

Real Estate Tax Services Newsalert

Belgium

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The conditions for the investment deduction tax scheme violate articles 10, 11 and 172 of the Belgian Constitution

On 1 September 2008, the Belgian Constitutional Court ruled in reply to a preliminary question that the Belgian investment deduction scheme violates articles 10, 11 and 172 of the Belgian Constitution as certain companies are excluded from this tax scheme because their corporate activity means that the right to use the company's assets has been transferred to third parties (other than to natural persons using the assets concerned for their business activity in Belgium). The investment deduction would have been available had the investment been made directly by the third-party users or the assets been used by the person making the acquisition and this discrepancy has now been held to be unconstitutional.

This court case is of particular interest to companies having rental activities as the granting of a lease over a property means that the right to use the property has been transferred to the tenant and accordingly the landlord would not previously have qualified for the investment deduction scheme.

Background

For new investments acquired or developed during assessment year 2006 or before, companies were entitled, subject to certain conditions, to apply a general investment deduction scheme and deduct from their taxable income a certain percentage of the amounts invested in new fixed assets used for business purposes in Belgium. Where profits were insufficient, the non used part of the deduction could be carried forward without any limitation in time and amount.

Companies not qualifying as small and medium sized companies were excluded from this tax scheme, except to the extent that assets were acquired or developed during financial years in which these companies were employing less than 20 employees on the first day of the financial year (test to be met at company level not at group level). In the latter case, the investment deduction scheme was applied as a yearly (extra) tax deduction of, in principle, 10.5% of the acquisition cost spread over the depreciation period of the asset (the so-called spread investment deduction scheme). However, both for small and medium sized companies and for other companies, the application of the investment deduction scheme was always excluded for assets of which the right of use had been transferred to a third party (other than a natural person using these assets for his business activity in Belgium).

Implications

Based on the court case at hand, companies (who have not applied the investment deduction) have good arguments:

- To request that the tax authorities recalculate their taxable basis and grant tax refunds for (still open) assessments years (and following) during which assets have been developed / acquired which would have qualified for the spread investment deduction scheme had the owner used the assets himself or the third party user had developed / acquired the assets himself.
- for applying (in tax returns not yet filed) the investment deduction on acquisition / development costs of qualifying assets not yet completely written off.

Example: A Belgian company X not employing 20 people has developed a warehouse at a cost of EUR 20 million (excluding land) and has rented out the warehouse to a logistics company Y not employing 20 people either (maximum employment test met on first day of financial year during which warehouse was developed). As this investment was made during 2005 (assessment year 2006), arguments exist for company X to claim an additional tax deduction of 10.5% (i.e. EUR 2,1 million) spread over the depreciation period of the warehouse, say 20 years (EUR 105,000 per year).

Actions / timing

- Identify (real estate) companies which have developed / acquired new (real estate) assets (including major renovation costs) during assessment year 2006 or before where both the lessor / landlord company and the operational lessee / tenant company met the maximum employment test on the first day of their respective financial years.
- File for tax claims / relief requests for those assessments years which are still open. It should be noted that the period for relief requests has recently been extended to 5 years (instead of 3 years).

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