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Exemption of the Belgian withholding tax on dividends paid by a Belgian subsidiary to its foreign parent. A reminder before the proposed tax reform

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The proposed Belgian tax reform contemplates many changes in the tax treatment of dividends paid by a subsidiary to a parent company. It may be useful to remind the reader of the formalities required to obtain an exemption or a reduction of the withholding tax at source upon payment of a dividend by a Belgian subsidiary to a foreign parent. We shall concentrate on the situation of a parent owning more than 10 % of the capital of its subsidiary, as contemplated by the EU parent-subsidiary directive and by various tax treaties concluded by Belgium.

Present Belgian law also grants the exemption when the participation was acquired for EUR 2,500,000 or more. The reform wants to limit the exemption in that case to participations held as fixed assets, i.e. in order to create a durable link between parent subsidiary, related to the activity of the parent, to secure influence in management or to control the subsidiary. As this extension of the exemption is provided by Belgian domestic law and not by treaties or by the EU parent-subsidiary directive, Belgian law may modify it at will. The modification would apply for tax-years starting after December 31, 2024.

Under Belgian tax law, the obligation to withhold the “précompte mobilier” (withholding tax on income from capital) is waived on dividends when the debtor is a Belgian subsidiary company and the beneficiary is a parent company established in a country with which Belgium has concluded a tax treaty for the prevention of double taxation which provides for exchange of information necessary to apply the national legislation of the contracting States (Royal Decree of execution of the income tax code – RD – ITC, art. 106, § 49, taken in execution of art. 266, § 1 of the Income Tax Code – ITC).

The parent must hold a percentage of 10 % in the capital of the subsidiary. It must hold or will hold that participation during an uninterrupted period of at least one year (art. 106 , § 5, second, paragraph, referring to art. 106, § 6bis RD-ITC).

A subsidiary company is defined as a company having one of the forms provided in EU Council directive 90/435/EEC f 23 July 1990 (the parent-subsidiary directive) as modified by directive 2003/123/EC of 22 December 2003 or an analogous form, the Belgian reference to “société privée à responsabilité limitée” being understood as a reference to “société à responsabilité limitée (besloten vennootschap – BV), having its tax domicile in the State concerned according to the tax legislation of such State and the double tax treaties concluded between such State and third States and being subject to corporation tax without benefiting from a tax regime derogating from ordinary law (art. 106, § 5, third paragraph, RD-ITC).

The shares subject to a security or object of a loan are not taken into consideration.

The waiver of the WHG tax is subject to the communication by the debtor of the income of a certificate stating that the beneficiary:

a) is a parent company as defined above;
b) has kept the participation during one year or, if the one-year detention period has not been completed at the time of attribution of the dividend, include:
    - the date since which the participation is held in an uninterrupted way;
    - the commitment that this participation will be held until the one-year deadline is reached and that this fact will be notified immediately to the subsidiary;
    - the commitment that if the participation became lower than 10 % this fact would be notified immediately to the subsidiary (art. 117, § 4 RD-ICT).

This form is issued by the Belgian tax administration as form 273A. The form is to be completed by mentioning a code ("Box II" b, footnote 7). The appropriate code is 101, which according to the table of classification of income accompanying the form refers to the dividends described above. The appropriate rate of WHG to be mentioned in "Box II" d is zero.

An anti-abuse provision derived from Belgian law (art. 266, § 3 - ITC), EU directives or CJEU case law provides that the exemption will not apply if the dividend is connected to a legal act or a group of legal acts of which the administration demonstrates, but for evidence to the contrary, that they are not "genuine" (in French authentique) and are put into place to obtain, as a principal purpose or one of its principal purposes, the intercorporate dividend deduction (applying to Belgian parents – not our case) or one of the benefits provided in the EU parent-subsidiary directive in another State of the EU. This will be the case if the scheme is not motivated by valid commercial reasons in line with economic reality. If the shares are not retained during 60 days, this will be a presumption of abuse, which may be rebutted.

General anti-abuse provisions may also apply. It is sometimes useful, in borderline cases, to request a ruling from the Belgian Ruling Office (Service des Décisions anticipées).

A Ruling is binding during 5 years provided that the description of facts was correct.

The exemption provided by a tax treaty is redundant, as Belgian law grants the exemption if a treaty is in place.