



FSI tax alert Belgium

Withholding tax exemption for movable income extended to EEA investment companies

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The Royal Decree of 27 September 2015 broadened the scope of the withholding tax exemption for movable income (excluding Belgian source dividends), paid or attributed to certain Belgian investment companies, to similar investment companies located in the European Economic Area ("EEA").

On 27 June 2008, the European Commission initiated the first step of the infringement procedure by sending a letter of formal notice to the Belgian government, in which it was argued that the Royal Decree Implementing the Income Tax Code ("RD/ITC 92") breaches the free movement of capital and/or the freedom to provide services with respect to the following provisions:

- The exemption from withholding tax regarding movable income (excluding Belgian source dividends) is limited to Belgian investment companies (Art. 116 RD/ITC 92); and
- With interest-bearing securities, the exemption is furthermore limited to bearer instruments held in open custody with a qualifying financial institution in Belgium and to registered instruments held in a securities account with a qualifying financial institution in Belgium (Art. 118, §1, 6°, third indent, a and c).

Since the above provisions were not amended, the European Commission launched the second step in the infringement procedure and issued a reasoned opinion on 21 February 2013.

With the Royal Decree of 27 September 2015, the Belgian government addresses the issues identified by the European Commission. The withholding tax exemption regarding movable income (excluding Belgian source dividends) is now also applicable to open-ended (both UCITS and AIFs) and closed-ended investment companies located in the EEA (having made a public offering in Belgium or not), as well as to certain private investment companies located in the EEA (similar to a Belgian Privak/Pricaf or a VBS/SIC). Furthermore, the additional condition that interest-bearing registered securities must be held in a securities account in Belgium now includes accounts held in the EEA. Since bearer instruments no longer exist, additional conditions regarding such instruments are abolished.

The Royal Decree's impact will probably be limited. In practice, foreign (investment) companies could already generally apply withholding tax exemptions for interest income on Belgian bonds, so that the extension of the specific exemption for investment companies (which has a broader scope than interest on bonds) to EEA investment companies will have no effect in such a case.

It should be noted that Article 116 RD/ITC 92 will still not provide for an exemption from withholding tax for movable income for Belgian or foreign *institutional* investment companies. If no other exemption could be applied, Belgian institutional investment companies benefit from a tax credit and can in practice reclaim the withholding tax, whereas such refund is not available to foreign institutional investment companies. Such difference in treatment, despite a limited impact in practice (see above), may constitute an infringement of the free movement of capital.

In the context of withholding tax on *Belgian source dividends* paid or attributed to foreign investment companies, Belgium was already condemned by the European Court of Justice in the past (case C-387/11 of 25 October 2012, Commission v. Belgium). For foreign investment companies (including those located in the EEA) such withholding tax is indeed final, while their Belgian counterparts could, in the past, reclaim the tax through a refundable tax credit. Instead of exempting Belgian source dividends to foreign investment companies, the Belgian legislator, influenced by budgetary factors, reacted by abolishing the tax credit in the hands of Belgian investment companies as of tax year 2014 (law of 30 July 2013).

The Royal Decree of 27 September 2015 will be applicable to income paid or attributed as of 1 December 2015.

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