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Tax Measures in Belgium's 2017 Budget Law Unveiled

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By Marc Quaghebeur

The Belgian government recently published in the State Gazette the Act of December 25, 2016, which implements the 2017 budget along the lines announced at the time of the budget discussions in October 2016. (Prior coverage .)

Direct Taxes

The principal measures that will have an impact for individuals are as follows:

1. Withholding Tax Rate Increased

The default withholding tax rate has been increased to 30 percent for movable income paid or attributed starting January 1. The tax rate had just been increased from 25 percent to 27 percent at the beginning of 2016, and in most cases, 30 percent is double the withholding tax rate of five years ago.

The withholding tax rate on the early distribution of liquidation reserves recorded as of 2017 has been raised from 17 percent to 20 percent. By transferring profits of the year to the liquidation reserve, a company can earmark profits for tax-free distribution. An immediate tax of 10 percent is due, but liquidation dividends from the liquidation reserve can be paid out without any withholding tax. If, however, the liquidation reserve is used for the distribution of a dividend during the reserve's first five years, an additional withholding tax of (now) 20 percent will be due. For distributions after the five-year period, the withholding tax is only 5 percent. Notably, distributions within the first five years are still more favorable, since the total tax is 10 percent plus (20 percent of 90 = 18 percent) -- in total, 28 percent.

2. Speculative Gains Abandoned

In 2016 the government introduced a capital gains tax of 33 percent on so-called speculative capital gains. These are capital gains realized by individuals on listed shares, warrants, and options on listed shares, as well as listed financial instruments on shares (for example, derivatives such as futures). This speculative gains tax applied to all sales realized starting in 2016, with the exception of employee share option plans. The tax was due if the capital gain is realized within a period of six months following the acquisition of the shares, warrants, or options, with the understanding that this was to be determined on a "last in, first out" basis. The tax was, in principle, retained by the bank.

This tax was not expected to raise a lot of income for the Treasury; rather, it had an important symbolic significance, showing that the government was serious in its intent to shift taxes from labor to capital. In fact, the tax authorities received less in speculative gains tax than it cost them to collect it. This tax was abolished with effect from January 1.

3. Capital Gains Loophole Closed

As an alternative, the government opted to close a loophole that allowed owners of companies to distribute dividends tax-free. Indeed, when an individual holds a majority shareholding in an operating company or a holding company, he can transfer that shareholding to an entirely owned holding company, either against shares to be issued by the holding company or against a payable due by the holding company.

Such one-shot transactions with entirely controlled companies were tax-exempt as they were within the normal management of a private estate consisting of securities, tangible assets, or real property, and were not liable to CGT.

This allows the individual shareholder to create a current account through which he could pay out future dividends free of withholding tax.

In the case of an exchange of shares (that is the exchange of shares of the operating company for shares of the holding company), it is to be noted that in Belgium, the repayment to shareholders of paid-up share capital and issue premiums, which are assimilated to paid-up share capital, is not subject to withholding tax. All payments in excess of those amounts, however, are dividends and are subject to withholding tax. This means that the individual shareholder who exchanged shares of one company for the (paid-up) share capital of another could, at a later stage, distribute dividends tax-free in the form of a reimbursement of the company's paid-up share capital.

In the case of an exchange of shares after January 1, but only if the exchange did not trigger CGT, the parent company would have to make a distinction in the newly issued share capital between the paid-up capital and a taxed reserve. The paid-up capital of the company receiving these shares would, for tax purposes, only be increased with the acquisition the shares received for the original shareholder. The result will be that any repayment of excess capital will, in principle, be subject to withholding tax on dividends at a rate of 30 percent.

The following changes apply to the company income tax:

1. Disallowed Benefit in Kind for Company Cars

With the highest individual income tax rates, Belgian employers have found company cars to be an effective alternative for remuneration. The value of the fringe benefit for private use was determined on a lump sum basis based on the car's horsepower; this has evolved to a lump sum basis based on the carbon dioxide emission levels of the car, its value, and its age, regardless of whether the employee received a fuel card. In recent years, this was combined with a tax measure disallowing 17 percent of the value of that lump sum fringe benefit for the employer.

As of 2017 this disallowed percentage will be 40 percent if the company bears all or part of the

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fuel costs associated with the use of the car for private purposes. In practice, most employers providing company cars to their employees also grant fuel cards.

Moreover, while under the current rules, the employee's contribution toward the use of the car can be deducted from the calculation basis for the disallowed expense, this is no longer the case as of January 1. While in theory this tax increase relates solely to corporate tax, it is clear that employees will (also) suffer the consequences.

2. Tax Regime for Recovery of State Aid Under Excess Profit Tax Scheme

The Act of December 25, 2016, also introduced a set of rules to allow the recovery of state aid granted under the excess profit tax scheme. The background to these rules is European Commission decision SA.37667 of January 11, 2016, which declared Belgium's so-called excess profit rulings illegal state aid. These rules are based on article 185, section 2, of the Belgian Income Tax Code, which introduced the arm's-length principle into Belgian tax law. It allows the Belgian tax authorities to correct the taxable basis of a Belgian company upward (article 185, section 2a) or downward (article 185, section 2b) if it is not at arm's length.

The European Commission found that Belgium unilaterally used the downward adjustment to reduce the corporate tax base of companies in order to disregard "excess profits" that resulted from being part of a multinational group (that is, because of synergies, economies of scale, reputation, client and supplier networks, or access to new markets). The commission's investigation showed that the excess profit scheme derogated from normal practice under Belgian company tax rules and from the arm's-length principle. Consequently, the commission deemed that this was illegal under the EU state aid rules. (Prior coverage. News release.)

When the commission opened its investigation in February 2015, Belgium put the excess profit scheme on hold and no new tax rulings were granted under the scheme. The commission's decision requires Belgium to stop the excess profit scheme in the future and to recover in full the unpaid tax from at least 35 multinational companies that have benefited from the scheme.

The European Commission's decision is being challenged by the Belgian government and many companies before the Court of Justice of the European Union. (News release.) However, this procedure does not suspend the recovery procedure in itself.

This set of rules authorizes the Belgian tax authorities to issue tax assessments to recover the excess profit tax and lays down how the excess tax must be recovered from the companies that have benefited from the scheme. To that effect, the tax authorities will issue tax assessments to charge additional corporate income tax in accordance with the standard procedure, with some variations to adapt the standard procedure if it would not allow for recovery of the tax.

The Belgian tax authorities will determine the amount of company income tax due on a year-by-year basis for each financial year for which the ruling allowed a company to reduce its taxable profit. The tax relating to the excess profit will be calculated by recalculating the corporate tax liability, disregarding the excess profit deducted. The difference will be the reclaimed state aid.

Because the tax assessment is to be recalculated yearly, the tax authorities will automatically grant some specific deductions in the tax assessment, such as tax losses carried forward or tax

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credits that are automatically granted. Other deductions such as research and development tax deductions or credits or the patent income deduction, which must be claimed by the company, will only be granted if the company shows that it is entitled to the deductions.

Moreover, to the extent that the Belgian excess profit was effectively taxed abroad, a correction will be required to determine the correct amount of state aid to be recovered.

On top of the state aid, Belgium will charge compound interest calculated in accordance with the rules laid down in Chapter V of Council Regulation (EC) No 794/2004. The interest is part of the state aid to be recovered and is due from the date on which the aid was granted up to the date of reimbursement. The interest is a tax-deductible cost for the company in accordance with the provisions of domestic law.

Indirect Taxes

1. New Stock Exchange Tax Rules

Belgium charges a stock exchange tax on the purchase and sale of some financial instruments on a secondary market through a Belgium-based professional intermediary. The rate varies, depending on the nature of the instrument, with the tax payable by each party to the transaction.

The stock exchange tax is 0.27 percent on any sale or purchase of shares, with a maximum of €800 per transaction. That cap has been doubled to €1,600 with effect from January 1. For the sale or purchase of bonds on the secondary market, the rate is 0.09 percent, capped at €1,300 (previously €650) and on the sale of undertakings for collective investments in transferable securities (UCITS), the rate is 1.32 percent, capped at €4,000 (up from €2,000). When a distribution UCITS redeems its units, no tax is due, but the sale or purchase of such units on the secondary market will be taxed at 0.09 percent, capped at €1,300 (previously €650).

In the past, the stock exchange tax was not due if the transaction was carried out via a professional intermediary outside Belgium, or if no professional intermediary was involved, or if the transaction was carried out on behalf of an exempt person acting on its own behalf. Exempt investors include some Belgian institutional investors and nonresident investors, provided that they submit an affidavit to the financial intermediary in Belgium confirming their nonresident status.

Since January 1, the tax is also due if a Belgian resident individual purchases or sells financial instruments through a professional intermediary established outside Belgium (for example, via transactions on the internet). More specifically, the new rules provide that Belgian resident investors must declare and pay the stock exchange tax unless the financial intermediary has charged and paid it. Financial intermediaries established abroad may appoint a representative who will be responsible for paying the stock exchange tax.

Belgian individual taxpayers that have to pay the stock exchange tax must file a tax return and pay the tax before the end of the second month following the taxable transaction.

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2. VAT Rate Reduced

The Act also introduced a reduced VAT rate of 12 percent for private housing initiatives within the framework of social policy, effective from January 1.

Marc Quaghebeur, partner, De Broeck Van Laere & Partners, Brussels

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