

Belgium – Tax Developments – January-May 2010

Belgian domestic rules of foreign credit tax prevail: Supreme Court judgement in the Belgian-Czech double tax treaty

On January 22, 2010 the Belgian Supreme Court ruled (in contrast to prior Court of Appeal case law) that only the Belgian domestic rules of foreign tax credit are applicable to royalties taxed in the Czech Republic under the old Belgium-Czech DTT. This decision was met with surprise by most Belgian tax practitioners, as the wording of the provision at issue (art. 23) seemed not to allow this restrictive interpretation. As the double tax treaties concluded by Belgium contain a wide variety of credit/exemption clauses, businesses confronted with this issue are advised to carefully check, on a case-by-case basis, the implications of the Supreme Court judgment on their tax position.

European Commission requests Belgium to change withholding tax exemption rules

The European Commission has formally requested Belgium to change its withholding tax exemption rules. More specifically, on January, 28, 2010¹ the European Commission requested Belgium to amend its withholding tax rules for dividends stemming from real estate SICAF investments. Under Belgian legislation, dividends distributed by Belgian real estate SICAFs are exempt from withholding tax on condition that at least 60% is invested in residential real estate located in Belgium². Since latter condition hinders Belgian investment funds to invest in real estate located abroad, the provision is, in the Commission's opinion, considered contrary to the free movement of capital and freedom to provide services.

A similar reasoning is applied to dividends and interest distributed by Belgian companies to foreign (meaning non Belgium) investment funds³. Indeed, dividends distributed by Belgian companies to domestic investment funds are currently exempt from withholding tax provided well defined conditions are met⁴. Dividends distributed to foreign counterparts are however subject to 15 or 25% Belgian withholding tax.

Additionally, Belgian investment funds meeting certain conditions are exempt from withholding tax on revenues deriving from money deposits performed in Belgium, whereas the same revenues of foreign counterparts are subject to 15% withholding tax⁵.

¹ Press release nr. IP/10/91

² Art. 106 §8 Royal Decree BITC

³ Press release nr. IP/10/94

⁴ Art. 106 §3 Royal Decree BITC

⁵ Press release nr. IP/10/94. Art. 110 Royal Decree BITC

In case Belgium fails to react satisfactorily, the Commission may refer the cases to the ECJ. Belgian and or foreign tax payers may in the meanwhile already consider taking appropriate action.

European Commission requests Belgium to amend its exit tax rules:

In its press release of March 18, 2010⁶ the European Commission announced that Belgium, alongside Denmark and the Netherlands, should amend its exit tax rules.

Under the currently applicable Belgian rules⁷, corporations, while transferring their seat (or assets) abroad, are subject to exit tax on the accrued (unrealised) capital gains, hidden reserves and tax-free reserves. Comparable domestic transfers are however not subject to exit tax.

According to the Commission, it is not compatible with the European freedom of establishment to tax companies on the date on which the seat or assets are transferred to another Member State. With reference to the ECJ judgments in the case of Lasteyrie du Saillant (C-9/02) and N (C-470/04), Member States should defer taxation to the moment of actual realisation. In this respect, the Commission's Communication on exit taxation (COM(2006)825) is relevant.

In Belgian tax practice, the Commission's action is welcomed since the exit tax is definitely an important factor in the decision making process of corporate restructurings. Note that next to Belgium, Denmark and the Netherlands, also Spain, Portugal and Sweden were on the Commission's shortlist. The Spanish and Portuguese (similar) exit tax rules are currently pending before the ECJ.

ECJ rejects actions for the annulment of the Commission's decision on the Belgian aid scheme for coordination centres

On March 18, 2010, the ECJ dismissed two actions for the annulment of the Commission's decision of November, 13, 2007 providing prospective transitional periods for coordination centres. In both cases⁸, the ECJ decided that the applicants were not in a situation in which an action brought by an association could be declared admissible.

Belgium requested to amend rules on tax relief for pension savings

The European Commission formally requested Belgium to amend its income tax rules for relief on pension savings⁹. Currently, the income tax relief is only granted for savings paid to Belgian

⁶ Press release nr. IP/10/299

⁷ Art. 208, 209 and 210 §1, 4° BITC

⁸ Centre de coordination Carrefour SNS/European Commission (T-94/08) and Forum 187 ASBL (T-189/08)

⁹ Press release nr. IP/10/300

institutions. For collective pension savings, it is required to invest the savings in Belgian funds. In the Commission's opinion, applications of the Mutual Assistance Directive (77/799/EC) or Third Life Insurance Directive (2002/83/EC) are a more proportionate alternative.

European Commission requests Belgium to change its rules on the appointment of fiscal representatives

On March 18, 2010, Belgium was requested by the European Commission to amend its legislation requiring operators of foreign securities lending systems to appoint a fiscal representative in Belgium¹⁰. In the Commission's opinion, Belgium could have a less burdensome alternative in relying on the Mutual Assistance Directive or in asking information to the foreign provider.

Notional interest deduction also applies to dissolved companies

Very recently, the Belgian Minister of Finance confirmed that all Belgian corporations (companies and branches) benefit from the notional interest deduction. This is undoubtedly also the case for dissolved corporations since latter companies remain subject to the ordinary Belgian corporate income tax rules during the liquidation process. Advanced payments of liquidation proceeds should however be deducted from the qualifying equity, hence implying a downward adjustment of the notional interest deduction.

Patent income deduction: Belgian rulings commission shows a more relaxing attitude to the benefit of small and medium-sized enterprises (SMEs)

Over the past months, the Belgian rulings commission published several favourable decisions relating to the application of the Belgian patent income deduction. Especially noteworthy, is that in these rulings, a flexible approach towards SMEs is shown. Such less stringent attitude of the Belgian rulings commissions, is welcomed in Belgian tax practice since SMEs in particular encounter(ed) difficulties to meet the condition of having a qualifying research centre.

Administrative circular letter illustrating and clarifying the conditions for double taxation relief

On April 6, 2010 the Belgian tax authorities issued a circular letter, clarifying and illustrating the conditions for double taxation relief and its position to issues of double non taxation. Although the circular letter is rather technical, the various examples given are considered

¹⁰ Press release nr. IP/10/300

useful in practice. Furthermore the illustrations and clarifications of the double taxation relief mechanisms is of interest for Belgian and foreign companies that are subject to the Belgian double tax treaties. More specifically, depending on the wording of the applicable treaty, Belgium interprets and categorises its double tax treaties as follows:

- Treaties in which the relief for double taxation- provision is in line with the OECD model; hence using the wording "*may be taxed* in the source state";
- Treaties in which the relief for double taxation- provision is making reference to a *subject-to-tax* condition;
- Treaties in which the relief for double taxation- provision is making reference to a *subject-to-tax* condition which is interpreted as the need for effective taxation.

It is clear that under the first and second category of treaties more opportunities exist for appropriate tax planning.

Belgium referred to the ECJ for its limited tax exemption for interest on savings

On May 5, 2010, Belgium was referred to the ECJ for its tax rules on savings¹¹. Under Belgian income tax law, Belgian resident individuals are entitled to a tax exemption for interest received on their savings deposit account¹². However, the exemption only applies to interest paid by a Belgian bank. No similar exemption applies for interest paid by a foreign bank. Hence, the ECJ has to decide whether the rules infringe the free movement of capital and the freedom to provide services.

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For further information on the above mentioned topics please contact Bernard Peeters or Mieke Van Zandweghe by telephone (+32 2 773 40 00) or by email: bernard.peeters@tiberghien.com / mieke.vanzandweghe@tiberghien.com.

¹¹ Press release nr. IP/10/513

¹² Art. 21, 5° BITC