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New administrative circulars issued on participation exemption

The Belgian tax authorities published two administrative circulars on 4 November 2009 clarifying their position on the applicability of the participation exemption after the European Court of Justice (ECJ) ruled (in *Cobelfret* and *KBC/Beleggen, Risicokapitaal, Beheer v Belgium*) that the Belgian participation exemption regime was incompatible with the EC Parent-Subsidiary Directive (see Tax Alerts of **12 February 2009** and **16 June 2009**) because it fails to effectively refrain from taxing dividends in certain situations.

The ECJ's decisions brought relief to many Belgian (holding) companies, which were unable to fully compensate current-year losses with qualifying dividend income and thus to carry forward a substantial or higher portion of current-year losses in the form of an excess dividends received deduction ("excess DRD"). After the ECJ's decisions, the Belgian tax authorities issued an administrative circular in which they acknowledged that excess DRD that relates to dividends from companies resident in Belgium and other EU/EEA Member States may be claimed, provided the requirements for the DRD were met at the time the dividends were received (see Tax Alert of **25 June 2009**). However, neither the ECJ decisions nor the previous circular specifically or clearly addressed all aspects of the territorial and temporal scope of the participation exemption. The new circulars address these issues and the Belgian tax authorities now accept the principles of the ECJ decisions as being applicable to a wide(r) range of dividends.

Territorial scope

The circulars confirm that excess DRD related to qualifying dividends distributed by companies established in Belgium or another EU/EEA Member State, *as well as dividends distributed by companies established outside the EU/EEA* (i.e. "third countries") may be carried forward. For the carryforward to apply to the latter category, the relevant tax treaty should provide for the same treatment as would apply to dividends paid between Belgian companies (i.e. the treaty would need to have an equal treatment clause in the article relating to methods for the elimination of double taxation) or the free movement of capital principle in the EC Treaty should apply.

In this respect, the circulars provide a list of (currently 26) third countries that have concluded a tax treaty with Belgium that contains the required equal treatment clause. Affected taxpayers can request the application of this treaty provision, either relying on Belgian domestic law procedures (notice of objection or request for *ex officio* relief) or under the mutual agreement procedure in the relevant treaty.

For dividends distributed by companies established in third countries for which the treaty does not include an equal treatment clause, an excess DRD carryforward can in some cases still be validly claimed on the basis of

the free movement of capital. This principle should apply where the share participation does not confer influence on the decision-making process or activities of the subsidiary.

Temporal scope

The new administrative circulars also confirm that, based on above principles, an excess DRD carryforward can be claimed with respect to qualifying dividends distributed as from the following dates :

- Dividends distributed by Belgian companies: tax year 1992 (when the Parent-Subsidiary Directive became effective);
- Dividends distributed by companies established in Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and the U.K.: tax year 1992;
- Dividends distributed by companies established in Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Poland, Slovakia and Slovenia: 1 May 2005 (the date these countries became EU Member States);
- Dividends distributed by companies established in Austria, Finland, Iceland, Norway and Sweden: 1 January 1994 (the date these countries became EEA Member States) and
- Dividends distributed by companies established in Bulgaria and Romania: 1 January 2007 (the date these two countries became EU Member States).

Contact

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