



Cayman Tax Update

The so-called ‘Cayman Tax’, introduced in 2015, introduced a tax transparency regime for so-called ‘legal constructions’ that have been set up by Belgian private individual tax residents. The income of such qualifying entities will be taxed directly in the hands of these individuals if they are to be considered as founder, as if they would have received the income directly. Distributions are generally taxable as dividend. The look-through regime does not apply when the legal structure deploys a so-called ‘genuine economic activities’, a notion which is however interpreted strictly by the legislator.

In respect of the qualifying legal structures, a distinction is made between 3 categories of legal structures:

- (i) trusts and other structures without legal personality (**type 1**), a category which was used before to denominate a combination of stichting-administratiekantoor (STAK) and burgerlijke maatschap (BM) as ‘legal construction’;
- (ii) foreign entities with legal personality that are not subject to income tax or subject to income tax at an effective tax rate of less than 15% calculated according the rules of Belgian income tax law (**type 2**) and
- (iii) a legal construction type 1 or type 2 wrapped up in an agreement (**type 3**).

In this respect, the legal structures type 2 were initially listed in two Royal Decrees dated 18 December 2015 (exhaustive list of entities within the European Economic Area – EEA) and 23 August 2015 (non-exhaustive list of entities outside the EEA).

New Royal Decree

In an earlier news alert, we announced that the EEA-decree would be modified to expand its scope. On 3 December 2018, the new Royal Decree was finally published in the Belgian Official Gazette, amending the existing Royal Decree of 18 December 2015.

The Royal Decree of 18 December 2015 targeted certain public or institutional undertakings for collective investments (UCI) or alternative investments funds (AIF) if these entities were held by one person or several related individuals, and foreign hybrid companies with Belgian source income. It also included an exhaustive list of four types of entities within the EEA, that were irrefutably considered to be legal constructions: the Liechtenstein “Stiftung”, the Liechtenstein “Anstalt”, the Luxembourg “Société de gestion de Patrimoine Familiale” and Luxembourg “Fondation Patrimoniale”.

Three categories of legal constructions

The new Royal Decree of 21 November 2018, published in the Belgian Official Gazette on 3 December 2018, now introduces three categories of legal constructions within the EEA that will be considered as legal constructions, potentially in scope of Cayman Tax, going forward:

- Investment vehicles (private UCI’s and AIF’s) that are held by one individual or several individuals who are related to each other (assessment made per ‘compartment’). The main reason for this amendment was to include ‘private investment vehicles’, such as a SICAV-SIF;

- The so-called hybrid entities, *i.e.* legal structures that are not transparent for Belgian income tax purposes, but that are tax transparent in the jurisdiction within the EEA where they are established. However hybrid entities where the shareholders pay a minimal of 1% income tax – compared to the income tax that would be due in Belgium – in the country of establishment, are again excluded. Also the so-called ‘translucent companies’, for example the French ‘Société Civile Immobilière’, that have legal personality but where income tax is levied in the hands of the shareholders, are in principle excluded. Belgian shareholders of the SCI will for now have to adhere to the recent High Court Case law leading to potential double taxation for distributions of real estate income;
- Lastly, and probably the most important modification, entities with legal personality established in the EEA, that are (a) not subject to income tax or (b) that are subject to an income tax that is less than 1% of the taxable income as determined in accordance with the rules applicable under Belgian income tax law, will from now on also be subject to Cayman Tax. It remains to be seen how this new rule will be applied. It will in any event trigger more caution for taxpayers investing through entities in the EEA, such as Luxemburg, Netherlands, Cyprus or Malta, where the participation regime or tax attributes (such as establishment or carry forward of losses or application of notional interest deduction) are sometimes more beneficial than the Belgian tax regime. The fact that the nominal tax rates for these countries exceed 1%, is as such not sufficient to exclude them from the scope of Cayman tax.

The 1% threshold will only be applicable to entities that do not fall in the scope of category 1 or 2.

The entities as defined under 2 and 3 will not qualify as legal constructions if the income derived would be exempted from Belgian income tax under the applicable double tax treaty, if the Belgian tax resident founder of the legal construction would have received the income directly. Note that investment income generally cannot be exempted under double tax treaties.

Entry into force

Caution should be given to the fact that the Royal Decree will be applicable for income received, granted or made payable by legal constructions as from 1 January 2018. For further detail, please contact office@sanseninternational.tax or your regular contact.