

Tax Newsletter

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Spread capital gains taxation: recent developments

When a company or a natural person earning 'profit' or 'fees' realizes a capital gain on qualifying assets, the capital gain can be taxed on a deferred basis in case of a timely and useful reinvestment of the total alienation price. The capital gain is thus taxed at a rate of the fiscally allowed depreciations of a qualifying reinvestment within the EEA. Some appropriate accounting entries must be made and a Form 276K should be enclosed with the Belgium income tax return.

What can we learn from some recent developments within the Belgium tax practice?

- If a company acquires an asset from another company following a tax-free reorganization (e.g. a merger or (partial) spin-off), this asset qualifies as useful reinvestment if its residual net book value which still needs to be amortized for tax purposes equals at least the disposal value for the acquiring company resulting in a capital gain to be taxed on a spread basis. This principle has been confirmed by case law (e.g. Ghent Court of Appeal, 25.06.2013), by the ruling commission (e.g. Decision 2017.400) and by the Belgium Finance Minister (Parl. Question n° 616 of 30.10.2015).
- A freely realized capital gain can only be taxed on a deferred basis if it stems from an asset that had been qualifying for more than 5 years as 'fixed asset' in the hands of the alienator. This 5 years period is to be computed on a day-by-day basis. The ruling commission clarified that this condition does not require 'full legal ownership' whilst 'bare ownership' of the disposed asset should be sufficient (Decisions 2015.644 and 2023.0717).
- As to this minimum 5 years period, sometimes the question arises how the spread taxation should be actually applied when real estate being transferred had been refurbished during that 5 years period? Are these renovation works thus deemed to be integrated in that property? If so and if the real estate had already been part of the business for more than 5 years, the entire realized capital gain would be eligible for spread taxation. However, on 15.03.2024 the Belgium Supreme Court came to another conclusion: pursuant to Belgium accounting legislation, the property as such and the refurbishment works should be recorded separately. Hence, both assets should thus each satisfy the conditions in view of deferred capital gains taxation. The ruling commission has added that the alienation price should be broken-down, either based on evidential elements, either in accordance with the acquisition value of each asset reduced by fiscally allowed amortizations. As a result, the capital gains realized on each asset can be quantified accordingly (Decision 2023.0868).
- Finally, when a company carries-out a capital reduction in kind (e.g. a property), the Belgium Commission for Accounting Standards has said that this should be done at fair market value implying the company may realize a capital gain on real estate. Specifically, the ruling commission has concluded that this capital gain is eligible for spread taxation (Decision 2024.0016).