
European Tax Newsalert

A Washington National Tax Services (WNTS)
Publication

Belgium

January 12, 2012

Belgium enacts new tax measures

Belgium has enacted various new tax measures which were proposed in November 2011 as part of the 2012 Belgian budget. These measures were enacted in the Miscellaneous Provisions Act of December 28, 2011 ("the Act"), and affect the Belgian corporate income tax, personal tax, withholding tax and indirect tax.

Note that other tax measures, not yet included in legislation were proposed in the budget agreement framework. However, we expect that they will also be enacted in the first quarter of 2012.

This Newsalert provides an overview of proposed and enacted tax provisions relevant to US multinationals.

Notional interest deduction ("NID") (partially enacted)

Belgian corporate income taxpayers can claim an NID for tax purposes, reflecting the economic cost of capital, equal to the cost of long-term, risk-free financing. The NID rate for a given tax year is, in principle, based on the Belgian ten-year government bond interest rate for the calendar year two years prior to the tax year (e.g., for tax year 2012, the NID references the 2010 government bond rate). The current NID rate - for tax year 2012 (accounting year 2011) - is 3.425% (3.925% for small and medium enterprises ("SMEs")). The Act now caps the NID's rate at 3% for tax year 2013 and subsequent tax years and no longer allows the government to increase the cap through royal decree.



Entry into force: this new rate is effective beginning with tax year 2013 (accounting years ending between December 31, 2012 and December 30, 2013, both dates inclusive).

In addition, under the current rules, “excess NID” (i.e., NID that cannot be claimed when a taxpayer has insufficient taxable income) can be carried forward for seven years. Under the proposal, new excess NID may no longer be carried forward.

However, the “stock” of excess NID (stemming from prior years, i.e., tax years 2012 and before) may be carried forward for seven years (as is currently the case), though the excess NID that could be applied in a given year would be limited to 60% of taxable profit (i.e., the profit net of carried-forward tax losses and other tax deductions). The 60% limit would only apply to the amount of taxable profit that exceeds EUR 1 million. The portion of excess NID that is not be used due to the “60% rule” (i.e., 40% of taxable profit) could be carried forward for one extra year.

Entry into force: the above measures for excess NID carryforwards have not (yet) been enacted. However, we expect that (once they become law), they will be effective with tax year 2013.

Company cars and disallowed expenses (fully enacted)

The Act introduces an additional disallowed expense related to company cars.

The new disallowed expense is 17% of the new benefit in kind (i.e., 17% of 6/7 of the car’s list price multiplied by a percentage (between 4% and 18%) linked to the car’s CO₂ emissions). With regard to ‘new benefit in kind’ calculation, see below under “Belgian personal income tax measures and the benefit in kind related to the private use of company cars”. This new disallowed expense cannot offset the notional interest deduction, tax losses or other tax deductions. Thus, the new disallowed expense results in a minimum tax base.

Entry into force: this measure applies to benefits in kind attributed on or after January 1, 2012.

Capital gains on shares - one-year holding period required for exemption (not yet enacted)

Under current law, (net) capital gains realized by a Belgian company (or Belgian branch) on shares are 100% tax exempt (if certain conditions are met), without any minimum holding-period requirement. The budget proposed a minimum one year holding period.

If shares are sold (or if a capital gain is realized on shares via another transaction, e.g., a capital contribution) before reaching the minimum one year holding period, a budget agreement proposal would tax the capital gain at 25%. However, if the shares were sold after the one-year holding period, the capital gain would be tax exempt. Capital losses on shares would continue to be non-deductible unless certain conditions are met.

New general thin-cap rule (not yet enacted)

Belgian tax law currently does not have a general thin-cap rule. A specific thin-cap rule exists for interest payments or attributions to (real) beneficiaries taxed at low rates on that interest. This is the so-called 7:1 debt-equity ratio.

The new rule would introduce a general 5:1 debt-equity ratio. If enacted, interest on debt in excess of the 5:1 ratio would be considered a non-deductible expense. In addition, the thin-cap rule would only apply to intra-group financing (regardless of whether the (real) beneficiary of the interest is taxed at high or low rates) and would not apply to third party loans.

Anti-abuse rule: substance over form (not yet enacted)

Currently, according to section 344(1) of the Income Tax Code, the Belgian tax authorities can (under certain conditions) reclassify a legal deed (transaction) as a different form of legal deed (with a higher tax burden) provided both transactions have the same, or similar, legal consequences. Under the new rules, in order to reclassify a transaction, the 'new transaction' would no longer need to have consequences the same as, or similar to, those of the 'old' transaction. Hence, the budget appears to introduce a substance-over-form approach.

Pension schemes and pension reserves (not yet enacted)

According to the '80%-rule', pension premiums are only tax deductible if the pension does not exceed 80% of the last normal gross annual remuneration calculated on the basis of a normal full working lifetime. The proposed rules would reduce the 80% limit by basing it on the highest civil service pension ("ambtenaar/fonctionnaire").

Currently companies can build up pensions via provisions for an individual pension scheme. The proposal would no longer allow this. Internal pension-scheme provisions would be subject to the general 4.4% group insurance tax. Existing provisions would have to be transferred to insurance companies within three years. These existing provisions would receive a more favorable tax rate of 1.75%.

New withholding tax rates (enacted)

Dividend withholding tax

- The current general withholding tax rate of 25% does not change.
- The current 15% rate (applicable in certain cases) becomes 21%.
- The withholding tax rate applicable to liquidation surpluses remains at 10%.
- The withholding tax rate on own share redemptions increases from 10% to 21%.
- The numerous withholding tax exemptions (specifically for payments to companies) are not affected.

Entry into force: this measure applies to income attributed or made payable on or after January 1, 2012.

Interest withholding tax

The withholding tax on interest increases from (generally) 15% to 21%, except for:

- State bonds issued and subscribed during the period November 24, 2011 through December 2, 2011;
- interest stemming from ordinary savings accounts (to the extent they exceed the first tax-free band of EUR 1,770 per taxpayer for tax year 2012).

The numerous withholding tax exemptions (especially for payments to companies) are not affected.

Entry into force: this measure applies to income attributed or made payable on or after January 1, 2012.

Royalty withholding tax

The standard 15% withholding tax rate on royalties does not change. The numerous withholding tax exemptions (specifically for payments to companies) are also not affected.

Personal income tax measures (enacted)

Private use of company cars

Under the current rules, the benefit in kind for company car use is based on the car's CO₂ emissions, the fuel type and the amount of the car's private use (5,000 km or 7,500 km). The Act stipulates that the yearly benefit in kind on which an employee is taxed is computed as 6/7 of the list price of the car multiplied by a percentage linked to the car's CO₂ emission rate (the "taxable percentage"). The list price is the invoiced amount, including options and VAT, but excluding any rebates. The percentage linked to the CO₂ emissions varies between 4% and 18%. The number of kilometres driven for private purposes is therefore no longer taken into account for computing the taxable benefit in kind. For further details, please visit <http://www.hrservices.be/new-2012-company-car-benefit-in-kind/>.

Entry into force: this measure applies to benefits in kind attributed on or after January 1, 2012.

Extra tax on interest and dividend income exceeding EUR 20,000 a year

The Act stipulates that the net amount (the amount before deducting certain costs but increased by the withholding taxes due) of interest and dividend income that exceeds EUR 13,675 (EUR 20,000 after indexation) per annum is subject to an additional tax of 4% (on top of the withholding taxes). Currently, there is no such surtax.

The following income should not be considered when calculating the EUR 20,000 cap: (i) the exempt part of ordinary saving accounts, (ii) liquidation surpluses and (iii) State bonds issued and subscribed in the period November 24, 2011 through December 2, 2011.

The following interest and dividend income is not subject to the 4% surtax: (i) income from ordinary saving accounts, (ii) liquidation surpluses, (iii) interest and dividends

subject to 25% withholding tax, and (iv) state bonds issued and subscribed in the period November 24, 2011 through December 2, 2011.

Entry into force: this measure applies to income attributed or made payable on or after January 1, 2012.

New reporting requirement for investment income

The Act introduces a new general reporting requirement for investment income (interest, dividends and royalties): this income should be declared in the annual tax return (there is an exemption for income which has been subject to both the 21% withholding tax and the additional tax of 4% at source). Currently, there is no general reporting requirement for such income.

Entry into force: this measure applies to income attributed or made payable on or after January 1, 2012.

Stock options

The benefit in kind in the form of stock options is currently based on a lump-sum valuation of 15% of the underlying share value. The Act increases this rate to 18%.

Entry into force: this measure applies to stock options offered on or after January 1, 2012

Tax on conversion of bearer securities (enacted)

The Act introduces a tax on the conversion of bearer securities into dematerialized securities or registered securities under the Act of December 14, 2005, which introduced a gradual abolition of bearer securities. The taxable event is conversion (i.e., dematerialization, as provided by a company's articles, of bearer shares when they are deposited in a securities account with a financial institution or registration with the issuing company in respect of registered shares). The tax rate is 1% for conversions during 2012 and 2% for conversions in 2013.

The Act also provides that the tax is calculated at the time of deposit, as follows:

- for listed securities, the taxable basis is the most recent quoted value before the date of deposit in a securities account or with the issuer;
- for unlisted securities, the taxable basis is (i) the face value for bonds and other debt securities, (ii) the most recent inventory value for shares in investment funds, or (iii) the book value on the date of deposit (interest excluded) for any other securities.

The tax must be paid:

- for conversions into dematerialized securities, by the professional intermediary upon deposit of the bearer securities in a securities account;
- for conversions into registered securities, by the issuing company upon registration.

If conversion occurred before December 31, 2011, no tax will be due. The Act of December 14, 2005 provides that, for bearer securities issued by listed companies, conversion into dematerialized securities is automatic when the bearer securities are deposited in a securities account. A similar regime applies to public debt securities.

For bearer securities issued by unlisted companies, their deposit in a securities account does not automatically lead to their conversion into dematerialized securities, since they are only converted if the articles of association of the issuing company provide for that upon deposit (or are amended to that effect) and a date of conversion is stipulated. Hence, when bearer securities issued by an unlisted issuer whose articles of association make no provision for conversion before December 31, 2011 are held in a securities account, the law does not address how the tax will be paid upon conversion.

Tax on stock exchange transactions (enacted)

The Act provides for new rates and new (higher) caps for calculating tax on stock exchange transactions effective January 1, 2012.

*For more information, please do not hesitate to contact the
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