Real Estate tax alert
Belgium

Ruling Commission: silent mergers between a B-REIF and several real estate companies do not trigger WHT within 1 year after acquisition

In a recently published ruling regarding several so-called 'silent mergers' (i.e. 100% parent-subsidiary mergers) between a **B-REIF** ('GVBF'/'FIIS') and several 'ordinary' real estate companies, the Belgian Ruling Commission confirmed that no WHT is due on the liquidation dividend following these transactions. No WHT is due regardless of the fact that the B-REIF did not hold the real estate companies' shares for at least 1 year. This ruling could be a game-changer for the entire B-REIT / B-REIF sector ('**B-REIT**' referring to the "GVV" / "SIR").

Restructuring operations involving a B-REIF

If a B-REIF (or B-REIT) is involved in a restructuring operation with an 'ordinary' company, the exit tax (currently still 16.995%) is due on the latent capital gains (for completeness sake, it should be noted that this exit tax is expected to decrease to 12.75% in either 2018 or 2019, and increase again to 15% as of taxable periods starting on or after 1 January 2020). On the other hand, such restructuring operations are from a tax perspective generally seen as a 'deemed liquidation', being in principle subject to WHT (30%). This WHT is *not* creditable nor refundable in the hands of a B-REIF (nor in the hands of a B-REIT).

A WHT exemption on a 'liquidation dividend' is applicable if the absorbing B-REIF holds (i) at least 10% of the shares in the company involved in the restructuring (ii) for an uninterrupted period of at least 1 year. Hence, after acquiring the shares of an 'ordinary' (real estate) company, a B-REIF (or B-REIT) should normally wait at least 1 year to absorb it.

According to current practice, the WHT exemption available to tax-neutral 'silent merger' operations was deemed as not applicable to restructurings involving a B-REIF / B-REIT and an 'ordinary' company, because these transactions are not tax-neutral (cf. supra on the exit tax). The Ruling Commission has now decided otherwise.

Ruling Commission: WHT exemption regardless of 1-year holding period

The ruling decision at hand concerned several silent mergers in which a B-REIF would absorb a couple of 'ordinary' real estate companies. These silent mergers are subject to exit tax and would trigger liquidation dividends.

The Ruling Commission first argued that the liquidation dividends in fact do not constitute a 'dividend' being granted or paid, that could be subject to WHT.

Secondly, even if these liquidation dividends are to be considered as a granted or paid 'dividend' from a tax technical perspective, then the WHT exemption for tax-neutral 'silent merger' operations could be applied. The Ruling Commission rules that the conditions in this respect are *de facto* fulfilled.

Consequently, the liquidation dividends stemming from the silent mergers are, according to the Commission, not subject to WHT regardless of the fact that they occur within 1 year after acquisition of the absorbed companies' shares.

Finally, and in order to be complete, the ruling confirmed as well that the exit tax basis upon a conversion into a B – REIF, is determined in the same way as for a B – REIT, i.e. on a 'net' basis after deduction of implied RETT (c.f. Circular of 2004).

Relevance for the B-REIT sector

This ruling is quite relevant for the B-REIF and B-REIT sectors, as it would allow to avoid the (corporate tax) cost of keeping a subsidiary as a separate company for too long. Some of the arguments invoked by the Ruling Commission would also apply to a 'lateral' merger of a real estate company into a B-REIF / B-REIT, raising the question of whether in such a situation, WHT can be avoided as well (especially relevant for private individual shareholders).

Nevertheless, the ruling should be read with precaution, and cannot be seen as a principle precedent. Technically, some of the arguments seem debatable, or not relevant to all restructuring scenarios involving a B-REIF or B-REIT. Furthermore, according to available information, this ruling would not have been secured with the Central Tax Administration. Therefore, it is clearly recommended to have

an advance ruling procedure with the Belgian Ruling Commission before actually applying this to other cases.

Contacts

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