

**Subject:      **Modification of the Belgian transparency tax****

With the Programme Law of 22 December 2023, the transparency tax (also called Cayman tax) was once again amended. We would like to explain the main changes in this memo.

As a reminder, the transparency tax aims to tax the income of low-taxed (less than 15%) or non-taxed legal structures (i.e. trusts, offshore companies or insurance vehicles investing in the other two structures) on behalf of Belgian residents who are the founders. It further aims to tax the distributions from these structures as dividends.

1.      Additional presumption of founder

First, an additional presumption for being considered as the founder of a legal structure has been added. All persons listed in a UBO register (foreign or otherwise) of a legal structure are presumed to be a founder of that structure for the purposes of the transparency tax. However, this is a refutable presumption.

2.      Adjustments to subject legal structures:

a.      *Fond-dédié structures*

Collective investment structures were already targeted by the transparency tax, in case the shareholding of these collective investment structures was entirely held by a group of related persons, so-called fond-dédié structures. In order to prevent the addition of a non-related person as a shareholder to avoid the application of the transparency tax, a fond-dédié structure is now already deemed to exist when at least 50.1% of the shares are held by related persons.

b.      *Chain structures become intermediate structures*

The 2017 amendment to the transparency tax introduced the concept of the “chain structure”, where “offshore” parent and subsidiary structures were considered as one entity. However, this chain is broken by the interposition of an entity that is not itself subject to the transparency tax, such as an EEA company paying more than 1% in taxes.

The new law therefore changes strategy, no longer referring to a “chain structure” but instead to “intermediary structures”. Each entity within a chain of entities has to check on an individual basis whether the transparency tax applies to it. Consequently, a non-subject entity no longer breaks the chain, the entity itself is simply no longer targeted by the transparency tax.

For this purpose, the term founder was also extended, by referring not only to the shareholding of a legal structure, but to the direct or indirect holding of the legal or economic rights of a legal structure.

c. *Closer definition of actual economic activity*

Legal structures enjoy the non-application of the transparency tax if it engages in an 'actual economic activity'. Previously, this was defined only in a negative sense, namely that the activity could not relate to the management of the founder's private assets.

Now, an 'actual economic activity' must be understood to mean that the legal structure offers goods or services on a market, and has personnel, assets, equipment and premises for this purpose. Furthermore, this activity must be a "substantial part" of the legal structures business.

3. *Extension of taxable benefits*

a. *Abolition of the "Exemption vaut impôt" rule*

In principle, the rule was that if a certain income of a legal structure was exempt from taxation under Belgian income tax, it was considered to have undergone its normal tax regime. As a result, this income could therefore be distributed to the founders without being qualified and taxed as dividends. The most obvious example is capital gains on shares (in case they were neither obtained professionally nor speculatively).

The Programme Act abolishes the application of this principle for distributions by a legal structure. From now on, the qualification as a dividend also always applies to distributed income from a legal structure, which is exempt from tax under the Income Tax Code.

This therefore means that capital gains on shares obtained by a legal structure and subsequently distributed to the founders will always be taxed as dividends (at a current rate of 30%). Furthermore, the new legal provision does not specify whether it concerns income obtained as from 2024, which means that historical capital gains (obtained before 2024) will also be taxed at 30% upon distribution.

The Council of State does argue that this provision should not affect the application of double taxation treaties. Thus, real estate capital gains whose tax was allocated to the source state will benefit from the exemption from taxation as a dividend.

b. *Clarifying the look-through rule and a distribution in the same year*

The law clarifies that income from a legal structure will always be taxed transparently on behalf of the founders, even if this income is distributed to the founders in the same year. Moreover, the distribution will also be regarded as a dividend, but this dividend may be exempt from tax if the distributed amounts were already subject to their normal tax regime

(read: subject to the transparency tax). Please note that the oldest reserves of a legal structure are considered to be distributed first, so it is not obvious that the income received in a specific year by the legal structure (and therefore taxed by the transparency tax), and distributed in the same year, can benefit from the exemption from taxation as a dividend.

c. *The 1-in-3 rule*

The qualification of an entity as a legal structure should be reassessed every year. For example, an entity might not pay at least 15% in taxes locally one year, and might pay 15% locally the next year, so the entity cannot be considered a legal structure in that second year.

The change in law provides that distributions are taxable not only in a year in which the entity qualifies as a legal structure, but also in the years in which the entity does not so qualify (by being subject to at least 15% tax that year, for example). If the entity qualified as a legal structure in 1 of the 3 past taxable eras, the distribution will qualify and be taxed as a dividend.

4. Exit tax

The most notable measure in the amended transparency tax is the introduction of an exit tax.

In case a founder moves his tax residence outside Belgium, he will be taxed on a notional distribution of all reserves of the legal structure that exceed the capital contributed by the founder. This notional distribution will also be assimilated to a dividend, and consequently taxed at 30%.

As the provision only refers to the existing reserves at the time of the transfer of the tax residence, this exit tax can also tax reserves accumulated before the initial entry into force of the transparency tax, and even reserves accumulated during a period when the founder may not (yet) have been a Belgian resident.

It should of course be considered how this exit tax relates to the application of double taxation treaties concluded by Belgium.

5. Application of the transparency tax to a Dutch STAK  
(Stichting Administratiekantoor)

The explanatory memorandum of the Programme Act of 22 December 2023 clarifies the situation of the Dutch STAK. The Minister of Finance states that the 1998 Certification Act takes precedence over the transparency tax, meaning that the income of a STAK cannot be taxed via this route. The income of a STAK is of course taxed transparently on behalf of the certificate holders.

The Minister further specifies that the certificate holders of the STAK are, however, required to report the existence of a STAK in their personal income tax return, as the STAK does qualify as a legal structure. It is the case that the extended definition of a founder as the person who directly or indirectly holds the legal or economic rights of a structure (already discussed under point 2.b) supports this view. However, we are still of the opinion that the equal treatment clause included in Article 26 of the Belgian-Dutch double tax treaty prevents such an obligation, as this is obligation does not exists for a Belgian STAK.

#### 6. Extended reporting obligation

Finally, the Programme Act of 22 December 2023 introduces an extended reporting obligation, requiring more details of legal structures to be included in an attachment to the tax return. The details include the already mandatory disclosures, such as, for example, the name, address and directors of the legal structure. However, now all income of the legal structure, as well as all distributions made, will have to be reported in the specific attachment.

This reporting obligation remains in place if the income or distributions are not or not fully taxable in the personal income tax (for that year).

#### 7. Entry into force

The new transparency tax will apply to income and benefits obtained as from 1 January 2024. However, the extended reporting obligation already applies to assessment year 2024, in other words to the tax return concerning the income of 2023.

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