 treaty between Indonesia and Iran has entered into force and applies generally as from 1 January 2011. The withholding tax on dividends, interest and royalty payments is 7%, 10% and 12%, respectively, provided the recipient of the income is the beneficial owner. In addition, a 7% branch profits tax applies on the after-tax profits of a permanent establishment in Indonesia. Certain practical issues, however, still need to be clarified, specifically on the mechanism to obtain a tax refund for tax over-withheld because of non-application of the reduced rate for payments made as from 1 January 2011.

Kazakhstan-Spain – The 2009 treaty enters into force on 18 August 2011 and will generally apply as from that date. The treaty replaces the treaty between Spain and the former USSR. When in effect, the treaty provides for a 5% withholding tax on dividends paid to a company that holds directly or indirectly at least 10% of the capital of the payer company; otherwise, the rate will be 15%. The rate on interest and royalties will be 10%.

Korea-Luxembourg – The Korean tax authorities have issued a ruling concluding that, under article 28 of the treaty with Luxembourg, SICAVs and SICAFs, which are Luxembourg indirect investment companies, cannot claim the reduced withholding tax rates under the treaty. According to article 28 (Exclusion of Certain Companies), the treaty does not apply to holding companies within the meaning of special Luxembourg law, currently the Act of 31 July 1929, the Decree of 17 December 1938 or any similar law enacted by Luxembourg after the treaty was signed.

Latvia-Russia – When in effect, the treaty signed on 20 December 2010 provides that the withholding tax rate on dividends will be 5% if paid to a company (other than a partnership) that holds directly at least 25% of the capital of the payer company, provided the capital invested exceeds USD 75,000 or its equivalent in Russia's or Latvia's national currency; otherwise, the rate will be 10%. The rate on interest will be 5% if paid on loans between banks or other financial institutions; otherwise the rate will be 10%. The rate on royalties will be 5%.

Malaysia-Laos – When in effect, the treaty signed on 3 June 2010 provides that dividends will be subject to withholding tax at a rate of 5% if paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company; otherwise, the rate will be 10%. The rate on interest and royalties will be 10%.

Norway-Turkey – The 2010 treaty to replace the existing treaty dating from 1971 entered into force on 15 June 2011 and will apply as from 1 January 2012. When in effect, the treaty provides for a 5% withholding tax on dividends paid to a company (other than a partnership) that holds directly at least 20% of the capital of the payer company or where the dividends are paid to the Norwegian Pension Fund or Turkey's Government Social Security Fund; otherwise the rate will be 15%. The rate on interest will be 10% if paid to a bank; otherwise the rate will be 15%. The rate on royalties will be 10%.

Slovenia-Belarus – The 2010 treaty entered into force on 31 May 2011 and will generally apply from 1 January 2012. When in effect, the treaty provides for a 5% withholding tax on dividends, interest and royalties.

Spain-Georgia – The 2010 treaty enters into force on 1 July 2010 and will generally apply from 1 January 2012. The treaty replaces the treaty between Spain and the former USSR. When in effect, dividends will be exempt if paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company; otherwise the rate will be 10%. Interest and royalties will be exempt.

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Spain-Pakistan – The 2010 treaty entered into force on 18 May 2011 and applies from that date. The treaty provides for a 5% withholding tax on dividends paid to a company that holds directly at least 50% of the voting power of the payer company for the six months before the dividends are declared; the rate is 7.5% where the dividends are paid to a company that holds directly at least 25% of the voting power of the payer company for the six months before the dividends are declared; otherwise, the rate is 10%. The rate on interest is 10% and that on royalties, 7.5%.

Spain-Panama – The 2010 treaty enters into force on 25 July 2011 and generally applies as from that date. When in effect, dividends will be exempt from withholding tax if paid to a company whose capital is divided into shares or participations and that holds directly at least 80% of the capital of the payer company and meets certain other criteria. The rate will be 5% if paid to a company (other than a partnership) that holds directly at least 40% of the voting power of the payer company; otherwise the rate will be 10%. The rate on interest and royalties will be 5%.

United Kingdom-Ethiopia – When in effect, the treaty signed on 9 June 2011 provides that dividends will be subject to a withholding tax rate of 15% if paid out of income or gains derived from immovable property within the meaning of Article 6 of the treaty by an investment vehicle that distributes most of this income annually and whose income or gains from such immovable property are exempted from tax; otherwise the rate will be 10%. The rate on interest will be 5% and that on royalties, 7.5%.

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Qatar

Regulations issued under 2009 income tax law

The government has issued Executive regulations for the 2009 income tax law, as well as guidance on the new contract retention rules. [Issued: 19 June 2011]

URL: http://www.deloitte.com/view/en_GX/global/services/tax/international-tax/f766d7e609ba0310VgnVCM1000001956f00aRCRD.htm?id=us_email_Tax_WTA_062411

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