Real Estate Tax Services News

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The new double tax treaty between Belgium and France: Changing the rules of the game

In brief

The current double tax treaty (DTT) between France and Belgium dates from 1964 and has been updated throughout the years via various protocols and most recently the Multilateral Instrument (MLI).

The Belgian and French government decided a couple of years ago to conclude a new DTT with the objective to achieve a BEPS compliant text. A draft version of this new DTT that would be submitted to the Flemish government for approval was briefly published on the website of the Flemish government and gave some more insights on the expected content. The entry into force is not yet known.

In detail

Some relevant changes in the draft new DTT are set out below.

Permanent establishment

The definition of a permanent establishment has been broadened (in line with the MLI developments).

Dividend withholding tax

The new DTT provides for a reduced dividend withholding tax rate of 12.8% (instead of 15% in the current version). Also, a withholding tax exemption is available for dividends between related group entities (direct

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participation of 10% in the capital required for at least 365 days). In the current version there is only a withholding tax reduction to 10% for dividend payments between related parties. However, dividends distributed by Belgian companies to French corporate shareholders can already benefit from a domestic exemption under similar conditions.

Interest withholding tax

A full withholding tax exemption is available in the new DTT on the at arm's length interest paid to the ultimate beneficial of it whereas the current one could only lead to a reduction to 15%.

Pension funds

For the above benefits of dividend and interest withholding tax, the protocol agreement clarifies that certain UCIs (including regulated real estate companies) and pension funds are eligible for these benefits.

Other income

Other income not explicitly mentioned in the DTT is taxable in the residence state. However, the new DTT states that this income may be taxed in the source state if such income is not effectively taxed in the residence state. Effectively taxed means that the income is subject to tax and does not benefit from a tax exemption.

Principal purpose test

In line with BEPS developments, a principal purpose test is explicitly included in the DTT allowing the tax authorities to deny the application of the treaty benefits if such application was one of the principal purposes of the arrangement or transaction.

Avoidance of double taxation

As expected, the new DTT abolishes the possibility to claim a foreign tax credit (QFIE; FBB) by Belgian individuals on French sourced dividends. In the current DTT, a tax credit of 15% could be claimed leading to a more favourable taxation regime of French sourced dividends than Belgian sourced dividends. This has led to many discussions with the Belgian tax authorities.

Our view

The new DTT will also have implications for the real estate sector. Below are a couple of thoughts on the impact for Belgian corporates active in the real estate sector.

Dividends from investment vehicles – Impact for OPCI

A specific provision has been included in the DTT for investment vehicles which distribute dividends from income stemming from immovable goods. If the investment vehicle (i) annually distributes the major part of its income and (ii) the income from this immovable property is tax exempt, a reduced withholding tax of 12.8% could be applied if the ultimate beneficial owner holds directly or indirectly less than 10% of the capital of that vehicle. If the beneficial owner of such dividends holds a participation of 10% or higher in the capital of that vehicle, the dividends are taxed at the domestic rate. This clause targets the French OPCI which under current DTT could benefit under conditions from a WHT reduction to 10% in case of a Belgian corporate shareholder. The question arises whether this clause also impacts in the same way dividends distributed by a Belgian specialised real estate fund (*fonds d'investissement immobiliers spécialisés* or *gespecialiseerd vastgoed beleggingsfonds*) to a French corporate shareholder, which is rather unexpected.

Capital gains on shares – Real estate rich companies' clause

Under the current DTT, Belgium is authorised to tax capital gains realised by a Belgium resident upon disposal of shares held in a French real estate company. Under the new DTT, the "real estate rich company" clause allocates the right to tax such capital gains to the source state. "Real estate rich" means that the shares (or other rights) are composed for more than 50% of immovable property (directly or indirectly – with the exception of real estate used for own commercial activity).This means that in the future France will have the power under the DTT to tax sales of French real estate companies by Belgian shareholders. This will have a major impact and groups in this situation need to rethink their strategy. Note that this provision is not applicable in case the shares are listed on the regulated EEA stock exchange.

Impact on SCI’s held by Belgian corporate shareholders

There is a long-lasting discussion on the tax treatment of certain “*société civile immobilière*” (SCI) taken into account the “translucid” character of such vehicle. A different view between the Belgian and French tax administration of the tax treatment of such vehicle has led to double taxation of the capital gains realised by Belgian shareholders of such SCIs. This matter has been tackled by the above land-rich clause, which allocates the power to tax SCIs to France resulting in an exemption in Belgium. A similar problem exists for dividends/real estate income from such SCIs but it is not clear yet whether the current text of the new DTT resolves this.

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