Belgian Ministry of Finance organizes information round on advantageous tax regimes

The Finance Committee of the Belgian Parliament has approved the draft bill implementing the major Corporate Income Tax Reform on 13 November 2002. The bill must now be submitted to the vote in a plenary session. In order to secure the vote of the representatives of environmental parties Agalev and Ecolo, the bill has been linked with the legislation on the so-called 'ecotaxes' (taxes on disposable packing) and 'ecoboni' (reductions on the VAT and excise duties on drinks in recyclable packing). The examination of this draft bill by the Finance Committee is scheduled for this week.

While the Parliament is preparing the vote of the draft bill on the Corporate Income Tax Reform, the administration of the Ministry of Finance is looking at its practical implementation.

One of the major measures of the draft bill is a strengthening of the so-called minimum taxation condition of the participation exemption for dividends received by a Belgian company.

A Belgian holding company can only claim the participation exemption if its subsidiary is subject to a corporate income tax equivalent to the Belgian corporate income tax and if it is not resident in a country which has an ordinary corporate income tax regime that is substantially more advantageous than the Belgian corporate income tax.

In its commentary on the Income Tax Code, the Tax Authorities had listed (Commentary on the Income Tax Code 199/34 and 199/35):

- Notorious tax havens such as Andorra, Anguilla, Bahamas, Bahrain, Bermuda, Campione, Cayman Islands, Ciskei, Grenada, Nauru, Saint-Pierre-et-Miquelon, Sark, Tonga, Turks and Caicos-Islands, Vanuatu, and

- Specific types of companies in certain countries, such as, inter alia :

  - the International Business Companies in Antigua, Barbados, the British Virgin Islands or Jamaica ;

  - the exempt companies in Aruba, Gibraltar and the Isle of Man ;

  - the holding companies in Liechtenstein and Luxembourg ;

  - the shipping companies based in Cyprus and Malta ;

  - companies in countries which do not tax foreign source income : the Cook Islands, Costa Rica, Djibouti, Hong Kong, the Isle of Man, Malaysia, Nevis, Oman, Panama and Singapore

However, this list dates back to 1991 and has only been adapted once to exclude Taiwan.

The second criterion was quite vague and, in practice, the burden of proof was left with the Tax Authorities.

This criterion will be clarified, and the ordinary corporate income tax regime will be deemed to be substantially more advantageous than the Belgian corporate income tax, in countries where

- The ordinary nominal tax rate levied on the profits of the company is less than 15 percent, or

- Where the actual tax burden under the ordinary corporate income tax rules is less than 15 percent.

The draft bill has incorporated the observations of the Conseil d'Etat. It does not take account anymore of the tax levied by the central tax authorities alone, but also with the taxes due to local authorities. Moreover, the new provision also looks at the effective tax burden, which is affected by a country's tax consolidation rules, carry back rules, etc ...

To ensure legal certainty, a Royal Decree will list the countries which have such a substantially more advantageous corporate income tax regime. This option was preferred above the original option to allow the Tax authorities and the tax payers to rebut the presumption by showing that if Belgian corporate tax that would be due on those profits, the effective tax rate would be less than 15 percent. This does not necessarily mean that the tax payer cannot rebut the presumption anymore, but this will now become more difficult.

The Tax Authorities have started preparing this list and they have published a first draft on 19 November 2002. The following countries were listed : Afghanistan, Alderney, American Samoa, Aruba, Belize, Bosnia and Herzegovina, British Virgin Islands, Burundi, Cape Verde, Central African Republic, Comoro Islands, Cook Islands, Cuba, Democratic People's Republic of Korea, Dominica, Equatorial Guinea, Estonia, Gibraltar, Grenada, Guernsey, Guinea-Bissau, Haiti, Herm, Iran, Irak, Jersey, Kiribati, Laos, Liberia, Liechtenstein, Macao, Maldives, Isle of Man, Marshall Islands, Mayotte, Micronesia, Monaco, Montserrat, Namibia, Netherlands Antilles, Niue, Oman, Panama, St Christopher and Nevis, St Lucia, St.-Pierre-et-Miquelon, St Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Seychelles, Somalia, Switzerland, Trinidad and Tobago, Tuvalu, Uzbekistan and the US Virgin Islands.

The Ministry of Finance adds that it has included countries for which it has not found sufficient information and it invites all interested parties to comment on this list before 9 December 2002.

Observations must be addressed to the Belgian Ministry of Finance, Administration des Affaires Fiscales, direction 3/3, Tour des Finances, Avenue du Jardin botanique 50 boîte 52, 1010 Bruxelles, by mail, by fax at nr +32.2.210.33.07 or to the following e-mail address : info.afzaaf@minfin.fed.be.

Multinational companies which have interests in any of these countries may wish to submit their observations to evidence that the ordinary corporate income tax regime is not substantially more advantageous than the Belgian corporate income tax by reference of the 15 percent tax.

This list raises two comments.

The fact that the tax havens of Andorra, Anguilla, Bahamas, Bahrain, Bermuda, Campione, Cayman Islands, Ciskei, Grenada, Nauru, Sark, Tonga, Turks and Caicos-Islands, Vanuatu, and the special tax regimes of Antigua, Costa Rica, Cyprus, Djibouti, Hong Kong, Jamaica, Malaysia, Malta, Singapore or the United Arab Emirates are not included in the list, does not mean that subsidiaries in those countries qualify for the participation exemption. They continue to be excluded under the first criterion as these countries do not have a corporate income tax or apply special tax regimes.

A new provision in the draft bill is that the ordinary tax provisions in other Member States of the European Union are not deemed to be substantially more advantageous. This exception is wider than the mere application of the Parent Subsidiary Directive. In that respect, it is surprising to notice that two countries are included in the list. Estonia is a candidate for accession to the European Union in 2004. Liechtenstein may not be a Member State of the European Union, but Liechtenstein subsidiaries may find protection under the Agreement on the European Economic Area, and in particular under the provisions relating to the free movement of persons and services.

Marc Quaghebeur, 26 November 2002

Belgian Ministry of Finance Organizes Information Round on Advantageous Tax Regimes, Tax Notes Int'l, 27 Nov. 2002, p. 721.