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Global Tax Alert

Belgium: 2019 year-end tax planning for MNEs

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Executive summary

The end of the calendar year marks the end of the financial year for many companies. The Belgian corporate tax reform, which was adopted in late 2017, is entering its third and final wave of introducing measures that will come into effect in 2020. These measures include a further reduction of the corporate tax rate to 25% (compared to 29.58% in 2018 and 2019).[1] The first and second wave introduced a series of measures, including a 100% participation exemption on dividends received and a tax consolidation regime, further improving the Belgian holding regime.[2]

Detailed discussion

As background, the following list of measures entered into force as from financial years commencing on 1 January 2019 - transposing the European Union (EU) Anti-Tax Avoidance Directives (ATAD).[3]

- 30% EBITDA (earnings before interest, taxes, depreciation and amortization) interest limitation rule
- Hybrid mismatch rules
- Exit taxation
- Controlled foreign company legislation

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Only limited guidance has been provided by the tax authorities. A draft law which includes some changes to the abovementioned measures was published on 26 November 2019. The draft law amends further the EBITDA interest restriction, and further aims to align the Belgian hybrid mismatch rules to the ATAD.[4] Due to the important impact these measures continue to have, it is critical to continue measuring the impact of these new rules and how the practice evolves. Action before year-end might be required to avoid adverse impact of these new rules.

In addition to the measures that entered into force this year, the following key measures will enter into force as from financial year 2020:

- **Limitation of losses incurred in foreign permanent establishments**: Tax losses incurred by a foreign permanent establishment (PE) of a Belgian company of which the income is treaty exempt in Belgium will no longer be deductible from the tax basis of the Belgian company. The losses will only remain deductible if these cannot be used to be offset by the profits of the Belgian branch abroad and are considered as definitive losses incurred in a branch located within the European Economic Area.
- **Broadened Belgian PE definition**: The Belgian establishment concept will be defined more broadly, taking into account a more economic approach in line with the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 7 recommendations. In particular, the rules on independent agents will target a broader range of situations. As this may result in a higher risk of taxable presence in Belgium, foreign companies should review potential PE situations and re-evaluate past assessments, thereby also considering the impact of the MLI in this respect (see below).

Other international developments

The following recent international developments should be considered, as these may have an impact on Belgian companies:

- **Multilateral instrument**: Belgium deposited its instrument of ratification with the OECD for the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) on 26 June 2019, together with its definitive MLI positions and a list of 99 tax treaties which Belgium entered into with other jurisdictions that it wishes to designate as Covered Tax Agreements (CTAs).[5] The MLI entered into force for Belgium on 1 October 2019. It is important to review each CTA, to determine whether the counterparty has also approved the MLI, and whether thus the MLI takes effect on 1 January 2020 for withholding taxes and on 1 April for other taxes (accounting years starting after 1 April 2020).
- **Mandatory disclosure rules**:[6] In an effort to increase transparency and tackle so-called cross-border aggressive tax planning, the Council of the European Union introduced a new Directive (2018/822) (referred to as DAC6) which requires certain intermediaries to disclose any cross-border arrangement that contains certain characteristics (hallmarks) indicating potential tax avoidance.[7] If there are no external or internal intermediaries that can report, the obligation will shift to the relevant taxpayers. The Directive applies to cross-border arrangements if the first steps of implementation are taken on or after 25 June 2018.

Determining whether a cross-border arrangement is reportable raises complex technical and procedural issues for multinational enterprises (MNEs) and their advisors. Belgium published on 26 November 2019 draft legislation and explanatory notes addressing the implementation of DAC6.[8] This draft law is largely in line with DAC6. MNEs are highly encouraged to start reviewing and understanding the ramifications of this new obligation, which may include severe penalties.

Other

- **New Code on Companies and Associations**:[9] On 28 February 2019, the Belgian Parliament approved the new Belgian Code on Companies and Associations (the Code) which modernizes Belgian company law by simplifying and clarifying rules and introducing more flexibility. The Code will enter into force for existing companies on 1 January 2020, and existing companies can opt in and apply the new Code as from 1 May 2019 (requiring a modification of their articles of association). As of 1 May 2019, the rules apply for newly incorporated companies.

As from 1 January 2020, existing companies are obliged to modify their articles of association in accordance with the new Code at the occasion of the first modification of their articles of association, or at the latest by 1 January 2024. Triggering events include e.g., capital reduction, change of name, change of date of annual shareholders meeting.

During the transitional period (1 January 2020 – 1 January 2024), the mandatory provisions of the new Code will apply regardless of whether the existing company's articles of association are contrary, while the supplementary (non-mandatory) provisions of the new Code will only apply if these are not deviating from the company's articles of association.

It must be noted that the Code reduces the number of different company types, and one of the commonly used type of companies – the private limited liability company, i.e., BVBA/SPRL is restyled into a new company form, i.e., the BV/SRL (besloten vennootschap/*société à responsabilité limitée*). The impact of a conversion of a BVBA/SPRL into a BV/SRL should also be reviewed from a foreign perspective, especially if specific a specific election was made for non-Belgian tax purposes.

- **Deadlines for ruling requests**:[10] The Belgian Commission for Advance Decisions (Ruling Commission) published deadlines for filing Transfer Pricing and Innovation Income deductions requests for tax year 2020 in order to manage the process and timing and to ensure the issuance of a decisions before the deadline for submission of the tax return (generally due by the end of September 2020 for companies that have a financial year closing on 31 December 2019):
  (i) For companies with a financial year closing on 31 December 2019, the prefiling requests or requests that are not preceded by a prefiling should be filed with the Ruling Commission by 31 January 2020 at the latest when they relate to transfer pricing matters or the application of the innovation deduction (or old patent income deduction).
  (ii) For companies not keeping accounts for the calendar year, a similar eight-month period prior to the deadline for filing of the corporate income tax return should be followed.

To ensure a timely tax ruling, taxpayers should start a ruling process as early as possible and preferably still in the financial year to which it relates to.

Endnotes

1. See EY Global Tax Alert, *Belgian government approves draft law on corporate tax reform including 100% participation exemption*, dated 7 November 2017.
2. See EY Global Tax Alert, *Belgium introduces 100% participation exemption*, dated 20 March 2018.
3. See EY Global Tax Alert, *Belgium: Year-end review for MNEs*, dated 26 November 2018.
4. See EY Tax Alert, *Draft bill amends interest limitation deduction and anti-hybrid rules*, dated 3 December 2019.
5. See EY Global Tax Alert, *Belgium deposits instrument of ratification for MLI*, dated 9 July 2018.
6. See EY Global Tax Alert, *Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers*, dated 14 March 2018.
7. See EY Global Tax Alert, *EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers*, dated 5 June 2018.
8. See EY Global Tax Alert, *Belgium issues draft mandatory disclosure regime legislation*, dated 5 December 2019.
9. See EY Global Tax Alert, *Belgium Parliament approves new Code on Companies and Associations*, dated 29 March 2019.
10. See EY Tax alert, *Ruling Commission publishes deadline for filing TP and Innovation Income deductions requests for tax year 2020*, dated 27 September 2019.

For additional information with respect to this Alert, please contact the following:

EY Brussels

- Steven Claes steven.claes@be.ey.com
- Peter Moreau peter.moreau@be.ey.com
- Arne Smeets arne.smeets@be.ey.com

EY Antwerp

- Werner Huygen werner.huygen@be.ey.com

Ernst & Young LLP (United States), Belgian Tax Desk, New York

- Jean-Charles van Heurck jean-charles.van.heurck1@ey.com

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