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Belgian Cayman Tax - update More EEA legal arrangements targeted

Less than 1 year after its conception, the Cayman Tax was apparently already up for amendments. Published on 30 December 2015, the Law on job creation and purchasing power (Tax Shift Law) of 26 December 2015 already modifies to the Cayman Tax legislation. The Royal Decree listing the EEA legal arrangements in scope was also modified (Belgian Official Journal of 29 December 2015).

The Cayman Tax is essentially a look-through tax applicable to Belgian Personal Income Tax ("PIT") and Belgian Legal Entities Tax ("LET"). It targets income earned by qualifying legal arrangements by attributing it to, and taxing it in the hands of the founder or third-party beneficiary of such an arrangement, as if the latter had received this income directly. Next to this transparent approach, the Cayman Tax also aims at taxing liquidations of legal arrangements and certain transfers of (part of) the assets (for legal arrangements with legal personality). Apart from the effective taxation, there is, since 2013, also an obligation for founders and third-party beneficiaries of legal arrangements to report the existence of the legal arrangement in their annual tax return.

Amendments to the reporting obligation

Firstly the law enlarges the reporting obligation. The taxpayer will no longer only have to mention the existence, but will also have to identify legal arrangements in his yearly tax return

by mentioning the name, legal form, address, and tax identification number. For trusts and trust-like arrangements the taxpayer will also have to mention the name and the address of the trustee.

Contrary to previous provisions, legal arrangements that claim to have a genuine economic activity and which are established in the EEA or treaty countries will also have to be reported in the yearly tax return (although, in that case, there should be no transparency taxation). Hence the taxpayer will have to formally take a position.

Amendments to the list of EEA legal arrangements in scope

The Royal Decree that lists EEA legal arrangements (with legal personality) was substantially enlarged. If the inclusion of the Luxembourg *fondation patrimoniale* (if ever introduced in Luxembourg) will have only a mild effect, the targeting of foreign hybrid entities established in the EEA, which are in scope if they derive Belgian source income while being taxed transparently abroad (and not in Belgium) will have more practical impact. The example explicitly mentioned here is the Luxembourg *Société en Commandite Simple*.

Most important is the carve-out of the currently existing exception (for both the Cayman Tax as well as the reporting obligation) applicable to four specific categories of entities i.e. (i) public and institutional undertakings for collective investments and undertakings for collective investment in receivables, (ii) public and institutional alternative undertakings for collective investment, (iii) pension funds and employee participation management entities and (iv) EEA (or equivalently) listed companies.

To the extent that these entities (or, if applicable, compartments of these entities) are privately owned or 'controlled' by the same person and/or his family (directly or indirectly), the exception no longer applies. For example a Luxembourg 'SICAV' held exclusively by one family (defined very broadly) will hence be taxed transparently in the hands of the Belgian individual shareholders, unless they can invoke an exception.

If managed in a professional manner, it seems logical that the EU case law-inspired 'substance' exception could be invoked in such a case (i.e. demonstrating a genuine economic activity and a proportionate correlation between the activities carried out by the entity and the extent to which it physically exists in terms of premises, staff and equipment). Preparatory works and the wording of the Program Law seem to prevent, however, that legal arrangements benefit from this exclusion if no 'professional income' is being generated. The exact scope of this exclusion, the potential means to refute it, as well as its EU compatibility remain unclear and open for discussion.

Some more technical changes

In the previous version of the Law, the heir-founder (not the original founder) of a Type 1 arrangement (trust or trust-like arrangement) was not liable to the Cayman Tax if he could prove that he would never obtain any benefit from the legal arrangement and supply evidence thereof through the relevant body of the legal arrangement.

The wording of the Law is now modified in order to allow the heir-founder of Type 2 arrangements (legal arrangement with legal personality) to also benefit from this measure.

The previous law stated that upon liquidation of a Type 2 arrangement, a liquidation dividend was deemed to be distributed, to the extent that the distribution exceeds the amount of assets that were contributed to the Type 2 arrangement and subject to Belgian tax. The new law confirms that liquidation dividends of a Type 2 company are taxed anyway under the 'regular'

income tax rules, so no specific Cayman Tax provisions are applicable. Distributions upon liquidation of a Type 2 legal arrangement other than a company (or so-called 'non-remunerated' transfers of assets) are taxed as dividends for the part that exceeds the amount of assets that were contributed. The wording 'that have already been subject to their normal tax regime in Belgium' was abolished in order to prevent any hidden 'regularisations' (i.e. previously untaxed capital being repatriated to Belgium at the more beneficial Cayman tax rates instead of 'normal' regularisation rates and penalties).

Double taxation is furthermore prevented by explicitly providing that Belgian tax is not applicable upon distribution of income if Cayman Tax transparency has already been previously applied.

This new rule does however not seem to resolve every potential source of double taxation embedded in the (amended) law.

Entry into force

The Law applies to income received, attributed or made payable by legal arrangements as of 1 January 2015 (assessment year 2016). Hence *de facto* with retroactive effect of one year. Any withholding tax aspects will enter into force for income paid as from 1 March 2016.

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