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R&D tax alert
Belgium

Abolition of patent income deduction with "grandfathering"

A draft bill containing urgent tax measures, deposited with Parliament on 23 June 2016 and approved by the Finance Committee on 8 July 2016, will abolish the patent income deduction (PID) regime, subject to a grandfathering period.

Framework

In its final report on Action 5 of the BEPS project, the OECD's Forum for Harmful Tax Practices concluded that all existing IP regimes (including the Belgian PID regime) did not meet the requirements of the so-called 'modified nexus approach', and would therefore need to be amended in order for it not to be considered as 'harmful' going forward.

In order to comply with the OECD's modified nexus approach (which is a 'minimum standard'), the draft bill of 23 June 2016 proposes to abolish the existing PID, subject to a grandfathering regime. The draft bill does not contain a proposal for a new, nexus approach-compliant IP system, but indicates that the Belgian government aims to adopt such legislation before year-end with retroactive effect from 1 July 2016.

Abolition of PID regime

The draft bill abolishes the 'old' PID regime (Articles 205^1 to 205^4 and Article 236*bis* of the Belgian Income Tax Code, or ITC) as from 1 July 2016.

Grandfathering regime

As allowed by the final report on Action 5 of the BEPS project, the Belgian government proposes to introduce a grandfathering rule in Article 543 ITC.

Further to this grandfathering rule, the 'old' PID regime can still be applied to patent income earned up until and including 30 June 2021 for the following IP rights:

- Patents for which 'old' PID was already applied
- Eligible patents that were requested before 1 July 2016
- Eligible patents or license rights acquired before 1 July 2016 (only if the patented products or processes are further improved)

In order to avoid patent transfers between group entities to benefit from the 'old' PID regime under the grandfathering system, a specific anti-abuse provision is proposed. Under such provision, the grandfathering system will not be open for patents directly or indirectly acquired from an associated company as of 1 January 2016, which were not eligible for the 'old' PID or similar foreign regime in the hands of such company.

The draft bill also proposes to amend Article 286 ITC (which limits the amount of foreign tax credit for royalty income) so as to ensure that the same limitation applies to taxpayers benefitting from the grandfathering regime.

The draft Explanatory Memorandum makes clear that taxpayers aiming to apply the grandfathering rule will be requested to indicate this in the tax return. This will be important since, as indicated in the draft Explanatory Memorandum, the law that will introduce a new, nexus-compliant IP regime will amend the grandfathering system in that it can only be applied to IP rights that have not led to an application of a 'new' IP regime in the taxable period or any previous taxable period. In other words, the choice to apply the 'new' IP regime will be irrevocable and taxpayers cannot 'switch back' to the 'old' PID system.

Next steps

The draft bill still needs to receive formal approval by Parliament, which is at this stage expected to occur in the near future.

Contacts

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