

## Belgium - Belgian Tax Law Changes 2010

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In December 2009, the Financial Arrangements Act and three Tax and Miscellaneous Provisions Acts ("the Acts") were approved by Belgium's parliament. The Acts contain important amendments to Belgium's tax legislation.

Below is an overview of the most-relevant changes for MNCs and investors, which in principle were effective 1 January 2010, unless otherwise specified.

### **Dividends-Received Deduction ("DRD")**

Belgian tax-resident companies (or Belgian branches) can deduct from their net taxable income 95% of dividends received from qualifying holdings. So far the criteria for the deduction to be available were that the company (or branch) had held or committed to maintain a shareholding of at least 10% or a minimum acquisition value of EUR 1,200,000 in the subsidiary for at least one year. Credit institutions, insurance companies and quoted companies did not have to meet this condition.

As of 1 January 2010, the minimum acquisition value has been raised from EUR 1,200,000 to EUR 2,500,000 (section 130, Financial Arrangements Act).

In addition, the exemption provided for credit institutions, insurance companies and quoted companies has been abolished. Accordingly, from the tax year 2010, the minimum threshold requirement also applies to these companies.

Previously under domestic Belgian tax law, any "excess" DRD in a given tax year (i.e. DRD that could not be used in the year in which it arose due to a lack of net taxable income to offset it against) was not able to be carried forward. Following judgments against Belgium by the ECJ for breach of the EU Parent-Subsidiary Directive (C-138/07, C-439/07 and C-499/07), the Belgian tax administration issued two practice notes in June and October 2009 in which it acknowledged that excess DRD for European Economic Area (EEA) dividends and certain non-EEA dividends (subject to conditions) can be carried forward to future tax years.

An amendment to the tax law has been made confirming that any unused portion of the DRD from EU dividends can be carried forward to future tax years. The ability to carry forward the unused portion of DRD from qualifying non-EU dividends has not been codified, but should continue to apply based on the October 2009 practice note.

Finally, a repeal of the condition that the shares should be booked as financial assets for accounting purposes (requested by the European Commission on 20 November 2009) has not been addressed by the Acts.

### **Notional Interest Deduction ("NID")**

Belgian companies (and Belgian branches) can claim tax relief for their cost of capital by deducting notional (deemed) interest, which is calculated on their net equity. The NID was introduced to mitigate the different tax treatment between equity and debt financing.

The NID rate for a given tax year depends on the 10-year government bond interest rate of the calendar year two years prior to the particular tax year (e.g., for tax year 2011 reference is made to 2009 government bonds). In principle the NID rate is capped at 6.5% (7% for SMEs).

For budgetary purposes, the NID rate for tax years 2011 and 2012 (i.e., financial years ending respectively on 31 December 2010 and 2011) has been capped at 3.8% (4.3% for SMEs).

A provision has been included in Belgium's non-resident (corporate) tax rules such that the research and development tax credit and NID may be transferred to the acquiring company in the case of a tax-exempt reorganization, as if the reorganization had not taken place. A similar provision was previously included in the resident (corporate) tax rules. It applies on and after 12 January 2009.

### **Payments Made to Tax Havens**

Starting 1 January 2010, companies subject to Belgian corporate income tax or Belgian non-resident corporate income tax are obliged to declare direct or indirect payments to recipients established in tax havens. The declaration is made on a special form if the payments exceed EUR 100,000 during the tax year.

A tax haven is defined as: (i) a jurisdiction regarded by the OECD as not being sufficiently cooperative concerning the international exchange of information or (ii) a jurisdiction where the nominal corporate tax rate is less than 10%. A royal decree containing a list of the countries where the nominal corporate tax rate is lower than 10% will be published.

In the event of non-disclosure, relief for the payments will be disallowed for corporate income tax purposes. In addition, the Belgian tax authorities can charge a tax-deductible secret commission assessment amounting to 309% of the undisclosed expenses. Where the payments have been duly disclosed in time but the taxpayer is not able to prove that the payments were made as part of genuine, proper transactions and they were made to an entity under an artificial construction, their deduction will be disallowed for corporate income tax purposes.

