



Real Estate Tax Alert

Potential tax impact of a notice of amendment or an ex officio assessment not to be underestimated

Belgian companies, and non-resident companies with a Belgian establishment, are required to file an annual corporate income tax return by the statutory deadline, or the deadline provided by the tax authorities if different. A company that is unable to meet the deadline may ask the tax authorities for an extension, but in practice these requests are rarely granted other than for exceptional events qualifying as “force majeure.”

Taxpayers that do not submit a return, or submit a return that is late, incomplete, or inaccurate, may be subject to assessments and penalties, but also may lose the benefit of certain tax attributes such as carried forward losses where either an *ex officio* assessment or a notice of amendment is issued by the tax authorities and a corresponding tax increase of at least 10% is applied.

Notice of amendment

Background

Even when a corporate income tax return is filed on time, the tax authorities may still challenge elements included in the return, such as any tax exemptions, or potentially disallowable expenses, following a tax audit.

Regulation

If the tax authorities intend to raise an assessment based on the information or income identified during an audit, or on data that otherwise varies from that in the original tax return, they must notify the taxpayer in advance using a notice of amendment, under article 346 of the Income Tax Code (ITC). The taxpayer

has one calendar month from the date of issue of the amendment notice to provide comments on the changes proposed by the tax authorities.

Sending a notice of amendment is considered an absolute requirement, and noncompliance by the taxpayer with this process will invalidate the amendment and assessment procedure.

Ex officio assessment

Background

The *ex officio* assessment is a form of sanction enforced on taxpayers that do not file their tax return by the relevant deadline.

The tax authorities are permitted to raise an assessment on the estimated amount of taxable income, calculated from the information available. However, the *ex officio* assessment must be based on objective data and correspond to the taxpayer's actual income.

Raising an *ex officio* assessment is optional, and there is no obligation for the tax authorities to follow this procedure.

Regulation

The situations in which the tax authorities are permitted to raise an *ex officio* assessment are strictly defined, under article 351, §1 of the ITC, and include the following cases:

- A return has not been submitted, or submitted late;
- The submitted return is invalid;
- The tax authorities are not granted access to the taxpayer's accounts;
- The taxpayer failed to respond in time to a request for information issued by the tax authorities; or
- The taxpayer failed to respond in time to a notice of amendment issued by the tax authorities.

Cases of "force majeure" and approved extensions to the filing deadline are exceptional situations which are not likely to result in an *ex officio* assessment.

Before the tax authorities can issue an *ex officio* assessment, the taxpayer must be informed by registered post. This notification should include the reasons for the assessment, the amount of income assessed, and the method and information used to determine the income, under article 351, §2 of the ITC. After receiving the notification, the taxpayer is given a response period of one calendar month. During this period, the tax authorities generally are not allowed to raise an assessment except in some specific situations.

An important feature of *ex officio* assessments is the reversal of the burden of proof (i.e., the *ex officio* assessment is presumed to be correct); however, the assessment also may have another important consequence—the restriction of the use of certain tax attributes.

Restriction of the use of tax attributes

Article 206/3, §1 of the ITC clearly states that in the case of either an *ex officio* assessment or a notice of amendment where a tax increase of at least 10% is applied, certain tax attributes may be denied, resulting in a corresponding increase to the taxable base.

Before 21 July 2021, a tax increase of at least 10% was possible only on income omitted from a return; however, following the law of 27 June 2021, income disclosed late (such as in a late-submitted return) also has been added to the

list of defaults giving rise to a potential 10% tax increase under article 444 of the ITC.

The provisions of article 206/3, §1 of the ITC may restrict the use of the following tax attributes:

- Gifts and other nontaxable items;
- Deduction of patent income;
- Deduction of innovation income;
- Investment deduction carried forward;
- Group contribution deduction;
- Notional interest deduction;
- Dividend received deduction carried forward;
- Innovation income deduction carried forward; and
- Tax losses carried forward.

Taxpayers affected by these provisions are not only required to pay corporate income tax on the taxable income as determined in the *ex officio* assessment or the notice of amendment (i.e., on a minimum taxable base without the use of the tax attributes noted above), but also may be unable to benefit from these tax attributes either permanently or for a long period, for example where there is an absence of any profit in the following financial years against which the deductions may be offset.

In practice, the tax authorities apply this rule strictly, and frequently proceed with an *ex officio* assessment in cases of late filing, where a tax increase of 10% generally is applied. Furthermore, the tax authorities almost always apply a 10% tax increase when a tax return is amended via a notice of amendment.

Considerations for real estate entities

Real estate companies often have significant amounts of tax losses carried forward, which could be lost through late filing of tax returns or inaccurate compliance.

Real estate companies that file their latest standard corporate income tax return upon liquidation of the company, merger into a Belgian real estate investment fund (BE-REIF) or Belgian regulated real estate investment trust (BE-REIT), or conversion into a BE-REIF or BE-REIT, should take particular care to ensure all compliance is accurate. In such cases, the company is taxed on the latent gains on the real property and any tax free reserves either at the standard corporate income tax rate or at the exit tax rate (in the event of a merger or conversion into a BE-REIF or BE-REIT).

Tax attributes carried forward generally may be offset against the taxable base, reducing the tax due. However, if the tax return is not filed on time or if the return is inaccurate, the tax authorities could impose an *ex officio* assessment or amend the tax return, and apply a 10% tax increase. This would enable the tax authorities to deny the carried forward tax attributes, which would be permanently lost as they relate to the last standard tax return.

As a result, it is important to carefully monitor filing deadlines and to file accurate returns, to retain the use of tax attributes in such circumstances.

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