

1. Withholding tax on dividends paid to certain foreign companies: the end of discrimination

Some time ago, the European Court of Justice condemned a Belgian scheme which levies a withholding tax on dividends paid to companies of other Member States. This is the case when the holding in the Belgian subsidiary does not meet the holding criteria defined in the Parent-Subsidiary Directive. Belgian companies meeting the same criteria benefit from the DTI scheme¹.

Example: A French company with a 5% holding in a Belgian company and an investment valued at €2.5 million would not be able to benefit from the Parent-Subsidiary Directive. The dividend distributed by the Belgian subsidiary would be levied a withholding of 27%.
Under the same conditions (a holding of 5% and an investment of €2.5 million), a Belgian parent company would benefit from the DTI scheme and charge any potential withholding. The dividend would only be levied the corporate tax of 5%, i.e. an effective taxation rate of 1.6995%.

Belgian has ended this discriminatory practice. It has introduced a new withholding tax of 1.6995% for certain dividends originating in Belgium paid or allocated to foreign companies established in the EEA or in a country with which Belgium has signed a double taxation agreement (or another bilateral agreement) requiring information exchange².

The provision targets foreign companies with a holding in a Belgian company below the (European) threshold of 10%, but with an investment at least equal to the (Belgian) threshold of €2.5 million.

Note that an action for the restitution of wrongfully paid withholdings is possible. It lapses within five years of January 1st of the year in which the withholding was paid³.

¹ The "Definitely Taxed Income", scheme, i.e., the 95% exemption for dividends distributed by a company to its parent company.

² Via the new Article 269/1 added to the Income Tax Code.

³ The conditions for restitution are defined in Circular n° Ci.RH.233/609.568 of 28 June 2013.

2. End of the VAT exemption for "cosmetic surgery"

Since 1 January 2016, surgery for purely "aesthetic" reasons is no longer entitled to the VAT exemption for medical services.

According to the arguments given, this only applies to purely cosmetic and aesthetic surgeries solely intended to embellish or improve physical appearance. This includes, for example: breast augmentations, reductions and lifts, tummy tucks, liposuction, eye, ear and nose surgery done for purely cosmetic reasons, Botox injections, teeth whitening, and other cosmetic dental work.

Note that the exclusions are solely for services provided by "physicians" and not those provided by dentists or physiotherapists.

3. Management services: conditions for deductibility

The Court of Appeals recently stated its position again on the conditions for deductibility for management services. According to the Court, taxpayers must always prove the actual existence of services if they want to be able to deduct the expenses from their taxes. The Court further stated that a non-simulated written agreement, invoices and proof of payment of the invoices do not constitute sufficient proof that the services were actually rendered.

The decree will, therefore, be an additional string to the tax authorities' bow to reject the deduction of management fees paid when taxpayers can only provide paid invoices and a management agreement which, although not simulated, is insufficiently detailed. Taxpayers will be required to provide additional information to prove that the services were actually rendered...

Where are we headed...?

4. 6% VAT for renovation work: postponement of the new 10-year age requirement

The reduced 6% rate for the renovation of private residences was previously limited to homes at least five years old. The lengthening of the period, which was supposed to increase to 10 years on January 1st, has been delayed until 12 February 2016.

In order to benefit from the 6% rate, homes will now have to be occupied for the first time in 2006 or earlier.

A transitional scheme (with conditions) had been planned for homes which met the age requirement (five years) at the end of last year, but not the 10-year condition at the beginning of this year. These homes were to continue to be taxed at the 6% rate through the end of 2017.

In order to benefit from the transitional scheme, the home must now have been occupied for the first time between 1 January 2007 and 31 December 2011.

5. Registration fee: a new rate in the Walloon Region

The Walloon Region is asserting its new tax competencies and increasing the registration fee to 15% (instead of 12.5% currently) when:

- The transaction is for a building located in Wallonia and used entirely, or in part as home, and if
- The buyer already has at least 33% full ownership or the usufruct of at least two other residential buildings at the time of the deed. It doesn't matter if the buildings are located in Belgium or another country or whether the buyer resides in Wallonia or not!

Failure to declare the properties held at acquisition time is punishable by a fine "in the amount of the fees evaded".

The new regime is applicable to translative agreements for payment for buildings "signed for from 1 January 2016 onward".

Note that the registration fee is 10% in Flanders!

6. Company size: new criteria

The Income Tax Code often refers to Article 15 of the Company Code to determine the size of companies and if they should receive benefits reserved for "small- and medium-sized" enterprises. This includes, for example, the liquidation reserve and the new Tax Shelter measures for start-ups.

A new law passed in December 2015 amends Article 15 by adjusting the size criteria for companies and expanding the definition of "SME". Companies previously considered "large" will now become "small" and be able to take advantage of the benefits reserved for this category of companies.

The new criteria are as follows:

- Average annual number of workers employed: 50
- Annual turnover excluding VAT: €9,000,000 (previously €7,300,000)
- Balance sheet total: €4,500,000 (previously €3,650,000)

From a tax standpoint, the criteria must still be considered on a consolidated basis for related companies.

A new category of companies has also been added: micro-companies whose average annual number of employees doesn't exceed 10 and which have turnover up to €700,000 and a total balance sheet of €350,000.

7. BEPS (Base Erosion and Profit Shifting) – What are the implications for Belgium?

At the end of 2015, the OECD published the 15 final reports for its “Base Erosion and Profit Shifting” (“BEPS”) project. The reports provide recommendations for national legislation and new international principles to fight tax base erosion practices and the transfer of profits to jurisdictions with low or non-existent taxes.

The conclusions of the 15 reports are intended to ensure that the profits of multinational companies are taxed where the activities generating the profits are carried out.

The recommendations are classified in three implementation categories of different intensity: minimum standards, common approaches and best practices. The minimum standards must be implemented in national legislation. They include the fight against harmful tax practices, the fight against the abusive use of tax treaties, strengthening of the concept of permanent establishment, the adaptation of transfer pricing standards and documentation, and dispute settlement.

What are the implications for Belgium?

In the short term, the patent income deduction should be revised and should be subject to stricter conditions to comply with the recommendations proposed by the OECD for harmful practices.

“Country-by-country reporting”⁴ should also come into effect in the short term. A draft law is expected in early 2016.

Note that notional interest is not being addressed at this time.

Many points still remain open and will be further researched in 2016 and 2017. In fact, some reports are not expected before 2020.

⁴ The document requires groups with consolidated turnover in excess of €750 million to provide an overview of the allocation of their profits, the taxes paid and the business activities carried out for each country in which they operate.