



Administrative Note repeals special tax regime for US Foreign Sales Corporations

In an administrative note of 21 August 2003, the Belgian Tax Authorities have abandoned the special tax regime they had granted to US Foreign Sales Corporations ('FSC') operating in Belgium.

The Belgian government had adopted the regime in 1984 to attract US companies. Under the U.S. legislation US corporations which carry out sales operations abroad (e.g. in Belgium) were allowed to attribute to the FSC part of the income realised from sales abroad, and under certain conditions, the profit attributed to the FSC was deemed taxable abroad and exempted in the US.

The Belgian tax regime was a simple cost plus 8 percent regime. A US based enterprise setting up an FSC in Belgium – either as a Belgian company or as a Belgian branch office – could obtain a ruling from the Belgian tax authorities that allowed the company to calculate its taxable income on the basis of some of its expenses.

- For an FSC operating in the form of a branch office, the taxable profit is determined on a notional cost plus basis with a mark-up of 8 %. However, "direct" costs incurred by the FSC with respect to advertising and sales promotion activities, transport of goods and the assumption of credit risk, were excluded from this notional cost plus tax base, as were the income taxes paid by the FSC
- If the FSC operates in the form of a subsidiary (a Belgian company) its taxable profit is, in principle, determined in the same way as for any Belgian company, i.e. on the basis of the profit that its annual accounts show, with certain tax adjustments in respect of retained earnings, disallowed expenses and dividends paid out.

The main difference is, however, that the Tax Authorities would not question whether the transactions between the FSC and affiliated companies are at arm's length as long as its taxable profit was at least 8 % of the relevant costs of the FSC.

The ruling was granted on a case-by-case basis and was valid for three years; it was tacitly renewed, as long as the US based company gave evidence that its status as an FSC in the US was maintained.

In its Code of Conduct for business taxation the Primarolo group pointed out Belgium's FSC regime as one of the harmful tax measures that needed to be rolled back. On 24 June 2003, the European Commission announced that it considered the Belgian tax regime to be an illegal state aid under the EU rules. However, the Commission has not ordered the recovery of the state aid received by these companies, because, at the time of the implementation of the scheme, the Belgian authorities as well as the beneficiaries had legitimate reasons to believe that the scheme did not constitute a state aid.

The Belgian Tax Authorities have now repealed the special tax regime for United States' Foreign Sales Corporations with effect from the first tax year following 24 June 2003.



Consequently, these companies and subsidiaries will now be taxed in accordance with the ordinary corporate income tax rules.

Nevertheless, the Tax Authorities suggest that FSC these companies could apply for a new ruling in accordance with the new rules laid down by the Act of 24 December 2002 which has substantially extended the Belgian ruling and advance pricing agreement practice, insofar as the proposed pricing structure and methods are sufficiently substantiated.

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