Belgium Finalizes List of Tax Havens

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In a 13 February royal decree, published in the official gazette on 21 February, Belgian Minister of Finance Didier Reynders finalized the list of countries deemed to have advantageous tax regimes. Tax authorities published a first draft of the list of advantageous tax regimes on 19 November 2002. (For prior coverage, see *2002 WTD 237-7* or *Doc 2002-26944 (3 original pages)* [PDF].)

One of the major changes in a 24 December 2002 law amending Belgium's corporate income tax regime was the strengthening of the so-called minimum taxation condition for application of the participation exemption for dividends received by a Belgian company. That condition implies that a Belgian holding company is entitled to the participation exemption only if the subsidiary is subject to a corporate income tax that is equivalent to the Belgian corporate income tax and if it is not resident in a country that has an ordinary corporate income tax regime that is substantially more advantageous than the Belgian corporate income tax.

A second criterion now has been refined: The classification as an advantageous tax regime applies to countries where the ordinary nominal tax rate levied on the subsidiary's profits is less than 15 percent or where the actual tax burden is less than 15 percent.

The final list includes: Afghanistan, Alderney, American Samoa, Belize, Bosnia and Herzegovina, the British Virgin Islands, Burundi, Cape Verde, the Central African Republic, the Comoro Islands, the Cook Islands, Cuba, North Korea, Dominica, Equatorial Guinea, Estonia, Gibraltar, Grenada, Guernsey, Guinea-Bissau, Haiti, Herm, Iran, Iraq, Jersey, Kiribati, Laos, Liberia, Liechtenstein, Macao, the Maldives, the Isle of Man, the Marshall Islands, Mayotte, Micronesia, Monaco, Montserrat, Namibia, Niue, Oman, Panama, St. Christopher and Nevis, St. Lucia, St. Pierre and Miquelon, St. Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, the Seychelles, Somalia, Tuvalu, the U.S. Virgin Islands, and Uzbekistan.

Reynders was particularly keen to point out that the list relates only to advantageous tax regimes and that the minimum taxation condition has been maintained. That is why countries such as Andorra, Nauru, and Vanuatu, which do not have such a corporate income tax, are not on the list, even if they are on the list of "uncooperative tax havens" published by the OECD on 18 April 2002. (For prior coverage, see *Tax Notes Int'l*, 30 Dec. 2002, p. 1316, *2003 WTD 4-6*, or *Doc 2003-653 (4 original pages)* [PDF].)

Reynders said the list does not prevent tax authorities from examining whether the minimum taxation condition is being met for certain types of companies or specific tax regimes, regardless of whether they are definitive or temporary measures. The Parliament has indeed clarified that it does not want to penalize investments in disadvantaged geographical areas that offer investment or development incentives.

Some countries that were on the provisional list have been removed. These include Aruba, the Netherlands Antilles, and Trinidad and Tobago, all of which recently introduced tax reforms.

It was never clear why Switzerland was on the list in the first place, as the ordinary nominal tax rate and the actual tax burden in Switzerland is more than 15 percent. Moreover, the Belgium-Switzerland double taxation convention requires Belgium to treat Swiss-origin dividends in the same way as Belgian dividends for the application of the participation exemption. It has been surmised that this might have been an ill-advised attempt to pressure Switzerland in negotiations relating to the EU savings tax package.

The new tax law also added a provision stating that the ordinary tax provisions in other EU member states will not be deemed to be substantially more advantageous than Belgium's (article 203, section 1, fourth paragraph of the Income Tax Code).

Reynders was careful to explain why certain countries with close links to the European Union were maintained on the list. He said Estonia, a candidate for EU membership, will be removed from the list upon accession.

Overseas countries and areas such as Mayotte, St. Pierre and Miquelon, Montserrat, and the British Virgin Islands may be in a free trade zone with the European Community under article 299(3) of the EC Treaty, but that does not mean they are part of a member state of the European Union, Reynders said. He added that under article 299(4) of the EC Treaty, Gibraltar is part of the European Union, but that the 1972 Deed of Accession excluded important areas of Community Law in Gibraltar's case, and that a Gibraltar subsidiary does not qualify as a company of an EU member state under article 2 of the EU Parent-Subsidiary Directive. Moreover, Gibraltar is not part of the United Kingdom for tax purposes, and Gibraltar companies are not subject to the U.K. corporation tax. Gibraltar also is excluded from application of the double taxation convention between Belgium and the United Kingdom.

As for the Channel Islands and the Isle of Man, even if they could invoke article 299(6) of the EC Treaty, Reynders argued that harmonization in the area of direct taxation does not apply to those areas, and consequently, their companies cannot be assimilated to a company of a member state.

However, the application of article 203, section 1, fourth paragraph of the Income Tax Code is wider than the mere application of the Parent Subsidiary Directive. It also should be noted that another country on the list, Liechtenstein, is not an EU member state, but that its subsidiaries can find protection under provisions relating to the free movement of persons and services of the Agreement on the European Economic Area.

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