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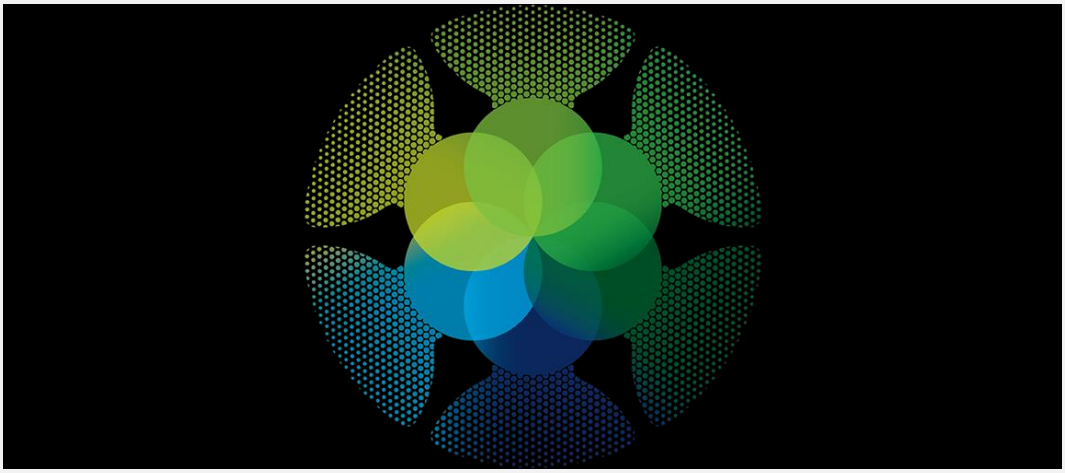

Global Employer Services
Individual tax

Tax developments affecting real estate and professional income reporting

With tax return season in full flow, this tax alert aims to outline important and useful information for tax resident income reporting.

Recent case law from European and Belgian courts underline the need to review the tax regime of real estate income in specific circumstances. This case law, which is outlined below, should affect how Belgian resident taxpayers report their income

- The Court of Justice of the European Union (CJEU) recently ruled that the difference in tax treatment between Belgian and foreign real estate (located in another Member state of the EU or the EEA) constitutes a forbidden restriction on the freedom of capital (Court case n° C-110/17 – (Dutch | French)).

- In Belgium, the Ghent court of appeal decided that the increased valuation of the benefit in kind for the provision of real estate by a legal person is discriminatory and cannot be applied. Hence, the lump sum benefit in kind must be calculated without applying the coefficient factors. A circular letter issued on 15 May 2018 confirms alignment with case law.

CJEU decision of 12 April 2018 (C-110/17)

This CJEU case concerns real estate located outside Belgium, owned by a Belgian resident taxpayer and leased by an individual for private use.

The court ruled that Belgium had failed in its obligations to guarantee the free movement of capital, because the tax base related to foreign real estate is determined less favourably compared to the lump sum tax base that applies to real estate located in Belgium.

The Belgian tax code (art. 7 ITC) does provide for different methods to determine income arising from unleased immovable property, or immovable property leased to either natural persons who do not use them for professional purposes or to legal entities that make such properties available to natural persons for private purposes, depending on whether these properties are located in Belgium or are located abroad.

- The tax base is calculated on the basis of the notional rental value as long as immovable property is located on Belgian territory

- The tax base corresponds to the actual rental value for immovable property located outside Belgium

Since the notional rental value is typically lower than the actual rental value or the actual rent, the CJEU considers that a difference in tax treatment that depends on the property's geographic location constitutes a forbidden restriction on the free movement of capital.

Interestingly, this is not the first CJEU decision in this subject area. In 2014, the CJEU already looked at the tax treatment of *unleased* immovable property (a holiday house located in France, for which the Antwerp court of appeal had referred a preliminary question to the CJEU – (Dutch | French)).

In that matter, the CJEU had deemed the matter as forbidden restriction on the free movement of capital, due to the less favourable tax treatment of the French property (taxation on the base of the actual rental value) compared to an unrented Belgian property (taxation on the base of the notional rental value). Based on the CJEU's response, the Antwerp court of appeal decided to exclude the actual rental value as the basis for calculating the tax and to rely on the theoretical rental value as determined by the French tax authorities.

Belgium responded to the CJEU's position through its 29 June 2016 circular, admitting that the actual rental value of foreign real estate that Belgian resident taxpayers have to report in their tax returns may correspond to the theoretical rental income, as determined by the foreign authority for unleased property located in a Member State of the EU or EEA.

Deloitte comment

From the CJEU's 12 April 2018 decision, it can be concluded that such tolerance expressed in the Belgian authorities' circular letter does not resolve the prohibited discrimination

because (1) it seems to be limited to unleased properties and (2) it is based on an administrative circular letter, which does not match the tax code's legislative power and (3) the rental values determined by the foreign authorities are not always lower than the actual rents paid.

Consequently, it seems clear that Belgium will have to adapt its tax laws to eliminate this unjustified difference in treatment of real estate income, which goes against European law.

For a similar case involving an apartment located in Luxembourg and rented to an individual for private use, the Liège court of appeal decided that the taxable income should equal 22.5% of the actual lease price. This has been determined based on a press release of the European Commission indicating that the taxable base of Belgian real estate amounts to around 20% to 25% of the actual market value.

The Ghent court of appeal's decision of 20 February 2018 and the 15 May 2018 circular letter

The Ghent court of appeal judged that the formula in article 18, §3, 2 RD/ITC for the lump sum calculation of the benefit in kind resulting from free housing granted by a legal entity (e.g. provided by a company to its director) is unconstitutional, because of the multiplier coefficient that does not apply when the free disposal of housing is granted by a natural person.

Consequently, the court of appeal decided that the taxable value should be calculated on 100/60 of indexed notional rental revenue, regardless of the party granting the benefit in kind (natural person or legal entity) and without applying the coefficient factor.

The administrative circular letter (2018/C/57) of 15 May 2018 (Dutch | French) confirms that the authorities will align the lump sum determination of taxable benefit in kind with case law.

In the longer term, a legislative initiative can be expected to adjust article 18, §3, 2 RD/ITC.

Conclusion

Belgian resident taxpayers may take the above case law into account when determining the amount of real estate income to be reported in their income tax return.

Contacts

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