Tax Newsletter

July 2024
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Does a 'guaranteed return' give rise to taxable capital gain on shares?

As a matter of principle, capital gains realized in private life (thus outside the scope of a business activity) are free of personal tax in Belgium.

However, this is only the case if the capital gain cannot be considered 'speculative'. If an individual realizes speculative capital gains, they are taxable at a flat 33% personal tax rate, plus communal taxes. In summary, a speculative capital gain would not be realized by a 'good housefather'. The question whether or not a capital gain is speculative comes down to an in-depth factual analysis.

In addition, Belgium tax law explicitly says that capital gains realized on shares when alienating these shares for valuable consideration and outside the scope of a business activity, are taxable as 'miscellaneous income' (at 33% personal tax), unless it concerns a normal transaction of good management of private assets.

Be careful: on 7 December 2023 the Belgium Supreme Court ruled that 'abnormal management of private assets' does not require that the taxpayer should be exposed to the risk of facing significant losses. Conversely, even in the event of a quasi-certainty that a capital gain will be realized, there can be 'abnormal management'.

In that particular case, two brothers were shareholder of BelCo. Following a BelCo takeover bid by a 3rd party, one brother exercised his pre-emption right on the shares held by his brother. He thus acquired 50% of BelCo shares for the price of EUR 25.000.000. Immediately afterwards, that brother sold all BelCo shares for EUR 55.000.000. The brother thus realized a significant capital gain on the shares for which he had exercised his pre-emption right. The Belgium tax authorities classified the significant capital gain as 'miscellaneous income' and taxed it at 33% personal tax, plus communal taxes.

However, the brother disagreed. He believed that there can only be 'abnormal management of private assets' if there is a significant risk to suffer a loss. In addition, that brother didn't have to free up own funds to acquire the shares of his brother. He only needed to conclude a short-term credit facility, but this was swiftly settled with the sales price for the BelCo shares paid by the 3rd party buyer. As a result, the brother benefited from a kind of 'guaranteed capital gain on shares'.

Unfortunately, the Supreme Court didn't follow the line of reasoning of the brother and stated that 'normal management of private assets' relates to 'acts of *simple* management that a good housefather would also carry-out'. On this point, the mere fact that a taxpayer cannot suffer a loss does not automatically entail that it is a 'simple act of normal management'.

In that particular case, the issue also seemed to be that, beforehand, the selling brother had negotiated with the buyer that he could realize an immediate and guaranteed capital gain on BelCo shares.