Belgium

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

The Belgian Government has introduced a new ‘speculation tax’ for individual investors, who invest in listed shares. When the individual realises a capital gain on such shares within six months following their purchase, they will be taxable at a special rate of 33%. In addition, the standard withholding tax rate for dividends, interest and royalty income is increased from 25% to 27%. Dividend distributions between group companies are not affected by the increase due to the Belgian and European exemptions applying to related companies.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

The Belgian Government is not proactively implementing the BEPS recommendations and seems to adopt a more ‘wait and see’ attitude. However, with regards to the specific transfer pricing recommendations, the Government has announced that it is looking into the matter to decide on how to convert these guidelines into Belgian tax law.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

In case of a stock acquisition, the acquiring company is not entitled to depreciate the assets of the target company, nor the acquired shares in the target company, which might lead him to prefer an asset deal instead. In most cases, however, the seller will prefer to carry out the transaction by means of a sale of stock, as capital gains on shares are in principle 100% tax exempt. However, the Belgian legislation on capital gains on shares realised by corporate taxpayers has changed. As a result, the exemption remains fully applicable to small and medium-sized enterprises (SMEs), but capital gains on shares realised by large companies are now taxed at a rate of 0.412% (see also question n° 15).

Individual sellers benefit in principle still from an exemption of the capital gain (when the capital gain is realised as a result of the ‘normal management’ of the seller’s private portfolio and does not concern listed shares or a substantial shareholding sold to a buyer established outside the European Economic Area).

b. Asset deal

In case of an acquisition of business assets, the acquiring company is in principle authorised to depreciate the acquired assets and goodwill or clientele on the basis of the acquisition value. This means that the acquiring company will benefit from a fiscal step-up that reflects the difference between the sale price of the transfer of assets and liabilities and the fiscal value of these assets and liabilities prior to the sale. As a result, the acquiring company usually prefers an asset deal.

On the contrary, upon a sale of business assets, the seller will in principle be taxed on all capital gains realised. It should be noted that capital gains realised on business assets may, however, benefit from a deferred taxation regime (see also question 16).

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

A stock acquisition does not change the fiscal identity of the target company. As such, the company's assets and liabilities will not acquire a different tax status. The target company will continue to depreciate or evaluate its assets as it did before the acquisition.

5. What are the particular rules of depreciation of goodwill in your country?

A buyer who has acquired goodwill is entitled to a fiscal step-up. This is because the Belgian Income Tax Code allows the acquiring company to depreciate all acquired assets in accordance with their acquisition value, including the value attributable to goodwill. Additional costs can be depreciated as well, either in the year in which these costs have been incurred, or on a pro rata basis. This is also, in accordance with the depreciation method applied to the assets to which these additional costs relate. To determine the depreciation methods, tax law in general refers to the principles of accountancy law. As a result, the depreciation period is in principle determined by the normal economic life expectancy of the assets concerned. However, Belgian tax law specifically provides for a minimum depreciation period of five years for intangible fixed assets (such as goodwill and clientele). Often the Belgian Tax Authority attempts to impose a depreciation period of 10 to 12 years for depreciations on clientele. In practice, and to avoid any dispute with the tax authorities, taxpayers will need to demonstrate that their clientele is of a more 'dynamic' nature and that the depreciation period should therefore be shorter than 10 or 12 years.

6. Are there any limitations to the deductibility of interest on borrowings?

As a general rule, taxpayers are allowed to 'deduct all costs incurred to acquire or to maintain taxable income'. This rule also applies to interest or financing costs incurred to acquire stock or assets. Therefore there is no difference in tax treatment between a share and an asset deal. Belgian tax law however provides some general provisions that limit the tax deduction of financing costs. Interest is not tax deductible when the interest rate is not set in accordance with normal market conditions, taking into account the specific transaction risk and the financial position of the debtor. Also, interest is not tax deductible when paid to a foreign taxpayer or to a foreign establishment that is not subject to income taxation. This is also the case if it is subject to a much more favourable tax regime than the Belgian income tax regime unless the taxpayer can prove that the interest payments relate to true and sincere transactions and do not exceed normal market limits.

A special 'thin capitalisation' rule has been introduced for corporate taxpayers (who also remain subject to the above restriction rules) regarding interest payments made to beneficiaries not subject to income taxation, or subject to a much more favourable tax regime than the Belgian tax regime or related companies. Such interest payments cannot be deducted by the corporate taxpayer if and insofar as the total loan amount exceeds five times the total sum of the taxed reserves at the beginning of the taxable period plus the amount of paid-in capital at the end of this period (this is the so-called 5:1 debt-equity ratio). Furthermore, the same debt-equity ratio of 5:1 also applies to loans granted by related parties.

7. What are usual strategies to push-down the debt on acquisitions?

Performing a debt push-down in general is often considered to be a fiscal 'necessity' due to the absence of a fiscal unity for Belgian income tax purposes. Such debt push-down is achieved by consolidating the financial costs of the acquiring company with the profits of the target company, often by means of a national or cross-border merger. However, in order to perform a tax neutral merger, the merger needs to pass a business test and cannot be solely inspired by tax motives (which in many cases is the only real motivation for the merger). The latter condition may jeopardise the possibility to perform the merger in a tax neutral manner.

However, a merger between the buyer's (intermediary holding) company and the target company may offer a solution that can result in an effective debt push-down. This is because the merger will result in the profits and costs of both companies remaining taxable and deductible within the one single taxable entity, i.e. the company resulting from the merger operation.

Other debt push-down strategies may be to charge management fees to the target company or perform a debt push-down by putting in place intra-group loans. A dividend distribution or capital decrease may also be considered as an alternative. Please note that such alternative strategies will need to comply with economical substance rules and transfer pricing regulations.

8. Are losses of the target company(ies) available after an acquisition is made?

Following an acquisition, tax losses carried forward are in principle lost due to the change of control of the company. That is unless the company can show that the acquisition was performed in accordance with 'legitimate financial or economic needs'.

Many disputes and court cases have resulted from the fact that the events or circumstances that represent a 'legitimate financial or economic need' are not specified in the text of the law. Recent jurisprudence has confirmed that a takeover designed to prolong the existence of the company (even in cases where new activities are carried out by the company after the change of control) can constitute such legitimate financial or economical motive. In order to obtain certainty on the possibility to maintain the available tax losses, the parties can request an advance tax ruling.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

Transfer taxes are due when immovable property (houses, land, industrial facilities, etc.) is involved. As a general rule, the transfer of real estate is subject to 12.5% registration duties on the sales price. However these duties may not be inferior to the normal market value of the property. The registration duties amount to 10% when the property is located in the Flemish region. However, 'new' buildings can be transferred under the VAT regime instead of registration duties, in which case the sale is subject to a 21% VAT levying. This rate is higher than the 12.5% or 10% registration duties rate. But when the acquiring company is entitled to deduct VAT, such a 'VAT-sale' may be more advantageous. Indeed, when the acquiring company is entitled to deduct input VAT and uses the acquired immovable property for activities subject to VAT, the paid input VAT can be recovered by reclaiming it in the VAT return relating to the period in which the transfer took place.

In principle, the transfer of all other – movable – assets will be subject to VAT. However, an exemption applies when the assets form a 'universality of goods' or 'branch of activities'.

Share deals are in principle not subject to any transfer tax, except for the 'stock exchange tax' (various rates apply, depending on the nature of the security concerned; the standard rate amounts to 0.27%). However various exemptions apply.

10. Are there any restrictions on the deductibility of acquisition costs?

Acquisition costs are, as any other cost, deductible provided the taxpayer can establish that said expenses or costs were incurred during the taxable period in order to acquire or at least preserve taxable income. Also, the reality and the amount of the expense needs to be justified as being "reasonable" (the taxpayer may deliver this proof by all means of law). An expense will however not qualify as tax deductible if the sole purpose of the expense is transferring taxable profits from one company to another.

11. Can VAT (if applicable) be recovered on acquisition costs?

For asset deals, the normal VAT deductions apply. When the acquiring company is entitled to deduct input VAT and uses the acquired assets and services for activities subject to VAT, the paid input VAT can be recovered by reclaiming it in the VAT return relating to the period in which the transfer took place.

For share deals, the answer is less affirmative. In general however, if the acquisition costs are part of the company's general business costs and are as such incorporated in the general turnover rendered by that company to third parties or other group companies, the input VAT on these costs will be deductible (depending on the company's overall right to deduct input VAT). If these costs however relate to an isolated purchase and sale of shares or participation, the concerned input VAT on these costs may not be deductible since it will be considered as a financial transaction for which no input VAT recovery is granted.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

When a foreign company acquires a Belgian company, the main tax consequences thereof will of course need to be verified in its own country of residence. However, from a Belgian perspective there are a few elements to take into account, such as the aforementioned debt-equity ratios and loss limitation rule. In addition, it will in any event be important to make sure that the Belgian company disposes of sufficient substance following the take-over so that it cannot be contested that the company remains a Belgian resident company. In that respect, we usually recommend that all shareholder's and board meetings are physically held in Belgium and that all important decisions are taken from the Belgian offices. The acquiring company itself should in principle not be afraid of becoming subject to Belgian taxation, unless of course a Belgian permanent establishment would be created upon or following the acquisition.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

A common post-acquisition restructuring is the merger of the acquiring company and the Belgian target company, certainly when a Belgian intermediary holding company (SPV) has been used by a foreign buyer to acquire the Belgian target company.

A tax neutral merger between two companies is possible if certain conditions are fulfilled:

- The acquiring company must be a Belgian or a European resident company;
- The merger is carried out in accordance with the Belgian Code of Companies or similar corporate rules applying to the acquiring company; and
- Tax fraud or tax evasion cannot be the main reason or one of the main reasons for the merger.

It is therefore necessary to establish that business motives (other than tax motives), such as restructuring, simplification of the group structure or rationalisation of activities have motivated the merger operation.

The burden of proof in principle lies with the tax authorities: the tax authorities have to prove that tax fraud or evasion is the main objective or one of the main objectives in order to deny the tax neutral character of the merger. However, tax fraud or evasion is deemed to exist if the tax authorities can prove the absence of business motives. The taxpayer may refute this presumption by giving considerations, other than tax-inspired ones.

If the acquiring company is a non-Belgian company resident in another EU Member State, the tax exemption only applies to assets that remain allocated to a 'Belgian establishment' that the foreign company avails of after the merger operation.

Various other alternative reorganisations may be considered (such as the transfer of activities), but many of these alternatives are often complicated to implement from a commercial point of view. Please note that these alternatives also need to comply with economical substance rules and transfer pricing regulations.

14. Is there any particular issue to consider in case of companies of which main assets are real estate?

When real estate is included in the transaction a transfer of shares may be a more tax-advantageous way to proceed since a transfer of real estate is subject to registration duties (10% to 12.5% depending on the location of the real estate in Belgium) or VAT where a new building is concerned (21%). A transfer of shares in general can be effectuated without any transfer tax being due (also see question 9).

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains realised by a corporate taxpayer are in principle deemed profit and are therefore taxable at the normal corporate income tax rate of 33.99%. However, capital gains on shares are in principle tax exempt.

Capital gains on shares are (as a general rule) fully exempt if the following two conditions are met:

- The shares must have been issued by companies subject to a normal tax regime (the taxation condition); and
- The shares must have been held in full ownership during an uninterrupted period of one year (the holding condition).

The exemption is fully applicable for SMEs, but other 'large' companies fulfilling the two exemption conditions mentioned above are subject to a special tax of 0.412%.

In Belgium, SMEs are defined in the Belgian Company Code. According to this Code, an SME is a company with legal personality, which, for the last and second last completed financial year, does not exceed more than one of the following thresholds:

- annual average number of 50 employees;
- annual turnover, excluding VAT of EUR 9 million;
- balance sheet total of EUR 4.5 million.

For companies affiliated with another company, the employees are added up and the annual turnover and the balance sheet total are determined on a consolidated basis.

The current tax regime of capital gains realised by corporate taxpayers can therefore be summarised as follows:

- Full exemption of capital gains on shares realised by SMEs if both the taxation condition and the holding condition are met;
- Taxation at 0.412% of capital gains on shares realised by companies other than SMEs if both the taxation condition and the holding condition are met;
- Taxation at 25.75% of capital gains on shares when the taxation condition is met, but not the holding condition; and
- Taxation at the standard corporate income tax rate of 33.99% of capital gains on shares when the taxation condition is not met (regardless of the holding condition).

Capital gains on shares realised by individuals are fully tax exempt, unless they qualify as professional or diverse income.

Therefore, capital gains on shares realised in the course of a professional activity are taxable as ordinary professional income at the normal (progressive) tax rates.

Capital gains realised within the normal management of the person's private estate are in principle fully exempt. That is, unless the shares represent a 'substantial shareholding' of more than 25% of the share capital of a Belgian company and they are transferred to an acquirer outside the European Economic Area.

Capital gains falling outside the scope of 'normal management' are taxed as speculative income at a separate rate of 33%. However a new 'speculation tax' has been introduced: capital gains realized on listed shares within 6 months after their purchase are now also taxed at the 33% rate.

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

For capital gains realised on shares, Belgian tax law does not provide for any specific method to defer or avoid taxation – if at all applicable.

By contrast, when a capital gain is realised on business assets, Belgian tax law does provide for a deferred taxation regime whereby the capital gain is not taxed immediately, but on a future pro rata basis. When the capital gain is realised on tangible or intangible fixed assets listed on the vendor's balance sheet for more than five years, the capital gain will be taxed on a deferred basis following the depreciation of the reinvestment assets. However this is provided that the purchase price of the assets is fully reinvested in depreciable fixed assets used within a Member State of the European Economic Area for the carrying out of the vendor's business activity within a certain period of time (in principle within three years, but extended to five years for reinvestments in buildings, vessels or airplanes).

17. Are there any local substance requirements for holding/finance companies?

In order to qualify as a Belgian tax resident company, a company will need to comply with the substance requirements of Belgian tax law, i.e. the company must have its registered seat, principal establishment or seat of management or administration in Belgium. As a result, when you wish to set up a Belgian tax resident company, it will be important not only to incorporate the company in accordance with Belgian company law provisions and have the seat of the company registered in Belgium, but also to make sure that the company is effectively managed in Belgium (e.g. board of directors' meeting is held in Belgium physically, all management decisions are effectively decided upon out of the Belgian office). In an international context, also the tax residency rules included in the Double Tax Treaties to which Belgium is a party will come into play. These Double Tax Treaties mainly provide the 'place of effective management' as the main criterion to determine a company's tax residency.

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