

Additional clarifications re. the use of the Form 275.F, i.e. for payments made to persons located in so-called "tax havens"

a) General

For payments as from January 1, 2010, Article 307 of the Belgian Income Tax Code (hereafter "BITC") provides for an obligation for (resident and non-resident) companies to report in an annex to their tax income return (i.e. through the specific Form 275.F) all direct and indirect payments insofar these payments:

- are made to persons located in states that are considered (i) not effectively or substantially applying the OECD standard on the exchange of information or (ii) as a tax haven or low-tax jurisdiction, identified as such by Royal Decree; and
- amount to at least EUR 100,000 in the taxable period (to be assessed on a consolidated basis, i.e. the total payments should be at least EUR 100,000).

The Law of 1 July 2016 has recently broadened the scope of aforesaid reporting obligation, resulting in the fact that as of 14 July 2016 also payments to a permanent establishment located in a tax haven or on a bank account located in such a tax haven¹ need to be reported on the Form 275.F.

In case the taxpayer does not disclose the aforementioned payments, Article 198, §1, 10° of the BITC provides that these payments will automatically be considered as disallowed expenses.

However, payments made directly or indirectly to persons established in aforesaid targeted jurisdictions will also be non-deductible, even if they are duly reported, to the extent the taxpayer does not provide satisfactory evidence, e.g. upon a tax audit, that they are made in the framework of 'real and sincere' transactions and with persons other than 'artificial arrangements'.

b) Notion of "Tax havens"

For the purpose of this specific reporting obligation, jurisdictions that are classified as 'tax havens' and thus fall within the scope of this provision can be summarized as follows:

1. Jurisdictions that – at the moment of payment – have been identified as "non-compliant" with the standards of transparency and exchange of information for tax purposes by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (hereafter "OECD's Global Forum").

On the most recent list of 4 November 2016, the following jurisdictions have been added to the list of non-compliant jurisdictions, i.e. Marshall Islands, Panama, Guatemala, Micronesia, and Trinidad and Tobago. Note that Panama, Guatemala, and Trinidad and Tobago were not previously mentioned on the Belgian list (see hereafter). The reporting obligation starts for all payments made to these countries as of 4 November 2016, irrespective of the financial year.

OR

2. Non-tax or low-tax jurisdictions, as mentioned in Article 179 of the Royal Decree executing the Belgian Income Tax Code (hereafter "RD/BITC"). The provision refers to jurisdictions with a nominal corporate tax rate below 10%² or jurisdictions where the effective tax rate on foreign source income is lower than 15%.

¹ This includes (i) bank accounts managed or held by persons or permanent establishments in "tax havens" and (ii) bank accounts managed by or held with credit institutions located or with a permanent establishment in "tax havens".

² The Royal Decree currently includes a list of 30 countries, i.e. Abu Dhabi, Ajman, Andorra, Anguilla, Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Dubai, Fujarah, Guernsey, Jersey, Jethou, Maldives, Isle of Man,

The latter ones are the so-called "territorial" tax systems or "offshore regimes" (e.g. Singapore, Hong Kong), that in principle levy normal taxes on income derived on their territory ('onshore'), but have exemptions for income arising abroad ('offshore').

For the time being, note that the Belgian Royal Decree identifying these territorial tax jurisdictions is still under preparation, i.e. currently no jurisdictions are impacted by this additional scope. Irrespective, it goes without saying that, from a prudence perspective, considering that the text of the law is clear and hereby taking into account the risk of non-deductibility for such payments, it is advisable to already include payments made to persons located in such "territorial" tax jurisdictions as of 1 January 2016 on the Form 275.F.

c) Substantial direct or indirect payments

Direct or indirect payments qualify as "substantial" under the specific reporting obligation to the extent the payments amount to at least EUR 100,000 per taxable period and per jurisdiction. In order to determine if this threshold has been exceeded, one should also take other payments to these tax havens during that taxable period into account.

In a Circular letter d.d. 30 November 2010 (hereafter "the Circular"), the Belgian tax authorities specified that a "payment" is to be interpreted in a broad way and includes payments in cash or via bank transfer as well as payments in kind. According to the Belgian tax authorities, it is also irrelevant whether the payments are made by the taxpayer in his own name and for his own account or in name and/or for account of third parties. Moreover, it is irrelevant whether the payment represents a cost or is made for a consideration. In the Circular examples of targeted payments are listed: e.g. payment of rent, interest or royalties, the repayment of capital and the payment of purchase price for goods or fixed assets.

The reporting and deductibility requirements apply both to "direct and indirect" payments to "tax havens". However, the legal provisions do not indicate clearly when a payment constitutes an indirect payment to a "tax haven".

d) Sanction: non-deductibility for income tax purposes

In the case the taxpayer forfeits the disclosure of the aforementioned payments, these payments will in principle automatically be considered as disallowed expenses.

However, the aforesaid Circular clarifies that this automatic sanction will not apply if the recipient is able to successfully invoke (i) the non-discrimination clause in a double tax treaty or (ii) the EU free movement of capital.

Finally, for sake of completeness, please note that payments made directly or indirectly to persons established in targeted jurisdictions will always be non-deductible, even if they are duly reported (or a tax treaty or the free movement of capital applies), to the extent the taxpayer does not provide satisfactory evidence, e.g. upon the occasion of a tax audit, that the payments are "real and sincere" transactions with persons other than "artificial arrangements".