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Real estate tax alert
Belgium

Tax administration circular clarifies Belgian REIT taxable basis determination

The central tax administration has issued a circular recently, in the context of the determination of the taxable basis of a Belgian REIT ('**sicafi**' / '**vastgoedbevak**'; '**GVV**' / '**SIR**') (Ci.RH.421/630.783, dd. 23.06.2014). The conclusions hereof are also relevant for investment companies ('**beveks**' / '**sicavs**') and pension funds ('**OFPs**').

In summary, the circular clarifies whether or not withholding tax ("WHT"), which is withheld on dividends received by a Belgian REIT, should be treated as a disallowed expense or not for purposes of the determination of the taxable basis of a REIT. As you know, the taxable basis of a Belgian REIT is comprised of disallowed items (non – deductible costs) and non – arm's length benefits received. In practice, there was some uncertainty as to the question whether, under the Law of 30 July 2013, whereby a REIT (or a sicav/bevek) can no longer recover WHT on Belgian dividends received, such WHT should be regarded as a disallowed item or not. Indeed, as such WHT is no longer recoverable under the Law of 30 July 2013, it must normally be recorded as a cost in the profit and loss account, therefore giving rise to the question whether such cost is "deductible" or not.

In the circular, the central tax administration takes the position that such (unrecoverable) WHT should not be regarded as a disallowed expense for purposes of determining the corporate tax basis of the REIT.

This conclusion (no disallowed item) of the central tax administration will probably be well appreciated in the market.

The underlying ratio that the central tax administration develops to come to that position is as follows. For the central tax administration it seems to be relevant whether or not the WHT is a 'recoverable' tax (i.e. a tax that can be credited against the corporate income tax due, or refunded in the absence hereof). If it is not recoverable (situation after the Law of 30 July 2013), it is, although recorded as a cost in the profit and loss account, according to the central tax administration no longer an 'amount paid as an advance to the corporate income tax' within the sense of art. 198, 1° ICT 1992 (article which lists the non – deductible expenses, e.g. the corporate income tax itself), and it should therefore <u>not</u> be regarded as a "non – deductible" cost.

At the same time however, the central tax administration takes the view that, in the case where the WHT is recoverable (i.e. situation <u>before</u> the Law of 30 July 2013 as far as Belgian dividends are concerned, received by REITs or investment companies; actual situation for WHT in relation to interest income received by REITs or investment companies and OFPs, and also for dividend income received by OFPs), this should be regarded as an 'amount paid as an advance to the corporate income tax' within the sense of art. 198, 1° ICT 1992, and therefore a "non – deductible" cost which is to be included in the taxable basis.

We have noticed that there is some **uncertainty** in practice as to what the central tax administration exactly envisages with the latter position.

Considering that one can only have a "non – deductible" cost for corporate income tax purposes, provided that there is a cost recorded in the profit and loss account, a logical interpretation of the latter position is that only in case where any WHT was, at the end of the accounting year, expressed as a cost in in the profit and loss account (and only to this extent), a disallowed item should be recognised for corporate income tax purposes. In that event, the WHT normally equals the ordinary corporate income tax charge over the year, which is explicitly listed as a non – deductible cost in art. 198, 1° ICT 1992. This would imply that, in the (opposite) case where the REIT has recorded a receivable vis-à-vis the State (since the WHT in excess of the corporate income tax due, is recoverable), and no corresponding cost is expressed in the profit and loss account, no disallowed item should be recognised.

The opposite interpretation, whereby any (recoverable) WHT should at all times be recorded as a disallowed item (also in case it is recorded as a tax receivable), could have adverse consequences, as it could lead to additional tax assessments in the case of audits of past tax filings. Also, this would increase the overall tax cost on WHT on interest income received in the hands of REITs (and also with regard to dividends received by OFPs) going forward (as such WHT is still recoverable).

However, for a number of reasons we believe that the latter interpretation is incorrect. Amongst others, it would clearly be contrary to the general corporate income tax principles in respect of the technical treatment of WHT in the annual corporate income tax return, as they are consistently applied by the Belgian tax administration in practice and confirmed as such in the Administrative Commentary itself (among others Com IR n° 195/54). Also, an additional argument can be found in the wording of the Circular itself, where it says that it is the WHT that is imputed on the corporate income tax due (so, implicitly, not the WHT in excess hereof, being the repayable WHT before the Law of 30 July 2013), that should be treated as a disallowed expense.

In case you would like to discuss the above more in detail, please do not hesitate to contact one of our specialists mentioned below.

Contacts

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