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Briefing note

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Belgian Federal Budget 2012 – Corporate tax measures

Yesterday, an agreement was reached between the Belgian government parties on the final set of new corporate tax measures in the context of the Belgian Federal Budget 2012. The measures will be put to vote in parliament later this week and are proposed to enter into force as of 1 January 2012.

The final list of measures does not substantially differ from the measures previously announced. However, some very last minute changes to the texts may have an important impact for Belgian corporate tax payers.

Short term capital gains on shares taxable at 25%. Losses on shares remain non-tax deductible

The introduction of a 25% taxation on short term capital gains on shares (sale before one year) is confirmed. Surprisingly, however, capital losses on shares will remain non-tax deductible. This may be problematic for non-regulated stock trading companies who could become taxable on their trading gains, without being able to deduct trading losses. For regulated trading companies (credit institutions, regulated investment companies and brokerage firms) the issue does not arise as these entities are in principle subject to normal profit taxation on their trading gains and losses.

Notional interest deduction remains in place, but is capped

The notional interest deduction (NID) remains in place, but the rate is capped at 3% (3.5% for SME's) for assessment years 2013 to 2015 (financial years 2012 to 2014).

In addition, the current possibility to carry forward excess NID during seven years is abolished. New excess NID which cannot be used because of insufficient taxable base would hence be lost.

The existing excess NID already carried forward can continue to be used, but the use will be spread in time as follows: the first million of taxable base (after deduction of the tax losses carried forward) can be entirely offset by the existing NID carried forward. The taxable basis above one million can only be offset up to 60%. Under this new limitation, the existing NID carried forward could be used even after the original seven years utilisation period, just so long as to allow the taxpayer to use the NID it would otherwise have used if the new limitations were not applicable. For example: if under the current seven years utilisation restriction a company would be able to use 100 out of 150 of NID carried forward, then that company will still be able to use the 100 of NID, even if under the new limitations this will take up to 15 years.

New thin-cap restriction of 5:1

A thin capitalisation restriction of 5:1 will be introduced for related party debts. Under the new restriction, interest on related party debts exceeding 5 times the accounting equity of the borrowing company, will no longer be tax deductible.

The term related party refers to any company holding a direct or indirect 50% participation. The equity of a company is the Belgian GAAP accounting equity at the end of the preceding financial year; changes to the equity during the financial year (for example a capital increase) are in principle only taken into consideration at the end of the year. As a result, it will in principle not be possible to avoid the impact of the restriction for 2012 by, for example, contributing part of the related party debt into the capital early 2012. Such capital increase will only have an impact on the ratio for financial year 2013.

Contrary to what is applicable in some of the neighbouring countries, there is no minimum safe harbour (i.e. amount of interest that can in any event be deducted), nor is there any netting with the related party interest income received.

The 5:1 restriction does not apply to publicly issued debt securities. In addition, certain specific industry sectors such as credit institutions, insurance companies, leasing and factoring companies and PPP project companies are excluded from the scope of the new restriction.

New general anti-tax avoidance rule

Finally, the Belgian government is proposing a new anti- tax avoidance rule allowing the tax authorities to re-classify a deed or a series of deeds forming a same operation if the choice of the taxpayer to perform such deed(s) is mainly tax driven, even if there are other valid economic reasons. In such case, the tax authorities have the possibility to "redefine" the operation carried out by the taxpayer so as to allow a "correct" tax treatment. In addition, in redefining a transaction the tax authorities would no longer be bound by the legal consequences of the original transaction as carried out by the parties.

This is a very far reaching anti-tax avoidance rule which may have an impact on certain legitimate tax optimisation structures. For some of these tax optimization structures, it might therefore become advisable to ask for an advance tax ruling with the Belgian ruling commission.

Contacts

Thierry Blockerye
Partner

E: thierry.blockerye
@cliffordchance.com

Alexandre Ooms
Senior Associate

E: alexandre.ooms
@cliffordchance.com