

What Belgium's tax amnesty will mean

Belgian taxpayers could receive a tax amnesty on interest from savings held in accounts in other EU member states. [Marc Quaghebeur](#) of DLA reveals how

The Belgian parliament has started examining the draft Bill submitted by the government that will allow Belgian residents to regularize undeclared savings.

In September, the government parties agreed on a Bill granting a general tax amnesty for tax dodgers who would repatriate funds invested abroad. The Belgian National Bank estimates that Belgians hold about €161 billion (\$190 billion) in banks abroad, mostly in Luxembourg and Switzerland.

Background

The tax amnesty is timed to coincide with the introduction of the *EU Savings Directive*. As of 2005 each EU member state will notify the tax authorities of the other member states how much income their residents have collected on their savings.

The Belgian tax authorities will then know exactly how much interest income each of its taxpayers has collected abroad. Interestingly enough, Belgium values its own banking secrecy rules too much to join in, at least for the immediate future. Together with Austria and Luxembourg, Belgium will withhold tax at 15% on interest earned by overseas savers on their Belgian savings, then at 20% (as of 2008), and finally at 35% (as of 2011).

The Directive will, however, only enter into force if an agreement is reached with Switzerland and other tax havens as well as with the USA. Moreover, it remains to be seen whether the system of exchange of information can be set up and working on January 1 2005.

Another reason for the tax amnesty is, of course, to help balance the Budget. The minister of finance hopes for a windfall of between 500 million and €1 billion, but has registered 850 million in next year's Budget.

The tax amnesty programme

The original plan was that a taxpayer would transfer their offshore savings to a Belgian bank account and the bank would then take 9% and deliver a certificate confirming that the tax has been duly paid. The taxpayer would be able to produce this certificate to counter a tax investigation into the origin of the funds. Moreover, if the taxpayer invested the money in the Belgian economy, the tax would only be 6%.

The plan had to be adapted twice and it is likely that it will undergo further changes. The principle that the assets needed to be invested in the Belgian economy was the first to go; this would inevitably have raised objections from the European Commission. The government has now also abandoned the requirement that the money be brought back to Belgium.

However, no decision has been made as to some other potentially discriminatory conditions, which are likely to undermine the entire tax amnesty.

Which taxpayers and which investments

The tax amnesty is laid down in a Bill about the single tax return to secure a release from tax liability (*declaration libératoire unique*).

The principle is that in 2004 Belgian resident individuals – as well as non-residents liable to Belgian income tax – can clear the funds, capital or securities, which they have received but failed to record in their accounts or declared in a tax return, or on which they have failed to pay tax in Belgium.

To avoid abuse a condition has been built in that these savings must have been held on an account with a foreign bank or securities company before June 1 2003. If the account is not in the taxpayer's own name, they have to prove that they are the benefi-

cial owner of the account. Funds held on a bank account in one of the non-cooperative countries and territories established by the OECD Financial Action Task Force (the Cook Islands, Egypt, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, the Philippines and Ukraine) are excluded.

A big concern is that the tax amnesty is not available to individuals who hold their undeclared investments in a Belgian bank account. Securities in a safe or savings invested in an insurance policy, a trust, a holding company or in real property are excluded from the amnesty as well. This may be deemed to be discriminatory, and it is unlikely that the *Cour d'Arbitrage*, the Belgian constitutional court, will be swayed by the reasons stated for excluding these investments (the difficulties to trace these investments or to establish ownership, and the fact that cash operations render the money laundering legislation ineffective). The minister of finance has also announced that he wants to extend the amnesty to stock, bonds and other debt instruments as well as certificates of investment funds to avoid

Procedure

A taxpayer can regularize their undeclared savings by filing a single final tax return. The taxpayer has the choice as to whether or not they repatriate the funds and securities. Following the protest of the Luxembourg bankers, the condition that the funds be repatriated has been abandoned. However, the option not to repatriate the funds will be made as unattractive as possible within the constraints of European law.

If the taxpayer transfers their savings to a Belgian account with a bank or stock broking company authorized by the Belgian Banking Commission, they can complete an anonymous tax return with that financial

Taxes on investment funds increase

The announcement last June that the government would triple the annual tax on investment funds was greeted with loud protest from the Belgian investment fund sector. The minister opened negotiations with the sector, reaching the following compromise.

- The rate of the annual tax on collective investment institutions is maintained at 0.06%, but as of 2004 it will also be due by fund managers that manage contractual investment funds, by foreign fund managers that offer investment funds in Belgium and by insurance companies that propose investment funds linked to life insurance products (so-called branch 23 products).
- The tax will be increased to 0.07% in 2005 and to 0.08% in 2008.
- The tax will no longer be calculated on the net asset value of the fund but on the total of the net outstanding amount as of December 31. This is the total value of the fund minus any redemption.

This tax will, in any event, be charged back to the private investor, who will also have to pay more for bearer securities. Moreover, the tax on the physical delivery of bearer securities will be raised from 0.2% to 0.6% in 2004. This meets another demand of finance as it makes securities accounts more attractive than labour intensive bearer securities.

The Belgian fund managers win on two counts. Not only do they do not see the tax tripled, but their competitors in the insurance sector lose the small competitive advantage they had.

The questions now are how the annual tax on foreign investment funds can be put in place and how the tax can be levied on the part of the funds that are held by Belgian investors. Financial institutions that distribute foreign UCITs and that already pay a similar tax abroad (for example, the Luxembourg *taxe d'abonnement* on SICAVs) will pay this tax twice.

institution. The bank will withhold a one-off tax of 9% of the value of the funds or securities.

The tax can be reduced to 6%. If the taxpayer invests the funds or securities in the economy of the European Union for at least three years, they will be able to recover one-third of the tax paid. The details of how this investment obligation would work will be worked out in a royal decree but it is anticipated that the banks will have to monitor compliance with these conditions.

One of the initial concerns was that the tax of 9% would be levied on the entire savings brought back to Belgium even if the taxpayer had earned or received the invested capital without avoiding any tax. A tax of 9% would have been a disproportionate penalty for failing to pay the tax on the interest income alone. The government has now confirmed that these taxpayers only

have to declare the interest on which they have not paid tax in the past.

Taxpayers do not need to repatriate the funds but, if they leave their savings abroad, they cannot file an anonymous return with a financial institution. They will then have to file a tax return with, and pay the tax directly to, the Belgian tax authorities. The rate is 9% as well. In principle, they would also be able to claim the 6% rate. But it is likely that the government's undeclared intention is to draft narrowly the practical conditions for claiming the partial reimbursement, making it difficult to comply with.

The obligation to declare the funds directly to the Belgian tax authorities will be a deterrent as taxpayers will be reluctant to face the risk of a severe tax audit. The only justification seems to be that only financial institutions monitored by the Belgian Banking Commission can offer the required levels of internal control and compliance.

The scope of the amnesty

The financial institution will issue a certificate in the taxpayer's name which will, in principle, release them from any liability to tax or social security contributions, tax increases, interest and penalties. It will also protect the individuals from whom the taxpayer has received these assets. Moreover, the return cannot be used as an indication of undeclared income allowing the tax authorities to start an investigation, to inform other tax authorities on possible infringements on the tax legislation or to exchange information with other authorities.

The amnesty cannot be used to come clean for funds, capitals and securities earned in 2002 or 2003, or inherited from a Belgian resident deceased before January 1 2003 unless no inheritance tax return has been filed. Also excluded are assets obtained from a money laundering operation or of an underlying criminal activity such as terrorism, organized crime, illegal drugs or arms trafficking, corruption, exploitation of prostitution, illegal trade in human organs, and serious and organized tax fraud. In such cases, the anti-money-laundering unit will inform the judicial and tax authorities for further investigation.

The notion of serious and organized tax fraud relates to cases of significant tax fraud such as complex financial mechanisms with a transnational dimension as well as VAT-carousels. Whether tax fraud is serious does not only relate to, for example, the use of false documents, but mainly to the impact on public revenues or the socio-

The Italian tax amnesty success

Italy's broad amnesty for unpaid individual and corporate income tax, regional corporate tax, value-added tax and transfer tax, custom duties, television licence fees, car registration, waste removal taxes, and social security is an interesting comparison. The amnesty extends to fines and penalties and prevents any tax audit and criminal prosecution for the past (until 2001), and it can terminate tax litigation in process.

Regularization or repatriation of offshore savings (tax shield) through a confidential disclosure with a bank or financial intermediary:

- rate of 4% (2.5% before March 16 2003);
- funds must be repatriated to Italy; and
- ended on June 30 2003.

Accounts and undeclared income can be regularized by submitting a tax return:

- rate between 4% to 8% (tax litigation can end with a payment of 10% to 50% of the disputed amount); and
- ended on October 16 2003.

The amnesty meant that over €60 billion (\$73 billion) has been repatriated resulting in a windfall in tax revenue of €8.5 billion.

economic order. Fraud is organized if complex legal structures, front companies or straw men are used, and if the capital is transferred through multiple bank accounts.

Finally, the tax amnesty will not have any effect if the taxpayer has been notified in writing of an investigation by the tax or social security authorities or if a criminal investigation has been started.

Chances of success

The current text of the Bill leaves an important number of issues unanswered, some on which the *Conseil d'Etat* specifically pointed out.

As the amnesty covers inheritance tax and registration taxes (which are now regional taxes), the amnesty needs to be approved by the parliaments of the three regions. And this may be a problem in the Flemish region, where the Bill may not find a sufficient majority until after the next regional elections on June 13 2004.

Unless taxpayers have the legal certainty that the European Commission will not block the amnesty and that it will not be repealed by the *Cour d'Arbitrage*, they will remain reluctant to apply for it.

In particular, the discrimination against financial firms of other EU member states is likely to be condemned by the European Commission. The *Association des banques et banquiers*, Luxembourg has already filed a complaint with the European

Germany plans for a bridge to tax honesty

General amnesty for unpaid individual and corporate income tax, trade tax, value-added tax, inheritance and gift taxes, payroll and withholding tax, due in or before 2001, as well as the fines and penalties. The amnesty prevents any tax audit and criminal prosecution for the past.

Offshore savings can be regularized in 2004 or in the first quarter of 2005, through a declaration for relief from criminal prosecution:

- rate of 25% (35% in 2005);
- repatriation of funds is not required; and
- ends on March 31 2005.

The German government is aiming for €20 billion to be repatriated in investments resulting in tax revenue of €5 billion.

Commission in the light of the free movement of capital and the freedom to provide services (see articles 56 and 49 of the *EC Treaty*). The association states that non-Belgian banks are discriminated against because they cannot guarantee an anonymous treatment of their clients' tax regularization and because they are excluded from obtaining the authorization for handling these single anonymous tax returns.

This difference in treatment is not necessary and it cannot be justified by any reason of public interest in particular where *Council Directive 2003/48/EC* of June 3 2003 on taxation of savings income in the form of interest payments (OJ, L 157, page 38) gives paying agents missions similar to the collection of the amnesty tax.

Moreover, the Luxembourg bankers invite the European Commission to examine the legislation in the light of the single passport granted to financial firms to operate throughout the EU subject to the regulations of their home country (*Directive 2000/12/EC* of the European Parliament and of the European Council of March 20 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, page 1), and *Council Directive 93/22/EEC* of May 10 1993 on investment services in the securities field (OJ, L 141, page 27). The requirement that the financial institution needs to be authorized by the Belgian Banking Commission is incompatible with this legislation.

Parliament will also have to find a solution to extend the amnesty to investments that were not held on a foreign bank account, such as bearer securities kept in a safe, or investments in an insurance policy. If the taxpayer has kept the purchase documents and can establish that they purchased the securities before June 1 2003, it

would be discriminatory to exclude these investments.

Prospects

Since the tax amnesty was announced, Belgian banks have noticed that taxpayers have started repatriating savings to invest them in long-term insurance bonds and open-ended investment companies (so-called SICAV funds) in the hope of organizing their own tax amnesty without paying the regularization tax. The interest received on these investments is not taxable and if the taxpayers are not found out within a period of five years, the tax authorities are time barred from claiming back the taxes. However, the minister of finance has announced his intention to stop this loophole. He is thinking of a 100% penalty for those taxpayers who had the opportunity to regularize their offshore investments but did not take it.

Moreover, the *Cour de Cassation*, the Supreme Court, decided on October 22 that a taxpayer can continue to be prosecuted as long as they derive direct benefits from the tax fraud. Even if the tax claim as such is time-barred, the taxpayer could face criminal prosecution as long as they hold undeclared earnings on a bank account. And this decision has the bank sector worried, as a bank would be an easy target of a criminal investigation for receiving and holding the proceeds of the tax evasion, as an accomplice of a tax defrauder.

However, Belgian banks are not unhappy with the tax amnesty, and they are keen to advise their clients about the opportunities of the tax amnesty. The amnesty tax is relatively low and the reasons for keeping savings offshore may not outweigh the taxes they face in Belgium. Inheritance rates in the direct line are relatively low in comparison to other countries even if there is no tax-exempt threshold, and the withholding tax of 15% due in Belgium is a final tax. Foreign banks such as UBS and Lombard Odier (Switzerland) and Edmond Rothschild (Luxembourg) have already set up an office in Belgium to follow their clients' savings.

Only half of the 161 billion in offshore investments would qualify for the tax amnesty. If the minister of finance hopes to collect 850 million next year, about 14% of the offshore investments will have to surface.

Marc Quaghebeur
(marc.quaghebeur@vandendijk-taxlaw.be),
Brussels