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Recent Developments in International Taxation

Belgium

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This report summarises a number of important international tax developments in Belgium in the period between May 2019 and July 2020.

Recent highlights

During the period covered by this report, the most significant international tax developments that occurred in Belgium related to the continued implementation of certain information exchange programmes and other measures related to initiatives by the European Union and Organisation for Economic Co-operation and Development (OECD) against base erosion and profit shifting (BEPS) and perceived aggressive tax planning.

Multilateral Instrument (MLI)

Belgium deposited its instrument of ratification for the MLI with the OECD on 26 June 2019, together with its definitive MLI positions and a list of 99 tax treaties that Belgium intends to see covered by the MLI. To the extent that Belgium's treaty counterparties also intend to see these treaties covered by the MLI, they are referred to as 'Covered Tax Agreements'.

As a result of the deposit of the instrument of ratification, the MLI entered into force for Belgium on 1 October 2019. The provisions of the MLI with respect to a specific Covered Tax Agreement have effect once the other treaty party has also deposited its instrument of ratification, as follows:

For withholding taxes

The MLI provisions have effect where the event giving rise to such taxes occurred as from 1 January 2020, if the treaty counterparty deposited its instrument of ratification, acceptance or approval before the end of September 2019.

For other treaty counterparties, it will have effect on or after the first day of the calendar year that begins on or after the date on which the MLI entered into force for that other specific treaty counterparty. For example, if the date of entry into force for the other treaty counterparty was 1 February 2020, the provisions of the MLI with respect to withholding taxes will have effect where the event giving rise to such taxes occurs on or after 1 January 2021.

For all other taxes

The MLI provisions will have effect for taxable periods beginning as from 1 April 2020 for the treaty counterparties that deposited their instrument of ratification, acceptance or approval before the end of June 2019.

For other treaty counterparties, the MLI will enter into effect with respect to taxable periods, beginning on or after the expiration of a period of six calendar months, starting as from the date on which the MLI entered into force for that other specific treaty counterparty. For example, if the date of entry into force for the other treaty counterparty was 1 February 2020, the provisions of the MLI will then be applicable to all taxes (other than withholding taxes) with respect to taxable periods, starting on or after 1 August 2020.

To date, the MLI has changed several Covered Tax Agreements, including those concluded by Belgium with Australia, Austria, Canada, France, India, Luxembourg and the United Kingdom (non-exhaustive list).

Mandatory disclosure rules

In December 2019, Belgium implemented Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the

field of taxation in relation to reportable cross-border arrangements ('DAC 6').

In line with DAC 6, the Belgian implementing law requires intermediaries, such as tax consultants and lawyers, to report information to the Belgian tax authorities with respect to cross-border arrangements meeting one or more so-called hallmarks, which are deemed to indicate the potential existence of tax avoidance or tax abuse (in some cases, the hallmarks are combined with a main benefit test). In certain cases, the reporting duty with respect to such arrangements can fall on the taxpayers who are party to the arrangement, instead of on an intermediary.

While reporting under the law implementing DAC 6 was initially intended to start in July 2020, the Belgian tax authorities decided to postpone the deadline for reporting for six months in light of the Covid-19 crisis, until early 2021.

A frequently asked questions document containing a number of clarifications around the Belgian law implementing DAC 6 was published in June 2020.

Transfer pricing circular

In February 2020, the Belgian tax authorities published their long-awaited Circular Letter containing transfer pricing guidelines for multinational enterprises and tax authorities.

The Circular Letter provides a summary of the 2017 OECD Transfer Pricing Guidelines and sets out the positions taken by the Belgian tax authorities in this respect. The Circular Letter also briefly deals with the transfer pricing aspects of financial transactions, referring mainly to the OECD's Transfer Pricing Guidance on Financial Transactions, which was published in February 2020. Finally, a number of transfer pricing aspects with respect to permanent establishments are addressed.

The Belgian tax authorities apply the Circular Letter to intercompany transactions entered into on or after 1 January 2018, with the exception of certain specific sections that apply only to intercompany transactions entered into on or after 1 January 2020.

Individual state aid investigations into Belgian excess profit rulings

In January 2016, the EU Commission decided that the Belgian excess profit ruling system constituted an unlawful state aid scheme. In February 2019, the General Court of the EU annulled this decision as it found that the EU Commission had failed to establish the existence of an 'aid scheme'. The General Court did not take a position on whether the excess profit rulings gave rise to illegal state aid.

In April 2019, the EU Commission appealed the General Court's judgment with the Court of Justice of the EU. This appeal is currently pending.

In September 2019, the EU Commission in parallel also launched individual in-depth investigations to assess whether the excess profit rulings granted by Belgium to 39 multinational companies gave those companies an unfair advantage over their competitors, in breach of EU state aid rules. The EU Commission's preliminary view in this respect is that, by deducting 'excess profit' from the alleged beneficiaries' tax base, the tax rulings under investigation selectively misapplied the Belgian income tax code, resulting in unlawful state aid. The EU Commission is yet to publish the individual opening decisions and to issue its final decisions in this respect.

Anti-Tax Avoidance Directive (ATAD)

Belgium implemented Council Directive (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market ('ATAD') as part of its corporate income tax reform in December 2017.

A number of the measures adopted will have to be applied for the first time by corporate taxpayers in their tax returns for assessment year 2020, including the interest deduction limitation rule, modified exit tax regime, anti-hybrid mismatch rules and controlled foreign company (CFC) rules.

In July 2020, the EU Commission sent Belgium a letter of formal notice indicating that Belgium failed to properly implement certain aspects of the interest deduction limitation rule and CFC rules under ATAD. Some corrections to Belgian legislation implementing ATAD can thus be expected in the coming period.

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