Belgium Requires Reporting of Payments to 4 Noncompliant Jurisdictions

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Belgian tax authorities on September 3 published an addendum to practice note Ci.RH.421/607.890 (AAFisc nr. 64/2010), commenting on the list of states that have not "effectively" or "substantially" implemented the OECD standard on the exchange of information.

Since January 1, 2010, Belgian companies and the permanent establishments of foreign companies have been required to report in their annual tax returns all (direct and indirect) payments totaling €100,000 or more that they have made to tax havens (article 307, Income Tax Code, 1992). Payments are tax deductible only if the taxpayer can prove that the payments were made in the context of a genuine transaction and not an artificial tax avoidance scheme. Normally, if the payments are not reported, they are not tax deductible.

The law defines a tax haven as:

-- any state that, during the whole tax year when the relevant payment(s) were made, is considered by the OECD Global Forum on Transparency and Exchange of Information as not having effectively or substantially implemented the OECD exchange of information standard; or

-- any state that has no or a low tax, the threshold being set at a nominal corporate tax rate of 10 percent (art. 179 RD/ITC 1992). A list of these states was adopted in a Royal Decree of 6 May 2010. (Prior coverage.)

As for the first category, the addendum explains that on March 16, the Global Forum reviewed and rated 77 states, four of which were deemed noncompliant with the OECD's standard on information exchange -- specifically, the British Virgin Islands, Cyprus, Luxembourg, and the Seychelles. (The British Virgin Islands has since been rated "largely compliant," a fact that appears to have been overlooked in the addendum.)

Therefore, payments made to any of those four jurisdictions must be reported in a Form 275F, which must be attached to the payer's income tax return, starting in tax year 2015 (that is, financial year 2014, for which the filing deadline is September 30). Payments to Andorra, Anguilla, Antigua and Barbuda, Austria, Barbados, Indonesia, Israel, St. Lucia, and Turkey, all of which received a partially compliant rating, are unaffected by the reporting obligation.

Failure to report payments to tax havens normally would result in the payment being disallowed as an expense for the payer. However, the addendum adds an interesting twist. It concludes that disallowing the payments for noncompliance with the reporting obligation would not be compatible with the nondiscrimination provisions in Belgium's income tax treaties or the free movement of capital guaranteed under article 63 of the Treaty on the Functioning of the European Union.

Belgium's tax treaty with Cyprus and the Convention on Mutual Administrative Assistance in Tax Matters for Belgium's relations with the British Virgin Islands have nondiscrimination provisions based on article 24, section 4, of the OECD model tax convention, so the payments cannot be disallowed.

The convention with Luxembourg, as amended through 2009, does not have such a provision. However, Tax Code article 198(10), which disallows the payments as expenses, infringes the free movement of capital because Belgium has information exchange provisions in its treaties with Cyprus and Luxembourg, and with respect to the British Virgin Islands, based on the Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 protocol.

Therefore, only payments to residents in the Seychelles can be disallowed, at least until the Belgium-Seychelles tax treaty enters into force or Seychelles ratifies the Convention on Mutual Administrative Assistance in Tax Matters.

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