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Operational Tax News

Publication of a new Belgian circular regarding the application of article 19bis BITC on funds-of-funds

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On 10 June 2021, the Belgian tax authorities published Circular 2021/C/56 (in French and Dutch—the "**Circular**") on the Belgian tax on savings income under article 19bis of the Belgian Income Tax Code (**BITC**).

According to article 19bis BITC, redemptions of shares or units of investment funds that invest at least:

- 10%, in the case of shares or units of funds acquired since 1 January 2018, or
- 25%, in the case of shares or units of funds acquired before 1 January 2018,

of assets in debt claims (i.e., interest-bearing securities, deposits, etc.) may be liable to a 30% Belgian withholding tax at the level of the Belgian investors.

To assess whether the required thresholds are met, the funds must calculate an asset test that corresponds to the percentage of assets invested in debt claims.

The Circular clarifies the application and scope of the above-mentioned article and provides certain methodological elements on the calculation of the asset test and Belgian Taxable Income per Share (**BTIS**) for funds-of-funds (**FoFs**). The main aspects of the Circular are summarized below.

Performing the asset test

The Circular specifies that, to calculate the asset test, FoFs must consider all target funds regardless of:

- Whether these target funds have a European passport;
- The asset test of the target funds; and
- Whether these target funds distribute or accumulate funds.

The Circular reiterates that the asset test is primarily determined by referring to the investment policy as reflected in the funds' prospectuses. If the asset test cannot be determined in this manner, it must be determined by considering the relevant fund's actual portfolio composition.

The basic principle for calculating an FoF's asset test is that each target fund must be combined into the FoF's asset test. For example, an FoF that invests (i) 80% of its assets into a target fund whose asset test is 40% and (ii) the remaining 20% of its assets into non-interest-bearing instruments, would have an asset test of 32% (i.e., 80% x 40% + 20% x 0%).

The Circular also reiterates that, pursuant to article 19bis BITC, if the asset test of a target fund is not known, its asset test is presumed to be 100%. However, the Circular clarifies that if a target fund's investment policy (as reflected in its prospectus) or its actual portfolio composition clearly and unequivocally excludes investments in debt claims, this target fund can be disregarded for the purposes of an FoF's asset test calculation. Importantly, the Circular clarifies that cash held on an ancillary basis can be disregarded when determining the asset test of a target fund.

The Circular further specifies that an FoF can, on its initiative and under its responsibility, determine the asset test of target funds if this asset test is not provided by the target fund. In this case, the determination must be carried out based on written and reliable documentation (such as audited annual and semi-annual reports or, if these documents are not available due to the target fund being newly established, the prospectus).

Furthermore, the Circular clarifies the rules governing the calculation of the asset tests based on the actual portfolio composition:

1. The percentage of investments in debt claims is determined on two different dates (i.e., the date of the semi-annual and annual reports);

2. The contribution of each asset is determined by referring to the book value of the asset in relation to the fund's total assets; and

3. The asset test is calculated by taking the average of the two percentages and is rounded up or down to the nearest unit.

The obtained asset test remains valid for 12 months, as from the first day of the fifth month following the end of the fund's financial year.

Asset test rounding rule

The Circular specifies that the asset test can be rounded up or down to the nearest unit. For example, an asset test of 10.49% can be rounded down to 10%, whereas an asset test of 10.51% can be rounded up to 11%.

This rule applies at the FoF level and at the target fund level. Therefore, the rounded asset test of the target fund can be used to determine the asset test of the FoF.

Home country rule

The Circular specifies that FoFs can take into account asset tests calculated by target funds based on the rules of the now-repealed Savings Directive. FoFs can also take into account asset tests calculated based on the target funds' semi-annual and annual reports established in accordance with the accounting rules of the target funds' domicile countries.

Exclusion of distributing funds

Under article 19bis BITC, redemptions of shares or units of distributing funds are not subject to taxation. Distributing funds are defined as funds that distribute all income received minus certain expenses annually. Interestingly, the Circular clarifies that since the scope of article 19bis BITC covers income from debt claims, a fund could be considered as a distributing fund if it distributes, annually, all income from debt claims received by the fund minus certain expenses. Therefore, if a fund distributes all income from debt claims (and not necessarily other types of income received), this is sufficient to qualify as a distributing fund.

It is worth noting that the provision according to which redemptions of shares or units of distributing funds are not subject to taxation under article 19bis BITC only applies to FoFs. In other words, the asset test of distributing target funds still needs to be considered when computing the asset test of the FoF.

Clarifications regarding the determination of taxable income (BTIS)

When calculating their BTIS, FoFs need to consider the BTIS of all the target funds regardless of:

- Whether these target funds have a European passport;
- The asset test of the target funds; and
- Whether these target funds distribute or accumulate funds.

In addition, an FoF can either consider the actual BTIS of the target fund (if published by the target fund), or apply a fall-back rule where the NAV variation of the target fund is multiplied by its asset test. If for a target fund neither BTIS nor Belgian asset test are known, the asset test is deemed to be 100%. Additionally, the Circular specifies that if the target fund's asset test is presumed to be 100%, the negative NAV variations of the target fund must be disregarded when computing the FoF's asset test.

According to the Circular, it is acceptable to apply different methods (actual BTIS or fall-back rule) for different target funds, if these methods are applied consistently over time for each target fund.

Impact of the distribution of dividends by a sub-fund

The Circular clarifies that, in the event of a dividend distribution by a target fund, the impact on the BTIS of the FoF will be as follows:

- If the target fund invests or is presumed to invest 100% of assets in debt claims (i.e., is a fixed income fund), 100% of the dividend paid is considered as BTIS.
- If the target fund invests or is presumed to invest 0% of assets in debt claims (i.e., is an equity fund), the dividend paid is considered as not containing any BTIS.
- In the case of mixed funds, the BTIS corresponds to either (i) the amount of the dividend multiplied by the asset test of the target fund or (ii) the actual BTIS embedded in the dividend distribution.

The release of this new circular, providing clarity on a range of relevant issues arising in practice, offers an opportunity for investment funds in scope of article 19bis BITC to review their Belgian fund tax reporting.

If you have any questions about this Circular and how it may affect your organization, do not hesitate to contact us.

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