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Important new tax rules following the introduction of the new Belgian Code on Companies and Associations

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On 28 February 2019 the Belgian parliament approved a new Belgian Code on Companies and Associations, as well as new tax legislation.

Indeed, Belgian tax law was in need of adaptation to the new corporate rules. In certain cases, however, these new tax rules have a far-reaching effect and seem to do more than merely formally adapt the tax legislation to the new corporate rules.

We will here highlight some of the most relevant changes.

Nationality and tax residency of a company

Before the corporate law reform, the nationality of a company (and the subsequent applicable company law) was determined by the "real seat theory", meaning that the company's nationality depends on the place of the company's real or effective head office. The corporate law reform now introduces the principle of the "incorporation theory" to determine the nationality of a company and the applicable company law, meaning that the location of the company's registered office is the determining factor.

However, for Belgian corporate income tax purposes, a company's tax residency will depend on the place of effective management of a company which is determined by both a human factor ("where do the company's directors manage the company") and by physical factors ("where is the real head office of the company located").

As a result, a company might become subject to Belgian corporate income tax, without being subject to Belgian company law (or vice versa). In order to bring corporate and tax law into closer alignment, various definitions in tax law are now to be modified. Indeed, a new legal presumption provides that if a company has its registered office in Belgium, it is also deemed to have its place of effective management in Belgium. In order to prove the opposite, the taxpayer will need to demonstrate that the tax residence of the company is established in another state and such in accordance with the tax legislation of that state.

New tax rules on repurchase of shares

Belgian corporate law authorises a repurchase of a company's own shares up to a maximum of 20% of the share capital. From a tax perspective, and assuming the corporate law rules are respected, the repurchase of shares is only treated as a dividend distribution (for the repurchasing company) in four specific cases (for example, when the company sells the repurchased shares or cancels them). The tax treatment of the repurchase of shares for the repurchasing / buying company will also determine the tax treatment applying to the seller of the shares. More specifically, when the repurchase of shares is treated as a dividend distribution for the buying company, it will also be qualified for the selling company as a dividend income. If not, the repurchase of shares will be qualified as a capital gain on shares.

The corporate law reform abolishes the 20%-cap. However, tax law will be modified and a rule will be introduced that if the 20%-cap is exceeded, the own shares exceeding the 20%-cap will be deemed to have been cancelled for tax purposes. As a result, an immediate taxation will apply, triggering withholding taxes on the deemed distributed dividend (unless a specific exemption applies).

In the case of a repurchase of shares with various shareholders and/or at different prices, the company will be able to choose which shares are considered to have been cancelled for tax purposes. Otherwise, the cancelling will be executed on a proportional base.

Abolition of the notion of “share capital”

For the BV/SRL (“besloten vennootschap”/“société à responsabilité limitée”) the notion of share capital is abolished under the new company law (for the NV/SA (“naamloze vennootschap”/“société anonyme”) the term “capital” will be used). The minimum share capital requirement will be replaced by the obligation for the shareholders to ensure that the company has sufficient funds to carry out its activities. A conversion of the share capital of existing BVs/SRLs into statutory unavailable equity reserves has been provided for.

Tax law currently still refers to “share capital”. In order to comply with the new corporate rules, an autonomous capital concept will be included in the definitions. In the case of an NV/SA, the notion of “capital” will also remain applicable for tax purposes. In other cases, the new tax legislation refers to the notion of “equity”, insofar as the equity is constituted by contributions in cash or in kind (other than contributions of labour). The paid-up capital is the capital insofar as it is formed by actually paid contributions in cash or in kind, excluding labour contributions, and insofar as no repayment or reduction has yet taken place.

Finally, the special regime of reduced withholding tax rates on dividends, which applies for small and medium-sized enterprises, will also be continued. One of the conditions for applying this special regime is, however, that the company concerned has a minimum share capital. Taking into account the modified “capital” definition (see above), tax legislation will also be modified in order to allow these companies to continue to enjoy the favourable tax regime.