



Corporate tax alert Belgium

Constitutional Court abolishes fairness tax as of tax year 2019

On 1 March 2018, the Constitutional Court rendered its long-awaited decision on the fairness tax.

Background

The fairness tax, effective from tax year 2014, is a separate tax imposed at a 5.15% rate on dividend distributions by non-SME companies, to the extent that they offset taxable income, in the year of distribution, with current year notional interest deduction and/or tax losses carried forward. The tax applies to both resident companies and permanent establishments (PEs) of non-resident companies.

In January 2014, an annulment action was filed before the Constitutional Court on grounds of the fairness tax's incompatibility with the Constitution, the Treaty on the Functioning of the EU, the Parent-Subsidiary Directive (PSD) and Belgium's tax treaties.

Following a 28 January 2015 interim decision, the Constitutional Court referred the issue of the fairness tax's compatibility with EU law to the Court of Justice of the European Union (CJEU).

The CJEU decided on 17 May 2017 that, while 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
- The Constitutional Court has to examine whether, in all instances, a foreign company with a PE is treated less favourably than a Belgian company for fairness tax purposes; if such less favourable treatment would exist, the freedom of establishment principle would be violated.

Court decides to annul fairness tax

The Constitutional Court's 1 March 2018 decision saw the fairness tax's annulment.

The Court first annulled the fairness tax as it applies to PEs of non-resident companies, due to the law's lack of required clarity as to how to determine, in practice, the taxable base of the fairness tax.

In line with the CJEU decision, the Court also cancelled the fairness tax for resident companies that redistribute dividends because of the PSD's violation.

Finally, the Court decided that the calculation of the fairness tax's taxable base for resident companies violates the constitutional non-discrimination principle. The violation is due to the fact that taxpayers with the same profit, distributing the same dividend and offsetting NID or tax losses to the same extent may be subject to a different amount of fairness tax, depending on whether they apply other tax deductions or have tax-exempt write-offs, provisions or capital gains.

Since the annulment of these latter provisions renders the fairness tax's application ineffective, the Court decided to annul the regime in its entirety.

However, notwithstanding this annulment, the Court decided to have its decision take effect only from tax year 2019, "in order to take into account budgetary and administrative difficulties and judicial litigation" that could follow its decision. This delayed enforcement does not apply if fairness tax was levied on the redistribution of dividends, because in such hypothesis, there is a violation of the PSD.

Contacts

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