

Status of Belgian Investment Company appears all the more important

During the budget negotiations for 2010, the Belgian government announced amongst others a cap on the notional interest deduction (cap of 3.8%). Furthermore, a stricter application of the Belgian participation exemption for dividends has been announced. In this respect, the status of Belgian Investment Company becomes even more important.

Announced changes to the dividend participation exemption

In Belgium currently, dividend income is exempt up to 95% under the following conditions (to be simultaneously met):

- the Belgian company shareholder has to hold a minimum participation of at least 10% *or* a participation with an acquisition value of at least 1.2 million EUR (minimum holding requirement);
- the participation has to qualify under Belgian accounting law as a fixed financial asset,
- the Belgian company shareholder must have or have had full legal ownership of the participation for an uninterrupted period of at least one year, and
- the subsidiary distributing the dividend must comply with our qualitative taxation rules.

Credit institutions, insurance companies and quoted companies may currently benefit from the participation exemption even if the above mentioned minimum holding requirement is not met. This exception has been introduced in order to allow credit institutions, insurance companies and quoted companies, (which usually do not hold qualifying participations) to benefit from the dividend received deduction.

Recently however, the Belgium government announced that the exception for credit institutions, insurance companies and quoted companies is no longer justified and consequently will be abolished. Furthermore it has been announced that the minimum investment amount, for companies that do not have a 10% holding, will be increased from 1.2 million EUR to 2.5 million EUR. As from tax year 2010 consequently, all corporations (so not only credit institutions, insurance companies and quoted companies), must hold a minimum participation of at least 10% or a participation with an acquisition value of at least 2.5 million EUR in order to benefit from the participation exemption.

Importance of Belgian Investment Company

The abolition of the above mentioned exception and the increase of the minimum investment amount may lead to adverse tax consequences for companies usually not holding substantial participations. Proper tax planning will be recommended since dividend income, for corporations

not meeting the conditions, will be fully taxable. Furthermore practice has shown that, even if the minimum holding requirement is met, companies may still face difficulties to prove towards the Belgian tax authorities that the dividends received derive from shares that qualify as fixed financial assets (especially when it concerns participations beneath the 10% threshold). However, since the above-mentioned conditions are not applicable on dividend income distributed and received by Investment Companies, the status of Investment Company can prevent taxation of the dividend (for 95%) and analysis of the fixed financial asset requirement. The status of Investment Company is therefore of great importance. For completeness' sake, we draw your attention to the fact that the Belgian so called Private Privak/Pricaf (see 2007 BVA newsletter, edition 12 for info in this respect) qualifies as Investment Company.

Definition of Belgian Investment Company

The concept "Investment Company" is defined in article 2, §1, 5° of the Belgian Income Tax Code (BITC). This definition is applicable in all the provisions of the BITC. Article 2, §1, 5°, f BITC specifies an Investment Company as "any company with the aim of collective investment of capital". The latter definition is definitely broader than the notion of "Investment Company" in Belgian finance law, such as the entities governed by the Law of July 20, 2004 concerning certain forms of collective investment or the Law of December 4, 1990, regarding financial transactions and financial markets. This is shown by the commentaries by the Belgian tax authorities on the BITC (Com/IB 2/11.3 and 2/11.4). This extensive and open interpretation has also been confirmed by the Belgian Minister of Finance, in response to a Parliamentary Question (Question no. 19 of September 3, 1999, Vr. en Antw. Kamer 1999-2000, 22 November 1999, 692).

Analysis of the corporate object and the planned investment activities leads to the conclusion that a lot of companies active in the private equity sector may fall under the scope of the Investment Company definition as mentioned in the BITC.

We experienced in the past that the Belgian ruling commission was restrictive in granting the status of Investment Company (although on June, 2, 2005 one positive ruling has been published). However, according to our latest contact with the advance ruling commission and the cabinet of the Minister of Finance, the advance ruling commission is willing to grant a positive ruling provided that it is shown sufficiently that it concerns a 'collective' Investment Company. In other words, the ruling commission should be convinced that the Investment Company has a sufficient (large) number of investors. The ruling commission especially wants to avoid that family owned holding companies misuse the status of so called 'Investment Companies'.

Conclusion

The status of Investment Company is very important in cases where dividend income is expected and the Belgian participation exemption should apply. A Belgian company, not qualifying as Investment Company must fulfil the minimum holding requirement for an uninterrupted period of one year. Additionally, the company will have to prove that the investments qualify as fixed financial assets. Especially for companies not holding a participation of 10 % this might be difficult though is however depending on all the facts and circumstances. The characterization of Investment Company can prevent such an analysis and offers corporations opportunities to take small participations without taking the risk that the dividend income will be fully taxable. Credit institutions, insurance companies, or quoted companies currently may benefit from the participation exemption even if the minimum holding requirement is not met. For the future however, all corporations have to hold a minimum participation of at least 10% or a participation with an acquisition value of at least 2.5 million EUR in order to benefit from a 95% exemption on the dividend income received (provided off course also the other conditions are met). The status of Investment Company is so all the more important. Recent contacts with the Belgian ruling commission and the cabinet of the Minister of Finance show that the ruling commission would even be willing to grant rulings.

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