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Featured Perspectives



Belgium's Permanent Regularization Procedure: The 2004 Tax Amnesty Redux?

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Belgium has introduced a new procedure for regularizing undeclared or untaxed income that is reminiscent of its 2004 tax amnesty, which was only partially successful.

The 2004 Tax Amnesty

In 2004 taxpayers had an opportunity to regularize undeclared or untaxed assets with a single final tax return. Taxpayers were able to file an anonymous tax return with a Belgian financial institution, pay a one-time tax of 9 percent on their undeclared savings, and be released from any further tax liability and from the risk of prosecution. Alternatively, they could opt for a 6 percent payment if they invested the savings in real property; the stock of a private company; bonds and other debt instruments; or participation rights in collective investment funds, term and savings accounts, new life insurance contracts, or capitalization contracts with an insurance company.

In total, approximately 18,543 taxpayers took advantage of the program, paying just under €500 million and regularizing some €5.7 billion in previously undeclared savings. Remarkably, three-quarters of the tax amnesty returns were filed in December, so the Belgian treasury ultimately real-

ized about 60 percent of Finance Minister Didier Reynders's projected windfall.

It seems that most taxpayers had been waiting to see whether a number of uncertainties would be resolved. First, the tax amnesty needed to be confirmed by the regional parliaments. The Brussels and Walloon parliaments adopted legislation to introduce it, but the Flemish government could not reach a consensus on the subject. By way of compromise, the Flemish government confirmed that it would not investigate taxpayers who had paid the one-time regularization amount.

On January 30, 2004, the Luxembourg Association of Banks and Bankers filed a complaint with the European Commission, claiming that the amnesty infringed the EC Treaty principles of freedom to provide services and free movement of capital (articles 56 and 49), but the European Commission has taken no further action on that complaint. (For prior coverage, see *Tax Notes Int'l*, Feb. 16, 2004, p. 601.) And at the last minute, the federal parliament adopted legislation to correct a number of mistakes in the amnesty law.

What Makes an Amnesty Successful?

The 2004 tax amnesty was a success, although not to the extent that the government had hoped. At the beginning of 2005, the Belgian National Bank announced that private individuals had repatriated approximately €17.8 billion in deposits, fixed-interest securities, and participations in open-ended investment companies. That unofficial repatriation

of investments was reflected in the performance of the Belgian stock exchange and an exceptional increase in consumption figures. Furthermore, Belgium's economic growth exceeded the eurozone average.

Experience shows that for a tax amnesty to be successful, the government has to use both the "stick" and the "carrot," but most importantly, it must show that taxpayers will not get another chance to regularize their assets under such beneficial circumstances. Successful amnesties in Ireland and Italy have tended to combine a low penalty level with anonymity and legal certainty.

The regularization frees the taxpayer from criminal pursuit for infringing the income tax, VAT, inheritance, and registration tax laws.

The 2004 tax amnesty was born under a good sign. The most decisive element in its success was not the threat to hit tax defrauders with a penalty of 100 percent on top of the tax owed if they did not take advantage of the amnesty. Rather, it was the amnesty's timing, which coincided with Belgium's implementation of the EU savings tax directive on July 1, 2005 (for prior coverage, see *Tax Notes Int'l*, July 11, 2005, p. 122). That meant that investors in one EU member state receiving interest from another EU member state, from one of the 5 participating non-EU countries, or from one of the 10 dependent or associated territories, knew that interest would be reported to their tax inspectors. They could still collect interest anonymously in Austria, Luxembourg, Switzerland, Liechtenstein, the Channel Islands, the Isle of Man, the British Virgin Islands, and the Turks and Caicos Islands, but those countries would withhold a 15 percent tax.¹

Also important were the tightening of money laundering legislation and the announcement that bearer securities would be banned. (It was not until December 14, 2005, however, that the Belgian Parliament adopted a law that will gradually abolish bearer securities starting in 2008.) Those moves, combined with the implementation of the EU savings tax directive, convinced many small investors to come clean and regularize their bearer bonds and cash certificates.

Now that the regional parliaments have reduced the gift tax to 3 percent (for gifts to children), many

¹That rate will increase to 20 percent in 2008, and to 35 percent in 2011.

investors are also taking the opportunity to plan their succession and save on the inheritance tax.

Despite those successes, the government clearly failed to communicate its determination to come down hard on unrepentant taxpayers. Indeed, it appears that a large majority of taxpayers have organized their own tax amnesty without paying the regularization tax: They have repatriated their savings and invested them in long-term insurance bonds and open-ended investment companies, knowing that the tax authorities are time-barred from claiming the taxes after five years.

Reynders did, however, understand that he must not waver in his resolution not to give taxpayers a second chance. Even when it appeared that most taxpayers had waited until the last moment to file their tax amnesty returns in December 2004, he did not give in to the banks' demand to extend the amnesty until June 30, 2005.

A Permanent Regularization Procedure

The unexpected success of the 2004 tax amnesty encouraged the government to give tax sinners a new opportunity. The new procedure for regularizing undeclared income was adopted on December 27, 2005, and implemented by royal decree on March 8, 2006.

Unlike the 2004 tax amnesty, the new opportunity is not limited in time, although there is an incentive for taxpayers with passive or portfolio income to regularize that income as soon as possible. Moreover, companies also have an opportunity to regularize their undeclared income. Finally, the effect of the 2006 regularization procedure is wider than that of 2004: It offers protection against criminal prosecution as well.

Procedure

To regularize undeclared or untaxed funds, securities, or income, a taxpayer can file a specific tax return with the regularization division. That unit is set up within a new Ruling Committee under the Ministry of Finance in order to offer sufficient guarantees of confidentiality and independence concerning the tax offices.

The return can be filed by the taxpayer in person or through a representative (a lawyer, banker, or other professional representative). The taxpayer must divulge his identity, as well as the origin and amount of the funds declared. It is often advisable to provide as much information as possible to help the regularization division verify the origin and the tax regime applicable, and to ensure that there are no grounds for exclusion. Ultimately, that responsibility rests with the taxpayer.

The regularization division must respond within 30 days, declaring whether the filing is admissible and inviting the taxpayer to pay the tax due. Payment must be made within 15 days of that notification. On tax authorities' receipt of the payment, the taxpayer will receive a certificate of regularization. A copy of each certificate is sent to the Belgian Financial Intelligence Processing Unit, an independent administrative authority that combats money laundering in criminal proceedings.

Tax Rate

If a taxpayer has not declared earnings or taxable company profits, has evaded the VAT, or has failed to declare assets in an inheritance tax return, the taxpayer must pay the tax rate that applied to the income, the transaction that is subject to VAT, or the assets in the relevant tax year. If the taxpayer was entitled to any tax reductions under a tax treaty, those would apply as well.

For company profits, the rate is 33.99 percent (including the 3 percent austerity charge), but if the profit was made in 2001, it will be taxed at the then-rate of 40.17 percent.

In the past, an individual taxpayer could expect a marginal rate of over 61 percent on his earnings and other business income (the top income tax rate was 55 percent plus a municipal tax of 8 percent and an austerity tax of 3 percent). Today, the marginal rate is 54 percent (the top rate has dropped to 50 percent, and the austerity tax has been phased out). If the income was subject to VAT, however, the total cost normally will increase by 21 percent.

For passive or portfolio investments, the tax rate is the normal rate (usually 15 percent for interest and 25 percent for dividends). However, that will increase by 5 percentage points on July 1, and by 10 percentage points on January 1, 2007, for individual shareholders.

Consequences

The effect of regularization is that no additional income tax can be levied on the income that has been regularized: There can be no assessment of tax increases, interest for late payment, or penalties. Moreover, if a taxpayer has obtained a regularization in accordance with the legislation, the 100 percent penalty for failure to participate in the 2004 tax amnesty will be waived. VAT penalties and interest are waived as well.

Probably even more important is that the regularization also frees the taxpayer from criminal pursuit for infringing the income tax, VAT, inheritance, and registration tax laws. It also can stop any indictment for concealment of funds resulting from tax evasion (article 505 of the penal code). That immunity is extended to co-perpetrators and accom-

plices. However, filing for regularization will not stop an ongoing criminal investigation.

Finally, the information obtained in the regularization procedure cannot be used as justification for further tax investigations, to report infringements of the tax laws, or in an exchange of information.

Exclusions

The regularization procedure cannot be used to regularize income following a money laundering operation, or from a criminal activity that renders the origin of the money or assets illicit,² including "serious and organized tax fraud." The concept of serious and organized tax fraud describes, for example, complex financial mechanisms with an international dimension and VAT carousel fraud.

Regularization is also ineffective if, before filing for regularization, the taxpayer has been notified in writing by the Belgian tax or social security authorities of a pending investigation.

A taxpayer is only given one chance to come clean; once he has obtained a regularization, he is barred from applying for another.

Conclusion

Regularization is more expensive in 2006 than it was in 2004, when the rate was 9 percent or even 6 percent if the taxpayer reinvested the undeclared assets. However, regularization is a permanent measure that gives taxpayers legal certainty. It is clear that the government wants to encourage individual taxpayers to regularize their investment income as soon as possible, and in any event, before the end of the year.

For many taxpayers, regularizing income from earnings and business activities will be prohibitive, considering the VAT, the corporate income tax, and the possible withholding tax. Those taxpayers may be tempted to take their chances and wait for their tax liability to be time-barred.

Few taxpayers have used the tax regularization procedure thus far. Since the middle of March, the regularization division has received only 214 files from taxpayers seeking to regularize a total of approximately €33 million. That may generate about €5 million in tax revenue.

On May 30 Prime Minister Guy Verhofstadt signed a protocol with the Diamond High Council of

²Specifically, activities related to terrorism; organized crime; illicit trafficking in narcotics, weapons, and illegal labor and human beings; the exploitation of prostitution; bribery; and illicit trafficking in human organs.

Belgium. As a result of that protocol, diamond traders — many of whom have large amounts of undeclared stocks in diamonds that they have built up since World War II — will be given a one-time opportunity to regularize those stocks. In 1999 the council and the tax authorities agreed on a plan to establish a method of calculating diamond traders' taxable profits that will allow diamond traders to

increase their equity, increasing their solvency and the opportunities to obtain bank loans. Of course, a higher equity will also give them access to a higher risk capital deduction. (For prior coverage, see *Tax Notes Int'l*, Feb. 6, 2006, p. 449.) Although the tax rate for that regularization has not yet been established, Verhofstadt hopes for a windfall of between €50 million and €100 million. ◆