



Corporate tax alert Belgium

CJEU issues its “fairness tax” verdict

The “fairness tax”, voted in July 2013 and effective from tax year 2014, is a separate income tax imposed at a 5.15% rate on dividend distributions by non-SME companies, to the extent that these companies offset taxable income, in the year of distribution, with current year notional interest deduction and/or tax losses carried forward. The “fairness tax” is applicable to resident companies as well as permanent establishments of foreign companies.

Since its introduction, the “fairness tax” has been subject to criticism. In January 2014, an annulment action before the Constitutional Court was initiated on the grounds that the “fairness tax” was not compatible with the Belgian Constitution, the Treaty on the Functioning of the EU (TFEU), the EU Parent-Subsidiary Directive (PSD) and Belgium’s double taxation treaties. In its interim decision issued 28 January 2015, the Constitutional Court decided to refer preliminary questions, relating to the compatibility of the fairness tax with the TFEU and the PSD, to the CJEU (Court of Justice of the European Union).

In her [17 November 2016 opinion](#), Advocate General (AG) Kokott found that the “fairness tax” does not go against the freedom of establishment guaranteed by the TFEU, and is also not a prohibited withholding tax under the PSD. However, it does violate the PSD where “fairness tax” would be due upon the redistribution of a dividend received.

The CJEU's 17 May 2017 decision ([Dutch](#) | [French](#)) is essentially in line with the aforementioned opinion:

- There is no violation of the freedom of establishment principle, subject to the Belgian court being required to verify that, in practice, a foreign company with a Belgian PE is not treated less favourably than a Belgian company in calculating the fairness tax's taxable base
- The fairness tax is not a prohibited withholding tax
- There is a violation of the PSD requirement to refrain from taxation on dividends received, where fairness tax is due upon redistribution of dividends received in a later year than that in which the dividend from the subsidiary is received.

The Constitutional Court will now need to issue its final decision, taking into account the CJEU's ruling and the other aforementioned grounds for annulment. At this stage, it is unknown when this decision will be issued, and the full picture will only be clear once the Constitutional Court has rendered it.

In the meantime, Deloitte is readily available to discuss the impact of the CJEU decision on a company's fairness tax position.

Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium

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