Corporate Tax Alliance

Newsletter
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Corporate Tax Alliance
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Intro talk

Dear all,

In the first quarter of 2022 there were many international developments and trends that will also have an impact on taxation. The rapid recovery after the Covid pandemic resulted in a steep increase of energy and commodity prices, which was sharpened by the terrible invasion of Ukraine. Many governments increase spending to support citizens and tax instruments are also used to facilitate the energy transition. Many measures have yet to crystallize. In the upcoming newsletters we will most probably reflect on these new measures.

It was very nice to "teams-up" in our last webinar, but undoubtedly there is no equivalent to a real meeting. We are working hard to organize. The event is probably happening on 2/3 or 9/10 September, so block your calendar.

In 2022 we would like to welcome one new CTA member:

- Slovenia, Martin Šifrer

In this edition of the Newsletter, we have contributions from:

- *Belgium by Gert Vranckx*
- *Belgium by Katrien Bollen and Liana Willemse*
- *Belgium by Ivo Vande Velde, Quentin Masure, Gilles Van Namen*
- *Argentina by Daniel Rybnik*

Stay in touch, share your news proactively with the network, ask questions, send comments… Let's build a stronger network and interact!

All the best,
Jan, Guido & Nico

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Fixed establishment through an affiliate company in Belgium? The Court of Appeal of Liège affirms.

By Gert Vranckx, Sr Associate & Loulou Geboers, Associate

Tiberghien.
Advocaten / Avocats / Lawyers

Introduction

Recently, the concept 'fixed establishment'('FE') for VAT purposes is the subject of many discussions and it seems that the saga will continue. In a judgement of 22 October 2021, the Court of Appeal of Liège has affirmed the position of the Belgian VAT authorities stating that a foreign company has a FE through its affiliate companies in Belgium (Liège 22 October 2021, 2020/RG/765).

Case

The case concerned a Slovakian company, 'SRO A', which was reputed to have a FE through - and in the infrastructure - of three affiliate companies of the same group in Belgium. The Belgian Special Tax Inspectorate ('STI') had considered the existence of a FE, characterized by a sufficient degree of permanence and an appropriate structure, in terms of human and technical resources, following the presence of accounting and other documents and company means of SRO A at the premises of the affiliated companies in Belgium. These concerned, amongst others, CMR's, insurance contracts, letters, e-mails, stamps with its letterhead, a computer with its fleet management program, etc. In addition, the staff of one of the Belgian affiliate companies carried out tasks relating to the daily management of SRO A. As a result, the services of SRO A, which had been provided to the Belgian affiliate companies, should have been invoiced with Belgian VAT (which it also has been doing since 2014).

In its decision, the Court of Appeal of Liège affirms the position of the Belgian STI as concerns (i) the existence of a FE of SRO A in Belgium through its Belgian affiliate companies and (ii) the services of SRO A provided to the Belgian companies, having to be invoiced with Belgian VAT. Previously, it had already been confirmed by the Court of First Instance of Liège that a foreign company could have a FE in Belgium through the exclusive agreement concluded with a Belgian toll manufacturer (Trib. Liège 14 January 2020, 18/1759/A). The question whether a FE could be created through an affiliated company is currently also again pending before the Court of Justice of the European Union (case C-333/20, Berlin Chemie A. Menarini SRL). The foregoing seems to be in line with the ongoing search of the Belgian VAT authorities for factual elements that would allow them to consider that a foreign company has a FE in Belgium, resulting in Belgian VAT becoming due on the services received or performed by the FE.

The Belgian STI however went a step too far by arguing that the VAT exempt intra-Community supplies of goods performed by one of the Belgian affiliate companies to SRO A should have been subject to Belgian VAT (claim at stake: € 15k), given the existence of a FE of SRO A in Belgium. This incorrect reasoning has of course been declined by the Court of Appeal, as the existence of a FE solely affects the place of supply for the provision of services.

This case law illustrates once more that it is of the utmost importance for Belgian MNE's to verify, based on the factual circumstances/their business model, whether foreign affiliated companies could have a FE in Belgium through the resources of the Belgian company. This of course can have a significant impact for both companies of the group involved.

New Belgian special tax regime for executives and researchers – who's in?

By Katrien Bollen, Sr Associate & Liana Willemse, Associate

Tiberghien.
Advocaten / Avocats / Lawyers

Introduction

A new special tax regime for incoming executives and researchers entered into force in Belgium on 1 January 2022.

Considering the change in the special tax regime's scope, conditions and benefits, it certainly offers opportunities for some companies and individuals: for instance, it is no longer required to be part of a multinational group and a specific category of 'researchers' is now in scope. On the other hand, for others, the new special tax regime has created several challenges.

Scope of application

- **Employees and (certain) directors** that execute an activity in Belgium are eligible for the regime.

- The person concerned must be **recruited abroad by a Belgian company**, establishment or non-profit organisation. The regime also applies to individuals who are **posted within a multinational group** by a foreign company to a Belgian company, establishment or non-profit organisation.

- In the **60 months** preceding the individual's entry into service in Belgium, he or she must **not** have been a **Belgian resident**, nor have lived within **150 kilometres** of the Belgian border and must not have earned professional income that was taxable in the Belgian **non-resident income tax**.

- There is no nationality requirement under the new regime, which means it can also apply to Belgian nationals taking up professional activities in Belgium after a (minimum) stay abroad.

- The individual (except for researchers) must earn a **minimum gross remuneration** of 75,000 EUR per year. The minimum salary threshold condition must be fulfilled throughout the duration of the special tax regime.

- Specific conditions apply to **researchers**. There is no minimum salary requirement for researchers, but they must hold a qualifying degree or have 10 years of relevant professional experience.

Benefits

The company /organisation may bear recurring expenses arising from the posting or employment in Belgium, on top of the individual's remuneration. These **'expatriation allowances'** are exempt from taxation. However, the tax-exempted allowance is capped at 30% of the gross salary, with an absolute maximum of EUR 90,000 per year. Certain **specific costs,** such as relocation costs, furnishing costs made in the first 6 months after arriving in Belgium and school fees, can be reimbursed tax-free on top.

The old regime's travel exclusion no longer exists under the new regime.

The special tax regime only applies for a **period of 5 years**, with the option of a 3-year **extension**.

Tax residency

The tax residency is determined in line with the **Belgian Income Tax Code's rules**. Hence, the expat's tax residency is determined based upon the factual circumstances of his/her situation. This implies, for instance, that individuals who live in Belgium with their family are presumed to be tax residents of Belgium. As a Belgian tax resident, such a person is in principle taxed on his/her worldwide income. Non-residency should be demonstrated towards the Belgian tax authorities through an annual certificate of residency, issued by the state of residence.

Procedure

To benefit from the special tax regime, the company must submit an **application** within a period of 3 months from the start of the activity. The extension of the regime after 5 years must also be requested, at the latest 3 months after the expiry of the 5-year term.

The company must also provide the tax administration with a **list of names** of all the employees, directors and researchers who benefited from the special tax regime during the previous year.

Opt-in

For the **executives who currently are under the 'old' expat tax regime**, there is an option to opt-in to the new regime, on the condition that the individual met the conditions for the new regime at the moment of his/her first employment in Belgium and the individual has been in Belgium for less than 5 years. The following scenarios should be distinguished:

The opt-in application is approved by the tax administration: the new expat regime will apply (as from 1 January 2022); or

The administration denies the opt-in application, or a possible applicant decides it is not opportune to file an opt-in application: the old expat regime will continue to apply until 31 December 2023.

Requests for an opt-in should be filed by 31 July 2022 at the latest.

Call to action

Both for expats under the 'old' expat tax regime as well as for new hires, it is important to assess the new special tax regime's impact and to take the appropriate action, such as assessing whether an opt-in is opportune, reviewing contractual clauses in old and new contracts, evaluating remuneration packages, etc.

Interest limitation rules: Tax authorities adopt favorable position for the Private Equity sector

By Ivo Vande Velde, Quentin Masure, Gilles Van Namen, Counsels & Tayfun Anil, Associate

Tiberghien.
Advocaten / Avocats / Lawyers

Introduction

The Belgian Central Tax Authorities have recently taken an important decision on how the ATAD interest limitation rules must apply in the private equity (PE) sector. According to that decision, portfolio companies in which a PE fund has a majority shareholding must, for the purpose of the ATAD interest limitation rules, (under certain conditions) not be considered belonging to the same 'group' as the PE fund and the other portfolio companies. This decision will undoubtedly be very welcomed by the PE sector and other alternative investment funds.

Background

In line with the EU Anti-Tax Avoidance Directive (ATAD), the Belgian Income Tax Code (ITC) provides (complicated) rules limiting allowable interest deduction for Belgian corporate entities. Under these interest limitation rules, 'exceeding borrowing costs' ('*financieringskostensurplus*' - '*surcoûts d'emprunt*') are disallowed for tax purposes to the extent that they exceed the higher of either 30% of the entity's (tax adjusted) EBITDA or a *de minimis* threshold of EUR 3,000,000 (Article 198/1 ITC).

Although ATAD provides for the possibility to consider both the exceeding borrowing costs and the EBITDA at group level, the Belgian legislator has only partly opted for this ('group') approach. This means that, for Belgian companies, the interest limitation rules must *in principle* be applied on a legal entity basis, it being understood that certain 'group adjustments' can/must be made (to simulate the effects of a 'consolidated' group approach). These 'group adjustments include *inter alia:*

- Adjustments of the exceeding borrowing costs: intra-group interest (and 'equivalent') payments between Belgian group members (that are not excluded from the application of the ATAD rule) are disregarded for the calculation of the exceeding borrowing costs.
- Division between all Belgian group members of the *de minimis* EUR 3,000,000 threshold.
- Adjustments of the EBITDA-calculation of each group member.

As a result, the definition of a 'group' of companies has a significant importance in applying the interest limitation rules. In absence of any specific definition in the framework of the interest limitation rules, the general definition of a 'group of companies' (Article 2, § 1, 5°/1 ITC) in principle applies. As this provision refers to Article 1:20 of the Belgian Code on Companies and Associations (*CCA*), the corporate law meaning of 'affiliated companies' in principle prevails.

This means that Belgian companies must be considered 'affiliated' if one of them exercises 'control' over the other, if both companies are controlled by a joint (parent) company, or if they constitute a 'consortium'.

Difficult match with the PE context

The strict application of the notion of 'control' may however result in unexpected and adverse consequences in the context of PE investments. It would mean, for example, that a PE fund that exercises the majority of the voting rights in several portfolio companies (and, hence, is irrefutably presumed exercising 'control' over such portfolio companies) would be considered belonging to the same group as those portfolio companies for the application of the interest limitation rules. In addition, all 'controlled' portfolio companies would belong to the same 'group' for interest limitation purposes.

In such a case, the *legal* notion of 'control' may not be fully in line with the 'consolidation' for *accounting/reporting* purposes. Whereas 'control' is being exercised at the level of the PE fund (assuming the latter holds a majority shareholding), consolidated annual accounts are in principle published at the level of the portfolio company and its (own) subsidiaries. As a rule, the PE fund will not include the portfolio companies (and their subsidiaries) in its consolidation circle, as its investments in the portfolio companies are held in a short or mid-term time horizon with a view to realizing a gain upon exit (as opposed to holding its investments with a longer term strategic objective, as a typical holding company would do) (Article 3:97 Royal Decree in execution of the CCA).

For the purpose of the interest limitation rules, the above does not raise specific issues in relation to the PE fund itself, provided that the latter qualifies as an Alternative Investment Fund within the meaning of the Act of 19 April 2014 on alternative investment funds and their managers (the "*AIFM Act*"). As such, the fund is excluded from the scope of the interest limitation rules (Article 198/1, §6, 9° ITC).

For the portfolio companies, however, adverse tax consequences may arise from the fact that the PE fund is exercising control over multiple portfolio companies, as this means that these portfolio companies (and their subsidiaries) are in principle 'affiliated' (within the corporate law definition). For example, both portfolio companies (and their subsidiaries) would have to 'share' the EUR 3,000,000 *de minimis* threshold. Consequently, if (the group of) one of the portfolio companies is heavily leveraged, this may reduce the margin for the other portfolio companies (and their subsidiaries) to attract additional debt funding whereas, without such group affiliation, the latter group may not have faced any interest limitation issues. This effect seems hardly justifiable from an economic perspective, as both portfolio companies (and their subsidiaries) decide independently on their funding structure.

Similarly, if one of the portfolio companies (or one of its subsidiaries) has a negative EBITDA, such negative EBITDA must (at least according to the Royal Decree in execution of the ITC) be deducted from the positive EBITDA's elsewhere in the 'group', thus reducing the fiscal funding capacity of the group companies with a positive EBITDA. As there is no rule allowing a negative EBITDA to be 'absorbed' first by the subsidiaries of the same portfolio company, negative EBITDA figures at the level of one portfolio company and/or its subsidiaries may result in disallowed interest expenses at the level of another portfolio company or its subsidiaries. This is, again, an 'unexpected' outcome, assuming the 'group' concept for interest deductibility purposes is to be understood in line with the corporate law definition of 'affiliated' companies.

Favorable decision by the Belgian tax authorities

The Central Tax Authorities have recently confirmed the view that the 'group' concept for the application of the interest deduction rules must be in line with ATAD and, therefore, the 'group' is to be restricted to those entities that are fully included in the consolidated financial statements of the 'parent' entity.

It can be noted that the Central Tax Authorities had before, in another context, already confirmed an interpretation of the 'group' concept for interest deduction purposes that is in line with ATAD. Reference is made to their circular letter of 10 July 2020 on the application of the interest deduction rules on 'joint-ventures' (https://www.tiberghien.com/nl/2568/interestaftrekbeperking-de-fiscale-administratie-verduidelijkt).

Based on Article 3:97 of the Royal Decree in execution of the CCA, an Alternative Investment Fund can elect not to consolidate its portfolio companies that are held merely with the purpose of realizing a capital gain on 'exit'. If the fund makes such an election, the consolidation does not take place at the level of the PE fund, but at the level of the portfolio company. The Central Tax Authorities agree that, under these circumstances, the latter will constitute a separate 'group' with its own subsidiaries for the purpose of the interest deduction rules, even if the fund has a majority shareholding and, therefore, 'controls' the portfolio company within the corporate law definition.

There is however an important *caveat* to be considered: the Central Tax Authorities take the view that the above interpretation is in principle subject to the condition that there are no financial transactions or management services between the portfolio companies, and that the fund does not grant any loans or guarantees to the portfolio companies. In practice, however, the Central Tax Authorities seem to apply this condition with a certain degree of flexibility, and to analyze each situation on a case-by-case basis.

Subject to the above reservation, the position taken by the Central Tax Authorities can be in favor of PE funds qualifying as an Alternative Investment Fund, as it can avoid that high exceeding borrowing costs or a negative EBITDA at the level of one portfolio company (or its subsidiaries) has an adverse impact on the tax-deductible interest of other portfolio companies (and their subsidiaries). It is therefore likely to be welcomed by fund managers and their advisors.

Mining of cryptoassets in Argentina

*By Daniel Rybnik, Founder of EnterPricing**

EnterPricing

'Glocal' context

The European Union[1], Russia[2], Kazakhstan[3], China[4], the United States[5] and even GreenPeace[6] public policy agendas are focusing on mining of crypto assets under the 'proof of work' consensus mechanism.

The main concern being -but not limited to- the environmental impact, paradoxically since it was revealed that the electricity consumed each year by turned on but idle home devices in the United States alone could power the Bitcoin network for 3 1/2 years!.[7]

Systemic, financial stability[8], foreign exchange, money laundering, terrorist financing[9] and tax[10] have also joined the menu of risks associated with this 'cryptowitch hunt'.

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[1] MiCA Could Still Be Delayed by EU Parliamentarians Over Proof-of-Work Provision. Read more at: https://www.coindesk.com/policy/2022/03/23/mica-could-still-be-delayed-by-eu-parliamentarians-over-proof-of-work-provision/

[2] Russian Ministry of Energy Calls for Urgent Legalization of Crypto Mining Read more at: https://news.bitcoin.com/russian-ministry-of-energy-calls-for-urgent-legalization-of-crypto-mining/

[3] Kazakhstan preparing to raise tax on cryptocurrency miners. Read more at: https://www.thecoinrepublic.com/2022/04/18/kazakhstan-preparing-to-raise-tax-on-cryptocurrency-miners/

[4] To thwart crypto mining in China, authorities seek public input to trace outlawed activity. Read more at: https://www.globaltimes.cn/page/202203/1254802.shtml

[5] Bitcoin's proof-of-work mechanism is a climate disaster. Environmental groups have a fix. Read more at: https://coingeek.com/proposal-to-ban-proof-of-work-mining-moves-forward-in-new-york-state-assembly/

[6] Campaigners call for bitcoin miners to drop 'proof of work' to reduce their excessive use of energy. Read more at: https://markets.businessinsider.com/news/currencies/bitcoin-mining-climate-change-activists-ripple-miners-code-cryptography-staking-2022-3

[7] *See* Gabriela Battiato, Bitcoin y el consumo de energía: ¿un problema o una oportunidad para el cuidado de nuestro ambiente?, Perfil, 30 Dec 2021, available at: https://www.perfil.com/noticias/opinion/gabriela-battiato-bitcoin-y-el-consumo-de-energia-un-problema-o-una-oportunidad-para-el-cuidado-de-nuestro-ambiente.phtml

[8] Assessment of Risks to Financial Stability from Crypto-assets. Read more at: https://www.fsb.org/wp-content/uploads/P160222.pdf

[9] Cryptocurrencies could be misused for terror funding, says Nirmala Sitharaman at IMF meeting. Read more at: https://scroll.in/latest/1022156/cryptocurrencies-can-be-misused-for-terror-funding-says-nirmala-sitharaman-at-imf-meeting?utm_source=rss&utm_medium=jio

[10] DeFi Is Like Nothing Regulators Have Seen Before. How Should They Tackle It? Read more at: https://www.coindesk.com/policy/2021/10/19/defi-is-like-nothing-regulators-have-seen-before-how-should-they-tackle-it/ https://www.financialexpress.com/digital-currency/crypto-tds-india-calculation-1-tds-on-cryptocurrency-trading-govt-to-lose-revenue/2454972/ https://www.financialexpress.com/digital-currency/crypto-tds-india-calculation-1-tds-on-cryptocurrency-trading-govt-to-lose-revenue/2454972/

In the middle of a series of blackouts in various urban areas in the metropolitan Buenos Aires, capital city of Argentina, it was disclosed a few months ago by an online newspaper that Cammessa, the company operating the wholesale electricity market in Argentina, was sending letters to Large Users and Self Generators to inquire whether and to what extent the energy consumption was related to mining of cryptocurrencies.[11]

Proposed legislation

Two draft bills have been introduced at the House of Representatives to address the mining of crypto-assets last year.

The first draft bill was filed by representative Ramon, and contains some tax provisions:

- exemption from income tax on payments via digital currencies;
- exemption from income tax on the first sale of digital currencies obtained through mining;
- exemption from personal assets to digital currencies; and,
- 10 year fiscal stability regime on mining of digital currencies.[12]

The second draft bill was filed by representative Fernandez Langan, and is aimed at creating a federal fund to promote the acquisition and training on renewable energy and environmentally sustainable equipment for crypto-mining.[13]

Electricity bills

It was initially reported that the Argentine government was analyzing an increase of the energy tariffs on cryptomining farms.[14]

The Secretary of Energy, issued Regulation 40/20220[15] specifically addressing electricity prices for crypto mining activities in the Province of Tierra del Fuego, the southernmost province of Argentina, until 30 April 2022.

The regulation stated a stabilized price of energy for users of crypto mining of ARS 4804 p/MWh (USD 42 at official rate or USDT (Tether) 25 in the free market) in the area of Ushuaia and ARS 5126 p/MWh (USD 45 at official rate or USDT (Tether) 26 in the free market) in the area of Rio Grande, irrespective on the time it is consumed.[16]

Still the price of electricity in Argentina is very competitive compared to industry standards.[17]

Location selection, legal structuring and tax planning play a key role in carrying out crypto mining activities in Argentina.

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[11] El Gobierno apunta a las granjas de Bitcoin por los cortes de luz. Read more at: https://www.lapoliticaonline.com/energia/el-gobierno-le-pide-a-los-grandes-consumidores-de-elecrticidad-que-informen-si-tienen-mineria-de-criptomonedas/

[12] Jose Luis Ramón, 30 Jul 2021, A summary can be found at: https://www.diputados.gov.ar/proyectos/resultados-buscador.html.

[13] Ezequiel Fernandez Langan, 26 Nov 2021, A summary can be found at: https://www.diputados.gov.ar/proyectos/resultados-buscador.html.

[14] El Gobierno estudia aumentar la tarifa de la luz a las granjas de minería de criptomonedas. Read more at: https://www.clarin.com/tecnologia/gobierno-estudia-aumentar-tarifa-luz-granjas-mineria-criptomonedas_0_RKTJKOlR-.html

[15] *See* full text of the Regulation at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/360000-364999/360338/texact.htm

[16] *See* Annex to Regulation at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/360000-364999/360338/res40-2.pdf

[17] Cheap Coins: Which Bitcoin Miners Enjoy The Best Electricity Pricing? Read more at: https://bitcoinist.com/cheap-coins-which-bitcoin-miners-enjoy-the-best-electricity-pricing/

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