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by Marc Quaghebeur

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Since January 1, 2003, Belgium has a new, broad system of advance tax rulings designed to give investors legal certainty. Taxpayers can obtain a binding ruling on all federal taxes (and some regional taxes) relating to a specified project. In the first two years, 473 applications were filed.

In the past, tax rulings were limited to a specific number of tax issues, such as antiabuse provisions, the tax consequences of some investments, whether the taxpayer was entitled to tax incentives, and some transfer pricing issues.

The Ruling Committee can now grant unilateral rulings on the tax consequences of a specific situation or transaction that has not had any taxable effect. The Ruling Committee cannot grant any tax exemptions or reductions, and it does not have any authority to give rulings on tax rates and tax increases.

Generally speaking, a taxpayer can request a ruling on all tax issues except if:

- the situations or transactions are identical ones that the taxpayer has already implemented or that are disputed between the taxpayer and the government;
- a ruling is not appropriate in view of the statutory provisions on which the application is based; or
- it involves the application of tax procedures.

For income tax purposes, a taxpayer can request a ruling except if:

- essential elements of the situation or transaction involve a tax haven blacklisted by the OECD; or
- the intended situation or transaction has no economic substance in Belgium.

Tax authorities are bound by a ruling unless the facts were incorrectly described; the taxpayer did not abide with the conditions set in the ruling; the ruling is in conflict with a tax treaty, domestic law, or EC law; or the law subsequently changed. A ruling is generally valid for five years but is renewable. Rulings are also published anonymously.

The system was reorganized in 2005, and a new autonomous office has been set up within the Ministry of Finance to allow a more efficient handling of cases. To promote flexibility and cooperation between taxpayers and the Ruling Committee, the applicant taxpayer or the taxpayer's adviser may be given the opportunity to meet at several stages with the officials in charge of the request. Even prefiling meetings are possible on a no-name basis.

The Ruling Committee has an impressive track record to date. In 2005 it dealt with 375 applications, and in the first half of 2006, it had already dealt with 220 applications.

Rulings are granted within an average of three months, and the decisions are published within a couple of weeks. The Ruling Committee publishes position papers on various recurring issues at http://www.ruling.be.

I. Leasehold

Although a sale of property is liable to a registration tax of 12.5 percent, the registration tax on a leasehold (*bail emphythéotique*) is only 0.2 percent. A form of tax planning, therefore, consists in granting a leasehold for a period between 27 and 99 years, followed by the sale of a freehold. A 12.5 percent registration tax is due, but the value of a freehold is low. The main issue is to avoid the recharacterization as a sale when transferring the leasehold to one company and the freehold to another.

The Ruling Committee has taken the position that a leasehold can be recharacterized when the leasehold and the freehold are acquired by two related companies if either the price for the leasehold is more than 95 percent of the value of the property or if the property is sold within two weeks after the leasehold agreement. However, the Ruling Committee accepts that the characterization of leasehold can be maintained under the following circumstances:

- parties must agree that the leasehold agreement cannot be terminated before the agreed duration;
- if the companies acquire the leasehold and the freehold as special purpose vehicles with no other assets other than the leasehold and the freehold, they must agree that there will be no change in the control over the companies for a period of five years; and

- if the same individuals are board members of both companies, they may not be in the majority on the board of both companies.

To ensure a proper valuation of the assets and the leasehold, the Ruling Committee insists on a valuation by an independent expert. The rental due can be a one-off payment. In that case, it must not be more than 95 percent of the value of the property; if it is higher, then it must be reduced to 95 percent. If the freehold is sold, the value must be at least 5 percent of the value of the property.

II. Life Interest on Real Property

A transaction that is quite popular is for individuals to acquire property and grant a life interest to a controlled company, or for the individual to acquire bare ownership rights and for the controlled company to acquire the life interest. (See *Tax Notes Int'l,* Jan. 16, 2006, p. 141.) That is tax efficient because the company can depreciate the acquisition price over the duration of the life interest; at the end of the life interest, the individual becomes the full owner of the property.

The Ruling Committee favors releases of intercompany debt if the related company has serious financial difficulties.

The Ruling Committee is reluctant to confirm that such life interest constructions cannot be recharacterized, for example, as a rental agreement between the individual and the company. If the taxpayer can justify the life interest construction, the Ruling Committee will not exclude the tax authorities' ability to tax the individual on a benefit received when the life interest expires.

III. Participations by Individuals

TNI previously published an article (see *Tax Notes Int'l*, Apr. 17, 2006, p. 251) that explains how the tax authorities had reversed their position to tax the capital gains when a shareholder transfers his shareholding to an entirely controlled company. In fact, it was the Ruling Committee that forced the issue and came up with a practical solution. That solution has now been confirmed in a position paper.

The Ruling Committee accepts that a private individual does not incur any capital gains tax liability if he assigns his participation against shares to be issued by a holding company in which he has a majority participation, if he subsequently maintains the status quo for a period of three years. In particular, he must refrain from:

- reducing the share capital of the holding company;
- reducing the share capital of the subsidiary;
- paying out higher dividends from the subsidiary to the holding company; and
- paying out higher management fees or director's fees unless the holding company actually takes over activities (such as accounting tasks) from the subsidiary.

The subsidiary can, however, reduce its share capital or pay out a higher dividend if the funds released are used for new investments, to finance other companies of the group, or to finance other affiliated companies. Those funds, however, cannot be passed on to the individual shareholders. Higher dividends may also be used to pay back a loan or a current account of a shareholder who leaves the company. The reimbursement must be spread over a sufficiently long period (five to seven years).

The Ruling Committee is, however, quite strict and refuses to acknowledge the sale of shares to a majority controlled holding company in view of the dissenting case law. The main concern appears to be to avoid creating a financial burden for companies.

IV. Release of Intragroup Debt

Company restructurings may require a recapitalization of a Belgian company or a waiver of a debt by another company of the group. However, that means that the tax authorities can deny the Belgian company the right to set off its tax losses against the debt waived by a related company (articles 79 and 207, Income Tax Code 1992 (ITC 1992)). A resident company cannot set off the losses it carries forward, or, since 2003, the losses of the current year, against any abnormal or benevolent advantages that it has received from the controlling company.

Alternatively, if the company waiving the debt is a Belgian resident company, the waiver may not be a tax-deductible expense (article 49, ITC 1992) and it may constitute an abnormal or benevolent advantage that must be added to its taxable profits.

The Ruling Committee favors releases of intercompany debt if the related company has serious financial difficulties. There must be a temporary malaise in the sector, the losses of the company must be significantly in excess of its equity, or the company must be in bankruptcy. Generally, a reorganization must be planned to reduce the costs, stop the activities, and wind up the company, possibly in combination with a transfer of the intellectual property rights to a third party.

If the company waiving the debt is a Belgian company, the Ruling Committee insists on the condition that the waiver is undone if the company's fortunes improve. If the foreign company becomes profitable, the debt must be revived for at least half of its profit, depending on the available cash flow. In the opposite situation, the Ruling Committee does not insist on such a condition subsequent. As a matter of principle, the Ruling Committee does not require an actual reimbursement of the debt, but it has done so in specific situations.

V. Transfer Pricing

Taxpayers may ask the Ruling Committee to approve intragroup transfer pricing. The Ruling Committee has confirmed that it can give a positive ruling based on a limited transfer pricing study. That is the case for the pricing of preparatory or auxiliary activities such as storing, handling, and packaging of goods for distribution, as well as for administrative activities such as invoicing or complying with financial or tax formalities.

The company must submit at least a description of the services and a risk and functions analysis over a minimum of four tax years. It must also justify the choice of the intragroup transfer pricing method and the markup proposed. The Ruling Committee will check whether the results of the chosen transfer pricing method are within the range of its own benchmarks. If that is not the case, the taxpayer is required to provide further analysis.

Limited documentation will not suffice for transfer pricing rulings for financial spreads, sales transactions, or production activities. Extensive transfer pricing documentation will also be required if a company applies for a reduction of its taxable profits because the same profits were also taxed in the hands of another company (article 185, para. 2(b), ITC 1992). (For prior coverage, see *Tax Notes Int'l*, Aug. 16, 2004, p. 603.) ◆