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Real Estate tax alert
Belgium

New decisions on REITs taxable basis and on withholding tax matter

This newsletter looks at a recent court case and a recent opinion of the ECJ Advocate General in a case that is relevant for the Belgian REIT sector.

Constitutional Court rejects alleged discrimination SICAFI taxable basis

On 20 October 2016, the Belgian Constitutional Court ruled on the alleged discrimination caused by the 'special' corporate taxable basis of a Belgian SICAFI ("sicafi" / "vastgoedbevak"). The judgement is also relevant for Belgian REITs ("SIR" / "GVV") as well as other investment companies (such as the "sicav" / "bevek"), the new REIF ("FIIS" / "GVBF") and pension funds ("OFP").

The taxable basis of a SICAFI is comprised of disallowed items (i.e. non–deductible expenses) and non–arm's length benefits received, whereas the taxable basis of a company subject to 'normal' corporate income tax is determined by its profit before tax. Both types of taxable basis include the corporate income tax paid and any prepayments made as a disallowed item.

In the case at hand, a SICAFI argued before the Court of First Instance that the fact that the corporate income tax paid is part of the disallowed items (and hence of its taxable basis) violates the constitutional principle of non-discrimination. The SICAFI referred to case law of the Belgian Supreme Court in

which the latter ruled that corporate income tax paid (or provisioned) should not be included in the taxable basis of the (former) Belgian Coordinates Centres, the taxable basis of which was identical to the taxable basis of SICAFIs.

The Court of First Instance requested the Constitutional Court for a preliminary ruling. In its judgement of 20 October 2016, the Constitutional Court ruled that the inclusion of the corporate income tax as a disallowed item in the taxable basis of a SICAFI, which leads to a so-called tax-on-tax situation, is non-discriminatory and hence not unconstitutional. The apparent reasoning behind this decision is that the Constitutional non-discrimination principle does not contain a general prohibition on double taxation.

Strictly speaking, this judgement is not the 'end' of the relating discussion with the tax administration on this particular issue, but it is clear that it has taken away one of the main typical defence arguments that the SICAFIs (now "SIR" / "GVV") upheld to support the position of not including the corporate income tax in their taxable basis.

It should be noted that this judgement does not express any opinion on the question of whether a SICAFI needs to include the withholding tax ("WHT") in its taxable basis. Two years ago, the central tax administration issued a circular letter in which they took the position that a recoverable WHT should be regarded as disallowed item for purposes of determining the taxable basis of a SICAFI. As pointed out in a previous newsletter, that position is in Deloitte's view incorrect, based on grounds other than those discussed in the Constitutional Court's case.

AG Opinion in ECJ case on WHT

A case is pending before the European Court of Justice ("ECJ") about the interpretation of the 'subject-to-tax' clause of the Parent-Subsidiary Directive (90/435/EEG) ("PSD"; case C-448/15).

According to the PSD, cross-border dividend payments in the EU/EEA are tax exempt provided that a number of conditions are fulfilled, such as minimum holding period, minimum shareholding and 'subject-to-tax' requirement. If the PSD is applicable, the Member State of the subsidiary should refrain from levying WHT on outbound dividend payments. The Member State of the parent company should exempt the dividend income (by credit or exemption).

In the case at hand, a Belgian SICAFI (now "SIR" / "GVV") paid a dividend to its Dutch shareholders. The Dutch shareholders were REITs benefiting from the so-called FBI-regime ("Fiscale Beleggingsinstellingen"). This implies that the respective companies are subject to Dutch corporate income tax but with the applicable rate of 0%.

The dispute relates to the question of whether these companies can invoke the PSD in view of the tax regime of the parent companies, so that Belgium should refrain from levying WHT on dividends paid by the Belgian subsidiary.

On 26 October 2016, the Advocate General to the ECJ (“AG”) concluded that the Belgian SICAFI cannot rely on the PSD exemption of WHT. The respective companies are required to pay a zero rate tax, which in practice is, according to the AG, the same as granting these companies an exemption from corporate tax. Therefore, the ‘subject-to-tax’ requirement is not fulfilled and the companies are not within scope of the PSD.

Notwithstanding the fact that the AG only addresses the dividend receiving company (FBI in the case at hand), the final judgement will also be important for dividend paying companies (SICAFI in the case at hand) because these are subject to the same ‘subject-to-tax’ clause.

Should the ECJ render a judgement in line with the AG’s conclusion (which is not necessarily the case), the question would of course be whether a Belgian SICAFI and by extension Belgian REITs and REIFs (“FIIS” / “GVBF”) meet the ‘subject-to-tax’ clause for the purposes of applying the WHT exemption under the PSD. As opposed to a FBI, a Belgian REIT or REIF is subject to the normal (Belgian) corporate tax rate, but its (Belgian) taxable basis is determined in such a way that a very large part of its taxable profits are tax exempt.

It should be noted that the above does not affect the WHT exemption on dividends between a Belgian subsidiary and a Belgian parent company, as in that situation the PSD based ‘subject-to-tax’ clause is not applicable.

Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium or:

- Michael Van Gils, mivangils@deloitte.com , +32 2 600 65 79

For general inquiries, please contact:
bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website:
http://www.deloitte.com/be/tax

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