July Newsletter Sansen International Tax Lawyers

Dear reader,

Before the summer holidays really kick in, we want to draw your focus to very recent case law from the Belgian Supreme Court (June, 16, 2017 F 15.0102. N/1) on the basis of which it seems that **French withholding tax paid on dividends can be reclaimed** in Belgium by Belgian resident individual investors for up to 5 years back in time (see below 1). Do not hesitate to contact us in case you or your clients would like us to further look into possibilities of reclaiming French or other foreign withholding tax in Belgium.

With this newsletter, we also want to give you an update on the status of the **introduction of UBO-registers** in the BeNeLux (see below 2). It seems that the introduction of these much debated registers is running late.

Finally, these are not the only recent evolutions in the field of Belgian and international income taxation. Reference can amongst others also be made to:

1. positive case law by the Belgian Supreme Court in relation to Dutch 'AOW' payments paid to Belgian tax residents (May, 5, 2017);
2. a procedure initiated by the European Commission in relation to Belgian taxation of foreign real estate (C-110/17, Commissie against Belgium, *PB EU* C 121, April 18, 2017, 19;
3. a Royal Decree indicating the countries to whom Belgian financial institutions will have to exchange information;
4. EU Case Law in relation to the application of the Belgian exemption for interest received on foreign savings accounts (ECJ 8 June 2017, C-580/15);
5. the signing on June, 7 by a.o. Belgium of the "Multilateral Convention to Implement Tax Treaty Related Measures" to prevent BEPS;
6. a positive ruling in relation to dividends paid by a Belgian subsidiary to its Luxembourg parent company and the application of the newly introduced Belgian anti-abuse provisions to avoid the grant of benefits on the basis of internal law and the EU parent-subsidiary directive to 'artificial constructions' ('Voorafgaande beslissing nr. 2016.782');

In case you would have questions in relation to one of the topics mentioned in this newsletter, feel free to contact us.

Enjoy reading!

Erik, Gertjan, Daan

1. Belgian tax credit for foreign source tax paid on dividends - Belgian Supreme Court (June, 16, 2017 F 15.0102. N/1)

Double tax treaties regulate how cross-border dividends should be taxed. In general, these dividends are taxable in the country of which the (private) investor is resident. However, most of the double tax treaties also allow the source country to levy a source (withholding) tax on the outgoing dividends paid by resident companies.

For private investors, the source tax is often limited to 15% on the basis of the applicable double tax treaty. A Belgian resident private investor will however also undergo Belgian taxation on the net dividend, increasing the overall tax burden as both the foreign source tax and Belgian income tax will have to be paid. Belgian internal tax legislation indeed no longer provides for a foreign tax credit in relation to source tax paid on foreign dividends as from 1988 (outside the course of professional activities), unlike what is for instance the case in Luxembourg or the United Kingdom.

Although this can discourage Belgian private individuals to invest in foreign companies (be it in the EU or outside of the EU), the European Court of Justice has ruled on several occasions that this “double taxation” is not in breach with EU Law (ECJ 14 November 2006, C-513/04, Kerckhaert en Morres; 16 July 2006, C-128/08, Damseaux; 19 September 2012, C-540/11, Levy).

After this case law, it was often thought that this form of double taxation could not be remedied. On June, 16, 2017, the Belgian Supreme Court however seems to provide a new argument following an application of the France - Belgium double tax treaty ('DTT' of March, 10, 1964). The Belgian-French DTT contains an obligation for Belgium to grant a tax credit (min. 15%) to Belgian tax resident individuals with respect to dividends received from French companies that have effectively been taxed in France, albeit that such tax credit will be granted "*according to the conditions provided for by Belgian legislation*". Following the 1988 modification of internal Belgian tax law, Belgian private individuals in practice could no longer invoke the internal so-called FBB tax credit, thus undergoing double taxation on French dividends.

In its very briefly motivated decision of June, 16, 2017, the Belgian Supreme Court now however states that refusal to grant a tax credit of at least 15% violates the Belgian-French tax treaty, as this means that additional conditions (such as the aforementioned "professionality requirement") are imposed by Belgian internal law, while these are not foreseen in the Double Tax Treaty. In the eyes of the Court, not granting the tax credit for the foreign dividend, seems to be override of the treaty with France.

The practical consequence of this case law, is that taxpayers should examine the possibility of claiming a tax credit in Belgium for French withholding tax effectively levied on dividends. This might allow recovering of up to 5 years of overpaid taxes.

Furthermore, while the decision explicitly relates to France, the same discussion could be relevant for dividends received from other countries. Careful examination of the relevant double tax treaty is necessary.

2. Deadline introduction of UBO-registers not met

On 26 June 2017 the deadline has passed for the implementation of the European directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ('4th AML-directive').

The 4th AML-directive amongst others imposes the obligation for members states to introduce a so-called register of ultimate beneficial owners (UBO-register). This privacy-sensitive UBO-register should have been introduced by Member States on June, 26, 2017. It however seems now that most of the members states are running late. According to our information, **Denmark** currently is the only member state having effectively implemented the UBO-register. The **UK** enacted a register for persons with significant control last year.

The Netherlands were one of the first countries to publish a draft bill, made available in the Netherlands for public consultation on March, 31, 2017. The bill has not been adopted yet, though the Dutch government recently announced that a definitive bill can be expected in the second half of 2017. In **Belgium**, a "bill on the prevention of money laundering and terrorist financing" was recently approved by the Belgian Council of Ministers on 22 June 2017. The bill has been submitted to State Council for further advice, but is expected to be published this summer. The content however has not yet officially been made available. **Luxembourg** will implement the Fourth anti-money laundering directive in two separate bills. On 26 April 2017 a bill was introduced in the Luxembourg Parliament, containing all other provisions than the ones related to the UBO-register. The bill regarding the implementation of the UBO-register is however expected to be brought before Parliament soon.

Although it indeed seems that the introduction of the UBO-registers is to be running late, the effective introduction will only be a matter of time. We will closely follow-up the progress on the Belgian proposal, in particular with a view on analyzing the provisions of the Belgian draft bill in relation to legitimate privacy rights for taxpayers.

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