

## Belgium amends treatment of EU permanent establishments for notional interest deduction purposes

*(Please note that this article is from an independent third-party tax news provider and the views expressed do not necessarily reflect those of Deloitte).*

The Belgian Official Gazette of 31 December 2013 contains numerous tax measures which should apply (traditionally) as of 1 January 2014 including the following:

### Deduction for risk capital – Argenta-Spaarbank judgment

The Belgian legislation on the "deduction for risk capital" (notional interest deduction) contained a difference in treatment between assets of a permanent establishment (PE) situated in a Member State other than Belgium and assets of a PE situated in Belgium. Assets of the former were not taken into account for the deduction for risk capital, whereas assets of the latter are taken into account for that purpose. Since this disadvantageous treatment was seen as liable to deter a Belgian company from exercising its freedom of establishment, the ECJ concluded in *Argenta Spaarbank (Case C-350/11)* that it constituted a restriction prohibited in principle by the EU law.

The Belgian Income Tax Code 1992 has been amended such that the assets of a PE in countries with which Belgium has concluded an income and capital tax treaty are taken into account. However, this does not imply that companies will be able to deduct more. Budgetary, this was not possible. Instead, the government has chosen to reduce the deduction with that part of the deduction that relates to the PE or the immovable property abroad. However, in respect of PEs or immovable property located in EEA countries, the reduction will be limited up to the related capital-risk deduction that is not higher than the profit of the PE or immovable property. The excess remains deductible. In other words, the government has opted to link the capital-risk deduction to the profit and to allow for a deduction solely for profit that is not exempt on the basis of an income and capital tax treaty.

The preparatory works contain, amongst others, the following example:

A Belgian company has three PEs:

- a Belgian PE realising a profit of 100 and having a risk capital that represents a deduction of 21;
- a Dutch PE realising a profit of 110 and having a risk capital that represents a deduction of 22; and
- an Angolan PE realising a profit of 120 and having a risk capital that represents a deduction of 23.

Pursuant to the Belgium-Netherlands Income and Capital Tax Treaty (2001) (as amended through 2009), the profit of the Dutch PE is exempt. Hence, the taxable base before the application of the capital-risk deduction will be 220. The amount of available capital-risk deduction (66) will have to be reduced by 22 because the amount of profit is higher than the available deduction. However, if the Dutch PE would have realised a loss of 110, the available deduction will be 66 because there is no profit on which the available Dutch deduction of 22 can be imputed.

*(This is an edited version of the full IBFD article.)*

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