European Tax Newsalert

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Belgium

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Belgium overhauls general anti-avoidance rule and introduces 5/1 thin cap provision

Belgium has enacted more of the tax measures proposed at the end of November 2011 under the 2012 budget agreement. The newly enacted provisions include an overhaul of the general anti-avoidance rule and a new thin capitalization ("thin cap") provision.

This newsalert summarizes the proposed and enacted income tax provisions that are most relevant to US multinationals:

- Proposed amendments to the notional interest deduction regime;
- A new one-year holding period for capital gains on shares;
- A new thin cap provision; and
- The overhauled general anti-abuse provision.

Some of the proposed measures were enacted as part of the Miscellaneous Provisions Act of December 28, 2011. Other proposed measures were adopted as part of the Program Act on March 22, 2012, by the Chamber and on March 28, 2012, by the Senate. According to information we have received, the approved Program Act was signed by the Belgian Government on March 29, 2012, and will be published soon in the Official Gazette.

Other tax measures that have not yet been set down in legislation or in draft legislation were proposed in the framework of the budget agreement and are expected to be enacted later in 2012.

This Newsalert also includes a reminder of the new withholding tax rates enacted on December 28.

Notional interest deduction ("NID")

Belgian corporate income tax payers 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 10-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 December 28 Act capped the NID's rate at 3 percent for tax year 2013 (accounting years ending between December 31, 2012, and December 30, 2013) and subsequent tax years, and no longer allows the government to increase the cap through a royal decree.

Under the current rules, “excess NID” (i.e., NID that cannot be claimed because the taxpayer has insufficient taxable income) can be carried forward for seven years. Under the budget proposal, new excess NID no longer could be carried forward.

However, excess NID carried forward from previous years still could be carried forward for seven years under the existing rules The amount of excess NID carryforwards that could be used in a given income year would be limited to 60 percent of the taxable profit (the profit remaining after setting off tax loss carryforwards and other tax deductions). The 60-percent limit would apply only to taxable profit exceeding EUR 1 million. The portion of excess NID that could not be used because of the “60-percent rule” (40 percent of taxable profit minus EUR 1 million) still could be carried forward indefinitely.

Note: Because these measures have not yet been enacted, the details of the final legislation could be modified. It is expected these measures will apply beginning in tax year 2013.

Capital gains on shares: one-year holding period required for exemption (Act of March 29, 2012)

Old rule

Under current law, net capital gains realized by a Belgian company or Belgian branch on shares are 100-percent tax exempt if certain conditions are met, without any minimum holding-period requirement.

New rule (enacted)

Under the new rule, shares must be held in full ownership for an uninterrupted period of one year. If the capital gains are realized before the shares have been held for one year, the capital gains are taxed at a rate of 25 percent (with a 3-percent surcharge, creating an effective rate of 25.75 percent). There are some exceptions, including one for financial institutions.

Capital losses on shares will continue to be non-deductible.

Entry into force: This provision will apply for tax year 2013 and will apply to capital gains realized on or after November 28, 2011, during a tax period closing on or after the date the act is published in the Official Gazette. Any change made from November 28, 2011, to the closing date of the annual accounts will be disregarded.

New general thin cap rule (Act of March 29, 2012)

Current rule

Belgian tax law currently does not have a general thin cap rule. There is a specific thin cap rule for interest payments or attributions to real beneficiaries taxed at low rates on that interest. This rule is commonly known as the 7/1 debt-equity ratio.

New rule (enacted)

The new Program Act replaces the 7/1 debt-equity ratio with a general 5/1 debt-equity ratio.

For the purposes of the new thin cap rule, equity is defined as the sum of the taxed reserves at the beginning of the tax period and the paid-up capital at the end of the tax period. For the purposes of this new rule, certain non-taxed reserves are deemed to be taxed reserves, such as certain tax-free reserves created upon a merger/demerger (for example, as a result of merger goodwill).

For the purposes of the thin cap rule, debt is defined as:

- All loans for which the beneficial owner is not subject to income taxes, or, with regard to the interest income, is subject to a tax regime that is substantially more advantageous than the Belgian tax regime; and
- All intra-group loans (“group” should be interpreted in accordance with section 11 of the Belgian Companies Code).

Interest payments or attributions in excess of the 5/1 ratio are not tax deductible.

Bonds and other publicly issued securities are excluded, as well as loans granted by financial institutions. The new rule also does not apply to loans contracted by movable leasing companies (as defined by article 2 of the Royal Decree n° 55 of 10 November 1967) and companies whose main activity consists of factoring or immovable leasing, within the financial sector, and to the extent the funds are effectively used for leasing and factoring activities.

The new rule includes an anti-abuse provision under which, if a loan is guaranteed by a third party or is funded by a third party that partly or wholly bears the risk related to the loans, the third party is deemed to be the beneficial owner of the interest if the guarantee or the funding has tax avoidance as its main purpose.

Note: The new thin cap rule has been heavily criticized for not including an exception for finance companies or companies that perform (zero balancing) cash pool activities. The Government has announced that it will revisit the new thin cap rule and adjust it to accommodate finance activities in Belgium. It is expected that, under the revised rule, considered amendments, “debt” for thin cap purposes would be defined as "net debt" (debt minus receivables) and that finance companies would not be covered by the thin cap rules.

The actual language of the revised rule has not yet been released, but it is expected in the coming months. Entry into force of the new rule therefore has been delayed. The new Program Act states that the entry into force will be determined by a Royal Decree, but will be no later than July 1, 2012.

Anti-abuse rule: substance over form (Act of March 29, 2012)

Old rule

Under section 344(1) of the Belgian Income Tax Code, the tax authorities can, under certain conditions, reclassify a legal deed (transaction) into a different transaction (generally with a higher tax burden), provided both transactions have the same or similar legal consequences. There are similar provisions for registration duties and inheritance tax purposes.

New rule (enacted)

Under the new rule, a legal deed or a set of legal deeds may be reclassified by the Belgian tax authorities if the tax authorities show, on the basis of objective circumstances, that there is "tax abuse." For purposes of this rule, tax abuse is defined as:

- A transaction by which the taxpayer, in violation of the objective of a provision of the income tax code, places itself outside the scope of application of said provision; or
- A transaction by which the taxpayer claims a tax advantage provided by a provision of the income tax code if the taxpayer obtaining this tax advantage would be contrary to the objective of this provision and if the pursuit of this tax advantage is the primary goal of the transaction.

The burden then shifts to the taxpayer to prove that its choice of the legal deed or the set of legal deeds is driven by reasons other than tax avoidance. If the taxpayer cannot meet this burden, the transaction will be taxed in line with the purposes of the law as if the tax abuse had not taken place.

Entry into force: The new rule applies for the 2013 tax year as well as to legal deeds or sets of legal deeds that took place during a tax period that closes on or after the date the act is published in the Official Gazette. Any change made as from November 28, 2011, to the closing date of the annual accounts will be disregarded. For inheritance and registration duties purposes, the new rule applies to legal deeds performed on or after the first day of the second month after the act is published in the Official Gazette.

Reminder: new withholding tax rates (Act of December 28, 2011)

Dividend withholding tax

- The general 25-percent withholding tax rate has not changed.
- The 15-percent rate applicable in certain cases is now 21 percent.
- The 10-percent withholding tax rate applicable to liquidation surpluses has not changed.
- The 10-percent withholding tax rate on own share redemptions is now 21 percent.

- The numerous withholding tax exemptions (such as for payments to companies) have not changed.

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 generally has increased from 15 percent to 21 percent, except for:

- State bonds issued and subscribed from November 24, 2011, through December 2, 2011; and
- Interest on 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 (such as 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-percent withholding tax rate on royalties has not changed. The numerous withholding tax exemptions (such as for payments to companies) also are not affected.

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