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Briefing note

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Belgian Federal Budget 2012: New Program Law published

Contacts

Thierry Blockerye
Partner

E: thierry.blockerye @cliffordchance.com

Alexandre Ooms
Senior Associate

E: alexandre.ooms @cliffordchance.com

Valerie Oyen
Associate

E: valerie.oyen @cliffordchance.com

Last Friday, the Program Law of 29 March 2012 containing a set of new corporate tax measures was published in the Belgian State Gazette. The final adopted provisions are largely in line with the proposals made in January. Some specific topics (such as the notional interest deduction) will be covered by a separate law that should be put to vote in parliament shortly.

Below, we have summarized the most important new corporate tax measures.

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

The Program Law introduces a 25% taxation on short term capital gains on shares (sale before one year). As announced previously, 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.

New thin-cap restriction of 5:1

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

The equity of a company is calculated as the sum of the taxed reserves at the beginning of the taxable period and the paid-up capital at the end of the taxable period (negative reserves, such as accounting losses, are in principle not taken into account). For the ongoing financial year it will hence be possible to counter the application of the new thin-cap restriction by increasing the capital before year-end.

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

The 5:1 restriction does not apply to publicly issued debt securities and loans granted by banks or similar financial institutions. In addition, the Program Law specifically excludes regulated leasing and factoring activities and PPP project companies from the scope of the new restriction. Discussions are ongoing in order to also exclude intra-group cash pooling activities, however this is not yet reflected in the Program Law.

New general anti-tax avoidance rule

A new anti-tax avoidance rule is introduced allowing the tax authorities to re-classify a transaction if the choice of form is, in substance, tax motivated, *i.e.* if there are no material non-tax motives.

In such case, the tax authorities have the possibility to re-classify the transaction carried out by the taxpayer so as to allow a tax treatment which is in line with the purpose of the tax law. In

reclassifying the transaction, the tax authorities would no longer be bound by the legal consequences of the original transaction as carried out by the parties.

The anti-tax avoidance rule should be interpreted in a restrictive manner in order not to impact legitimate tax optimisation. Some guidance as to the interpretation of this new anti-tax avoidance rule is provided in the explanatory note to the Program Law. Further guidance by way of an administrative circular is expected by the end of April.

In order to get full certainty on the legitimate character of a transaction or tax optimisation, an advance ruling from the Belgian ruling commission will, more often than before, be advisable. In this context, we are currently in discussion with the ruling commission on how the new anti-tax avoidance rule should be applied to certain common acquisition structures (*e.g.* a transfer of business by way of a sale of shares).

Notional interest deduction is capped but should remain in place

The Law of 28 December 2011 capped the rate of the notional interest deduction (NID) at 3% (3.5% for SME's).

Additional restrictions to the NID regime have been announced but are not yet included in the latest Program Law. The possibility to carry forward excess NID would be abolished as of assessment year 2013. The existing "stock" of excess NID could continue to be used, but the use would 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.

Other important tax measures

The Program Law of 29 March brings in further changes to the regime for company cars as introduced by the Law of 28 December 2011 and clarifies certain aspects in relation to the new 4% surcharge on movable income. As to the collection of this 4% surcharge, some practicalities remain unclear at this stage. Further guidance is expected in a Royal Decree to be issued shortly. Moreover, some technical corrections to the new withholding tax rules introduced by the Law of 28 December, that had previously been announced by the government, are still not included in the Program Law.

Entry into force of the new rules

Most of the new rules apply as of assessment year 2013 (financial year 2012) as well as to transactions carried out during a 2011-2012 financial year if such financial year closes after the publication of the Program Law (*i.e.* after 6 April 2012). There is hence a limited retroactive effect. Moreover, anti-abuse provisions apply for anticipated year end closings.

For registration duties, the new anti-tax avoidance rule will only apply to transactions as of 1 June 2012.

The entry into force of the new thin-cap restriction still needs to be confirmed by the Government but will be at the latest on 1 July 2012.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Avenue Louise 65, Box 2, 1050 Brussels, Belgium

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