Tax Consult

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1. Fixed allowance expenses – the Rulings Service has sole competence

It is now no longer possible to reach an agreement with a local controller for fixed allowance expenses[1]. Indeed, since 1 May 2016, these files are dealt with solely by the rulings service in accordance with a new procedure put in place. A model for requesting a ruling has thus been published containing on one hand all of the necessary explanation and on the other hand the information required in order for the request to be accepted. The objective is to standardise the fixed amounts by type, function and sector.

The extension of a previous agreement is no longer possible and a new procedure should take place with the rulings service.

2. New European Anti-Tax Avoidance Directive

An agreement has recently been reached concerning the Anti-Tax Avoidance Directive. The biggest change for Belgian companies concerns the limit on interest deduction.

Indeed, the Directive limits the deduction of "net" interest charges to a maximum of 30% of the EBITDA. This limit should apply to interest charges on all forms of debt whether they are allocated to connected companies or to third parties.

A certain "leeway" would however be given to Member States who will thus be able to choose between not applying this limit to entities that are not part of a group or not limiting deduction of the first portion of 3,000,000 EUR of net interest charges.

This new rule should come into force on 1 January 2019.

Other measures are also planned namely in terms of exit taxes, the general anti-abuse clause, CFC rules and a framework for combating hybrid arrangements.

3. "Fixed place of work" and the 40 day rule

As a reminder, a tax-free meal allowance can be allocated to workers (and to company directors) as a reimbursement of expenses specific to the employer in the case of business travel - other than "home to workplace" travel ".
The tax authorities have always agreed that a workplace is considered as "fixed" as soon as the individual is physically present at that place for at least 40 days (successive or not) and therefore qualify and consists in a form of "substantial" occupation.

This principle has recently been undermined by the Ghent lower court which considers the 40 days rule (in a tax perspective) as a simple "administrative rule". Therefore, based on concrete facts, nothing prevents a place where the worker (or the company director) is present for less than 40 days during the taxable period from being considered as a "fixed place of work".

Conclusion: administrative rules are not legally binding and we cannot make use of them indiscriminately. Logically, such rules should also apply to the benefit of the taxpayer!

[1] The allowances that the employer pays to his workers for reimbursement of expenses are his own. These reimbursements do not constitute a remuneration for the worker and are deductible for the employer.

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4. French Civil Property Company (SCI): doing and undoing is still… ruling?

Last 29 September, the Belgian Court of Cassation reconsidered its case law from 2 December 2004 in which it had earmarked a transparency plan, merging the French tax handling of SCI's partners. This judgment from the Court of Cassation had notably resulted in the judgment made by the Court of Appeal of Liège on 20 December 2006 and by which SCI's revenues (common law) described as property revenues were ruled as exempt from progressiveness by the doing and undoing application of the France-Belgian Tax Convention[2].

In its judgment from 29 September, the Court of Cassation reconsiders its jurisprudence by finding that:

1. In the absence of an effective distribution of income, Belgian residents should not have to report property income in their Belgian tax declaration.
2. When income is effectively distributed by SCI to the benefit of partners, said income must be declared for the application of the income tax code as it qualifies as a dividend (taxable at the rate of 30% as from 1 January 2017).

Comments:

1. Although we share the former jurisprudence of the Court of Cassation, we have stressed that this had the merit of eliminating the double (economic) tax on the perceived income for SCI's Belgian tax residents.
2. As in the case of the tax on dividends in an international context, it would be appropriate, failing a harmonisation of applicable tax regimes, to encourage investments instead of taxing more and more heavily with no further consideration for the taxpayer.

The Court of Cassation referred the case to the Court of Appeal in Liège. To be continued!

5. Fairness Tax: soon to be a thing of the past?

Since 2013, "large" companies have been liable for a separate[3] non-deductible contribution when distributing dividends and deducting the reported losses and/or notional interests, resulting in a lower or nihil taxable basis.

This contribution was the subject of an annulment appeal submitted to the Constitutional Court on the grounds of a violation of the freedom of establishment principle and the Parent-Subsidiary Directive.
Before ruling, the Court decided to submit three questions to the European Court of Justice regarding the violation of these principles.

Last 17 November, the attorney general of this Court presented his conclusions as follows:
There is no violation of the free establishment clause;
The Fairness Tax does not constitute a withholding tax in the sense of the Directive (because the person liable for the tax is not the beneficiary of the income);
The Fairness Tax is in contrast contrary to the Directive in the sense that in a situation of distribution of dividends, the (distributed) profits from the subsidiary are taxed at a rate of more than the 5% authorised by the Directive.

We are awaiting the reaction of the European Court concerning this point of view... and the final decision of the Constitutional Court!

[2] Article 3 and 19 of said Convention.
[3] Called a "Fairness Tax"