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30 January 2014

Constitutional Court issues foreign tax credit decision

On 29 January 2014, the Constitutional Court issued its decision on the compatibility of the Belgian foreign tax credit rules with the Constitution ([Dutch](#) | [French](#)).

The question at stake – referred by the Antwerp First Instance Tax Tribunal in a case involving interest from an Australian subsidiary – was whether Articles 37, 3rd indent, 285 and 292, 1st indent ITC are unconstitutional due to the fact that:

- companies with a positive taxable base can effectively use the foreign tax credit, thereby avoiding international double taxation and decreasing their tax burden,
- whereas companies with no or insufficient taxable base cannot effectively use all or part of the foreign tax credit and where the treatment of the credit as a disallowed expense reduces the tax losses and eventually creates double taxation.

The Court decided as follows:

- Articles 285 and 292 ITC do not violate the Constitution by not allowing the possibility to carry over or request a refund of the excess foreign tax credit;
- Article 37, 3rd indent ITC violates the Constitution to the extent it would require the taxable base to include a foreign tax credit that has not actually been credited. Stated differently, only a foreign tax credit that has effectively been credited can be treated as a disallowed expense according to Article 37 ITC.

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