



The Success of the Gift tax in Flanders

The Flemish newspaper 'De Tijd', reported on 9 November that the Flemish Tax Authorities had seen a significant increase in gift tax collected. In the first nine months they received some € 82,5 million, twice as much as budgeted on the basis of last year's figures.

In a Decree of 19 December 2003¹, the Flemish Government had dropped the gift tax rates significantly.

The old gift tax rates are maintained for donations of real property. They range between 3 percent (on the first bracket of € 12,500) to 30 percent on the bracket above € 500,000 for donations between parents and children. The rates for relatives in the second degree (siblings) and the third degree (e.g. uncle – nephew) start at 20 or 25 percent with a maximum of 65 or 70 percent. The highest rates apply to donations between individuals who are not related: 30 to 80 percent (over € 175,000).

However, for a donation of moveable assets, including cash, securities, etc... the rates are simplified and reduced. The rate is 3 percent between (grand)parents and (grand)children and between spouses². For any other donations, the gift tax is 7 percent³. The additional € 41,3 million collected shows that donations have been made for a value of between € 590 and € 1,377 million.

Donations at 80 percent have always exceptional, but even within the same family the gift tax could be quite prohibitive. The hand-to-hand gift has been a favourite alternative for ages.

The gift tax is in fact a registration tax due at the time of the registration of the notarial deed recording the donation with the Ministry of Finance. Strictly legally speaking, a donation is not valid if it is not laid down in a notarial deed⁴. Traditionally, it has been accepted that a hand-to-hand gift of moveable assets was nevertheless valid. Since only the notarial deed must be registered and since this registration is the taxable event for the registration tax, the hand-to-hand gift is a legal means of avoiding the gift tax. However, the hand-to-hand gift has its shortcomings :

- it can only be used for moveable assets that can be physically handed over,
- the donor must live for another three years. If he dies within three years following the donation, the assets he has donated are included in his estate and are subject to the inheritance tax⁵.
- a hand-to-hand donation excludes – per definition – a written document, and this implies that the donor cannot make his donation conditional. If the donor wanted to make his donation conditional, a solution was to make the donation before a Dutch

¹ Belgian State Gazette, 31 December 2003.

² Partners living together under a cohabitation agreement (articles 1475-1479 of the Civil Code), or individuals who have set up household together for at least one year are assimilated to spouses.

³ Article 131 of the Registration Tax Code.

⁴ Article 931 of the Civil Code.

⁵ Article 7 of the Inheritance Tax Code.



notary, since no Dutch or Belgian gift tax is due.

The reduction of the gift tax means that donors living in Flanders could overcome all of these drawbacks and this has obviously seduced many people. Combined with the tax amnesty (for prior coverage see Doc 2004-20616), it allows taxpayers to repatriate their savings, pay a tax of 9 percent of the undeclared savings, and pass them on to their children at a cost of 3 percent.

However, it was rumoured that many donors considered that 3 or 7 percent was still too much, and that the reduced gift tax was abused to get around the inheritance tax. While the hand-to-hand gift can escape the liability to inheritance tax if there was a period of three years between the donation and the death, the inheritance tax can be avoided by a last-minute donation before a notary. Three percent gift tax is always less than 27 percent inheritance tax.

Suggestions that notaries might be called to somebody's deathbed to pass a notarial deed confirming a donation in order to avoid the inheritance tax, prompted a member of the Flemish Parliament to interrogate the Flemish Minister of Finance. Minister Van Mechelen replied that he did not plan to take measures against deathbed donations.

Nevertheless, one of the loopholes will be closed. To avoid inheritance tax, some had conceived donations subject to the suspensory condition of the donor's death. The donation only becomes effective at the time of the donor's death and still remains a donation subject to the 3 percent gift tax. There is, indeed, no provision in the Inheritance Tax Code that assimilates such conditional donations to a legacy.

The Minister of Finance will now propose legislation to assimilate such donations to legacies and to subject them to inheritance tax.

Marc Quaghebeur
9 November 2004