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Tax authorities publish new guidelines on the application of the secret commissions' tax

On 22 July 2013, the Belgian tax authorities issued a circular further clarifying the 'softening' introduced by the Law of 17 June 2013 in relation to the so-called 309% 'secret commissions' tax'.

The Law of 17 June 2013 and this new circular aim to end the commotion that arose in the wake of the Administrative Commentaries' 2010 update through the circular letter Ci.RH.421/605.074 (AOIF nr. 71/2010) and the internal instruction of 27 July 2011.

The new circular confirms that the secret commissions' tax should only apply as an **exception rule** and that unreported benefits should most preferably be taxed in the hands of the beneficiaries. In doing so, the circular provides a number of administrative tolerances which go beyond what is provided for in the Law of 17 June 2013.

The circular also indicates that internal audits will be performed to ascertain that local tax inspectors correctly apply the new administrative position.

Background

The **Administrative Commentaries' 2010 update** abolished the administrative tolerance which prevents the commissions' tax's application in case the beneficiaries agreed to their taxation within the ordinary 3-year assessment period. Also, where in practice local tax inspectors had agreed to include unreported benefits in disallowed expenses or allow debiting the current account from the beneficiary, the central tax authorities in an **internal instruction** of 27 July 2011 reconfirmed their position that such 'alternative' treatment was not allowed.

Based on the aforementioned 2010 circular and internal instruction, the secret commissions' tax's effective application became standard practice regarding unreported fringe benefits.

After continued public uproar, two **addenda** (dated 23 December 2010 and 20 July 2012) were issued to the 2010 circular, of which the latter:

- Introduced a leniency for small errors made in good faith where the beneficiary agreed to be taxed on the income; and
- Extended the legal escape route of Art. 219, 4th indent ITC (inclusion of unreported benefit in a tax return filed in accordance with Art. 305 ITC) to situations where the beneficiary had spontaneously included the benefits in a foreign income tax return similar to Art. 305 ITC.

New administrative tolerances

Below is a summary of the main new administrative tolerances included in the 22 July 2013 circular which, as indicated, go beyond the 'softening' introduced by the Law of 17 June 2013:

- According to the Law of 17 June 2013, the secret commission tax is not applied in case the benefits are taxed within the ordinary 3-year assessment period of Article 354 ITC in the hands of the beneficiary with the latter's approval. The circular expands this non-application to final **assessments** levied even **without the beneficiary's consent and** assessments **levied outside the ordinary 3-year assessment period** (e.g. under the additional one year assessment period of Art. 358, § 2, 3° ITC that is open to the tax authorities in case evidential data reveal unreported taxable income).

  It is important to note that the above does not apply in cases where the tax assessment is not yet final (e.g. in tax claim could still be filed), or where the final character of the beneficiary's taxation cannot be guaranteed near the end of the assessment period.

- The Law of 17 June 2013 also provided that the secret commissions tax does not apply in case the benefit is reported in a Belgian income tax return. Based on a strict reading, the secret commission tax would therefore in any case apply if the benefit was granted to a foreign beneficiary and included in its foreign tax return. Despite the use of different terminology, this is likely intended to be a re-confirmation of the position already taken in the addendum of 20 July 2012 to the 2010 circular letter in relation to inclusion in the beneficiary's foreign tax return. It also provides that the secret commissions' tax will also not apply if it can be demonstrated that the income has effectively been **taxed abroad** within said assessment periods.

- As per the Law of 17 June 2013, certain costs incurred in relation to benefits not spontaneously reported in the beneficiary's tax return are to be considered as a disallowed expense. The circular now 'revokes' the position previously taken by the Finance Minister and states that double taxation should be avoided to the highest extent possible. Accordingly, as per the circular, such costs should **no**t be considered as a **disallowed expense**, especially in the absence of "bad faith".

Entry into force

Despite the measures introduced by the Law of 17 June 2013 only entering into force as of tax year 2014, the circular confirms that the new administrative tolerances can also be applied to pending disputes and files currently under audit, even if they relate to previous tax years, provided the tax assessment periods have not yet expired.

In conclusion

Through subsequent legal initiatives and additional administrative tolerances, the secret-- commissions' tax's effective application seems to become the exception to the rule, on the basis of a clear legislative and administrative basis governing its non-application. Although it may occasionally imply a relatively burdensome administrative proof (especially in case of foreign beneficiaries or non-related beneficiaries), the broader business community will certainly welcome the broad basis for non-application through (proof of) inclusion of any unreported benefit in a Belgian or foreign (personal income tax, corporate income tax or legal entities' tax) return or any final tax assessment.

Click (**Dutch** | **French**) to read the circular.

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