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National Reporter
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I. Acquisition of a Belgian Corporation by a Non-Resident Corporation

A. Acquisition of Shares of a Belgian Corporation

a. Preliminary Remark

Although the vendor of a Belgian corporation may be a resident or non-resident corporation or individual, this report will only address the tax consequences of a seale of shares of a Belgian corporation where the vendor is a Belgian resident.

This restriction is justified by the fact that under the Belgian double taxation treaties the right to tax capital gains realized on a disposal of shares is generally allocated to the country of residence of the vendor (unless the shares have been invested by a Belgian resident in a non-Belgian permanent establishment (Art. 13 (2) and (3) tax treaties)).

b. Vendor is a Belgian Individual

Capital gains realized by a Belgian resident on the sale of shares in a Belgian company held as a private investment, are in principle tax exempt. There are, however, two exceptions to this rule.

First, where the sale of the shareholding can be characterized as a speculative activity, the resulting capital gains will be taxed at the rate of 33% (Art. 93, § 1, 1° a) I.T.C.). The burden of proof that a sale is inspired by speculative intent rests with the tax authorities.[1]

The second exception regards the sale of shares of a Belgian company having its registered office, main establishment or seat of management in Belgium. Capital gains realized on the sale of such shares are taxed at a rate of 16.5% if the shares are part of a so-called "substantial shareholding" and the buyer is a non-resident company or non-resident legal entity (Art. 67, 8°; 67 ter and 93,

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1 Bruxelles, 20.01.1981, J.D.F., 1982, 119; Antwerpen, 03.05.1982, F.J.F. 83/46.

§ 1, 2° e) I.T.C.). A shareholding qualifies as a "substantial shareholding" if the vendor, together with its family group, has owned directly or indirectly, more than 25% of the shares of the company at any time during the five years preceding the sale. The sale of shares which are part of a substantial shareholding is subject to tax not only if the entire shareholding is disposed of, but also if only part of it is sold. In order to prevent the vendor from selling his shares at fair market value to a Belgian resident and realizing a tax exempt capital gain so that such transferee could then sell on the shares to the ultimate non-resident company at the same price, an anti-abuse provision has been provided. Under such rule, all capital gains realized on sales that are principally tax exempt and that occur during a twelve month period preceding the sale to the non-resident company or legal entity are taxable.

Losses incurred on a sale of shares, held as a private investment, are not tax deductible, except for losses incurred in the course of an occasional or speculative activity which can be set off against occasional or speculative profits and carried forward for five years (Art. 70, § 1 I.T.C.). Losses incurred in the course of a speculative activity cannot be offset against capital gains realized on the sale of a substantial shareholding.[2]

c. Vendor is a Belgian Corporation

Beginning with the tax year 1992 (i.e. companies closing their accounts on December 31, 1991 or any date in 1992 prior to December 31, 1992), capital gains realized on the sale of shares will be fully tax exempt (Art. 105 bis I.T.C.).

A new rule has also been enacted stipulating that any reduction in value recorded on a shareholding and any capital loss realized on a sale thereof are no longer tax deductible (Art. 109, 3° I.T.C.).

As an exception to the exemption, capital gains will be taxable at the ordinary rate (currently 39%) to the extent that a reduction in value on the shares has been admitted for tax purposes under prior legislation (Art. 105 bis in fine I.T.C.). The exemption will also not apply to capital gains realized on the sale of shares in tax haven companies; foreign holding or finance companies that benefit from an advantageous tax regime; joint investment companies (such as Belgian or Luxembourg SICAV's and SICAF's) and foreign companies holding shares in these aforementioned types of companies. Capital gains realized on the disposal of shares in these companies will be taxed at the ordinary rate.

B. Acquisition of Assets of a Belgian Corporation

a. Preliminary Remark

Regarding assets sales, this report only addresses the sales of a Belgian resident corporation as a going concern in such circumstances where the right to tax is

2 Com. I.T.C. 70/5.

granted to Belgium. Capital gains realized on sales of assets (such as foreign situs real estate or assets invested in a foreign permanent establishment) where Belgium has no right to tax under a double tax treaty, are not dealt with.

b. Tax Effect to the Vendor

A Belgian resident corporation is subject to tax on all capital gains realized on the sale of a business. Capital gains realized on the sale of assets are taxed at the ordinary rate.

The gain is taxable at the time the vendor has a fixed and certain receivable on the purchaser even if the sales price is paid in several installments over a number of years.[3] However, if the sales price is determined by reference to an unknown factor to be realized in future years (e.g. a percentage of future turnover realized by the buyer with the acquired assets), the gain only becomes taxable at the time the exact sales price can be determined. In such cases, tax liability can be postponed until the amounts received by the vendor exceed the tax base of the assets sold.[5] The amount of the taxable capital gain is the difference between the sales price or the attributed sales value of the assets sold, on the one hand, and the tax base of such assets, on the other hand; the latter being equal to the acquisition or construction price less depreciation allowances (Art. 32 quinquies I.T.C.).

Capital gains realized on the sale of tangible or intangible fixed assets (as defined for accounting law purposes) which have been used in the corporation's business for more than five years may benefit from a tax deferral provided that (i) the capital gain is credited to a special blocked reserve account and (ii) the sales proceeds are reinvested in depreciable tangible or intangible fixed assets (whether new or not) used for business purposes in Belgium ("the reinvested asset") within a period of three years, starting from the first day of the taxable period in which the gain was realized. If, however, the proceeds are reinvested in buildings, aircraft or vessels the reinvestment period is extended to five years and the taxpayer may elect for it to commence, either, on the first day of the taxable period in which the gain was realized, or, on the first day of the taxable period two periods before the one in which the gain was realized (Art. 32 sexies I.T.C.).

If the taxpayer elects for tax deferral, the capital gain will be taxed at the ordinary rate over the period of depreciation of the reinvested asset. The functioning of this deferral mechanism is illustrated in Exhibit I.

If the reinvested asset is disposed of (or if the corporation ceases its activity) before the capital gain has been entirely taxed, the untaxed portion will be taxed in the taxable period in which such reinvested asset is disposed of (or in which the corporation ceases its activity).

3 Cass., 04.10.1943, Pas., I, 365; Antwerpen, 18.06.1985, F.J.F., 86/73.
4 Brussel, 08.04.1986, F.J.F., 87/73.
5 Com. I.T.C. 31/27-30.

Taxpayers are able to exempt capital gains realized on the sale of assets acquired prior to 1950 that are caused by inflation, provided such capital gains are credited to a special blocked reserve account (Art. 34,2° jo Art. 119 I.T.C.).

A capital loss incurred on the sale of assets constitutes a tax deductible item. When such loss exceeds income, it gives rise to a loss carry forward.

C. Specific Issues

a. Tax Treatment of the Acquisition Cost to the Acquiring Corporation

1. Acquisition of Shares

The treatment of the acquisition cost is only relevant for Belgian tax purposes if the acquiring corporation has set up a Belgian subsidiary for purposes of the acquisition or if the shares have been acquired by a Belgian permanent establishment of the acquiring corporation.

Shares should be valued at their acquisition cost.

If the shares held in a subsidiary reflect an actual and permanent increase in value as compared to their bookvalue, the parent company may proceed to a revaluation (Art. 34 R.D. 08.10.1976). Any capital gain so recorded is fully tax exempt provided it is credited to a special blocked reserve account (Art. 34, 1° I.T.C.). Under accounting law, corporations are entitled to record a reduction in the value of shares in case of actual and long-lasting decrease in value attributed to the situation, yield and perspectives of the subsidiaries in which the shares are held (Art. 29, § 2 R.D. 08.10.1976). Such reduction in value no longer constitutes a tax deductible item (Art. 109, 3° I.T.C.).

A revaluation of the assets of the acquired corporation is not permitted in the course of a share acquisition. A merger between the acquired and acquiring corporation is needed to accomplish such a revaluation.[6]

In the past, certain case law[7] has allowed the acquiring corporation to deduct as a capital loss in the year of the acquisition of the shares, the difference between the price paid for the shares and the net bookvalue of the assets of the acquired corporation (revalued, if necessary, to reflect non-recorded assets, capital gains or hidden reserves).[8] For instance, in the first quoted case, the acquiring corporation paid an amount in excess of the actual value of the acquired business because the acquisition enabled it to overtake a competitor. Other cases involved payments for potential synergies or increased market shares. In such cases, the excess paid over the actual value of the acquired corporation was deemed to be a “non-value” qualifying for immediate deduction.

6 *See infra* I.C.4.

7 To which the tax administration seems to have adhered, Com. I.T.C. 124/64-66.

8 Bruxelles, 04.06.1973, J. Pr. Dr. F., 1973, 155; Bruxelles, 04.02.1974, J. Pr. Dr. F., 1974, 60; Gent, 20.12.1988, F.J.F. 89/41.

In 1989 the Commission for Accounting Standards issued a Regulation that precludes the acquiring corporation from recording a reduction in value on the shares in the year of acquisition reflecting such "non-value" or from amortizing such excess price in subsequent years. Under the Regulation, the acquiring corporation is only allowed to record such a reduction in value on the shares in the years subsequent to the acquisition in exceptional circumstances, such as a significant material error in the valuation of the acquired business or long-lasting changes in the prospects of the acquired business subsequent to the acquisition. The tax administration has announced that it will apply the same rules to shareholdings acquired as of December 20, 1990.[10] However, the recent enactment of Article 109, 3° I.T.C. has made these changes somewhat irrelevant since reductions in the value of shareholdings are no longer tax deductible.

In view of this Regulation of the Commission for Accounting Standards, it is not clear whether an acquiring corporation will be entitled to depreciate or deduct as expense amounts paid for covenants not to compete. To the extent that the acquisition price of a shareholding includes an amount paid for the vendor's undertaking not to compete, the amount paid for such undertaking, as part of the total purchase price for the shares, would not qualify for depreciation or deduction. To the extent that a separate amount has been agreed upon for such undertaking not to compete (perhaps under a separate agreement), it could be argued that the acquiring corporation has acquired an intangible asset. For tax purposes, such intangible would qualify for a straight-line depreciation method over a period of at least five years.[11] The latter depreciation rule applies to all types of intangibles, except certain R & D investments.

2. Acquisition of Assets

The treatment of the acquisition cost for Belgian tax purposes will only be relevant if the acquiring corporation has set up a Belgian subsidiary for purposes of the acquisition or if such corporation has a Belgian permanent establishment in which the acquired assets are invested. If the assets of a Belgian corporation are acquired by a non-resident corporation of Belgium, the Belgian situs assets will most likely constitute a permanent establishment in Belgium under the relevant tax treaty provisions or provisions of domestic law (Art. 141, § 1 I.T.C).

Assets should be valued at the acquisition cost. These assets (except for land, shares and securities) qualify for depreciation on either a straight-line or a declining-balance basis in function of their economic useful lifetime. However, certain assets, such as assets leased to a third party under operating leases and cars, do not qualify for declining-balance depreciation (Art. 41 R.D. I.T.C).

9 Bull. Comm. Boekh. Normen, 1989, n° 24, p. 15-17.

10 Circ. 20.12.1990, Bull. Bel., 1991, n° 702, p. 347.

11 Art. 45, 4° and 48, § 4 I.T.C.; Antwerpen, 02.05.1989, F.J.F. 89/172; Cass. 22.03.1991, F.J.F. 91/130.

If a price is paid in excess of the aggregate net value of the assets acquired, the excess constitutes a payment for goodwill, which qualifies for depreciation provided that the taxpayer is able to demonstrate that such goodwill is subject to an actual reduction in value.[12] For tax purposes, such goodwill should be depreciated on a straight-line basis over at least five years (Annexe to R.D. 08.10.1976, Ch. III, Section I, II; Art. 45, 4° and 48, § 4 I.T.C.).

b. Interest on Debt incurred to make the Acquisition

1. Acquisition of Shares

Since there is no concept of tax consolidation in Belgium, interest payments made by the foreign purchaser of a Belgian company cannot be set off against the profits of the Belgian company which it acquired.

However, interest on debt incurred to make the acquisition can be deducted in Belgium if the non-resident has set up a Belgian company to purchase shares in the Belgian company and such holding company has incurred the debt. In order to set off the interest on the loan against the profits of the acquired Belgian company, companies would have to merge (see infra I.C.d.). Similarly, interest will be deductible for Belgian tax purposes if the shares are acquired by a Belgian permanent establishment of the foreign corporation and such permanent establishment has incurred the acquisition debt. It should, however, be noted that no deduction is allowed for interest paid by a permanent establishment on funds advanced by its head office.[13]

Belgian corporate law precludes the acquired corporation from lending funds to the acquiring corporation in view of the acquisition of its shares (Art. 52 ter Comp. Law Act). Such loans may only be made to personnel of the company to be acquired or to companies related to such company and controlled by its personnel.[14]

Interest paid to Belgian banks or financial institutions and Belgian branches of foreign banks or financial institutions is tax deductible without any limitation.[15] The same rule applies to interest paid on publicly issued bonds.

Interest paid to other taxpayers is, however, subject to restrictions (Art. 50, 1° I.T.C.). Each year, the maximum deductible interest is fixed by Royal Decree.[16] Such maximum deductible interest is determined either by reference to

12 Antwerpen, 02.05.1989, F.J.F., 89/172; Cass.. 22.03.1991, F.J.F., 91/130.

13 Com. Tax Treaties 7/132.

14 This new rule, which has been enacted by the Law of July 18, 1991 amending the Company Law Act, has already been critized because it does not allow the target company under a typical LMBO to lend funds to the acquisition holding set up by the personnel of the target: De Broe, L., De leveraged buy-out na de wet van 18 juli 1991, syllabus Ehsal-seminarie, 20.09.1991, p. 32-33; Lievens, J., De nieuwe Vennootschapswet, p. 69-70.

15 This rule may be in conflict with the non-discrimination clause of certain tax treaties since it results in a preferential treatment of Belgian banks as compared to non-Belgian banks.

16 For the issuance of debt instruments in Belgian currency between November 5, 1990 and December 31, 1990, the maximum deductible interest is equal to 13,50% (R.D. of August 5, 1991).

the interest rate applied by the entity issuing the instruments in the country in which currency the loan is expressed, increased by 3% or by reference to the currency used in the financial markets of such country, also increased by 3%. No Royal Decree has been published yet determining the maximum deductible interest for the year 1991.

It should be emphasized that the parent company is entitled to deduct its financing expenses relating to an acquisition of a shareholding, even though dividends received on such shareholding are exempt up to 95% under the "dividend received deduction" (see infra II.B.).

2. Acquisition of Assets

If the acquiring corporation has set up a Belgian subsidiary for acquisition purposes of if the assets are acquired by a Belgian permanent establishment and such subsidiary or permanent establishment has incurred the acquisition debt, interest will be deductible for Belgian tax purposes. The same rules as to the limitation on the deductibility of interest referred to above apply (see I.C.b.1.).

3. Thin Capitalisation

Belgium does not have any specific thin capitalisation rules.

However, interest paid by a private company (BVBA/SPRL; VOF/SNC; Com. V./S. Com. S. and CV/SC) on loans from its shareholders, their spouses and children, is treated as dividend income (Art. 15, al. 2, 2° I.T.C). Accordingly, loans from shareholders and their family groups to a private company are always treated as equity. The company must withhold 25% dividend withholding tax on such interest instead of the 10% interest withholding (Art. 174 I.T.C.), subject to the provisions of any applicable double taxation treaty.

A Belgian company, shareholder of such a Belgian private company, can benefit from the "dividend received deduction"-regime on the interest received (Art. 111, § 1, 3° I.T.C.). Under such exemption 95% of the interest income will be tax exempt (see infra II.B.).

c. Impact of the Acquisition on the Loss Carry Forward or other Carry-overs of the Acquired Corporation

An acquisition of shares of a corporation does not affect the net operating loss carry forward or carry-over of investment deduction of the acquired corporation. Losses can be carried forward without any time limit. However, the maximum amount of losses which may be set off per year is equal to 50% of annual profits or BF 20,000,000, whichever is higher (Art. 114 I.T.C.).

The investment deduction (a deduction against profits in addition to depreciation, applicable in case of new investments) can be carried forward without any time limit. However, the maximum amount of investment deduction which may be deducted from subsequent annual profits is equal to BF 25,000,000 per year. If the total amount of investment deduction to be carried forward (at the end of the previous taxable period) exceeds BF 100,000,000 the maximum investment deduction which may be deducted from profits in a subsequent taxable period is equal to 25% of such total amount (Art. 42 ter, § 4 I.T.C.).

Regarding the acquisition of assets, the seller can set off any loss carry forwards and investment deduction carry-overs against capital gains realized on the sale of the assets.

d. Post-Acquisition Mergers

1. General

An acquisition might involve as a second step a merger of the acquired corporation into the acquiring corporation. Such a merger may be inspired by various motives of an economic and commercial, financial or fiscal nature.

Under Belgian law, a corporate shareholder that has acquired all of the shares of another corporation can proceed to a merger of the two corporations. In order to achieve such merger, the acquired corporation must be dissolved. The sole shareholder should in a notarial deed formally decide to dissolve the subsidiary whereupon all assets and liabilities of the subsidiary are transferred to the acquiring corporation and the liquidation is closed. Such merger does not result in a capital increase of the acquiring company.[17]

Such merger may, at the election of the taxpayer, either be taxable or (partially or fully) tax exempt.

2. Taxable Merger

Regarding taxable mergers, the difference between the value at which the assets of the acquired corporation are transferred and the taxable base of such assets is taxable at the ordinary corporate tax rate. Moreover, a 39% tax is levied on the tax exempt retained earnings of the absorbed corporation.[18] Where the

[17] Under current law, it is still possible to formally merge the acquired corporation into the acquiring corporation in such a way that the latter may increase its share capital and issue new shares. As a result, the acquiring corporation would own its own shares. For tax purposes, such merger is treated as a stock redemption (Art. 103 I.T.C.). The tax consequences of this type of merger are currently very uncertain making definitive answers in this context impossible (Verstraelen, J., Nieuw stelsel van fusies van ondernemingen, Centrum voor Fiscale Wetenschappen en bedrijfsbeleid, 15.04.1991; Lycops, J.F., Interimverslag over diverse reorganisatiemethoden van Belgische (naamloze) vennootschappen, A.F.T., 1990, n° 12 bis, p. 18; Dierckx, F., Inkoop van eigen aandelen, A.F.T., 1990, p. 263).

[18] The withholding tax which was previously due on the liquidating bonus in such instances, has been repealed retroactively (Official Publication Belgian State Gazette of September 21, 1991; Article 169, 2° I.T.C.).

absorbed company has loss carry forwards, such losses may be deducted from its taxable basis.[19]

The acquiring corporation will realize a capital gain to the extent that the net value of the assets transferred exceeds the taxable basis of the shares in the acquired corporation. Such capital gain is treated as a dividend and will be exempt up to 95% under the "dividend received deduction" (see infra II.B.). If, on the other hand, the acquiring corporation would realize a capital loss as a result of the merger, such capital loss is no longer tax deductible.[20] The assets transferred will benefit from a step-up in basis in the hands of the acquiring corporation enabling it to depreciate such assets at the values at which they were transferred.

An example of a taxable merger is given in Exhibit II.

3. Tax Free Merger

If the taxpayer elects for the merger to be *tax exempt*, such merger may either be partially or fully tax exempt. The difference between the value at which the assets of the acquired corporation are transferred and their taxable base will be fully tax exempt (Art. 124, § 1, 1° I.T.C.). However, the merger will only be fully tax exempt if the acquired corporation does not have untaxed retained earnings (Art. 124, § 1, 1° and 2° I.T.C.). Where the acquired corporation has untaxed retained earnings, such retained earnings are taxable upon the consummation of the merger (Art. 124, § 1, 2° I.T.C.).

If the election is made, capital gains realized by the acquiring corporation equal to the difference between the net value of the acquired corporation and the taxable basis of the shares in such corporation will be fully tax exempt. Under the new rules with respect to capital gains on shareholdings, there is no longer any requirement to record such capital gain on a blocked reserve account (Art. 38 jo. 105 bis I.T.C.). Where the merger would have been partially tax exempt, part of the capital gain will be treated as a dividend and taxed accordingly. In practice, however, even the taxable portion of the capital gain will be subject to the "dividend received deduction"-regime and thus be tax exempt up to 95% (see infra II.B.). Capital losses realized on the exchange of the shareholding are no longer tax deductible.[21]

In case of a partially or fully tax exempt merger, the acquiring corporation does not benefit from a step-up in basis on the assets transferred. It must carry over the bookvalue of the acquired corporation's assets and liabilities.

An example of a tax free merger is given in Exhibit III.

19 Subject to the limitations mentioned supra I.C.c.

20 Art. 109, 3° I.T.C., except to the extent that the net value of the shares of the subsidiary would be less than the subsidiary's share capital.

21 Art. 109, 3° I.T.C.; except to the extent that the net value of the shares of the subsidiary would be less than the subsidiary's share capital.

4. Mergers involving Loss-Making Companies

Under Belgian tax law, the acquiring company may in case of merger not carry the prior losses of the absorbed company forward. Hence, all loss carry forwards of the absorbed company are lost in a merger. Consequently, a merger involving a loss-making company is typically constructed so that the profitable company is absorbed by the loss-making company. In the past, the tax administration has successfully challenged a number of such mergers arguing that the transaction was in substance a sham ("veinzing"/"simulation").[22] Such mergers involved, for instance, loss-making companies that had ceased virtually all activities; companies that had no personnel or net equity or companies that were almost bankrupt. In these cases, the absorbing company took over the name of the absorbed profit-making company and its registered office was transferred to the headquarters of the absorbed company immediately after the merger. In a number of other cases, however, the Courts have held for the taxpayer and have allowed the absorbing company to set off its losses against the profits of the absorbed company.[23]

Beginning with tax year 1991, a specific provision was inserted in the tax code stipulating that in case of a tax free merger, the losses of the absorbing company are not fully eligible for carry forward. After the merger, the carry forward is limited to a percentage of the total loss carry forward, which percentage equals the net value of the assets of the absorbing corporation divided by the net value of all assets of the combined corporations after the merger.

The loss recovery is further restricted by the rule which provides that the maximum amount of losses that may be offset per year is equal to 50% of the annual profits or BF 20,000,000, whichever is the higher (Art. 114 I.T.C.). In addition, the tax administration is entitled to deny loss carry forwards after a tax free merger if it can demonstrate that such merger was not motivated by business or financial objectives but was only inspired by tax considerations (Art. 114 I.T.C.). The administration will, at the taxpayer's request, issue advance rulings with respect to specific merger transactions (Art. 250 bis, § 1,1° I.T.C.).

The limitation or denial of loss carry forwards only applies to exempt (or partially exempt) mergers. In case of taxable mergers, the absorbing company is fully entitled to set off its losses against any profits of the absorbed company, subject to the limitation that the maximum loss recovery per year is equal to 50% of the annual profits or BF 20,000,000, whichever is the higher.

If the purchaser has set up a Belgian company that has purchased all of the shares of another loss-making Belgian company, the above rules have the following consequences if such purchaser wishes to combine the two Belgian operations.

22 Cass., 07.12.1979, Pas., 1980, I, 446, confirming: Antwerpen, 02.03.1978, J.D.F., 1979, 344; Bruxelles, 26.10.1982, J.D.F., 1983, 311; Bruxelles, 31.03.1987, F.J.F., 87/93; Bruxelles, 22.12.1987, F.J.F., 88/49.

23 Cass., 20.04.1989, not yet published in Pasicrisie; Cass., 22.03.1990, F.J.F. 90/95; Mons, 16.03.1990, F.J.F., 90/184; Gent, 13.06.1989, F.J.F., 89/142; Liège, 26.10.1988, F.J.F., 89/1; compare also: Liège, 06.02.1991, F.J.F., 91/97.

In order for the acquired subsidiary to preserve its loss carry forwards, it should absorb its Belgian parent company. If the taxpayers elect for such merger to be tax free, the amount of losses to be carried forward after the merger will be limited to a percentage of such losses equal to the net value of the assets of the acquired company divided by the net value of all assets of the combined corporations after the merger. If no election for tax exemption is made, this restriction is not applicable. Regardless whether the merger is exempt or not, the loss recovery will be limited by the rule providing that a company may only offset losses up to 50% of its annual profits or BF 20,000,000, whichever is the higher.

As a result of the merger of the parent company into the subsidiary, the latter will receive its own shares. If, after the merger, such shares are declared null and void through a reduction of the subsidiary's taxed retained earnings, such annulment will not have any tax effect. If, however, such annulment is imputed on untaxed retained earnings, it will trigger a 39% tax liability (Art. 103 I.T.C.). Hence, even if the merger is elected to be tax exempt, the fact that the subsidiary acquires its own shares may result in an undesired tax burden.

5. Special Remarks

With respect to mergers between parent and subsidiary companies, two important remarks must be made.

- Under current Belgian tax law, a merger whereby the acquiring corporation absorbs its wholly owned subsidiary, may only be elected to be fully (or partially) tax exempt if the acquiring company is a Belgian resident taxpayer (Art. 124 I.T.C.). If the acquiring company is not a resident of Belgium, the merger cannot be tax exempt. In such case, it will always be taxable at the level of the Belgian subsidiary (see example in Exhibit II).
- Normally, mergers are fully exempt from VAT and registration duties. However, a merger whereby the parent company absorbs its wholly-owned subsidiary as explained above (i.e. not through a formal merger involving a capital increase), always triggers the levy of 12.5% registration duties on the value of the real property transferred from the subsidiary to the absorbing parent company.[24]

e. Withholding Tax Issues

1. Dividends

Under Belgian domestic law, dividends paid by Belgian companies to resident or non-resident individuals or corporations are subject to 25% withholding tax.

[24] Donnay, A., Rép. Not., XII, II, n° 146: Decision of tax administration, 11.12.1987, Rec. Gén. Enr., n° 23639, p. 371; Werdefroy, R., Registratierechten, II, 1050-1051.

This rate is often reduced by treaty to 15%. The treaties concluded with China, Hungary, Poland, Romania and the United Kingdom reduce the rate to 10%. Dividends paid on substantial shareholdings held by corporations resident of Finland, Yugoslavia, France, Luxembourg and Switzerland are subject to a 10% dividend withholding tax in Belgium. The dividend withholding tax rate applicable to dividends paid on substantial shareholdings held by Dutch, Japanese, UK and US companies is further reduced to 5%. Depending upon the relevant treaty, a substantial shareholding requires either a 25% (e.g. the Netherlands treaty) or a 10% (e.g. the US treaty) shareholding in the Belgian company.

The treaties with Switzerland and the United States include an anti-abuse provision (Art. 22 Swiss treaty; Art. 12 US treaty) denying certain Swiss and US companies the benefit of the reduced withholding tax rates in Belgium.

The Royal Decree of October 14, 1991 has executed Article 5 of the EC Parent Subsidiary Directive 90/435 of July 23, 1990 with respect to the exemption of withholding tax on dividends paid by an EEC-subsidiary to its EEC-parent company (hereafter "Parent/Subsidiary" Directive). As of October 15, 1991 dividends distributed by a Belgian subsidiary taking the form of a NV/SA; a Comm. V.A./Soc. Comm. A. or a BVBA/SPRL to its parent company are exempt from withholding tax, provided that the parent company i. is a resident of another EEC-Member State, ii. is subject to corporate tax, iii. is listed on the list of companies attached to the Parent-Subsidiary Directive and iv. has held at least 25% of the shares of the Belgian subsidiary for an uninterrupted period of at least one year at the time of the distribution of dividends.

As of the same date, dividends distributed by any type of Belgian company subject to corporate tax to another Belgian company subject to corporate tax, regardless of the latter's legal form, are exempt from dividend withholding tax, provided that the recipient has held at least 25% of the shares of the company distributing the dividends for an uninterrupted period of at least one year at the time of the distribution of dividends.

2. Interest

For loan agreements concluded as of March 1, 1990, interest paid to resident and non-resident companies and individuals is subject to withholding tax at a rate of 10% (previously 25%).

Since most double taxation treaties also provide for a 15% or 10% rate of withholding tax on interest, the rate is not effectively reduced.

Certain treaties provide, however, for an exemption of withholding tax. For example, interest paid by a Belgian company to a company resident in the Netherlands, Germany or Luxembourg is not subject to Belgian withholding tax. Such exemption does not, however, apply to interest on bonds. Nor does it apply to interest paid by a Belgian company to a Luxembourg or German company having a direct or indirect shareholding in the payor of at least 25%. The exemption neither applies to interest paid by a Belgian company (with the legal form of a NV/SA; Comm. V.A./S. Comm. A. or BVBA/SPRL) to a Dutch NV, BV or Comm. V. A. if the Dutch recipient owns 25% or more of the shares of the payor or vice versa.

f. Non-Income Tax Issues

1. Acquisition of Shares

The sale of shares of a Belgian corporation is not subject to VAT or registration taxes.

In exceptional cases, certain case law has recharacterized the sale of all of the shares of a corporation as a sale of the underlying real estate triggering the 12.5% registration taxes.[25] In these cases, the tax administration has successfully applied the "sham doctrine" ("veinzing", "simulation") to the sale of all shares of a corporation that only owned Belgian real estate, arguing that it was the intention of the parties not to sell the shares but rather the real estate owned by the corporation.[26]

2. Acquisition of Assets

i. Registration Taxes

The sale of Belgian situs real property (land or building) located in Belgium is subject to a 12.5% registration tax. The tax is levied on the greater of the purchase price or the fair market value of the property as determined by the tax administration. In practice the sales agreement specifies which party is liable for the payment of such tax. If the party stipulated in the sales agreement fails to pay the tax both the transferor and the transferee are jointly liable for its payment.

In exceptional cases, the sale of buildings is subject to VAT rather than registration taxes (see infra I.C.f.2.(ii.)).

ii. Value Added Taxes (VAT)

The sale of assets by a VAT-taxpayer is subject to Belgian VAT either as the supply of goods (sale of tangibles such as inventory, machinery, etc.) or the supply of services (sale of intangibles such as patents, trademarks, goodwill, etc.). VAT is levied at the rate relevant to the particular asset being transferred. The general rate is 19%.

25 Trib. Huy, 08.06.1876, Rec. Gén. Enr., n° 8592, p. 377; Rb. Oudenaarde, 24.10.1961, Rec. Gén. Enr., n° 20463, p. 87; Gent, 26.03.1965, Rec. Gén. Enr., n° 20895, p. 476; Trib. Bruxelles, 19.12.1962, Rec. Gén. Enr., n° 20640, p. 275.

26 P.Q. of May 11, 1973, Rec. Gén. Enr., n°21754, p. 13; Decision of tax administration of October 3, 1975, Rec. Gén. Enr., n° 22071, p. 326.

The application of Belgian VAT is limited to sales of goods that are deemed to take place in Belgium. The place of the sale, in turn, depends on the place where the goods are located at the time of physical supply (Arts. 10 and 16 VAT-Code). The law creates a rebuttable presumption that the goods are located in Belgium if at the time of sale either the buyer or the vendor has his place of management or permanent establishment or, in the absence thereof, his residence or customary place of abode, in Belgium (Art. 16 VAT-Code).

Similarly, the application of Belgian VAT is limited to supplies of services that are deemed to take place in Belgium. The general rule is that the place of supply is the place where the supplier of the service has his business or permanent establishment or, in the absence thereof, his residence or customary place of abode (Art. 21 (2) VAT-Code). The VAT-Code provides, however, for numerous exceptions to this general rule (e.g. sale of intangibles). At the sale of goods, the law creates a rebuttable presumption that the service is supplied in Belgium provided one of the parties to the transaction is established in Belgium.

As an exception to the aforementioned rules, the sale of a business as a going concern (“algemeenheid van goederen”/“universalité de biens”) by a VAT-taxpayer is exempt from VAT provided that the transferee is a VAT-taxpayer. This exemption enables the buyer to avoid any VAT prefinancing cost (Art. 11 VAT-Code). A non-Belgian acquiring corporation that will continue to operate the business of the acquired Belgian corporation, either directly (in which case it will most likely have a permanent establishment in Belgium) or through a Belgian subsidiary set up for this purposes, will qualify as a VAT-taxpayer within the meaning of the Belgian VAT-Code and the 6th EEC-Directive.

A sale will qualify as a sale of a going concern if all of the business’ assets (including goodwill, equipment, machinery, trademarks, patents, etc.) are transferred. The VAT administration has, however, ruled that a business can be transferred as a going concern without the transfer of the real property in which the transferor’s business was conducted. It has also been admitted that leaseholds need not necessarily be transferred, nor the receivables and trade debts.[27] However, where the goodwill (“cliënteel”/“clientèle”) is effectively connected with the situs of the real estate, the real property must be transferred or, at least, such real property should be leased to the transferee.[28]

As a further exception to the aforementioned rules, the sale of a so-called “branch of activity” is fully exempt from VAT if the transferee is a VAT-taxpayer. A transfer of a branch of activity is defined as a transfer of all assets used in a branch of business, which technically can be considered to be an independent enterprise (e.g. construction department independent from sales department). In principle the transfer of a branch of activity should include the real property unless the transferor would continue to use such real property in the non-transferred branch of activity.[29]

27 VAT Manual n° 33 c).
28 Fisc. Doc. Vandewinckele, n° 11/36, n° 24 *et seq.*
29 VAT-Manual, n° 33 D).

The sale of a "new building" as defined for VAT purposes is subject to VAT and not to the 12.5% registration taxes, provided that certain formalities are complied with.

If the transferee is a VAT taxpayer, he may set off the VAT charged on the acquisition of the building against the VAT charged on his supplies and services. Moreover, a "new" building can form part of a going concern or branch of activity that can be transferred exempt from VAT so that the transferee may avoid all VAT prefinancing cost.

II. Acquisition of a Foreign Business by a Belgian Corporation

A. Interest on Debt Incurred to make an Acquisition

Interest paid by a Belgian corporation on debt incurred to acquire assets from a foreign corporation or shares in such corporations is tax deductible subject to the same conditions as described supra (see supra I.C.2).

B. Dividend Income

Dividends paid by a non-resident company to a Belgian company benefit from a special tax regime, called "dividend received deduction" ("definitief belaste inkomsten"/"revenus définitivement taxés").

Under such tax regime, which has been reformed to bring it in line with the Parent/Subsidiary Directive 90/435, dividends are tax exempt up to 95% of the amount received. No foreign tax credit is, however, available.

No minimum holding period is required for this exemption to apply (Art. 111, § 1, 1° and Art. 113, § 1 I.T.C.).

The foreign company must, however, be subject to a foreign tax similar to the Belgian income tax (Art. 111, § 2 I.T.C.).

The Belgian tax authorities have issued two non-exclusive lists in order to interpret Art. 111, § 2 I.T.C..[30] One list contains countries where companies are not considered to be subject to foreign tax similar to Belgian corporate income tax (e.g. Bahamas, Bermudas, Cayman Islands etc.). The second list enumerates several types of companies which are deemed not to be subject to a tax similar to Belgian corporate income tax (e.g. Luxembourg or Liechtenstein holding companies, Hong Kong companies having foreign source income, Liberian companies controlled by non-residents having offshore activities, etc.).

The "dividend received deduction" is also not granted when the dividend is received from:

– a foreign company established in a country where the tax treatment is considerably more favorable than the Belgian tax regime (so-called "tax

[30] Official State Gazette of August 24, 1991, p. 18431.

haven countries"). A list of countries has been issued by the tax authorities to illustrate this exception (including, inter alia, the Netherlands Antilles, Guernsey, Jersey, Liechtenstein, Isle of Man, British Virgin Islands).

- a foreign holding company for a foreign finance company which enjoys a privileged tax status in its country of residence. The list of countries that are deemed to provide privileged tax treatment to domestic holding or finance companies includes the Netherlands Antilles, Jersey, Liechtenstein, Luxembourg and Uruguay.
- a joint investment company (such as a SICAV or SICAF or similar foreign UCITS vehicle).
- a foreign company that distributes dividends which would not qualify for the "dividend received deduction" if such dividends had been distributed directly to the Belgian investor. The purpose of this exception is to exclude from the preferential tax regime a foreign company interposed between, for example, a tax haven company and the Belgian investor.

C. Interest and Royalty Income

Interest received by a Belgian corporation from its foreign subsidiary is taxable at the ordinary corporate income tax rate. If such interest was subject to withholding tax in the source country, a foreign tax credit is available equal to

$$\frac{\text{foreign withholding tax (maximum 15\%)} \times \text{interest received}}{100 - \text{foreign withholding tax (maximum 15\%)}}$$

With respect to interest bearing securities and bonds, the foreign tax credit should be prorated with reference to the period that such instruments were owned by the recipient.

The net interest must be increased by an amount equal to the tax credit.

It is a standing principle of Belgian law that double tax treaties overrule provisions of domestic law, even if the latter are of a more recent date. In this respect, it should be emphasized that under certain tax treaties taxpayers are entitled to a higher tax credit (e.g. 15% or 20%) or to a tax credit even if the interest was not subject to withholding tax abroad (i.e. tax sparing credit).[31] Belgium has announced to renegotiate certain treaties in order to make them consistent with its domestic law (e.g. treaty with Singapore, Korea, Brazil).

Royalties received by a Belgian corporation from its foreign subsidiary are taxable at the ordinary corporate tax rate. If such royalty was subject to withholding tax in the source country, a fixed foreign tax credit equal to 15/85 of the net royalty received, is available, regardless the amount of foreign withholding tax. The net royalty has to be increased by an amount equal to the fixed

[31] Wyntin, D., Het nieuwe FBB-systeem en de dubbelbelastingverdragen, Fiskoloog Internationaal, n° 87, p. 9 *et seq.*; De Broe, J., Kroniek internationaal belastingrecht, T.R.V., 1991, p. 274 *et seq.*

foreign tax credit. This rule of domestic law may also be overriden by tax treaties providing for a higher tax credit or a tax sparing credit.

III. International Business Combinations

A. General

In the past, international business combinations through cross-border mergers or transfers of a division of a company have been extremely difficult. Such operations were severely hampered by the tax cost. In Belgium, a merger involving the transfer of all assets and liabilities of a Belgian corporation to a non-Belgian absorbing corporation with the issue of shares by the latter could not take place without incurring a tax liability. One of the requirements of the Belgian tax laws with respect to mergers is that for the merger to be tax exempt the surviving corporation must be a tax resident of Belgium (Art. 124, § 1 I.T.C.). As a result, the absorption of a Belgian corporation by a non-Belgian corporation triggered a 39% corporate tax on the difference between the value at which the assets were transferred and their tax base as well as on the tax exempt retained earnings of the Belgian corporation.

In other jurisdictions similar rules applied rendering a merger of a corporation resident in such jurisdiction into a Belgian corporation tax prohibitive.

International cooperation between companies established in different jurisdictions was therefore achieved through alternative structures such as joint holding companies; cross-shareholdings; joint venture agreements and Economic Interest Groupings.

However, in each of the alternatives one had to carefully examine the tax consequences of the structure.

For instance, in order to establish a joint holding company in a third country, one typically has to find a jurisdiction that provides a full tax exemption on dividend income and has a favorable tax treaty with both Belgium and the country of establishment of the other business partner[32], and which ideally allows a deduction for financial expenses.

Moreover, after the 1989 corporate tax reform, it became necessary to ascertain the availability of the “dividend received deduction” to the ultimate Belgian shareholder with respect to dividends distributed by the foreign joint holding. Such deduction is denied, inter alia, to dividends distributed by tax haven companies; non-Belgian finance and holding companies that benefit from an advantageous tax status in their country of residence and foreign holding companies distributing dividends that would not qualify for the “dividend received deduction” had such income been distributed directly to the Belgian shareholders (see supra II.B.).

[32] *E.g.* Belgium/Netherlands treaty: 50% dividend withholding tax for direct shareholdings of 25% ; Belgium/United Kingdom treaty: 5% in case direct or indirect voting rights of 25%; Belgium/United States: 5% for direct shareholding of 10%.

Capital gains realized by a Belgian corporate shareholder on an exchange of shares in structures involving cross-shareholdings could not benefit from the exemption provided for by the former Art. 36 I.T.C.. Hence, they were subject to tax at the full rate or, if the shares were held for more than five years, the reduced capital gains tax rate.[33] The amount of the capital gains was equal to the difference between the fair market value and the tax base of the shares so exchanged (Art. 32 quinquies I.T.C.).

Cooperation between companies established in different jurisdictions involving the setting-up of joint ventures, such as partnerships, often result in a non-resident company being deemed to have a permanent establishment in the country of the other partner or the country where the business is conducted. For instance, a non-resident of Belgium entering into a partnership agreement with a Belgian corporation ("association en participation"/"vereniging in deelneming") will be deemed to have a permanent establishment in Belgium if the joint business is conducted in Belgium or if the partnership has an office or some other type of fixed establishment in Belgium (Comm. Tax Treaties 5/244-245; Bruxelles, 07.11.1955 confirmed by Cass., 18.01.1957; Bruxelles, 17.01.1963, quoted by Com. I.T.C. 140/22).

B. Implementation of the EEC Directive 90/434 of July 23, 1990 on the Common System of Taxation applicable to Mergers, Divisions, Transfers of Assets and Exchange of Shares concerning Companies of Different Member States

a. Enactment of EEC-Directive 90/434

Acknowledging that the combination of companies established in different countries was hampered by restrictions and distortions arising in particular from the tax provisions of the EEC Member States on July 23, 1990, the EC-Council adapted Directive 90/434 on the common system of taxation applicable of mergers, divisions, transfers of assets and exchange of shares concerning companies of different Member States (hereafter "Merger. Directive").

The common tax system which will be enacted in compliance with the Merger Directive should avoid the imposition of tax in connection with reorganisations, while also acting to safeguard the financial interest of the country of residence of the transferring or acquired corporation. The Merger Directive introduces a system of tax neutrality. Mergers, divisions and transfers of branches normally result in the transferring company becoming a permanent establishment of the transferee company. Therefore, with respect to capital gains relating to the assets transferred to the permanent establishment, a tax deferral system should be applied until the actual disposal of such assets.

Capital gains realized by the shareholders of the transferring corporation

33 This rule is applicable until tax year 1991. As of tax year 1992 capital gains realized on shareholdings will in principle be fully tax exempt.

upon exchanging their shares in such corporation for new shares of the transferee corporation should also be tax exempted.

EC Member States must enact all legislation necessary to comply with the Merger Directive no later than January 1, 1992 (except Portugal for which the deadline expires on January 1, 1993). They may, however, elect not to apply the rules described above where the reorganisation in question is being used for the purposes of tax evasion or avoidance or to circumvent employees' representation in company councils.

b. Implementation of EEC-Directive 90/434

At the time this report was prepared, Belgium has enacted only some of the legislation necessary to conform its tax laws with the types of reorganisations envisaged by the Merger Directive. Changes so far are as follows.

1. Capital Gains on Exchanges of Shares

Beginning with the tax year 1992, capital gains realized upon an exchange of shares by a Belgian corporation for shares in a non-Belgian corporation are fully tax exempt, provided that the shares which are disposed of are not shares in a tax haven company, a foreign holding or finance company that benefit from a special tax regime; or a foreign company holding shares in foreign companies that cannot distribute tax free dividends directly to the Belgian shareholder (new Art. 105 bis I.T.C.).

Accordingly, Belgium has implemented Article 2 (d) of the Merger Directive.

The exemption provided for applies to capital gains realized on exchanges of shares, regardless of whether the shares involved relate to companies established in the EEC or not.

2. Transfer of a Branch

Under a draft bill that was enacted in September 1991, capital gains realized by a Belgian company on the transfer of any of its branches to a company established in the EEC in exchange for shares would benefit from a tax deferral if the assets of the branch are invested in a Belgian establishment of the transferee. The acquiring corporation must value the assets and liabilities transferred at the bookvalue as recognized by the transferor company. The latter must value the shares received at the same value as the assets transferred (draft Art. 40, § 1, § 2, § 3 I.T.C.).

This system of tax deferral may not be allowed if the tax administration can demonstrate that the reorganisation is not motivated by financial or business objectives. The tax administration will issue advance rulings in this respect (draft Art. 250 bis I.T.C).

Furthermore, this system does not apply if the transferee company is based outside of the EEC. A transfer of a branch by a Belgian company to a non-EEC company will thus trigger taxation of capital gains realized on the assets transferred. The tax deferral mechanism applicable if the taxpayer reinvests in depreciable assets (see supra I.B.b.) never applies to such transfers.

Due to the fall of the Belgian Government in October 1991, this draft bill has not been voted upon by the Parliament. It is thus quite unlikely that this legislation will be in force by January 1, 1992.

3. Mergers and Divisions

Belgium has not enacted any legislation in either final or draft form to implement the Merger Directive with respect to mergers and divisions of companies.

Under the current Belgian tax law (Art. 124, § 1I.T.C.) a merger of a Belgian company into a non-Belgian company or a division of a Belgian company into at least one non-Belgian company will thus always be taxable.

Exhibit I: Deferral of capital gains tax on assets

- Bookvalue of the asset: BF. 3,000,000
- Sales price: BF. 4,000,000
- Capital gain: BF. 1,000,000
- Amount to be reinvested: BF. 4,000,000
- Reinvested asset depreciable over 5 years (20% straightline).
- Capital gain will be taxable over 5 years.
- Each year 200,000 BF becomes taxable at 39%.

Exhibit II: Taxable merger of Subsidiary company S into Parent company P

S

tangibles	2.000	capital	1.000
stock in trade	5.000	retained earnings (taxed)	2.000
receivables	1.000	retained earnings (untaxed)	1.000
		debt	4.000
	8.000		8.000

P

shareholding S (100%)	3.000	capital	2.000
		retained earnings	2.000
tangibles	2.000	debt	1.000
	5.000		5.000

S' tangibles will be transferred at 10.000, its stock in trade at 7.000 and the receivables at 1.000.

i. Situation at S

- Capital gain realized at the occasion of the merger on tangibles and stock in trade (Art. 117 I.T.C.):

(10.000 – 2.000):	8.000	
(7.000 – 5.000):	2.000	
	10.000	
taxable at 39% = 3.900		

- Taxation of tax exempt retained earnings (Art. 118 I.T.C.):

liquidating distribution:	18.000	
	– 4.000	(debtS)
	– 3.900	(tax on capital gain)
	10.100	
minus share capital	(1.000)	
minus taxed retained earnings and net capital gain realized at the merger	(8.100)	
untaxed retained earnings	1.000	
taxable at 39% = 390		

- Net after tax value of assets transferred:

	18.000	
–	4.000	(debtS)
–	4.290	(tax on capital gains & untaxed retained earnings)
	9.710	

ii. Situation at P

- The shareholding in S will be replaced by the assets transferred from S. At this occasion P realizes a capital gain of 6710.

Tangibles (ex S):	10.000
Stock (ex S):	7.000
Receivables (ex S):	1.000
Debt (ex S):	4.000
Tax debt:	4.290
Shareholdings:	3.000
Capital gain:	6.710

Such capital gain will be exempt up to 95% under the “dividend received deduction”:

Capital gain:	6.710
Div. Rec. Ded. (95%):	(6.375)
Taxable:	335
Tax (39%):	137
Net after Tax:	6.579

- The depreciable basis of the tangibles will be stepped up to 10.000 and the tax basis of the stock in trade to 7.000.

Exhibit III: Tax exempt merger of Subsidiary company S into Parent company P

S

tangibles	2.000	capital	1.000
stock in trade	5.000	retained earnings (taxed)	2.000
receivables	1.000	retained earnings (untaxed)	1.000
		debt	4.000
	8.000		8.000

P

shareholding S (100%)	3.000	capital	2.000
		retained earnings	2.000
tangibles	2.000	debt	1.000
	5.000		5.000

S’ tangibles will be transferred at 10.000, its stock in trade at 7.000 and the receivables at 1.000.

i. Situation at S

- Capital gains realized at the occasion of the merger on tangibles and stock in trade (Art. 117 I.T.C. not applicable):

(10.000 – 2.000):	8.000
(7.000) – 5.000):	2.000
	10.000

Tax exempt (Art. 124, § 1, 1° I.T.C.)

- Taxation of tax exempt retained earnings (Art. 118 I.T.C.):
  Untaxed retained earnings 1.000
  Taxable at 39% = 390 (Art. 124, § 1, 2° I.T.C.)
- Net after tax value of assets transferred:

	18.000	
–	4.000	(debtS)
–	390	(tax debt)
	13.610	

ii. Situation at P

- The shareholding in S will be replaced by the assets transferred from S. At this occasion, P realizes a capital gain of 10.610.

Tangibles (ex S):	10.000
Stock (ex S):	7.000
Receivables (ex S):	1.000
Debt (ex S):	4.000
Tax Debt:	390
Shareholding S:	3.000
Capital gain:	10.610

Part of this 10.610 capital gain (i.e. 610) will be treated as dividend and be exempt up to 95% under the "dividend received deduction". The remainder (10.000) will be fully tax exempt. There is no further obligation to record such portion of the capital gain on a blocked reserve account.

The "dividend received deduction" will apply to the difference between, on the one hand, the amounts as defined in Art. 118 I.T.C. (i.e. the share capital and the taxes and untaxed retained earnings) and, on the other, the tax base of the shareholding in S (Art. 111, § 1, 2° I.T.C).
[(1.000 + 2.000 + 1.000) – 390] – 3.000 = 610
This 610 benefits from the dividend received deduction regime:

Div. Rec. Ded. (95%);	(580)
Taxable:	30
Tax (39%):	(12)

The remainder of the capital gain ([10.610 – 610] = 10.000) will be fully tax exempt.

- The assets transferred from S do not benefit from a step-up in basis. Their tax base at P is 2.000 (tangibles), 5.000 (stock in trade) and 1.000 (receivables).

Résumé

Les acquisitions de sociétés belges prennent généralement la forme soit d'achats d'actions, soit d'achats d'actifs. Les gains en capital réalisés par le vendeur à l'occasion de cessions d'actions dans une société belge sont par principe exonérés d'impôts, que le vendeur soit une personne physique ou une personne morale résidant en Belgique. Un achat d'actions ne permet pas une réévaluation des actifs de la société acquise. Les ventes d'actifs par une société belge seront imposables. Si des réinvestissements spécifiques peuvent être effectués, les impôts peuvent être différés.

Les baisses de valeur des actions ou les pertes en capital subies sur les ventes d'actions ne sont pas déductibles aux fins fiscales. En cas de transaction sur un actif, le coût de l'achat peut faire l'objet d'un amortissement soit linéaire, soit dégressif. Le fonds de commerce donnera lieu à un amortissement linéaire au bout d'une période de cinq ans au minimum.

Les intérêts de la somme empruntée sont déductibles dans le cas d'une transaction sur un actif ou d'une transaction sur des actions. La législation fiscale belge ne contient pas de règlement concernant la capitalisation faible. L'imputation du coût du financement de la société qui procède à l'acquisition sur les bénéfices de la société acquise est subordonnée à une fusion entre les deux sociétés. Cette fusion peut, au choix du contribuable, être ou non exonérée d'impôts. Néanmoins, si la société qui absorbe l'autre n'est pas une résidente de la Belgique, ou si la société absorbée conserve des gains non imposés une telle fusion ne peut être assortie d'une exonération d'impôts. Les fusions qui impliquent des sociétés déficitaires s'opèrent généralement de telle façon que la société qui réalise des bénéfices est absorbée par la société déficitaire afin de préserver la récupération des pertes.

La Belgique a appliqué la Directive de la CEE sur les relations entre société-mère et filiale. Les dividendes distribués sont exonérés à concurrence de 95 pour cent. Les coûts du financement relatifs à l'achat des actions restent entièrement déductibles. La Belgique n'a pas appliqué la Directive sur les fusions. Toutefois, la législation en vigueur prévoit une exonération totale des gains en capital réalisés à l'occasion d'un échange d'actions.

Zusammenfassung

Der Erwerb belgischer Unternehmen erfolgt in der Regel entweder durch den Erwerb der Gesellschaftsanteile oder des Betriebsvermögens. Die vom Veräusserer erzielten Veräusserungsgewinne aus einem Verkauf der Anteile an einer belgischen Gesellschaft sind im Grundsatz steuerfrei. Insoweit spielt es keine Rolle; ob der in Belgien ansässige Veräusserer eine natürliche Person oder eine Körperschaft ist. Mit dem Erwerb der Gesellschaftsanteile ist keine Neubewertung des Anlagevermögens der erworbenen Gesellschaft verbunden. Die Veräusserung von Wirtschaftsgütern durch eine belgische Körperschaft führt zu einer Besteuerung. Werden die Gewinne reinvestiert und bestimmte Bedingungen erfüllt, kann die Steuerpflicht auf spätere Jahre verlagert werden.

Wertminderungen bei den Gesellschaftsanteilen oder Kapitalverluste, die bei der Veräusserung von Gesellschaftsanteilen eintreten, sind steuerlich nicht abzugsfähig. Im Fall einer Übertragung des Betriebsvermögens können die Anschaffungskosten entweder direkt oder degressiv abgeschrieben werden. Goodwill soll direkt über einen Mindestzeitraum von fünf Jahren abgeschrieben werden.

Finanzierungskosten können sowohl beim Erwerb der Gesellschaftsanteile als auch des

Betriebsvermögens in Abzug gebracht werden. Das belgische Steuerrecht enthält keine Bestimmungen gegen Unterkapitalisierungen. Die Verrechnung der Finanzierungskosten mit den Gewinnen der erworbenen Gesellschaft setzt eine Verschmelzung beider Unternehmen voraus. Eine solche Verschmelzung kann je nach dem Willen des Steuerpflichtigen steuerneutral oder steuerpflichtig durchgeführt werden. Ist jedoch die aufnehmende Gesellschaft nicht in Belgien ansässig oder hat die aufgenommene Gesellschaft nicht versteuerte stille Reserven, lässt sich die Fusion nicht steuerneutral durchführen. Fusionen, an denen Gesellschaften mit Verlusten beteiligt sind, werden typischerweise so gestaltet, dass die Gewinn erzielende Gesellschaft von der Verlustgesellschaft aufgenommen wird, so dass die Verlustverrechnungsmöglichkeit erhalten bleibt.

Belgien hat die EG-Mutter-Tochter-Richtlinie in belgisches Recht transferiert. Dividendenausschüttungen sind zu 95% steuerbefreit. Finanzierungskosten für den Erwerb der Gesellschaftsanteile bleiben voll abzugsfähig. Die EG-Fusionsrichtlinie ist noch nicht in innerstaatliches Recht umgesetzt worden. Das geltende Recht sieht jedoch bereits eine vollständige Freistellung der Veräusserungsgewinne vor, die bei einem Tausch der Gesellschaftsanteile entstehen.

Resumen

Por lo general, las adquisiciones de sociedades belgas toman la forma bien de compras de acciones, bien de compras de activos. Por principio, quedan exentas de impuestos las ganancias en capital realizadas por el vendedor por la cesión de acciones en una sociedad belga, tanto si el vendedor es persona física como si es persona jurídica residente en Bélgica. La compra de acciones no permite la revalorización de los activos de la sociedad adquirida. Sewrán gravables las ventas de activos por una sociedad belga. Pueden quedar diferidos los impuestos si es efectúan reinversiones específicas.

La baja del valor de las acciones o las pérdidas en capital sufridas en las ventas de acciones no son deducibles a efectos fiscales. En caso de transacción sobre un activo, el costo de compra puede ser objeto de amortización li o degresiva. El fondo de comercio dará lugar a una amortización lineal al cabo de un periodo de cinco años como mínimo.

Los intereses de la suma recibida en préstamo son deducibles en transacciones sobre un activo o sobre acciones. La legislación fiscal belga no contiene reglas sobre la feble capitalización. La imputación del coste de financiación de la sociedad que procede a la adquisición sobre los. beneficios de la sociedad adquirida queda subordinada a la fusión de las dos sociedades. Esta fusión puede, a elección del contribuyente, quedar exenta de impuestos o no.

Sin embargo, si la sociedad que absorbe a la otra no es residente en Bélgica, o si la sociedad absorbida conserva ganancias no gravadas, esta fusión no queda exenta de impuestos, las fusiones que implican a sociedades deficitarias se realizan de forma tal que la sociedad que tiene beneficios es absorbida por la deficitaria para preservar la recuperación de las pérdidas.

Bélgica ha aplicado la Directriz de la CEE sobre relaciones entre matriz y filial. Los dividendos distribuidos quedan exentos hasta el 95 por ciento. Son deducibles en su totalidad los costos de financiación de la compra de acciones. Bélgica no ha aplicado la Directriz sobre fusiones. Sin embargo, la legislación en vigor prevé la exoneración total de las ganancias en capital realizadas en un intercambio de acciones.