



FSI tax alert Belgium

Speculation tax: Draft law published

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A [draft law](#) dated 10 December 2015 and published on 14 December 2015 would introduce a “speculation tax” as from 1 January 2016 on capital gains realised by Belgian resident individuals (and non-resident individuals in cases where gains are realised by a Belgian intermediary), on sales of certain quoted financial instruments acquired less than six months before the sale, and on short sales.

The draft law introducing the speculation tax (into Art. 90, 13° of the Income Tax Code (ITC) and Art. 228, §2, 9° of the ITC) is intended to reinforce job creation and purchasing power in Belgium (“tax shift”). The final version of the text may deviate from the version currently published.

The speculation tax would be due on capital gains realised (other than from the exercise of a professional activity) by Belgian resident individuals on quoted shares, options, warrants or other quoted financial instruments that were acquired for consideration less than six months before the sale for consideration. The tax also would apply to capital gains on short sales (*shorttransactie/vente à découvert*, as provided under Art. 2, 1st ind., b of EU Regulation n° 236/2012 dd. 14 March 2012). Non-Belgian resident individuals also would be subject to the tax in cases where the capital gain is realised via a Belgian intermediary.

Scope of proposed rules

To fall within the scope of the proposed speculation tax, shares, options, warrants or other financial instruments must be quoted on one of the following:

1. A Belgian or foreign-regulated market (as provided in Art. 2, 1st ind., 3° of the Law of 2 August 2002);
2. A multilateral trading facility (as provided in Art. 2, 1st ind., 4° of the Law of 2 August 2002), provided there is daily trading and a central order book; or
3. A trading platform of a third country fulfilling a similar function.

The draft law defines quoted “shares,” “options” and “warrants.” The definition of shares excludes units or shares in UCITS and undertakings investing in debt claims, as well as units or shares in alternative investment funds (as provided in the Law of 3 August 2012 and the Law of 19 April 2014, respectively, or under a similar provision of foreign law) and shares in regulated real estate companies. Hence, capital gains realised on the sale of shares or units in quoted exchange-traded funds (“trackers” or ETFs) are beyond the scope of the draft law.

The tax also targets capital gains realised on “other quoted financial instruments,” leveraged or unleveraged, through which an investor invests in changes to the value of an underlying asset, provided the underlying asset consists solely of one or more specific quoted shares. The explanatory memorandum relating to the tax clarifies that quoted “turbos,” “speeders,” “sprinters,” warrants and futures may fall under this category, but excludes convertible bonds.

In determining whether a financial instrument has been held for less than six months, gifts would be disregarded in calculating the six-month period. The (less than) six-month period would be calculated based on the LIFO (“last in, first out”) method. In the case of short sales, the period would

be calculated between the date of sale and the date of acquisition of the shares, options, warrants or other quoted financial instruments concerned.

Application of proposed rules

In cases where the rules would apply, the capital gain subject to the speculation tax would be equal to the positive difference between:

- The sales price, reduced by the stock exchange tax borne by the taxpayer on the sale; and
- The acquisition price paid by the taxpayer (or the donor in the case of a gift), increased by the stock exchange tax borne by the taxpayer (or donor) on the acquisition.

Under certain specific circumstances, capital losses could be taken into account in determining the capital gain realised. If the acquisition price is unknown, the withholding tax would be levied on the entire sales price (less the stock exchange tax), and taxpayer would have to reclaim any excess tax through his/her personal income tax return.

The speculation tax rate would be 33%. The tax, in principle, would be levied through a withholding tax due from the intermediaries established in Belgium that are involved in the transaction. The withholding tax would be final, so no reporting would be required if the withholding tax is levied. If no Belgian intermediary is involved in the transaction, Belgian individuals would have to report the capital gains in their annual tax return. No communal tax would be due on the speculation tax.

Exemptions from proposed rules

The following gains would be excluded from the speculation tax:

1. Capital gains realised on quoted shares, options or warrants acquired in the context of a professional activity (stock option plan), where the acquisition has triggered taxable professional income (if any) under the Belgian Income Tax Code, other specific provisions or similar foreign law provisions; and
2. Capital gains realised as a result of the transfer of quoted shares, options, warrants or other quoted financial instruments solely through the issuer's initiative, and where no choice was available for the taxpayer (e.g. mergers, demergers, spin-offs, "squeeze outs" and (non-optional) stock dividends).

The following transactions involving employee incentive plans would also be explicitly excluded from the speculation tax, according to the explanatory memorandum:

1. The sale of quoted options, warrants or quoted shares obtained through the exercise of quoted options (as defined in article 41 of the stock option law of 26 March 1999);
2. The sale of quoted options on quoted shares, or quoted shares (as defined in article 49 of the stock option law of 26 March 1999), i.e. shares acquired following a capital increase under article 609 of the Companies Code (discount of 20%); and
3. The sale of quoted shares that were acquired through the application of the law of 22 May 2001 on employee participation plans.

Effective date

The speculation tax would apply on qualifying sales of shares, options, warrants or other quoted financial instruments acquired as from 1 January 2016. With short sales, the tax would apply on sales occurring as from 1 January 2016. The draft law is expected to be enacted in the coming days.

Contacts

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