

INSIGHT: Belgian Corporate Taxation—2020 Changes

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A new tax year brings, as usual, new possibilities. Laurent Donnay de Casteau provides an overview of the main changes in Belgian corporate taxation, focusing on changes that result from the large corporate tax reform initiated in 2017 and the U.K.'s withdrawal from the EU.

Third Stage of the Corporate Tax Reform

Further to the multi-stage implementation of Belgium's corporate tax reform voted on in December 2017, several measures enter into force in 2020. We detail the main changes, together with some updates.

Corporate Tax Rate Reduction

The ordinary corporate tax rate is 25% as from 2020 (with a reduced rate at 20% for the first 100,000 euros (\$108,000) of profit for small and medium-sized enterprises (SMEs), subject to conditions).

Losses Incurred by Foreign Establishments of Belgian Entities: Limitations to Deductibility in Belgium

The deductibility of losses incurred by a foreign establishment of Belgian companies is significantly modified as from 2020. The possibility to offset such foreign losses against the Belgian profit of the Belgian company is now limited to losses that are:

- incurred in another European Economic Area (EEA) country (or in treaty countries benefiting from an equal treatment clause); and
- final (foreign activities permanently stopped).

Fines Become Generally Non-deductible

Non-deductibility is no longer limited to fines of a criminal nature: now any fine, even of an administrative nature, is not tax deductible. This has put an end to long discussions around the tax deductibility of European fines (cartel cases, etc.), with several decisions admitting the deductible character of European fines (including the Court of Brussels' judgment of April 3, 2019).

Maximum Interest Rate for Tax Deductibility on (some) Interest Charges

Interest charges are tax deductible only if they do not exceed the rate existing on the market (Article 55 of the Income Tax Code (ITC)).

The law now clarifies the limitation for non-mortgage non-term loans by reference to the rate applied by Monetary Financial Institutions as published by the Belgian National Bank on loans to non-financial companies with a variable rate up to 1 million euros with an initial rate fixed for a maximum of one year, increased by 2.5%, for the month of November preceding the considered year. For 2020, this results in a maximum rate of 4.06% (1.56% + 2.5%).

Aside from the limitation provided by Article 55 of the ITC, the limitation of interest charge deductions resulting from the Anti-Tax Avoidance Directive (ATAD) entered into force as from January 1, 2019. A royal decree of December 20, 2019 (published on December 27) provides several details on the concrete application of the limitation of interest deduction (applicable as from tax year 2020 starting at the earliest on January 1, 2019):

- Identification of costs and products to be included in the scope of the limitation: based on Article 2 of the ATAD and inspired by BEPS Action 4, the royal decree provides for a list of costs and products that are not qualified as interest under Belgian tax law but are economically equivalent to interest. As such these must also be included in the scope of the limitations applied to the interests:
 - the depreciation of an intangible or tangible asset insofar as the interest charges relating to the borrowed capital are included in the acquisition value of this asset (in accordance with accounting rules);
 - the reduction in stocks considered as professional expenses, insofar as the interest charges relating to the borrowed capital are included in the cost price of these stocks and orders in progress (in accordance with accounting rules);
 - the indemnity due by the taxpayer to a foreign company which belongs to the same group of companies and which is limited to a premium for the provision of capital (based on Article 185, § 2a) of the ITC and transfer pricing rules);
 - exchange gains and losses insofar as these result from the payment of interest in the execution of a loan contract;
 - the constitution costs for a bank guarantee, the administrative costs and similar related costs;
 - part of the discount of receivables (respectively debts) which are not earning interest or which are accompanied by an abnormally low interest that is included in the profits of the taxable period (respectively considered as professional expenses).

The taxpayer has the possibility to request an advance ruling to extend the qualification of “economically equivalent to interest” to other costs and products resulting from specific factors, provided that the ruling would also be binding for the counterpart of the contract (this being a novelty compared to the usual binding character of advance decisions that are enforceable only within relation to applicant-tax authorities).

- Identification of costs and products to be excluded from limitation: the royal decree provides some details on the safe harbor rule for loans concluded before June 17, 2016 and not substantially based on the public private partnership projects excluded from the rule.
- Application of the rule for companies within a group: the royal decree provides specific rules for determining the earnings before interest, tax, depreciation, and amortization (EBITDA) and the 3 million euro threshold within a group.
 - The EBITDA must represent the consolidated result of all the Belgian group entities (even if no pure Belgian tax consolidation exists). A negative EBITDA also has to be considered, with allocation rules within the group. The royal decree also provides for the possibility to waive the EBITDA computation: in such a case, the EBITDA will be equal to zero and the Belgian companies of the group will have to enter into an agreement based on a model to be provided by the Ministry of Finance: these companies will only have to apply the 3 million euro threshold within the group.
 - The 3 million euro threshold allocation involves several steps:
 - **First step:** the amount of 3 million euros is reduced by 30% of the consolidated EBITDA of all the Belgian members of the group (the “adapted threshold”). This first step signifies that, as soon as the group’s EBITDA is equal to or greater than 10 million euros, the threshold to be allocated (3 million euros) is reduced to zero. As a result, for such a group, applying this allocation rule no longer makes sense; the sole relevant threshold would then be the 30% EBITDA rule.
 - **Second step:** a computation is made at the level of each company considering the consolidated 30% EBITDA threshold;
 - **Third step:** the adapted threshold (from step 1) is proportionally allocated between all the Belgian members of the group based on the result of step two.
 - **Fourth step:** the taxpayer’s final threshold is then equal to the sum of 30% of his adapted threshold and the result of step three.

In case the group waives computing its EBITDA, an alternative method consists in dividing the threshold in equal amounts between the Belgian members of the group.

Other Measures

The deductibility of car costs has again been revised. Depreciation rules are unified and simplified for assets acquired as from January 1, 2020. The secret commission tax is not deductible any more as from tax year 2021 (accounting year starting on January 2, 2020 or later). Other measures relate to the movie tax shelter, to the withdrawals from immune reserves, to the exit tax applicable to some real estate investment companies, and to some specific economic exemptions (for accounting year starting on January 1, 2020 or later).

Brexit

Further to Brexit, the Belgian Parliament voted on a law on February 13, 2020 organizing additional specific soft transitional measures (a global law of 2019 organizing the general transitional regime, including at the level of direct taxation).

The general transitional regime is extended up to December 31, 2020, without any reciprocity condition.

Some specific measures are now excluded from the transitional measures, relating to the transfer of insurance agreements to another EEA-located enterprise or the transfer of a tax domicile: in these circumstances, Brexit will generate all its consequences as from January 31, 2020.

The law voted on in February organizes a transition period up to December 31, 2020 for U.K. private investment companies and a tax neutrality for U.K. companies involved in operations initially covered by the merger directive for any operation or transfer published in the Belgian official gazette by December 31, 2020 at the latest.

The law also provides a transition period for some real estate investment companies having U.K.-located real estate by December 31, 2020 at the level of the conditions to be fulfilled for a withholding tax reduction of their dividend distribution up to December 31, 2025. For the tonnage tax, the U.K. is also treated as an EEA country up to December 31, 2020.

Conclusion

The implementation of the corporate tax reform, initiated in 2017, is now achieved with several measures entering into force as from January 1, 2020. The reduction of the ordinary corporate tax rate to 25% is an important component of these measures. Other measures result in the limitation of the tax deductible character of expenses, a point of attention for the taxpayer.

Brexit is another hot topic for the taxpayer. A transition period up to the end of the year 2020 offers opportunities to consider due to the major uncertainties about the future tax rules in the EU-U.K. relationship.

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