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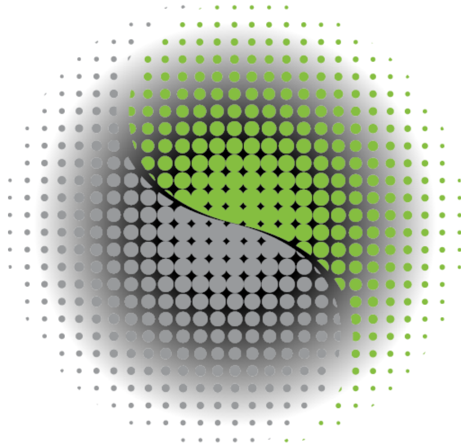

Corporate tax alert
Belgium

Federal Government reaches agreement on corporate tax reform

On 26 July 2017, the Belgian federal government reached an agreement on the corporate tax reform that was anticipated and announced in 2016. The most important measure concerns the gradual reduction in the standard corporate tax rate.

An overview of the major measures included in the agreement follows below, focusing especially on the measures applicable to large enterprises. Some of these measures would apply as from 2018, while others would apply as from 2020.

Some of the measures still need to be fine-tuned and may be subject to "minor" amendments. Especially with respect to the entry into force of some of the measures, the texts of the agreement are not always aligned.

Expectations are that the bill enacting the changes will be submitted to Parliament in autumn.

Gradual decrease of the standard corporate tax rate

The standard corporate tax rate (currently 33%) would be decreased to 29% in 2018 and 25% in 2020.

The 3% surcharge applicable on the corporate tax rate (which currently results in an aggregate standard tax rate of 33.99%) would be decreased to 2% in 2018 and abolished in 2020.

To prevent companies from shifting profits to taxable periods that are subject to a lower corporate tax rate, anti-avoidance measures would be introduced with respect to (1) the taxation of reversed accruals for risks and charges, and (2) the application of the spread in taxation or the exemption for capital gains on qualifying assets.

Corporate tax measures 2018

Capital gains on shares

The conditions to benefit from the exemption for capital gains on shares would be aligned with the conditions for applying the dividends received deduction. As a result, the underlying shares would need to satisfy not only the "subject to taxation" condition (the dividends derived from the shares must be subject to tax at the level of the distributing company), but also the minimum participation threshold (10% of the share capital of the distributing company, or an acquisition value of at least EUR 2.5 million).

Currently, a separate tax of 0.4% (0.412%, including the 3% surtax) is levied on the net amount of fully tax-exempt capital gains derived by large enterprises from shareholdings in other companies. This tax would be abolished in 2018.

Wage tax exemption for R&D personnel

The wage tax exemption for qualifying R&D personnel will (gradually) be extended to holders of a professional bachelor degree.

Fairness tax

At this stage, it is unclear whether the fairness tax would be abolished.

Notional interest deduction

The notional interest deduction (NID) no longer would be calculated on the total amount of qualifying equity, but only on the incremental equity increase. To calculate the NID basis for a given taxable period, the combined average equity of the taxable period and the four preceding years would be compared with the combined average equity of the five preceding years.

Minimal taxable base

A limitation would be introduced on the use of the following corporate tax deductions:

- Tax losses carried forward
- Dividend received deduction carried forward
- Innovation income deduction carried forward
- ("Old") NID carried forward
- The "new" incremental NID

Companies would be able to use the above deductions only in an amount up to EUR 1 million plus 70% of the taxable profit.

In practice, this means that 30% of the taxable profit in excess of EUR 1 million would constitute the minimum taxable base for a company.

In addition, it no longer would be possible to offset additional tax assessed as the result of a tax control proceeding by applying the various corporate tax deductions (including the deduction of current-year losses). The only deduction that would remain applicable to offset such additional tax is any current-year dividends received deduction remaining that otherwise would be carried forward.

Withholding tax on capital reductions

Capital reductions would become subject to withholding tax, in proportion to the share of taxed reserves in the paid-up capital increased by the taxed reserves. The portion of the capital reduction resulting from paid-up capital would remain untaxed.

Accruals for risks and charges

Accruals for risks and charges would only be tax exempt if they stem from obligations existing at the moment of closing of the balance sheet. The exemption remains applicable for accruals stemming from contractual, legal or regulatory obligations.

Advance payments

Currently, a failure to make sufficient advance payments of corporate income tax will result in a tax increase. The increase, however, does not apply if its amount would be lower than 0.5% of the tax on which the increase is computed, or lower than EUR 50. As from 2018, no exceptions to the increase would be applied.

The current calculation method for the tax increase would remain intact (2.25 x the basic interest rate), but the basic interest rate would be increased to “at least” 3% (currently 1%).

Employment of low-skilled an unemployed workers

Companies employing certain categories of “low-skilled” and unemployed workers can apply for the status of “integration enterprise” (“*inschakelingsbedrijf” / “entreprise d’insertion”)*, which allows them to benefit from a full corporate tax exemption.

As from 2018, the corporate tax exemption would be limited to EUR 7,440 (subject to indexation) for each effective employment of a qualifying worker.

Corporate tax measures 2020

Implementation of interest deduction limitation rule

The EU anti-tax avoidance directive (ATAD) requires member states to implement measures limiting the tax deductibility of interest on debt.

These measures would be implemented in Belgian law as follows:

- As a general rule, the interest deduction limitation would provide that "exceeding borrowing costs" of a taxpayer would be deductible only up to 30% of its EBITDA (earnings before interest, taxes, depreciation and amortization) in the tax period in which they are incurred.
- Loans established before 17 June 2016 would benefit from a "grandfathering" rule. For these loans, the current 5-to-1 thin capitalization ratio of debt to equity still would apply.
- Under a de minimis rule, interest of up to EUR 3 million would be tax deductible without limitation.
- The EBITDA of Belgian companies that are part of the same group would be calculated on a consolidated basis ("ad hoc" consolidation). The de minimis threshold of EUR 3 million could only be applied once within a group of Belgian companies.
- For interest payments made to tax havens, the current 5-to-1 thin capitalization rule still would apply.
- Interest that is not tax deductible under these rules could be carried forward with no time limit.

The limitation rules would not be applicable to loans granted within the framework of public-private cooperation. The rules also would not apply to "financial institutions" or "stand-alone entities."

The text of the agreement seems to suggest that this measure will be introduced in 2020, though the ATAD requires that the interest deduction limitation rule becomes applicable as of 2019.

Discount on debts payable over more than one year

From an accounting perspective, a discount should be recorded on debts payable over more than one year if no interest or abnormally low interest is due and the debt relates to the transfer of fixed assets. Such a discount should be considered as an accounting loss *pro rata temporis* through the transitional accounts of the company.

The Belgian Supreme Court ruled on 11 March 2016 that the discount can be treated as a tax-deductible cost by the taxpayer during the relevant financial years. However, this resulted in the possibility of creating tax-deductible costs in relation to non-depreciable assets (such as shares).

The government wants to counter such deductibility, so the corporate tax reform agreement provides for the non-deductibility of such discounts.

Conversion of tax exempt reserves

Companies would be allowed to convert tax-exempt reserves (created in tax years ending before 1 January 2017) into taxed reserves at a tax rate of 15%. If certain requirements are fulfilled, the applicable tax rate would further decrease to 10%. This would be a temporary measure for a period of two years.

The tax resulting from the conversion of the tax-exempt reserves could not be offset by tax attributes mentioned in articles 199-206 of the income tax code (ITC) or with current-year losses. Furthermore, no foreign tax credit, withholding taxes or tax credits could be used to offset the tax charge. Consequently, the 15% or 10% taxation is to be considered as a minimum taxable amount.

An increase for insufficient advance payments also would be applicable in relation to the 15% or 10% tax.

Conversion could not be applied to a number of specific tax-exempt reserves.

Permanent establishments (PEs)

Belgium intends to follow the OECD recommendations (such as those under BEPS action 7 (preventing the artificial avoidance of PE status)) to adopt a more economically based definition of a PE. No further details are available at this time.

Recapture of foreign PE losses

Losses of a foreign PE would be deductible in Belgium only if assurance can be given that the taxpayer has exhausted all possibilities in the foreign country of deducting the loss from its profits of future or previous tax years. The foreign tax loss could be deducted by the Belgian head office only in cases where the loss is truly "definitive."

The mere fact that the law in the residence state of the foreign branch does not provide for a carryback or carryforward of losses would be insufficient to prove that the foreign losses could be considered definitive.

Tax consolidation

Belgian legislators intend to provide for a system of tax consolidation. Although there are currently no further details, legislators are studying the Swedish model, which provides for transfers of losses to either the parent company, a subsidiary or a sister company if certain conditions are met.

Implementation of the other ATAD rules

In addition to the interest limitation rule, ATAD and ATAD 2 (which amended the ATAD regarding hybrid mismatches) provide for a number of other tax-related measures. In this respect, the corporate tax reform agreement provides as follows:

Controlled foreign company (CFC) legislation

Belgian legislators are evaluating the possibilities for implementing the CFC legislation provided for by the ATAD.

Exit taxation

Article 5 of the ATAD requires all EU member states to levy an exit tax if assets are transferred abroad.

If the transfer is carried out within the European Economic Area, the exit tax can be spread over five years. However, this mechanism already has been provided for in Belgium by the Law of 1 December 2016.

Hybrid mismatches

Belgium intends to implement the special rules in ATAD and ATAD 2 to avoid "reverse hybrid" mismatches, tax residency mismatches and imported mismatches.

Change in depreciation rules

Accelerated depreciation (provided for under article 64 of the ITC) for investments no longer would be allowed for assets acquired as from 1 January 2020.

Tax deductibility of certain expenses

- All fines in relation to direct or indirect taxes would be fully non-deductible.
- The "secret commission" tax would be fully non-deductible.
- The secret commission tax rate of 50% on undisclosed profits would be abolished.
- Regarding company car-related expenses:
    - Deductibility would depend on CO_2 emissions per car, regardless of fuel type. If the CO_2 emissions exceed 200 grams/kilometre, the tax deductibility of car-related expenses would be limited to only 40% of costs.
    - Fuel costs would be deductible based on the CO_2 emissions of the underlying car (the lump sum reduction of 25% of costs no would longer apply).
    - Car costs related to certain hybrid cars would become non-deductible in the same manner as their non-hybrid counterparts.
    - Costs related to electric cars would be deductible at 100% instead of 120%
- Other costs currently deductible at 120% (e.g. security investments) would be deductible only at 100%

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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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