

Belgian Corporate Tax Reforms 2018–19

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Abstract

Corporations are a vehicle for shareholders to indirectly operate business and hopefully make profit. Corporate income tax is a convenient way for the various jurisdictions to indirectly collect tax and derive revenue from such profits when the business is operated with a relevant territorial nexus, without uncompetitively deterring those businesses from acquiring that nexus nor condoning abuse. In a changing business environment and in fluctuating competitive conditions between the jurisdictions, corporate income tax has to evolve. Belgium has done so; we will outline the initial position and describe the evolutions. The focus of international tax competition between states is clearly shifting. Complicated and not transparent niches are under fire from BEPS and ATAD and are getting out of fashion. To increase its international competitiveness, Belgium needed a lower nominal rate, a tax consolidation regime, and a 100% dividend received exemption. Those measures are of a nature to decrease revenue. The government took a few measures to try and increase the tax base, spectacularly by capping carry forwards, and otherwise essentially by correcting technical anomalies and by nearly doing away with NID. It however seems that the government rather hopes for a growth of the tax base due to improving economic conditions, notably thanks to a “reflex effect” of the tax cuts. In the meantime, the budget deficit is likely to increase. The exemption conditions of capital gains on shares, now aligned on the dividend received exemption, will not hurt typical MNEs. Simplification was only paid lip-service even though the finance minister was journalist by profession and was thus not suspect of willingly supplying work to the noble trade of tax lawyer. ATAD compliance was clumsy on some topics but unconvinced on other ones. That is understandable, since ATAD may be analysed as a move by large EU countries to deprive smaller ones of — harmful? — competitive advantages when vying for MNEs’ investment. That ATAD implementation will hurt MNEs, but should not hamper international competitiveness too much, since it will occur Europe-wide. The really smart policy move for the EU could be to capture MNEs’ broadly untaxed profits through a kind of CCCTB that would benefit directly the EU budget.

Keywords: corporate tax; Belgium; reform; ATAD.

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TABLE OF CONTENTS: 1. Introduction — 2. The Belgian corporate tax system — 3. Implementing ATAD — 4. Assessment

1. Introduction

Corporations are a vehicle for shareholders to indirectly operate business and hopefully make profit. Corporate income tax is a convenient way for the various jurisdictions to indirectly collect tax and derive revenue from such profits when the business is operated with a relevant territorial *nexus*, without uncompetitively deterring those businesses from acquiring that *nexus* nor condoning abuse.

In a changing business environment and in fluctuating competitive conditions between the jurisdictions, corporate income tax has to evolve. Belgium has done so; we will outline the initial position and describe the evolutions.

2. The Belgian corporate tax system¹

2.1. Principles

- Legality

Taxes are established by an act of parliament, with only implementation being entrusted with the government (art. 170 Constitution).

Equality is mandatory, so that discrimination is prohibited under the control of the constitutional court (art. 10, 11 and 172 Constitution). Corporate income tax is established by title III of the Code of Income Taxes 1992 (“CIT”), title II establishing the tax on natural persons; the rules of the latter apply to the former except for special provisions (art. 183 CIT). Implementing rules are laid out in a royal decree (“RDCIT”).

- Tax abuse

The corollaries of the principle of legality are that tax rules are construed narrowly and that the least taxed way can be freely chosen.² Under article 344 § 1 of the CIT, artificial transactions or series of transactions are not opposable to the tax administration when they involve “tax abuse,”³ *viz.* when, in opposition to the purpose of the rule concerned, they are without the scope of a provision imposing a tax or within the scope of a provision granting a benefit.⁴

Next to that General Anti-Abuse Rule (“GAAR”), various Targeted Anti-Abuse Rules (“TAARs”) exist, notably when transactions involve tax havens. Within the EU, they may be found to exceed the proportionality principle, when they lack precision.⁵

Transfers of assets, including shares, bonds, claims, patents, know-how, trademarks or simply cash to tax haven entities are disregarded except if the transaction serves legitimate needs of financial or economic character or if the consideration is real and generates a proportionate amount of income taxable in Belgium (art. 344 § 2 CIT). Foreign entities may be captured as

1. See in general : J. KIRKPATRICK, D. GARABEDIAN, *Le régime fiscal des sociétés en Belgique*, 3è éd., Bruylant, 2003 ; P.F. COPPENS, *L'entreprise face au droit fiscal belge*, Vol. 2, Larcier, 2009 ; TIBERGHIE, *Handboek voor fiscaal recht 2018-2019*, Wolters Kluwer, 2019.

2. Cass., 6 June 1961, *Pasicrisie*, 1961, I, 1082, Brepols ; Cass., 22 mars 1990, *Pasicrisie*, 1990, I, 849, Au Vieux St-Martin.

3. See Ph. MALHERBE, “Abuse of Law in Belgian Tax Law”, *REIDF* 2018, 501.

4. Upheld by the Constitutional Court, Judgment No. 141/2013 of 30 October 2013.

5. CJEU, 5 July 2012, C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT)*.

effectively resident in Belgium or as having a Belgian PE at the place where the true manager takes business decisions. It is fair to say that case law on that provision is scarce,⁶ but the deterrent effect is real, all the more that direct or indirect transfers in excess of 100.000€ per year to tax havens are to be specifically reported (art. 307 §1/2 CIT).

- Liability to tax

All companies enjoying legal personality are liable to corporate income tax without faculty of election for transparency taxation. Are not subject, so that partners are directly liable to tax, companies devoid of legal personality, as well as European Economic Interest Groupings and, upon election, agricultural companies whose members all are natural persons.

2.2. Taxation of net book profit

- Rule

The corporate income tax base starts from the accounting profit, except for express variations by tax law, so that accounting rules play a key role. Various types of amounts are deductible or exempt, exemption taking sometimes the form of inclusion followed by deduction.

Are added to the profit the “abnormal and gratuitous benefits” granted, essentially,⁷ to foreign affiliated or tax haven taxpayers (art. 26 CIT);⁸ that rule lays down the foundation of the transfer pricing control, even though it has a broader scope.

- Deductions

We shall examine some of the main or most topical deductions.

- a. Business expenses

Expenses are deductible under article 49 CIT; since that provision is inscribed in the section pertaining to personal income tax, it logically limits deduction to expenses made in order to acquire business income, as opposed to private expenses. However, case law considers that the finality test applies also to corporate income tax and sometimes rejects expenses on that basis, so that the rule has functioned as an anti-abuse rule, where expenses made in order to reduce tax liability but also other quite normal expenses failed the deductibility test as not being made to foster the normal business of the company. That tendency has been somehow curbed by a case-law reversal of the Court of cassation.⁹

- b. Interest and thin capitalization

Interest is deductible as long as it is at market rate (art. 55 CIT) and, when it is paid to a tax haven entity, defined as a entity in a country that subjects the income to a “noticeably more advantageous regime than” the one applicable in Belgium, provided that the taxpayer proves that the transaction is real and sincere and that the amount

6. Judged that the Luxembourg subsidiary of a Belgian company is a genuine Luxembourg tax resident as it was effectively managed in Luxembourg even if the decisions were prepared in Belgium (Court of appeal, Brussels, 23 November 2017, R.G. No. 2014/AF/271, www.monkey.be).

7. The rule does not apply between Belgian taxpayers, except that, when it takes the form of an excessive payment of business expense, the expense may be disallowed.

8. Upheld as not disproportionately furthering the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance by CJUE, 21 January 2010, C-311/08, *Société de Gestion Industrielle SA (SGI)*.

9. Cass., 4 June 2015, F.14.0165.F and F.14.0185.F, with opinion adv.-gen. A. HENKES (referring to: J. KIRKPATRICK, “L'imposition des sommes détournées par une personne physique ou par une société et la déductibilité corrélative au titre de frais professionnels du remboursement ultérieur des sommes détournées”, *JDF* 2013, 321 ; Th. AFSCHRIFT, “Les conditions non écrites de la déductibilité des frais professionnels”, *JT* 2012, 296).

does not exceed the normal limits. That rule also applies to royalties and service fees (art. 54 CIT).

As for thin capitalization, we have a traditional debt/equity ratio rule that loans from individual shareholders, directors or managers are subject to a 1/1 limitation, exceeding which interest is recharacterized as dividends (art. 18 § 1 4° CIT) and a more recent rule that loans are limited to 5/1 when originating from a tax haven or a group company exceeding which interest is disallowed (art. 198, 11° CIT).

The latter rule is blunt, not to say counterproductive, since it applies irrespective of any hint of tax evasion, and even applies in a purely Belgian context, where interest is paid to a totally *bona fide* and taxable Belgian company. It thus unquestionably creates a purposeless double taxation. It had to be relaxed so as not to prevent cash pooling (art. 198 §4 CIT).

c. NID

The declared purpose¹⁰ of the “deduction for risk capital”, nicknamed “notional interest deduction” (‘NID’) was to end an alleged discrimination between non-risk borrowed funds, where interest is deductible, and risk equity, where dividends are not deductible. The rule allowed deduction of a market-reference interest on equity, as if it had been borrowed, subject to a few anti-abuse rules of little relevance for multinational enterprises (art. 205*bis* CIT). The true purpose may have been to replace the “coordination centres” regime, condemned by the Commission and the CJUE,¹¹ by a nominally non-selective system.

The planning opportunity¹² was that a heavily capitalized Belgian company could extend loans to group companies, allowing them to deduct interest, whilst itself would only be taxed on the spread between the interest and the notional interest, whilst distributing out of those little-taxed profits dividends which would hopefully be exempt, failing which there would probably be no distribution.

d. “Innovation profits”

Innovation profits enjoy an 85%-deduction, being 85% exempt (arts. 205/1 to 205/4 and 194*quinquies* CIT). That deduction, streamlined to conform with BEPS nexus requirements, replaces the 80%-deduction for patent income.

Those profits include income from patents and supplementary protection certificates (from 2007), proprietary variety protection certificates, orphan medicinal products and data exclusivity under various EU or similar national instruments, as well as copyrighted software, all from 1st July 2016.

Innovation income includes disposal price of fixed assets and royalties but also infringement damages and implicit royalties in sales prices; historical expenses are to be deducted. Nexus is calculated by a fraction of relevant qualifying expenses, increased by 30%, divided by all similar expenses.

The new rules are effective retroactively on 1st July 2016, subject to grandfathering for the previous regime entitlements (art. 543 CIT).

10. House of Repr., Doc 51 1778/001, p. 4.

11. CJEU, 22 June 2006, Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities.

12. Although such planning opportunity was heavily advertised by the government itself, the administration has fought some cases for lack of substance of the Belgian company and recently obtained a technical success that the court of appeals had not properly construed the rules for determining whether the arrangement entailed abnormal or gratuitous benefits (Cass., 24 May 2019, Nos. F.18.0058.N and F.16.0053.N).

e. “Tax shelter”

The cinematographic industry and, more recently, the live stage enjoy a duly notified State aid regime: corporate taxpayers may invest in qualifying productions spending a sufficient proportion of the investment in Belgium and enjoy both a tax break and a guaranteed fixed income (arts. 194*ter* to 194*ter*/2 CIT).

f. Losses

Losses can be carried forward without limitation. In case of merger, the losses of both companies may be carried forward, but for each in proportion to their share in the combined net assets of the new or remaining entity.

Foreign losses were deductible subject to recapture at the time of carry forward abroad (arts. 185 § 3 and 206 § 1, para. 2 CIT).

• Adjustments

a. Dividends received

Quasi exemption: Dividends were 95% exempt provided they stem from shares in companies undergoing normal taxation. The shares had to be held for one year,¹³ in full ownership,¹⁴ and represent a holding of 10% or acquired for at least 2.5 million€.

A taxation condition disqualifies dividends distributed by various types of not or not sufficiently taxed companies or stemming from not or not sufficiently taxed income (art. 203 CIT).

Technically, dividends were included in the tax base and then subtracted “to the extent they are still present”; that means that the subtraction could not leave a loss which could be carried forward. In its landmark Cobelfret judgment, the CJEU has found that rule to be contrary to the directive, since cancelling losses that could otherwise be carried forward is tantamount to taxation;¹⁵ so as to give effect to that judgment, the law has created a special class of deduction for carry-forward purposes in article 205 § 3 CIT.¹⁶

b. Dividends paid

Dividends paid on shares are exempt from withholding taxes under the conditions of the parent-subsidiary directive, as well as, unilaterally, on any holding of 10% held by corporate shareholders in a country with a treaty providing for exchange of information.

c. Capital gains

Capital gains on shares satisfying the taxation condition provided for dividends are exempt after one year (art. 192 CIT), but, for non-SMEs, were still liable to tax at the special and unexplained rate of 0,412% (art. 217 para. 1 2° CIT); if realised during the first year, they are liable to tax at the reduced rate of 25% (which will become the standard rate, *infra*). Conversely, capital losses or depreciation are disallowed, except in case of “total division” of the assets, *viz.* liquidation or bankruptcy, but then only up to the original equity (art. 198 § 1 7° CIT). For the trading portfolio of companies trading in securities, the gains and losses are fully taxable and deductible (art. 192 § 1 para. 4 and 198 § 1 7° CIT).

d. Interest

13. As the case may be, the holding period straddling the distribution (cf. CJEU, 17 October 1996, Joined cases C-283/94, C-291/94 and C-292/94, Denkvit International BV, VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen).

14. Condoned by CJEU, 22 December 2008, C-48/07, Vergers du Vieux Tauve.

15. CJEU, 12 February 2009, C-138/07, Cobelfret.

16. Act of 21 December 2009 bearing fiscal and miscellaneous measures, *M.b.* 31 December 2009.

Interest on borrowings made for financing acquisition of shares is deductible.

2.3. Distributions

Distributions are in principle liable to withholding tax at the rate of 30%, sometimes reduced, most notably to 15% for distributions by SMEs on registered shares issued against cash contribution after 1st July 2013 and still in the hands of the original subscriber (art. 269 § 2 CIT). For individual shareholders, that is the final tax.

Companies may elect to retain and freeze for five years earnings in as special liquidation reserve, with immediate payment of a special assessment at the rate of 10%, in which case the withholding tax is reduced to 5%, or even 0% in case of liquidation of the company (arts. 184 and 541 CIT).

A spectacular — demagogic? — measure was the so-called “fairness tax,”¹⁷ a 5% tax in case dividends were distributed whilst the company had enjoyed the benefit of losses carry forward or of NID (art. 219^{ter} CIT). That tax was challenged in front of the Constitutional court, which sought a preliminary ruling from the CJEU, with ambivalent results,¹⁸ and eventually annulled¹⁹ the tax whilst maintaining its effects until the ruling except as far as it had concerned dividends received.

3. The reform

The reform,²⁰ advocated by the centre-right coalition government, was passed by the acts of 25 December 2017²¹ and 30 July 2018.²²

3.1. Friendly measures

- Lowering the rate

With a rate of 33.99%, Belgium had a higher nominal rate than most neighbouring countries. That nominal rate was in fact substantially reduced in terms of effective rate to the benefit of multinational and high-equity groups, by the mechanisms of “notional interest deduction” and “excess profits rulings”. The first mechanism had dwindled due to the fall of interest rates; the second had been found by the EU Commission to constitute illegal state-aid.²³ Belgium accordingly had to reinstate its attractiveness and competitiveness.

a. In general

The general rate has been lowered to 29% (increased with additional cents dropping from 3% to 2%, thus 29.58%) for income tax years 2019-20²⁴ and shall be further lowered to 25% (without additional cents) effective income tax year 2021.

17. *En anglais dans le texte*. Act of 30 July 2013 introducing various measures (*M.b.*, 1st August 2013).

18. CJEU, 17 May 2017, case C-68/15, X v Ministerraad.

19. Const. Court, 1 March 2018, No. 24/2018.

20. Cf. S. VAN CROMBRUGGE, *De hervorming van de vennootschapsbelasting. De wetten van 25 december 2017 en 30 juli 2018*, Roularta 2018, 287 p. ; S. SABLON (ed.), *Aperçu des dispositions fiscales de l'année 2017*, Le courrier fiscal – Wolters Kluwer 2018, 822 p.

21. Act of 25 December 2017 bearing reform of corporations' tax (*M.b.*, 29 December 2017).

22. Act of 30 July 2018 bearing various measures in the matter of income tax (*M.b.*, 10 August 2018).

23. That finding has been quashed by the EU General Court in its judgment of 14 February 2019, T-131/16 Belgium/Commission and T-263/16 Magnetrol International/Commission; but the system had been repealed by the programme act of 25 December 2016 and can hardly be reinstated.

24. In order to prevent abuse by extension of the book year and hence of the tax year, the measure effective by tax year, say 2019, will only apply if that year started not earlier than 1st January 2018.

b. SMEs

For qualifying SMEs, the rate on the first 100,000€ tranche is further reduced to 20% effective income tax year 2021 (20,40% for 2019-20).

A SME is a company does not exceed the first or any two of the following thresholds:
;Manpower: 50 Turnover: 9M€; Total balance sheet: 4.5M€

In order to qualify, the SME must be neither a parent nor a subsidiary and must pay to at least one officer²⁵ a compensation of at least the lower of 45,000€ or the amount of its taxable profit (art. 215, paras. 2 and 3, CIT). Failing which, the reduced rate shall be denied; a special assessment of 5 p.c. would be levied on the shortfall (art. 219*quinquies* § 1 CIT), but has been repealed due to the outcry of the middle class.²⁶ The excess over 100,000€ is taxable at the general rate.

• Participation Exemption

a. Dividends

Full deduction: The dividend received exemption is brought up to 100%, in order to make the holding companies' regime competitive with the neighbouring countries, whilst minister of justice Koen Geens got through parliament a new "code of companies and associations"²⁷ which he boasts will be the best in Europe. The rule comes into force for tax year 2019.

Hybrid dividends: The rule imposed by directive 2014/86/EU²⁸ has been transposed in article 203, para. 1, 6°, CIT.²⁹

TAAR: The rule imposed by directive 2015/121³⁰ has been gold-plated when transposed in article 203, para. 1, 7°, CIT³¹: it applies and denies dividend received exemption "when that action or set of actions is not authentic and is put in place in order to obtain, as its principal purpose or one of its principal purposes" the exemption of dividends received or the waiver of withholding tax on dividends. Exclusion of withholding tax exemption in that case is provided by article 266 para. 4 CIT.³² Nobody quite knows what that means, since enjoying exemption from double taxation is hardly an abusive purpose and exclusion of untaxed dividends, where double taxation is not an issue, was already secured by Nos. 1° to 5° of that paragraph 1. A few rulings have been issued,³³ the CJEU has shed some clarity in a pre TAAR case and redefined the purpose of the parent-subsidiary directive³⁴ :

"78 As is clear from its first and third recitals, Directive 90/435 has the aim of facilitating the grouping together of companies at EU level by introducing tax rules which are neutral from the point of view of competition, in order

25. That is a person taxable under art. 32 CIT.

26. Art. 41, act of 30 July 2018, *M.b.* 10 August 2018.

27. Act of 23 March 2019, *M.b.* 4 April 2019.

28. Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

29. Act of 1 December 2016 containing tax provisions (*M.b.*, 8 December 2016).

30. Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

31. Act of 1st December 2016 containing tax provisions.

32. S. GOMMERS, M. HENDERIKX, "De implementatie van de geamendeerde Moeder-dochterrichtlijn", AFT 2017/08-09, 33.

33. Notably ruling No. 2018.0706 of 2nd October 2018: the anti-abuse measure is not applicable for dividends distributed by a Swiss holding if the dividends would have been exempted if the holding had been Belgian.

34. CJEU, 26 February 2019, Skatteministeriet v T Danmark (C-116/16), Y Denmark Aps (C-117/16).

to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.”

“79 To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition³⁵”.

b. Capital gains on shares

Capital gains on share are again totally exempt for all companies, but henceforth subject to the same participation condition as for dividends, *viz.* 10% or 2,5M€ (art. 192, § 1 CIT), thus considerably reducing the scope of the exemption. That participation condition does not apply to shares held by or in an investment company, nor to shares held by insurance companies.

Capital losses remain disallowed, even for non-qualifying participations.

- Quasi consolidation

Each company is a separate taxpayer: not only there is no tax consolidation, but profits cannot be freely shifted within a group: companies are expected to deal at arm’s length and are taxable on abnormal or gratuitous benefits received without set-off with the previous or current losses (art. 207 CIT).³⁶

Rather than relaxing that rule, the legislator has opted for a rather convoluted system of “deductions of intra-group transfers” (art. 205/5 CIT) applicable between companies which have been affiliated at 90% for five years. By written agreement, a Belgian or non-resident loss-making taxpayer may transfer to a profitable eligible taxpayer (*viz.* a Belgian or EEA company) the right to make for a determined tax year a deduction equal to the transferred amount in consideration for an indemnity amount equal to the tax saving; that indemnity is tax neutral: not deductible, not taxable (arts. 194*septies* and 198, § 1, 15°, CIT). The transferor books a taxable profit equal to the transferred deduction. The same regime is available for losses of the last year of operation of a non-resident taxpayer.

Some companies are not eligible, essentially investment companies or companies enjoying lump-sum taxation, like shipowners or diamond traders, but also companies owning real estate made available to their directors (art. 205/5 § 2, para. 8 CIT).

The system will enter into force for tax year 2021.

- Investment deduction

The investment deduction is an additional deduction of 8% (normal rate) of investments in fixed assets in new condition. It had been “deactivated” at the time of introduction of the NID (2007) and later (2014) reactivated for SMEs.

The deduction rate is increased to 20% for 2018 and 2019 (arts. 69 § 1 and 201 § 1 CIT).

3.2. Unfriendly measures

- Limiting the carry-forwards

35. Since it finds that undue tax benefits are inconsistent with the internal market, the court may be about to revise its long-standing case law that double taxation — unquestionably an undue tax burden — is not so inconsistent.

36. Debt forgiveness by a parent toward a subsidiary will be deductible for the parent and not be considered as an abnormal benefit for the subsidiary provided it is justified by the financial condition of the subsidiary and made subject to a better fortunes clause: that kind of entails a form of consolidation (S. VAN CROMBRUGGE, *o.c.*, p. 39 and fn. 74).

The most spectacular measure is the introduction of a minimal tax base by limiting various carry forwards: to the extent the amount carried forward exceeds 1.000.000€, a minimum amount of 30% is taxable (art. 207 CIT). So, in presence of a profit of 2.000.000€ and an amount of 3.000.000€ to be carried forward, only 1.700.000€ can be actually deducted from the tax base, leaving a taxable amount of 300.000€ and the balance of 1.300.000€ being carried forward to the next year.

That concerns a “basket” including successively: the current deduction for incremental risk capital; the carry forward of losses absorbed by ‘Cobelfret’ dividends; of deduction for innovation income; of previous losses; of previous notional interest, first the unlimited ones, then the ones limited to 7 years.

Two other measures limit carry-forwards:

1. The cancellation of the carry forward of losses in case of change of control not justified by legitimate needs of economic or financial character is extended to carry forward of ‘Cobelfret’ dividend amounts and of innovation income (art. 207 CIT); and
2. The proratisation of the carry forward of losses in case of merger is extended to carry forward of ‘Cobelfret’ dividend amounts (art. 206 § 2 para. 7 CIT).

Conformity of those measure with the parent-subsidiary directive is questionable.³⁷

- Annihilating the NID

The notional interest deduction is not repealed, but is fundamentally modified, since it becomes a one-off deduction on the increase of equity (capital and retained earnings), spread over five years (art. 205ter, § 1 CIT).

Its international planning function disappears, all the more that contributions stemming from borrowings on which the contributor deducts interest are excluded from the base (art. 205ter, § 2, 9° CIT).

- Capital reduction

In case of capital reduction, except in case of liquidation, the distribution is characterized as dividend up to a fraction equal to the fraction of retained earnings in in the total shareholders equity (art. 18 para. 1 2° CIT).

- Increasing the base

Provisions are henceforth only allowed when mandatory as a matter of accounting law (art. 194 CIT), thus excluding provisions for substantial maintenance and repair.

Reversals of excess provision are taxable separately at the rate of the year in which they had been booked (art. 217/1 § 1 para. 1 CIT).

Amortization is henceforth prorated in the year of acquisition also for small companies (art. 196 § 2 CIT); declining balance amortization is repealed (art. 196, §§ 2 to 4 CIT). Odd measures, since faster amortization is unquestionably the simplest investment incentive. Small companies may deduct acquisition expenses, unless they elect to amortize them at the same rate as the asset.

Expenses can henceforth only be deducted to the extent allowed by the matching principle (art.195/1 CIT): no immediate deduction of, e.g., 100% of an insurance premium paid in December.

Interest on certain loans is capped at the rate published by the National Bank of Belgium for previous November loans of less than 1M€ increased by 2,5% (art 55, para. 1, 1° CIT); the

37. B. DESMET, P.-J. WOUTERS, A. VAN SANTVLIET, ” Artikel 207, lid 2, WIB 1992 gewikt en gewogen, *AFT* 2016, No. 6-7, p. 18.

rule does not apply to fixed duration loans or cash pooling, where market rate shall control, taking into account the specific risk profile of the debtor and the duration.

Recharacterization of interest as dividends shall apply on interest on all excess “receivables” of the affiliated person, no longer only on “loans” (art. 18 para. 8 CIT).

All monetary fines, whether criminal or administrative, shall be disallowed (art. 53 6° CIT).

In case of rectification of the taxable income mentioned in the return or of taxation *ex officio* (no return filed), the additional tax base is taxable even in case of overall loss and without application of any deductions (except for dividends received) if a tax increase (“*accroissement*”) of at least 10% is applied, which “may” be waived in case of good faith (art. 207 para. 7 CIT). One may comment that the taxation of non-existent income functions as an additional — double? — sanction.

- Foreign Losses

Losses of treaty exempt foreign establishments are no longer deductible, irrespective of the right to carry them forward in the foreign country. In the few instances where PE profits are not totally exempt in Belgium,³⁸ losses are allowed to the same extent.

Terminal losses in an EEA country, *viz.* losses that can in no way be deducted in case of discontinuation of business or disposal of all assets in the concerned country, will be deductible in Belgium, subject to recapture if business is resumed within three years in that country (art. 185 §3 CIT).

Those rules are effective for tax year 2021.

- Other measures

Deduction related to cars and gasoline is further curbed, effective tax year 2021, so as to allow some time in order to adjust the fleet (arts. 66 § 1, 185*ter* and 198*bis* CIT). The most spectacular measures include the targeting of “false hybrid”³⁹ cars and the end of the 120% deduction in connection with all-electric cars.

Special exemptions for leading personnel entrusted with exports or total quality management are repealed (arts. 67 and 67*bis* CIT, effective tax year 2021).

Capital gains temporarily exempt subject to reinvestment will, failing timely reinvestment or in case of anticipated re-disinvestment, be taxed at the rate of the year when they were realized, not at the new, lower rate (art. 217/1 CIT).

Beneficial regimes for hi-tech companies, *viz.* increased investment deduction and increased payroll tax exemption for night shifts, were awaiting EU commission approval as not being State aid but have been repealed due to the general rate decrease.

4. Implementing ATAD

Council Directive (EU) 2016/1164 of 12 July 2016 (“ATAD”), as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (“ATAD II”), purports to be “laying down rules against tax avoidance practices that directly affect the functioning of the internal market”. That sounds more as a mantra and a political

38. Convention with Isle of Man, Uganda and Seychelles; e.g. Seychelles, art. 21.1.a, para. 2 : “ However, where the Seychelles tax is less than 15 per cent of the net amount of the income referred to in Article 7, Belgium shall not exempt that income but shall reduce to a half the Belgian tax which is proportionally relating to that income, calculated as if that income was income from Belgian sources ».

39. Cars with a low nominal CO₂ emission rate, not actually achieved because the car is practically never plugged in.

slogan than as a valid legal foundation.⁴⁰ National transposition statutes could thus possibly be challenged for restricting the fundamental freedoms.

4.1. CFCs

If Belgium had believed in the CFC regime, it would not have waited for ATAD; it thus chose for a rather minimal transposition. CFC rules do not apply to individuals, who however are subject to the transparent taxation on income of “juridical constructions” of which they are “founders”, that notion being defined broadly (arts. 2, § 1, 13° to 14° and 5/1 CIT, nicknamed “Cayman tax”).

Under the new CFC rules, corporations are taxed on undistributed profits of the foreign company to the extent those profits arise from a non-genuine arrangement or series of arrangements which have been put in place for the essential purpose of obtaining a tax advantage and they are generated by assets and risks linked to key-functions exercised by the Belgian taxpayer. The rules target a foreign company which is directly or indirectly 50% controlled in terms of voting rights or profit entitlement and are either not subject to income tax or subject to a tax lower than half the tax that would apply on its profits if the company were resident in Belgium, excluding profits derived from a permanent establishment exempt under an applicable treaty. It also targets a foreign establishment of which the profits should be exempt under the applicable treaty with Belgium,⁴¹ under the same conditions of non-genuine arrangements and low taxation. Arrangements are non-genuine to the extent the foreign entity would not own the assets or undertake the risks which are key in generating the profits, if it were not controlled by the Belgian taxpayer who exercises connected important functions (art. 185/2 CIT).

The foreign tax is not creditable; the taxable profits are not prorated to the participation; no *de minimis* applies. For somehow avoiding double taxation, dividends received are exempt to due extent (art. 202, § 1, 4° and 5° CIT), as are capital gains realized, provided the taxed profits are still on the books at the time of realization.

Those rules come into force for tax year 2020. Rulings have started being issued.⁴²

4.2. Interest limitation

Net interest (*surcoûts d'emprunts*) deduction is capped at 30% of tax EBITDA, defined to include profit, less exempt income⁴³ and Public Private Partnership (‘PPP’) income, plus allowed⁴⁴ interest and allowed amortization, but disregarding intercompany interest between relevant Belgian entities. Interest is broadly defined to include economically similar items. The capping only clicks in when net interest exceeds 3.000.000€, as the case may be apportioned between the Belgian members of the group (art. 198/1 CIT).

The rule is blunt and applies irrespective of the location and taxation of the beneficiary or of any tax avoidance purpose or effect.

40. Cf. E. TRAVERSA, C. HERBAIN, M. POSSOZ, “La mise en œuvre du plan d’action européen : la lutte contre l’évasion fiscale prend-elle le pas sur l’achèvement du marché intérieur ? », *TFR* 2017, p. 330 ; C. DOCCLO, « L’ambition de l’Union européenne d’introduire des règles anti-abus dans les lois disparates de ses Etats membres », *TFR* 2017, p. 61 ; F. VANISTENDAEL, « De verschillende gedaanten van belastingvermijding in BEPS. Europees en nationaal recht », *AFT* 2016, p. 6.

41. The argument goes, maybe a bit quickly, that the rule does not violate the applicable double tax treaty, since, for EEA countries, the directive should prevail and, for other state, such profits should not be attributable to the PE under the transactional arm’s length approach (House of Repr., Doc 54 3147/001, p. 16-18).

42. *E.g.* No. 2018.0231 of 24 April 2018 determining that the acquisition of a pre-existing tax haven construction is not non-genuine.

43. Exempt dividends received, exempt part of innovation income and patent income, treaty exempt foreign income.

44. Disallowed surplus net interest is not added, which is fairly circular.

No exception for group ratio applies, as was allowed by art. 4.5 of the Directive. That capping does not apply to standalone companies, *viz.* companies without foreign establishments or affiliates at more than 25%. It does not apply either to regulated financial institutions or to PPP vehicles subject to public tenders rules and active in the EU. Loans predating 17 July 2016 are grandfathered and qualifying PPPs are excluded.

The excess can be carried forward (art. 194sexies CIT) or transferred by agreement to an affiliate, subject to a tax neutral compensation (not taxable, not deductible) equal to the tax benefit (arts. 198, §1, 15° and 198/1 CIT).

Correlatively, the existing thin cap provision is amended and no longer targets intra-group interest, but still targets tax-havens interest, which otherwise would have been fully deductible up to 3.000.000€ (art. 198, § 1, 11° CIT).

Those rules come into force for tax year 2020.

4.3. Exit Tax

Exit tax was already provided in case of transfer of the head office abroad, assimilated to a liquidation triggering taxation of all capital gains on the base of the true value of the assets and of all tax-free reserves except to the extent the assets are maintained in and contribute to the profitability of a Belgian establishment and to the extent the tax-free reserves are maintained in the equity of that establishment (art. 210 § 1 4° and 214bis CIT).⁴⁵ The company may elect to pay the tax in five instalments (art. 413/1 CIT).⁴⁶

The scope is broadened to include hitherto not taxed transfers. In case of transfer of assets from a Belgian company to its foreign PE exempt by treaty, the difference between the actual value (*valeur réelle*) and the tax value of the assets is taxable (arts. 184ter § 2 and 185/1 CIT). The same goes for transfers from a Belgian PE to the foreign head office or a foreign PE (art. 228 § 2 3°bis CIT).

Assets transferred from the foreign head office or from an exempt foreign PE to the Belgian head office or to a Belgian PE will be stepped up at their actual value notably for further amortization and capital gains taxation (arts. 184ter § 2 para. 11 and 229 § 5 CIT).

4.4. Hybrids

The directive as modified is transposed fairly literally, effective tax year 2020.

The Code defines hybrid arrangements, hybrid entities and hybrid transfers (art. 2, § 1, 16° to 18° CIT).

Arrangements are hybrid when they concern 50% affiliates (reduced to 25% when financial instruments are involved) and effect double deductions in Belgium and abroad or deduction in one country without inclusion in the taxable income in the other. When the non-inclusion is due to a special tax regime (*régime fiscal exorbitant du droit commun*) or to divergent valuations of the payment, notably because of transfer pricing adjustments, the rules do not apply.

Entities are hybrid when they are taxable in one country, whilst their income is attributable to other persons — typically the members — in another.

Transfers of financial instruments are hybrid when the underlying income is seen taxwise as being obtained by more than one party.

The Code disallows expenses, in order to prevent double deductions and deductions without inclusion; it also targets imported hybrids — hybrid arrangements between non-Belgian entities of which

45. W. WILLEMS, « Exit- en entry taxatie. Analyse van de Anti Tax Avoidance Richtlijn en de impact op het Belgisch fiscaal recht », *AFT* 2017/11, p. 5.

46. *Cf.* CJEU, 29 November 2011, C-371/10, National Grid Indus.

the effects overspill in Belgium — and double resident companies which could take a deduction in the other residence country (art. 198, § 1, 10^o/1 to 10^o/4 CIT).

It includes income deducted abroad in a hybrid arrangement or by a hybrid entity (art. 185, § 2/1 CIT), income included in the income of a treaty exempt foreign PE not recognized as such abroad (art. 185, § 1, para. 2 CIT) and income attributed by foreign tax law to a Belgian foreign controlled entity normally considered as transparent under Belgian tax law (art. 185, § 1, para. 3 CIT).

In case of hybrid transfer, imputation of the foreign tax credit is limited to the Belgian tax applicable to the net income, the income less any payments made (art. 292 para. 4 CIT).

One thing is sure: when the members of Parliament voted the act, they took a leap of faith. And another one: that arrangements, entities and transfers are not hybrid; only the treatment by the concerned States is, in most case because those States each insist on their own characterization. Rather than curing the symptoms, could we not eradicate the cause and wherever possible unify characterization and where not possible have the residence state defer to the source characterization?⁴⁷

4.5. Abuse

Nothing has been done for transposing the general anti abuse rule, in all likelihood because the government considers that the existing rule of article 344 § 1 CIT is sufficient. Experience however shows that the best way to comply with an EU anti abuse rule is to plagiarize it.⁴⁸

We can mention here the repeal of the exemption of “excess profits”, where, by individual rulings, Belgian entities, members of a multinational group, could obtain a tax break for the so-called profits that they would not have realized if they had not been members of that group, on behalf of some imaginary correlative adjustment (art. 185 § 2 (b) CIT). That practice was targeted as State aid by the European commission.⁴⁹ Belgium, which had already recuperated the (not so) illegal aid,⁵⁰ won a Pyrrhic victory in court: the commission was found wrong, not so much on the merits, but because it had targeted the general regime and not the individual rulings.⁵¹ Article 185 § 2 (b) CIT is henceforth limited to genuine correlative adjustment, subject to application of the EU Arbitration convention or other relevant international instruments.

5. Assessment

The focus of international tax competition between states is clearly shifting. Complicated and not transparent niches are under fire from BEPS and ATAD and are getting out of fashion.

To increase its international competitiveness, Belgium needed a lower nominal rate, a tax consolidation regime, and a 100% dividend received exemption. Those measures are of a nature to decrease revenue.

The government took a few measures to try and increase the tax base, spectacularly by capping carry forwards, and otherwise essentially by correcting technical anomalies and by nearly doing away with NID. it however seems that the government rather hopes for a growth of the tax base

47. Ph. MALHERBE, *Elements of International Income Taxation*, Bruylant, 2015, p. 46.

48. CJEU, 8 March 2017, C-14/16, Euro Park Service, n. Ph. MALHERBE, « De l'utilité de l'uniformité — Illicéité de l'agrément fiscal préalable des fusions internationales ? », *TRV-RPS* 2018, pp. 542-548.

49. Commission Decision of 11.1.2016 on the Excess Profit Exemption State Aid Scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium.

50. Programme act of 25 December 2016, *M.b.*. 29 December 2016.

51. EUGC, 14 February 2019, joined cases T-131/16 Belgium v Commission and T-263/16 Magnetrol International v Commission.

due to improving economic conditions, notably thanks to a “reflex effect” of the tax cuts. In the meantime, the budget deficit is likely to increase.

The exemption conditions of capital gains on shares, now aligned on the dividend received exemption, will not hurt typical MNEs.

Simplification was only paid lip-service even though the finance minister was journalist by profession and was thus not suspect of willingly supplying work to the noble trade of tax lawyer.

ATAD implementation was clumsy on some topics but unconvinced on other ones. That is understandable, since ATAD may be analysed as a move by large EU countries to deprive smaller ones of — harmful? — competitive advantages when vying for MNEs’ investment. That ATAD implementation will hurt MNEs, but should not hamper international competitiveness too much, since it will occur Europe-wide.

The really smart policy move for the EU could be to capture MNEs’ broadly untaxed profits through a kind of CCCTB that would benefit directly the EU budget.

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