RSM InterTax
Tax Insights February 2017

New tax measures

1. Tax changes further to Program Law of 25 December 2016

- **Fuel costs**: if a company puts a company car at disposal of an employee, 17% of the lump sum benefit in kind, taxable at the level of the employee, is added to the taxable basis of the company (as disallowed expenses). Please note that this 17% constitutes a minimum taxable basis (deduction of tax latencies is not possible).

  Based on the Program Law of 25 December 2016, the 17% increases to 40% when fuel costs related to the personal use of a company car are, totally or partially, borne by the company.

- **Internal capital gains**: as from 1 January 2017, shares contributed by an individual to a holding company are considered, at the level of the holding company, as paid-up capital only to the extent of the acquisition value (original) of shares at the level of the contributor. The part of the contribution value exceeding the acquisition value will be viewed as a "taxed reserve" (in case of distribution of this reserve – for example, in case of a capital decrease, this reserve will be subject to a withholding tax).

- **Withholding tax**: with respect to movable income paid or attributed as from 1 January 2017, the withholding tax rate (and the distinct rate for the personal income tax related to capital income and to movable goods) of 27% will increase to 30% (art. 171,3° and 269, §1, 1° of the Belgian Income Tax Code 1992 – hereafter BITC92).

  With respect to the liquidation reserve (art. 171, 3° septies and 269, §1, 8° BITC92), the applicable withholding tax rate of 17% in case of a distribution of (part of) this reserve during the first 5 years following its creation will increase to 20%. Please note that this rate of 20% will only be applied on the new increase of liquidation reserve and not on the liquidation reserves existing before 1 January 2017.

  The rate of 5% in case of distribution of the liquidation reserve after a period of 5 years remains the same.

  With respect to the transitional regime 2013-2014 (art. 537 BITC92 - regime named "internal liquidation"), the rate of 17% as provided in case of liquidation during the 2 or 4 years following the contribution into the company capital (depending on whether or not the company is considered as a small company) also remains identical.

- **Speculation tax**: speculation tax, which was introduced by the Program Law of 26 December 2015 (only one year ago), has been abolished. As a reminder, speculation

tax was applied, among others, on the capital gain realized on shares, options, warrants and other financial instruments quoted on a stock exchange, when the capital gain was realized outside any professional activity by an individual and when this capital gain was realized within 6 months after the acquisition of the shares, options, warrants and other financial instruments. This change in the regime is applicable as from 1 January 2017.

- **Stock exchange tax**: the applicable scope of the tax on stock exchange transactions has been expanded. The stock exchange transactions will also be taxable when the order related to the transactions is, directly or indirectly, given to an intermediary established abroad (either by an individual which has his habitual residency in Belgium or by a legal entity for the account of a head office or of an establishment of this legal entity in Belgium). Moreover, the trader will become liable for the payment of stock exchange tax when the professional intermediary is established abroad (unless he can prove that the stock exchange tax has already been paid). These provisions are aimed at preventing tax avoidance in case an intermediary located abroad is used.

  The ceilings for the stock exchange tax have also increased. The amounts of 650 EUR (with respect to shares and participations), 800 EUR (with respect to bonds) and 2.000 EUR (with respect to capitalization shares of SICAC/SICAF investment funds) are respectively replaced by the following amounts, 1.300 EUR, 1.600 EUR and 4.000 EUR.

  Finally, the law stipulates an extended payment term and a change with respect to the penalties.

- **« *Excess profit rulings* » – Recovering of State aids**: Articles 100 till 119 of the Program Law dated 25 December 2016 organize how to recover the advantages granted by means of the so-called excess profit rulings, which were considered by the European Commission as illegal State aid. Belgium has now been obliged to recover the advantages granted to the companies through these rulings.

  The law stipulates that the amount of aid to be recovered is determined and calculated per concerned taxable period, without applying any deduction related to the excess profit, but by taking into account the deductions the company is entitled to (Received Dividend Deduction, carried forward tax losses, …). Interest on the additional part of the corporate income tax will be applicable.

2. Other tax changes applicable as from 1st January 2017

- **Transfer pricing**: in the future, transfer pricing will have to be better documented for some companies which are part of a multinational group.

  Till now, there was no legal obligation for company groups to proactively document or justify their transactions between affiliated companies. In practice, companies were only requested to justify these transactions at the moment of a tax inspection. This will thoroughly change in the future.

The action plan BEPS 13 is composed of two elements: a country-by-country report and the documentation requirement of transfer pricing by means of a master file and of a local file.

The initiatives of the action plan BEPS 13 of the OECD have now also been implemented in Belgium. The Program Law of 1 July 2016 introduces the obligation for the Belgian group entity to provide the master file and the local file.

The requirement to submit a master file and a local file will be applicable for any company which, based on the annual financial statements of the accounting year immediately preceding the last closed accounting year, exceeds one or more of the following thresholds:

- Total operational and financial revenues of 50 Mio EUR ;
- Total Balance sheet of 1 Billion EUR ;
- Annual average number of staff: 100 full-time equivalents.

As such, it suffices that one of these abovementioned criteria is exceeded to be subject to the new documentation requirement.

The new documentation requirement applies to financial year beginning as from 1 January 2016.

Companies which do not respect the documentation requirement may be subject to penalties. If the master file or the local file is not submitted, submitted late or incomplete, the Belgian entity could incur a fine ranging from 1.250 EUR till 25.000 EUR as of the second infringement.

- **Notional interest deduction**: with respect to tax year 2017, the rate of notional interest deduction will equal 1,131% for large companies (instead of 1,63% for tax year 2016) and 1,631% (instead of 2,13% for tax year 2016) for SMEs.

- **Wyninckx contribution 2017**: as from 1 January 2017, the definitive regime of the Wyninckx contribution (special social security contribution for additional pensions) enters into force (the entry into force was initially planned for 1 January 2016 but was postponed). A transitional regime was applicable till 1 January 2017. Pursuant to this transitional regime, when the payments in order to build up an additional pension exceeded the amount of 31.212 EUR, the employer is obliged to pay the Wyninckx contribution. As from 1 January 2017, the Wyninckx contribution of 1,5% becomes payable when the “pension objective” is exceeded (the maximum threshold of pension objective is equal to the maximum pension of civil servants, multiplied by the career fraction).

  EU Parent-Subsidiary Directive: Further to the adoption of the European directive 2015/121 of European Council of 27 January 2015 adapting the EU Parent-Subsidiary Directive, the Member States of the European Union have had to adapt their own legislation in order to include a specific anti-abuse provision. This provision is aimed at refusing the grant of advantages related to the EU Parent-Subsidiary Directive to an act or a whole of acts which have been put into place for the main

purpose of obtaining a tax advantage that defeats the object or purpose of this directive and do not correspond to the economic reality, considering all facts and circumstances.

Belgium has implemented this specific anti-abuse provision through the Law of 1 December 2016 related to tax measures; in this respect, articles 203, §1, al. 1 BITC92 (with respect to taxation on received dividends) and 266 BITC92 (with respect to withholding tax on movable income) have accordingly been adapted.

As a reminder, under some conditions, the EU parent-Subsidiary Directive exempts dividends and other profit distributed by subsidiaries to parent companies from withholding tax and eliminates any double taxation of these profits at the level of the parent company.

Please note that this new provision is applicable to income attributed or paid as from 1 January 2017.

- **Automatic exchange of information within EU**: in virtue of Directive 2011/16/EU (as adapted by Directive 2014/107/EU) related to the administrative cooperation for tax purposes, EU Member States have to proceed, as from 1 January 2017, to the automatic exchange of information related to interest, dividends and other similar revenues, income coming from sales of financial assets and other revenues, and account balances. Moreover, the tax decisions with respect to cross-border matters, including rulings related to transfer pricing, should also automatically be sent to the tax authorities of other Member States.

3. Measures and changes expected in 2017

- **Deduction for innovation income:** as from 1 July 2016, patent income deduction is no longer authorized. This results from the fact that the regime (as it was applied) did not comply with the conditions as foreseen in the BEPS program.

  Further to the abolition of this regime, the government has announced its willingness to implement as soon as possible a new regime which would be in accordance with the BEPS program conditions. The law in this respect has recently been approved. The alternative rule replacing the former regime of patent income deduction will be named “deduction for innovation income”.

- **Fairness Tax:** The Fairness Tax regime has been subject to an annulment appeal filed with the Constitutional Court because, among others, this regime would violate the principles of equality and European law.

  The Constitutional Court decided to ask three prejudicial questions to the European Court of Justice. The European Court of Justice has not yet taken any decision, but the conclusions of the Advocate General have already been deposited.

  According to the Advocate General, Fairness Tax could be in contradiction to the EU Parent-Subsidiary Directive. If the European Court follows this reasoning, Belgium

must abolish the Fairness Tax regime. In case of abolition, companies which were subject to the Fairness Tax could reclaim this tax through a tax claim or request for detaxation ex officio.

RSM Belgium informs you

Should you want any further information on these new tax measures, please feel free to contact RSM Intertax.

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