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PRACTITIONERS' CORNER

More Guidance on Belgium's General Antiabuse Rule

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The Belgian program law of March 29, 2012,[1] has replaced the general antiavoidance rule by an antiabuse rule. The GAAR was introduced in the income tax, registration tax, and inheritance tax codes in 1993 but had proven ineffective. The new rule must combat abuses of tax avoidance schemes, but even after Finance Minister Steven Vanackere published a first practice note, there was a demand for some examples of transactions that the tax authorities considered abusive tax avoidance.

On July 19, the tax authorities published a second practice note that gave a list of examples regarding the inheritance tax and registration tax.

Background

While Belgian tax law has specific antiavoidance rules, it was not until 1993 that a GAAR was introduced into law.

Until then, the tax authorities could only rely on the sham transaction doctrine to disregard an agreement between parties. This doctrine is based on the civil law concept of simulation in which the parties to a transaction show the outside world a set of documents that evidence a specific transaction or agreement (for example, a sale) while they have secretly agreed on a different transaction or agreement between themselves (for example, a donation for which the vendor will not ask the payment of the purchase price).

The sham transaction doctrine allows the tax authorities to look beyond the simulated transaction and to levy the tax based on the actual intended transaction. The problem is that simulation is hard to prove. The tax authorities must provide evidence that both parties to the transaction or agreement had the intention to conclude a different agreement than the one disclosed in the documents of the transaction. Unless they can produce written evidence, this is as good as impossible.

Moreover, the Belgian Supreme Court (Cour de Cassation) has again confirmed that taxpayers have the right to choose the ''route of the lower taxation.'' This means that parties are free to conclude any agreements in the way they want even if the form they choose is not the most common one. The only limitation is that parties must not infringe any statutory provision and that they must assume all the consequences of the chosen agreement or transaction. This is known as the *Brepols*[2] case law after the famous decision of the Supreme Court. It gave the tax authorities two alternative justifications to disregard a disclosed (public) agreement and tax the effects of the concealed (private) agreement. First, they can check if the behavior of the parties to the agreement is consistent with the public transaction; in other words, have they assumed all the consequences of the public agreement? Second, they

[1]Published in the Belgian State Gazette of April 6, 2012.

[2]Cass., June 6, 1961, *Brepols*, *Pasicrisie*, 1961, I, 1082:

> There is no prohibited simulation and hence, no tax evasion, if, in order to enjoy a more favourable tax regime, and without infringing any statutory obligation, parties conclude agreements of which they assume all the consequences, even if the form which they give to these agreements is not the most common.

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can disregard the public agreement or transaction if it is in breach of a compulsory legal obligation. When the authorities find such justifications, they can tax the effects of the concealed agreement.

In the 1980s, the tax authorities tried a different approach and argued that the tax must always be assessed on the reality.[3] If they found that the transaction presented to them did not correspond to the economic reality, they would be authorized to disregard the disclosed transaction.[4] The Supreme Court put a halt to that line of attack by confirming its decision in *Brepols* that the taxpayer was allowed to choose the route of the lower taxation even if the only purpose of the transaction was to reduce the tax burden.[5]

Brepols therefore only limits fiscal constructions that are simulated and not based on reality.

The First General Antiavoidance Rule

To limit the application of *Brepols*, in 1993 Belgium introduced a GAAR in the Income Tax Code (article 344, section 1 ITC 1992), Registration Tax Code (article 18), and Inheritance Tax Code (article 106). This rule stated that a taxpayer could not rely on the legal qualification given to a specific transaction when the tax authorities could prove that it was for the sole purpose of avoiding tax that parties had given a specific legal qualification to the transaction. If they did, the tax authorities could disregard the legal qualification given by the parties and give the operation the qualification and assess the tax on this basis. Nevertheless, the taxpayer could still prove that the given qualification met lawful financial or economic requirements.

Taking its inspiration from the step transaction doctrine, the GAAR also allowed the tax authorities to evidence that parties have split up one single legal transaction into separate legal transactions realizing one transaction for tax reasons only. The tax authorities could then look through the separate steps and treat them as one single operation.

A reference has been made to the Constitutional Court regarding whether article 344, section 1 of the ITC infringed the constitutional principle that there should be no taxation without representation. The Constitutional Court upheld the GAAR, but it took the opportunity to clarify the conditions for the application of article 344, section 1.[6] First, the tax authorities had to prove that the legal transaction had been chosen by the parties to avoid the tax, even if that is not their sole aim. Second, article 344, section 1 was limited to transactions involving economic activities that result in profits or benefits that are in principle liable to tax; transactions relating to a person's private estate that do not affect any taxable elements are to be disregarded. And finally, when the taxpayer tried to counter the evidence given by the tax authorities, he had to prove that the legal classification given to the transaction met lawful financial or economic requirements; this meant that he had to show why he had opted for that specific legal qualification.

The Supreme Court later decided that the legal qualification the tax authorities propose must have the same consequences in law as the one that the parties had chosen. The tax authorities thought that this limited the application of the GAAR, since it would be practically impossible to replace one qualification with another; two different agreements or transactions always have different consequences in law. Consequently, the provision could mainly be applied to a chain of separate or subsequent transactions that are split in an artificial manner, as was the case in the decision of the Supreme Court on June 10, 2010.[7]

In 2009 the parliamentary commission in charge of investigating major tax evasion cases[8] recommended that the antiavoidance rule be reinforced to preclude cases of manifest abuse that qualified as a choice for the route of the lower taxation. The commission proposed that the notion of abuse of law be introduced in the tax code. Abuse of the law (*abus de droit/ rechtsmisbruik*) is a concept in many continental jurisdictions in Europe in which a legal position is used for a purpose contrary to the objective of the rule granting it. This concept has found its way into the case law of the European Court of Justice in cases on fundamental freedoms and in VAT cases (for example, *Halifax*[9] and *Huddersfield*[10]). This inspired a new antiabuse rule in the Belgian VAT code.[11]

When the new government adopted its budget for 2012, one of the measures announced was to replace the GAAR with a tax abuse rule, making it easier for

[3]The Supreme Court decided that ''taxes do not take account of appearances or fictions, but are based on the reality,'' Cass., Oct. 18, 1949, SA EV-VR. Cass., Mar. 20, 1958, *Pasicrisie*, 1958, I, 805.

[4]Court of Appeal Antwerp, Mar. 2, 1978, *Ines*, *Journal de Droit Fiscal*, 1979, 344; *contra*, Cass., Feb. 27, 1987, *Maas Int'l*, *Pasicrisie*, 1987, I, 777; Cass., Jan. 29, 1988, *Van Rompaey*, *Pasicrisie*, I, 633.

[5]Cass., Mar. 22, 1990, *Au Vieux St Martin*, Fiscale Jurisprudentie/Jurisprudence fiscale 90/95.

[6]For prior coverage, see *Tax Notes Int'l*, Dec. 6, 2004, p. 824, *Doc 2004-22847*, or *2004 WTD 232-1*.

[7]*Re New Vertongen S.A. v. Belgian State* (F.08.0067.N).

[8]For prior coverage, see *Doc 2009-14250* or *2009 WTD 120-5*.

[9]*Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v. Commissioners of Customs & Excise* (C-255/02), Feb. 21, 2006.

[10]*University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise* (C-223/03), Feb. 21, 2006.

[11]For prior coverage, see *Tax Notes Int'l*, Aug. 7, 2006, p. 449, *Doc 2006-14566*, or *2006 WTD 149-1*.

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the tax authorities to recharacterize a transaction without having to prove that both transactions have identical or similar effects in law.[12]

The New Tax Abuse Rule

However, rather than introducing the concept of abuse of law in the tax code, the concept of ''tax abuse'' was introduced (*abus fiscal/fiscal misbruik*). In fact, tax abuse comes down to abusing the right to avoid the tax, so that the *Brepols* case law — and the right to choose the route of the lower taxation — is maintained.

A tax abuse is deemed to exist if a taxpayer places himself outside the scope of application of a provision in one of the relevant tax codes[13] (in other words, has used a tax avoidance scheme) in a way that is not compatible with the objectives of this provision. Alternatively, there can also be tax abuse if a taxpayer uses a tax avoidance scheme to benefit from the application of a provision of the tax law to obtain an advantage that is not compatible with the objectives of the tax law.

If the tax authorities establish that there is tax abuse, the taxpayer can prevent the application of the antiabuse rule if he can demonstrate that the scheme is sufficiently justified by motives other than the avoidance of tax. It is only if the taxpayer fails to demonstrate one or more nonfiscal motives that the tax authorities may disregard the abusive tax avoidance scheme to determine the taxable base and compute the tax due in line with the objectives of the tax law.

The new antiabuse provision gets around two major limitations of the antiavoidance rules. In order to proceed with the recharacterization, the tax authorities must prove that the new legal qualification of the transaction or series of transactions did not result in similar legal consequences as the original qualification by the taxpayer. Moreover, the new rules will have a major impact on estate planning.

First Practice Note

On May 4, 2012, the Belgian tax authorities published a first practice note, No. Ci. RH. 81/616-0279 (No. AFZ 3/2012), explaining the view of the tax administration. It is a handy summary of the text of the law and of the discussions in Parliament.

The practice note confirms that the new antiabuse provision targets transactions in both the economic and private sphere. It points out that if there is tax abuse, the taxable basis and the computation of the tax will be adjusted so that the legal transaction is taxed in accordance with the objectives of the tax provision. However, the tax authorities will only adjust the tax consequences, not the transaction between parties.

The note also confirms that tax abuse does not mean that the taxpayer is guilty of tax evasion or that he will be prosecuted. The antiabuse rule is a means for the tax authorities to prove that the tax has been avoided, allowing the tax administration to make an adjustment, which in matters relating to income tax must be done within a three-year period.

The practice note also confirms the role of the Ruling Commission. A taxpayer can request an advance ruling,[14] but the Ruling Commission is not authorized to decide whether the tax administration will apply the general antiabuse provision or if a tax avoidance scheme is not abusive. Its role will be limited to deciding whether a tax avoidance scheme that may be abusive is justified by the nonfiscal motives of the taxpayer.

Second Practice Note

The first practice note was vague and did not give any examples. Some advisers were confused and questioned whether even simple tax planning techniques like *inter vivos* donations to minimize the inheritance tax upon death were abusive. While the finance minister initially refused to give examples, he relented and on July 19, 2012, the Ministry of Finance published practice note no. 8/2012 on the application of the new general antiabuse provision under the inheritance tax code and the registration tax code. The circular clarifies that the following estate planning techniques do not constitute abuse:

- Hand-to-hand donations, donations in the form of a bank transfer, and donations before a foreign notary do not constitute abuse. These donations must not be registered in Belgium and, therefore, gift tax (which is a registration tax) is not due. However, because such donations are not liable to Belgian gift tax, they may be liable to inheritance tax together with the donor's estate if he dies within three years.
- Donations that are passed before a Belgian notary must be registered, possibly at a reduced gift tax rate (for example, 3 percent for donations of movables to children or a partner or for the donation of the shares of a family company).
- A donation in which the donor retains the usufruct right or another lifetime right does not constitute abuse. A donation now results in a tax saving compared with the inheritance tax due later. However, many donors want to save on taxes but keep the income from and some form of control

[12]For prior coverage, see *Doc 2011-25982* or *2011 WTD 240-5*.

[13]The income tax code, the inheritance tax code, and the registration tax code or a decree implementing those codes.

[14]For prior coverage, see *Tax Notes Int'l*, Jan. 8, 2007, p. 53, *Doc 2006-24026*, or *2007 WTD 9-11*.

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over the assets they give. They can do so by retaining the usufruct, and that is confirmed as acceptable tax planning.

- A phased donation of real property is not considered abusive. Real property must always be donated before a Belgian notary. However, there are no reduced gift tax rates; the gift tax between parents and children on real property is due at rates that are similar to the inheritance tax rates. These rates are progressive. In Brussels, the first bracket of €50,000 is taxed at 3 percent between parents and children, the next bracket of €50,000 is taxed at 8 percent, and the next €75,000 is taxed at 9 percent. A father can give a share of €50,000 to each of his four children and gift tax will only be 3 percent, and once gift tax has been paid, inheritance tax is no longer due. Every donation is calculated starting in the lower tax brackets, but if real property is donated again within three years of a previous donation, the value of the previous donation is added to the value of the present donation to calculate the tax rate.
- Fiscally optimized wills in which the testator leaves more to a beneficiary who is entitled to a lower tax rate does not constitute abuse (for example, the inheritance tax exemption for the family home inherited by the spouse in Flanders).
- Generation-skipping wills do not constitute abuse. By appointing all the grandchildren rather than the children, the parent spreads his estate over more beneficiaries who will each pay inheritance tax on a smaller share of the estate at lower rates. Moreover, by skipping the generation of the children, that generation does not pay inheritance tax. However, a variation of that will is deemed abusive. The parent leaves his entire estate to his children with an obligation to acknowledge a debt to the grandchildren, it being understood that debt is not payable by the children until their own death. The estate is spread over more beneficiaries (children and grandchildren), but the grandchildren pay inheritance tax on a discounted value of what they will receive at their own parents' death.
- A will made by childless single persons with no descendants is not considered abusive. When the deceased has no partner or children, his estate is inherited by his parents and siblings. The inheritance tax rate is higher for siblings, because the inheritance tax rate between parent(s) and descendants is much lower. It can be worthwhile to make a will in which the individual leaves everything to his parent(s) who can then leave it to his siblings. The estate is inherited twice at the reduced tax rates between parents and children.
- A dual legacy (*legs en duo/duolegaat*). Charities and foundations pay a low inheritance tax of 7 percent in Wallonia, 8.8 percent in Flanders, and 12.5 percent in Brussels. Distant relatives and friends pay inheritance tax at rates between 30 and 80 percent. In a dual legacy, the will appoints two groups of beneficiaries: the first (the relatives and friends) inherit free of inheritance tax; the second (the charity) inherits under the obligation to pay the inheritance tax on the entire inheritance, which is tax deductible for calculating the inheritance tax. This allows for substantial tax savings. The dual legacy will be acceptable if the charity receives a substantial benefit after paying the inheritance tax.
- Tontine and ''accruer'' clauses do not constitute abuse. Contrary to common law in which accruer clauses occur in gifts or wills, in civil law (at least in Belgium) accruer clauses are included in the purchase deed where the purchasers buy property as tenants in common, providing that upon the death of one or more of them, his shares go to the survivor. The share of the decedent ''accrues'' to the others, not by will or by the force of the inheritance law, but because of the contractual accruer clause. This allows the purchasers to circumvent the forced heirship rules and avoid the inheritance tax.

The following schemes are deemed to be abusive:

- Split-purchase schemes (usufruct/bare ownership). In this scheme, the parents buy the usufruct and the children buy the bare ownership of a property. This is tax efficient because the usufruct extinguishes upon the death of the parents and the bare owners become full owners while they have only paid the purchase tax on the bare ownership rights. Article 9 of the inheritance tax code considers this a disguised donation unless the beneficiaries prove the contrary (that is, that they were in possession of the cash to pay for the bare ownership). This could be done through a prior donation by a hand-to-hand donation, before a foreign notary, or before a Belgian notary (with 3 percent gift tax). The practice note considers that this is tax abuse — even if the prior donation was registered and gift tax was paid — if there is unity of intent.

- Split-purchase schemes (leasehold/freehold). While the registration tax on the purchase of real property is 12.5 percent (10 percent in Flanders), the registration tax on a leasehold (*bail emphythéotique/erfpacht*) is only 0.2 percent. A form of tax planning, therefore, consists of granting a leasehold for a period of between 27 and 99 years to one company, followed by a sale of the freehold to another company. On the transfer of the freehold, the registration tax is 12.5 percent (10 percent in Flanders), but the tax is calculated on a minimal value, usually 5 percent on the value of the property. The practice note states that this is tax abuse if the two companies are related. This seems to fit in with a position taken by the

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Ruling Commission that such scheme is allowed under a set of specific conditions.[15]

- Deathbed provision in a marriage contract (*clause mortuaire/sterfhuisconstructie*). In a marriage contract, spouses can agree that upon the death of either spouse all the community property will pass to the surviving spouse. This is a contractual arrangement that can bypass the forced heirship rules (for joint children), but there is a rule in the inheritance tax code that obliges the surviving spouse to declare half of the community property as if it was part of the deceased's estate. That rule does not, however, apply if the marriage contract provides that it passes to a specific spouse, irrespective of his survival. This opens opportunities for last-minute estate planning by changing the marriage contract if one of the spouses is terminally ill (hence ''deathbed provision''). In December 2010 the Supreme Court confirmed that this was legal, even if one of the spouses had converted personal property into community property. The tax authorities continue to maintain their position, but the practice note is now stating that this is abusive tax avoidance.
- Joint donation by both spouses. If spouses do not have a matrimonial regime of community property, one parent may own all the family assets. A simple tax planning technique is for them to convert their personal property into community property (no gift tax is due) and to do a donation together. For real property, this would mean that the transfer is calculated at the lower gift tax rates twice. For movables, this would not make much difference, since the gift tax rate is fixed, but it might have an effect on the inheritance tax rate.
- Mutual donation between spouses. Spouses can split up the family assets equally and mutually donate to each other their own half with the condition subsequent that the donation is undone if the beneficiary dies first. This gives the surviving spouse all the family assets. A reciprocal donation cannot be done with community property. That is why the practice note clarifies that if a couple changes a marriage contract to convert community property and proceeds with such mutual donation, that will be deemed a tax abuse.

The practice note clarifies that it does not state that all these situations are definitively tax abuse or not, but it depends on the facts and circumstances. Even if a transaction is a (potentially) abusive tax avoidance scheme, the taxpayer may still justify it with other nonfiscal motives.

This second practice note is limited to registration tax and inheritance tax examples; another practice note has been announced that will deal with income tax issues. ◆

[15] *Id.*

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