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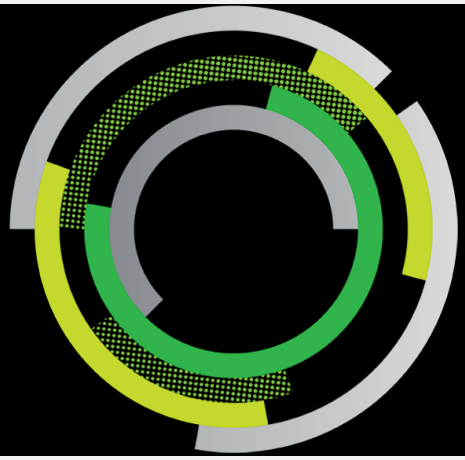

Corporate tax alert
Belgium

Royal Decree regarding the interest limitation rule published

On 27 December 2019, the Royal Decree ("RD") of 20 December 2019 addressing the interest limitation rule (Dutch | French) was published in the Belgian Official Journal. The RD introduces several changes to the interest limitation rule (cf. Article 198/1 of the Belgian Income Tax Code ("ITC"); also known as "30% EBITDA rule"). The RD's provisions are applicable as of tax year 2020, i.e. financial years that began on or after 1 January 2019.

New Royal Decree

Following the Council of State's criticism of the draft RD in August 2019, most of its provisions had been included in two (identical) draft laws, one of which ended up being withdrawn on 10 December 2019.

In order to ensure that the legislation clarifying the interest limitation rule would be published before calendar year-end, the Government eventually modified the initial draft RD, thereby addressing the Council of State's concerns.

The most important measures in the RD include:

- A list of costs and revenues that are "economically equivalent" to interest (the interest limitation rule not only applies to interest costs, but also to costs economically equivalent to interest)

- Modalities to exclude loans from the calculation of the exceeding borrowing costs
- Adjustments to the EBITDA in a Belgian group context
- Modalities for a proportional allocation of the EUR 3M "safe harbour" threshold
- Certain formalities

Unlike the aforementioned draft laws, the RD does not include the possibility to transfer negative exceeding borrowing costs to other Belgian group members to reduce the Belgian group members' consolidated interest limitation rule exposure.

Economically equivalent costs and revenues

The RD provides for a list of costs and revenues that should be considered economically equivalent to interest in view of determining the exceeding borrowing costs. Only costs and revenues that are truly equivalent to interest have been included, taking into account the already existing definition of interest in the ITC.

These economically equivalent components are similar to the ATAD and BEPS Action 4 list, including (e.g.) payments under profit participation loans, the finance cost element of finance lease payments, capitalised interest, the funding return under transfer pricing rules, foreign exchange gains and losses related to interest payments, etc.

Moreover, subject to a ruling confirmation and if the qualification is identical at payment recipient and debtor levels, taxpayers can opt to qualify other costs or revenues as economically equivalent to interest.

Modalities related to excluded loans

The following loans are excluded from the calculation of exceeding borrowing costs:

(i) Loans concluded before 17 June 2016 and to which no "fundamental" modifications have been made, and
(ii) Loans concluded in execution of qualifying public private partnership projects.

The exclusion of these loans is subject to compliance with practical modalities determined by the RD. For both loans, a detailed overview should be added to the tax return.

For guidance on the "fundamental" modifications related to grandfathered loans, reference can be made to the 11 September 2019 circular letter issued by the Belgian tax authorities.

Adjustments to the consolidated EBITDA

If the taxpayer is part of a Belgian group, a "virtual" consolidation must take place, and interest (as well as economically equivalent) costs and revenues paid to or received from other Belgian group members are disregarded when determining the exceeding borrowing costs.

Similarly, it is also necessary to neutralise other effects of intra-group transactions, as long as they effectively impact EBITDA. To create a consistent consolidation for the purposes of the interest limitation rule, the negative EBITDA of a Belgian group member is allocated to the other Belgian group members with a positive EBITDA, in proportion to each member's positive EBITDA.

Proportional allocation of the EUR 3M minimum deduction capacity

For Belgian groups, the EUR 3M threshold has to be allocated proportionately among all Belgian companies and permanent establishments belonging to the same group. The RD introduced a 4-step approach to allocate the EUR 3M safe harbour threshold among Belgian group members.

If the taxable EBITDA at Belgian group level is less than EUR 10M, group members can collectively waive their right to determine EBITDA, and the EUR 3M safe harbour will then be proportionately allocated among group members based on their percentage of exceeding borrowing costs.

The RD also provides for an alternative allocation method, whereby the EUR 3M minimum capacity is equally split among Belgian group members (i.e. by dividing EUR 3M by the total number of Belgian group members). The use of this equal allocation method is only possible if the Belgian group's members concluded an EBITDA waiver agreement.

Formalities

The RD lists the information required in the annex to the tax return to, in turn, benefit from the exemption of previously disallowed excess interest deduction carry-forward.

The Finance Minister is assigned with the preparation of an annex template in this regard, as well as templates regarding the interest deduction and group contribution agreements.

How can Deloitte assist?

For Belgian taxpayers, the challenge arises from how the interest limitation rule (sometimes in combination with the group contribution regime) should be applied in practice, especially if multiple Belgian group members are involved and/or if the application of this rule needs to be combined with the group contribution regime.

Deloitte developed the *Belgian Tax Consolidation Tool*, a web-based solution that facilitates the application of these rules.

Contacts

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