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New administrative circular letter sheds some light on the amended article 19bis ITC

The Belgian tax authorities recently issued an administrative circular letter (Ci.RH.231/629.328, dated 25 October 2013) that provides some guidance on the various amendments brought to article 19bis ITC (the so-called “Belgian TIS”) since the law of 21 December 2009.

This circular letter had been expected for a long time by the sector because of the many uncertainties related to this provision’s application. So far, only one circular letter (Ci.RH.231/579.253) on the subject matter had been issued.

Essentially, the Belgian TIS aims at taxing Belgian resident individuals on (part of) the proceeds received upon exit from investments funds (irrespective of where the funds have been established and whether the funds are transparent or not for Belgian tax purposes) that (in)directly invest a certain portion (currently set at 25%) of their assets in qualifying debt claims.

The key takeaways from the circular letter can be summarised as follows.

First of all, the *ratio legis* for the introduction of an anti-abuse rule with an acquisition of shares / units through a gift (“*donation*” / “*schenking*”) is confirmed. Since the Belgian TIS applies in function of the holding period of the shares / units by the individual, a transfer through a gift without roll-over of the holding period by the transferor to the transferee would have allowed avoiding the Belgian TIS for the period during which the transferor held the shares / units. In the same spirit, the mere transfer of shares / units, through a sale, has been included among the events which would trigger the Belgian TIS’ application. Without such an extension, Belgian private individuals could have possibly realised their tax free exit by selling their shares / units to another investor (not subject to the Belgian TIS).

In addition, the circular letter briefly comments on a number of self-explanatory amendments, such as

- the reduction of the “asset test” (from 40 to 25%, thereby aligning it with the asset test applicable within the EU Savings Directive framework);
- the abolishment of the grand-fathering clause;
- the situation where the acquisition value is unknown (in such a case, the taxable base is based on the amount received upon exit) or the fact that, when the asset test percentage is unknown, it is deemed to be equal to 100%.

The main part of the circular letter deals with the regime applicable to funds that were previously outside the Belgian TIS scope because they did not have an EU passport. Since 1 July 2013, such passport is no longer required for the Belgian TIS to apply. A first consequence of this modification is that article 19bis ITC no longer includes a definition of investment fund for Belgian TIS purposes; according to the circular letter, one should in this respect refer to the financial law of 3 August 2012.

As from 1 July 2013, such funds are subject to the Belgian TIS standard rules. However, the legislator introduced a claw-back rule whereby the Belgian TIS retroactively applies for the 1 July 2008 – 30 June 2013 period. In this respect, the following principles need to be taken into account:

- If the shares / units were acquired before 1 July 2008, they are deemed to be acquired on that date;
- the taxable base is in principle capped to the unrealised capital gain (provided such capital gain can be determined, i.e. provided the acquisition value is known);
- the taxable base is in principle based on the general rules, i.e. the Belgian TIS increase between the acquisition and 30 June 2013;
- however, since these funds were not requested to calculate any Belgian TIS for the period during which they were outside the Belgian TIS scope, an alternative taxable base has been defined;
- this alternative taxable base is based on a fictitious 3% rate of return on the investment value of the qualifying debt claims (in)directly held by the fund, for the period during which the individual has held the shares / units between 1 July 2008 and 30 June 2013. This return rate is calculated on a linear basis, without capitalisation. If the investment value of the qualifying debt claims is not available, it will be replaced by the shares / units' acquisition value of the shares / units (or alternatively their net asset value), multiplied by the asset test applicable on 30 June 2013;
- in order to avoid a double taxation, the Belgian TIS can be reduced by the interest component included in distributions (dividends / coupons) made to the investors. In other words, the TIS can be reduced by the TID ("Taxable Income per Distribution").

Finally, it should be noted that the circular letter does not contain any guidance on how to apply the Belgian TIS to tax transparent funds (FCPs and alike). This is particularly unfortunate since, for such funds, the application of the Belgian TIS (which provides for a deferred transparency with income conversion) goes against the generally accepted principles (immediate transparency without income conversion), thereby creating a hybrid tax regime depending on the underlying assets and corresponding income. By lack of administrative guidance, one should therefore refer to a few anticipated rulings in connection with such situations, which however do not cover all grey areas induced by this hybrid treatment.

All in all, this circular letter does shed light on some theoretical aspects of the Belgian TIS. However, it should be observed that most of the issues in connection with this provision relate to the implementation thereof. Indeed, in order to be compliant with the Belgian TIS, a substantial level of information needs to be provided. This is only possible provided sizeable investments are made. Regarding (compartments of) investments funds that are commercialised in jurisdictions other than Belgium, field experience shows that full compliance with the Belgian TIS is hardly a commercially valid option.

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