



The tax treatment of foreign trusts in Belgium

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Overview

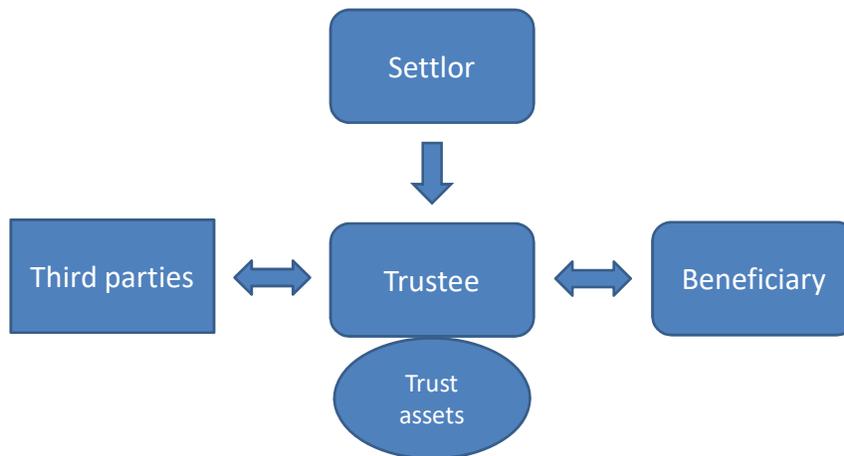
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The tax treatment of foreign trusts in Belgium

- Introductory remarks
- Interdependence of civil law and tax law in Belgium
- Belgian inheritance taxes (Federal and Flemish)
- Different approach in income taxation: 'Cayman Tax'

Introductory remarks

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Introductory remarks

- Belgium does not know the concept of a 'trust'
 - However, concrete plans to introduce a *fiducie*
 - Bill no. 54-3348/001 in Belgian Parliament
 - Still, fundamental differences with a 'trust' according to common law-standards

- Belgian PIL recognizes foreign trusts
 - Art. 122 – 125 Belgian PIL Code 2004

Introductory remarks

- However, Belgium is sometimes confronted with trusts
 - Belgian National Bank estimated in 2015 that about 57 billion euro's are held by Belgian taxpayers in 'foreign legal constructs'
 - Many of these 'legal constructs' are trusts
 - Numbers exclude US, Switzerland and Luxembourg
 - Trusts sometimes figure in Belgian case law
- Interest in trusts further fuelled by scandals such as Panama Papers, Paradise Papers, ...

Interdependence between civil law and tax law in Belgium

Interdependence civil law and tax law

➤ How to tax a legal relationship unknown to your legal system?

- Starting point: understanding the legal relationship which is being taxed
- In Belgium: fundamental interdependence between civil law and tax law
- Existing literature: differing conclusions on tax consequences due to differing civil law qualifications of relevant legal relationships

E.g.: Qualification of relationship between 'settlor' and 'beneficiaries' as a 'gift' or 'third party stipulation' for inheritance tax purposes?

Interdependence civil law and tax law

➤ Principle of legality: art. 170 Belgian Constitution

- 'Principle of liberty'
- All 'essential elements' of a tax are to be determined by **law**
 - ✓ Taxable matter/taxable object
 - ✓ Tax base
 - ✓ Tax rate
 - ✓ Tax exemptions and tax relief
- *No taxation without legislation*
 - ✓ The law should contain all 'elements' which should be present before a tax can be levied
 - ✓ Therefore, it concerns legal elements which have to be 'present in reality' before a tax can be levied
 - ✓ 'Principle of reality' in tax matters

Interdependence civil law and tax law

➤ Principle of reality in tax matters

- Belgian Supreme Court: legal reality should be taken into account, not the economic reality
- Baseline in formulating the 'right to follow the least-taxed road'
 - ✓ Implies that taxpayer is able to use the freedom of contract and property rights to choose how he structures his affairs
 - ✓ Legal structure chosen by taxpayer should in principle be respected by tax authorities, even if not the most common choice
 - ✓ No inherent (economic) *substance over form* principle in Belgian tax law
- Today: many nuances
 - ✓ Prohibition on simulation, new GAAR in 2012, many new SAARs, tax fictions, autonomous definitions, ...

Interdependence civil law and tax law

➤ Principle of reality as a 'default-rule' in Belgian tax law

- *"Attendu que les principes de droit civil [...] ne sont applicables à la matière fiscale que pour autant que la loi fiscale n'y avait pas dérogé, soit expressément, soit tacitement"*
- Explicit derogations: GAARs, SAARs, tax fictions, autonomous definitions of tax concepts, ...
- Implicit derogations: to be determined by interpreting tax provisions
 - ✓ Only certain interpretative techniques allowed in Belgian tax law due to strict principle of legality

Interdependence civil law and tax law

- **Also** relevant in case the 'civil law-infrastructure' is made up out of foreign law
- Explains tax difficulties: how to connect legal concepts in Belgian tax law to a legal reality which is completely alien to Belgian law?

Applying the rule: inheritance taxes

Inheritance taxes

➤ Federal Advance Tax Ruling Authority:

"... As the code on inheritance taxes is based primarily, not to say exclusively, on the legal reality, the provisions of the Belgian PIL Code have to be applied"

(ATR No. 2014.543, 2014.644 with regard to taxation of a Liechtenstein *Stiftung*)

➤ Problem: art. 1 W.Succ/art. 2.7.3.3.1. FTC

- Taxable base: value of goods received from the inheritance of the deceased Belgian taxpayer
- Trust assets are no longer part of the 'patrimony' or 'estate' of the deceased
- Therefore, not included in inheritance tax, unless...

Inheritance taxes

➤ Fiscal fiction: art. 7 W.Succ/art. 2.7.1.0.5. FTC?

- 'Gifts'/'disposals' done by the deceased 3 years prior to death, if no gift taxes were paid
- 'Donation' or any disposal without consideration required?
 - ✓ Historical interpretation
 - ✓ Systematic interpretation
 - ✓ Restrictive interpretation
 - ✓ *In dubio contra fiscum*
- Federal and Flemish tax authorities do not consider this article to be applicable, some authors do
- Trust ≠ donation
 - Especially in the case of a revocable trust...

Inheritance taxes

➤ Fiscal fiction: art. 8 W.Succ/art. 2.7.1.0.6. FTC?

- Values received by third parties on the basis of a contract containing a third party stipulation concluded by the deceased or on his behalf, and which the third party received due to the death of the deceased
- Legal doctrine: divided, different opinions
- Tax authorities and some court judgments: applicable to trusts
 - ✓ Difference between art. 8 W.Succ. For Brussels and Wallonia and art. 2.7.1.0.6. FTC for Flanders
 - ✓ Flanders: only taxation when beneficiary receives advantage
 - ✓ Bxl and W: fixed trusts vs discretionary trusts ('condition precedent')
 - ✓ Federal advance tax ruling nr. 700.112
 - Distribution of trust income: **not taxable** in inheritance tax
 - Distribution of trust capital: **taxable** in inheritance tax
 - To be determined on the basis of the applicable trust law

Inheritance taxes

➤ Fiscal fiction: art. 8 W.Succ/art. 2.7.1.0.6. FTC?

- Presence of a 'contract' or 'third party stipulation'?
- Strict or even restrictive interpretation?
- Letter of wishes?
- Interestingly, federal tax ruling authority takes different view in cases about foreign foundations (*Stiftung, SPF, ...*)
 - ✓ E.g. advance tax ruling nr. 2016.905: "*Une fondation de droit du Liechtenstein résulte d'un acte de constitution unilatéral du ou des fondateurs et non d'un contrat. L'article 8 n'est en conséquence pas applicable aux sommes, rentes ou valeurs qui seraient distribuées par une Fondation*"
 - ✓ E.g. advance tax ruling nr. 2012.049: Private foundation takes autonomous decision to distribute, framed within its 'charitable' object

Different approach in income taxation

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Income taxes

➤ Since 2015: Cayman Tax

- In 2013: duty to declare the existence of 'foreign legal constructs' to Belgian tax authorities
- Specific Belgian tax regime, akin to a CFC-regime
- Introduced to end the use of 'floating wealth'-structures
- Applies when a Belgian 'founder' can be linked to a 'legal construct'
- Conceived as an 'anti-abuse'-regime, but nowhere made explicit in the law
 - ✓ E.g. 'Abuse' is not required for the application of the Cayman Tax
- December 2017 amendment: 'fight against the use of legal constructs'

Income taxes

➤ Trusts as 'legal construct type A'

- Art. 2, § 1, 13° , a) BITC
- Definition of legal construct based on art. 122 of the PIL Code; description of the trust concept
- Slight changes in order to use 'system-neutral' language, in order to target 'fiduciary legal constructs' in general
- Definition does not state that the legal construct should be 'foreign'
 - ✓ Problematic in the light of the possible introduction of a Belgian *fiducie*...

Income taxes

➤ Relevant definitions of the concept of 'founder'

- The 'actual founders' (art. 2, § 1, 14° BITC)
 - ✓ The natural person or legal person taxed in 'legal persons tax' who founded the legal construct, outside the scope of a professional activity
 - ✓ The natural person or legal person taxed in 'legal persons tax' on whose behalf the legal construct was founded and who inserted goods or rights into it
- The founder-heirs (art. 2, § 1, 14° BITC)
 - ✓ The natural persons who are the direct or indirect heirs of the 'actual founders', unless they demonstrate that they will never receive any advantage from the legal construct
- Founder-holders (art. 2, § 1, 14° BITC)
 - ✓ Holders of legal or economic rights of the legal construct
 - ✓ Application to trusts?

Income taxes

➤ Application of the Cayman Tax

- 'Look-through taxation' (art. 5/1, § 1 BITC)
- Income acquired by the trust are taxed in the head of the founder(s), in accordance to their interest in the construct or by equal parts
- Applies only if relevant income is not distributed within the same fiscal year as it was received by the trust
- Total fiscal transparency: types of income received by the trust, retain their tax qualification in the head of the founder
 - ✓ E.g. income received from immoveables, income received from moveables, diverse income (incl. tax exemption for certain capital gains), ...

Income taxes

➤ Application of the Cayman Tax

- Taxation at the moment of distribution (art. 18 BITC)
- Qualification as dividend, no matter the content of the distribution
- Priority-rule *vis-à-vis* the transparent taxation
- Art. 22 BITC: prevention of double taxation
 - ✓ No tax if the distribution by the legal construct has already 'undergone its tax regime in Belgium'
 - ✓ E.g. distribution of income which underwent transparent taxation in a previous fiscal year
 - ✓ FIFO-rule, oldest income of legal construct deemed to be distributed first (targeting 'historical reserves')
 - ✓ No tax to the degree that the distribution consists of 'patrimony'/'capital' which the founder 'inserted' into the legal construct

Income taxes

➤ Application of the Cayman Tax

- Special 'Cayman exit tax' (art. 5/1, § 2 BITC)
- In order to facilitate 'repatriation' of historical reserves of legal constructs
- When the tax is triggered, all historical reserves of the trust which has not yet been taxed in Belgium will be deemed to have been distributed to the persons who are deemed to be the founders
 - ✓ Trigger 1: when 'shares, economic rights or the assets' of a legal construct are 'inserted' into another legal structure; mere creation of an additional legal structure suffices
 - ✓ Trigger 2: transfer of 'the assets' of a legal construct to a non-qualifying jurisdiction
- Newly realized capital gains? Partial transfers?

Unfortunately, many more questions than answers...

Thank you for your attention!

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