



Real Estate tax alert

Belgium

Belgian Supreme Courts upholds tax-on-tax

On 19 September 2019, the Belgian Supreme Court issued a judgment in a dispute where a Belgian REIT ("SICAFI" / "vastgoedbevak"; now "SIR" / "GVV") challenged the inclusion of corporate tax paid in its taxable basis, resulting into the so-called 'tax-on-tax'. The Belgian Supreme Court ruled in favour of the Belgian tax authorities and upheld this tax-on-tax practice. This judgment is also relevant for S-REIFs ("FIIS" / "GVBF") and other regulated investment vehicles that have the same taxable basis as a Belgian REIT.

Background

Companies subject to the standard corporate tax regime are taxed on the adjusted accounting profit before tax. In order to establish this taxable basis, the corporate tax paid or provisioned (including increases and late-payment interests) should be added to the accounting profit after tax. In the corporate tax return, the corporate tax therefore qualifies as a disallowed item.

The taxable basis of a Belgian REIT (and several other regulated investment vehicles such as the S-REIF) is composed of disallowed items (excluding reductions in share value, capital losses realised on shares and exceeding borrowing costs under the 30% EBITDA interest limitation rule) and non-arm's length benefits received. As the corporate tax paid or provisioned qualifies as a disallowed item, it is

comprised in the taxable basis of a Belgian REIT. This results in a taxation of the corporate tax, the so-called "tax-on-tax".

Several years ago, Belgian so called "coordination centres" faced the same issue, because their taxable basis was quasi-identical to the taxable basis of a Belgian REIT. In 2007, the Belgian Supreme Court ruled that the corporate tax is not to be comprised in the taxable basis of the Belgian Coordination Centres, thereby preventing tax-on-tax (Cass. 16 March 2007, AR F.04.0055.N).

On the other hand, in 2016 the Belgian Constitutional Court ruled that the inclusion of corporate tax in the taxable basis of a Belgian REIT does not violate the constitutional principle of non-discrimination (CC. 10 October 2016, n°135/2016).

Supreme Court confirms tax-on-tax

Both the Tribunal of first instance and the Antwerp Court of appeal already ruled in favour of the Belgian tax authorities in this matter. One of the Belgian REITs brought the case before the Supreme Court and referred to the Supreme Court's previous case law regarding tax-on-tax in the hands of the Belgian Coordination Centres.

However, in a very short decision, the Belgian Supreme Court ruled that "the corporate tax is comprised in the taxable basis" of the Belgian REIT. It is not clear why the Belgian Supreme Court came to a different conclusion to its previous case law for coordination centres.

This judgment of course comes as a disappointment for the Belgian REIT and S-REIF sector. In Deloitte's view, it is inconsistent to include the corporate tax in the taxable basis of Belgian REITs and S-REIFs because they – unlike companies with a standard corporate tax basis – are *not* taxed on the adjusted profit before tax. However, given this supreme court case law, Belgian REITs and S-REIFs that decide not to follow this ruling clearly face a risk of challenge in the future.

Contacts

If you have any questions concerning the items in this alert, please contact your usual consultant at Deloitte or Laga or:

- Michael Van Gils, Partner Deloitte, Global Business Tax, mivangils@deloitte.com, +32 2 600 65 79
- Sam Gommers, Lawyer, Laga, sgommers@laga.be, +32 2 800 70 90
- Astrid Peeters, Lawyer, Laga, astrpeeters@laga.be, +32 3 242 42 28;
- Wout Van Der Auwera, Lawyer, Laga, wvanderauwera@laga.com, + 32 2 800 71 24

For general inquiries, please contact:
bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website:
<http://www.deloitte.com/be/tax>



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte provides audit, tax and legal, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte has in the region of 225,000 professionals, all committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

Laga BV CVBA in Belgium

Laga BV CVBA is part of a privileged multidisciplinary cost-sharing association with Deloitte Belastingconsulenten BV CVBA.

© 2019. For information, contact Deloitte Belgium.

[Subscribe](#) | [Unsubscribe](#)