RSM InterTax
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Corporate Income tax reform : legal modifications and precisions

On 30 July 2018, the federal government adopted a new Act (published on 10 August 2018 in the Belgian Official Gazette) which adapts some of the measures established by the Law of 25 December 2017 reforming Belgian corporate income tax.

This legislation, called “Repair Act”, brings new precisions and modifications regarding the application of legal articles that were at the basis of the Corporate Tax reform. The Repair Act ensures the effective implementation of the Atad Directive and its entry into force.

In order to clarify certain measures, the Belgian tax administration also published an administrative circular letter concerning the new tax regime for reimbursements of paid-up capital. As a reminder, the Corporate Income Tax reform Act introduced substantial changes to the regime of capital reimbursements.

1. MODIFICATIONS AND/OR PRECISIONS BROUGHT BY THE REPAIR ACT

1.1. Notional interest deduction (« NID »)

1.1.1. The basis of NID calculation

The Act of 25 decembre 2017 introduced a new method to calculate the basis of notional interest deduction (article 6). This method initially provided that the incremental equity would be equal to one fifth of the positive difference between:

- ✓ The equity at the end of the taxable period, and;
- ✓ The equity at the end of the fifth preceding taxable period.

The Repair Act has altered this method, precising that the positive difference between the equity at the beginning of the taxable period and the beginning of the fifth preceding taxable period need to be taken into account for the calculation, rather than the equity amounts at the end of the taxable period.

The Repair Act planned the entry into force of this measure for tax year 2019 (in relation with financial years starting on or after 1 January 2018).

1.1.2. Anti-abuse provisions

To fight against tax avoidance situations, the new Act excludes certain elements from the equity base, when determining the basis of the notional interest deduction.

According to the new legislation, the following elements are excluded from the notional interest deduction computation :

- ✓ The net fiscal value of a debt receivable towards a taxpayer subject to non-resident tax or a foreign permanent establishment that is established in a country with which Belgium does not have the possibility to control the tax situation (Lack of exchange of information);
- ✓ Contributions of capital from a taxpayer which is subject to non-resident tax or from a foreign permanent establishment, which is established in a country with which Belgium does not have the possibility to control the tax situation (Lack of exchange of information);

In these two cases, taxpayers can avoid the application of these exclusions if they proove that the operation answers to legitimate financial or economical needs.

The last situation so-called by the new agreement taken by the government permits to tax authorities to fight with "double-dip" situations. These situations concern the case where a subsidiary received contributions of its mother company, which took out a loan and deducts the interest. There is a double deduction : tax-deductible interest expenses for the mother company and the subsidiary benefits from the notional interest deduction.

1.2. Carried forward dividend received deduction ("DRD")

In case of tax-exempted reorganisations (mergers, demergers, etc.), Belgian tax law limits the carried forward tax losses of the companies involved in the transaction; the use of these carried forward losses are limited to the net fiscal value in the companies. The Repair Act applies the regime for carried forward tax losses to DRD.

The Act of 30 july 2018 precised in article 17 that the new regime will be applicable to operations realized as from 1 January 2018 and will entry into force the day the law will be published in the Belgian Official Gazette.

1.3. New separate taxation and minimum remuneration

The Law of 25 December 2017 introduced a separate taxation of 5% for companies (large companies and SME's) which do not grant a minimum of 45.000 EUR as remuneration (or a remuneration equal to company's taxable basis) to at least one of its directors.

This measure is applicable as from 1 January 2018 (tax year 2019). However, it was intially foreseen that the special tax would be increased from 5 % to 10% as of tax year 2021 (taxable period starting the earliest on 1 January 2020). The increase of the separate taxation rate is cancelled by the Act of 30 July 2018.

Regarding related companies, the minimum remuneration is set at 75.000 EUR. The total remuneration attributed to one of the directors (at least half of the company's directors are the same persons), can be considered cumulatively in this respect.

The New Law clarifies that the separate taxation is due by the company which has declared the highest amount of remuneration (while it was originally planned that the separate taxation was due by the company with the highest taxable basis).

Unlike the Law of 25 Decembre 2017 which let subsist a doubt, the Repair Act explicitly confirms that companies without natural person as director are automatically subject to the application of the separate taxation of 5%. Since such there are no possibilities to grant a remuneration to a natural person in the capacity of director. Therefore, companies can't benefit from the reduced rate of corporate tax.

The entry into force of modification relating to this separate taxation is set at 10 days after the date of the publication in the Belgian Official Gazette, more in particular 20 August 2018.

2. ATAD DIRECTIVE IMPLEMENTATION

To comply with Directive (EU) 2016/1164 of the Counsil from 12 July 2016, the Law of 25 Decembre 2017 introduced a new rule regarding interest deductibility limitation.

This rule foresees that the deduction of exceeding borrowing costs (in other words, net charge of interests or exceeding charge of interests on interests revenue) is limited to 30% of the EBITDA of the taxpayer or to 3.000.000 EUR. The higher amount must be taking into account.

The exceeding borrowing costs of interests related to contracts concluded before 17th June 2016 are out of scope from the interest limitation rule of 30 %. However, they remain subject to the "Thin-Cap" rule (Thin capitalization rule) established by article 198, 11°/1 BITC92.

The Law of 30 July 2018 adds some clarification to the scope of the new interest deduction limitation rule.

These precisions mainly concern Specialised Real Estate Investment Fund ("SREIF") and Regulated Real Estate Companies ("RREC").

Besides the situations to which the rule does not apply according to the Law of 25 December 2017, the Repair Act adds two new cases :

- ✓ Companies, of which the single or main activity consists of financing real estate assets by emission of real estate certificates;
- ✓ Companies which obtained recognition in accordance with article 2, §1, of the Royal Decree n°55 of 10 November 1967 and which organises the legal statute of companies practicing leasing or companies which practice factoring as main activity, within the financial sector.

3. CIRCULAR LETTER 2018/C/103 ABOUT REIMBURSEMENT OF PAID-UP CAPITAL

On 2 August 2018, the finance minister published a circular letter 2018/C/103 related to capital reduction realized as from 1 January 2018. The circular letter comments on the application of article 18, §2 to 6 of BITC92 as reformed by the Law of 25 December 2017.

As clarified by the interpretative circular letter, capital decreases made by legal decision of the General Assembly as from 1 January 2018, are subject to a prorata calculation. If a company has (positive) taxed reserves, the reimbursement must be be imputed on paid-up capital (as defined by article 184 BITC92) but also on taxed reserves (included or not in the capital) and on taxed free reserves included in the capital.

The circular letter also reminds the order to follow to allocate the reimbursement of paid-up capital and sums assimilated to paid-up capital, as well on the reserves concerned. The circular letter lists all differents elements from the reserves that must be excluded from the prorata.

Please note that the circular letter provides precisions regarding the effective application of capital decreases when the company has booked a liquidation reserve, prior to the decision of the General Assembly. While the Law merely says that the capital decrease must be done without prejudice to article 537, the circular 2018/C/103 gives more explanation. The circular letter details that a reimbursement of capital must first be allocated on liquidation reserves, previously constituted. It also reminds that no withholding tax will be due, after the intangibility period (4 years or 8 years) has elapsed.

The circular letter also gives examples of practical cases of capital decreases, as well as the consequences of the capital decreases on the amount of paid-up capital and sums assimilated to it.

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If you would like to receive additional information on this matter, the tax and legal team of RSM Belgium is at your disposal.

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