Howden Tax & Contingent Risks

Insuring Belgian Capital Gains on Shares

A rare stronghold for exemptions on capital gains on shares realized by private individuals, Belgium is aiming at introducing a so-called “solidarity contribution” on future realized capital gains. In this Newsflash, we dive into the possibilities of insuring the risk of taxation of capital gains on shares in Belgium, today and in the future.

The current regime of capital gains on shares

Today, financial assets such as capital gains on shares are generally not taxable. However, the tax authorities have some options for taxing these gains nonetheless, notably by treating them as professional income or as miscellaneous income.

Professional Income 01

The Belgian Income Tax Code (BITC) allows for the taxation of capital gains that have a professional character. If the tax authorities can demonstrate successfully that the privately held assets are realized in the framework of the taxpayer's professional activities, the gains may be classified as professional income and subject to ordinary individual income tax rates. Whether or not gains qualify as professional income largely depends on the facts, including the manner in which the taxpayer is organized as well as the frequency of the transactions. For example, if a taxpayer frequently buys and sells shares, actively promotes this activity and is organized sufficiently professionally, the gains may be considered professional income.

Miscellaneous Income 02

Article 90 BITC aims at taxing so-called occasional or incidental profits, including capital gains on shares. Capital gains on shares that do not meet the above mentioned level to be taxed as professional income can be taxed as miscellaneous income nonetheless if they are considered speculative or realized outside the framework of so-called normal wealth management. In that case, the gains are taxed at a rate of 33% (increased with communal surcharges). What can be considered normal wealth management is not legally defined. Case law and the Ruling Commission lists several criteria to make that determination such as the complexity of the transaction in the context of which the gains are realized, the amount of leverage and the involvement of newly established companies. These criteria are helpful to assess whether the transactions are part of normal wealth management but remain very factual and therefore uncertain.

It must be mentioned that the BITC allows for taxation of capital gains in other circumstances than abnormal wealth management as well. More specifically, capital gains on share participations of 25% or more in domestic companies in case of disposal of shares to a legal entity established outside the EEA are subject to a 16.5% % tax and capital gains on shares, or units in collective investment companies that invest for more than 10% in. debt-related instruments are subject to 30% tax on the interest component.

Future solidarity contribution

The new government plans to introduce a new route to tax certain financial asset such as capital gains tax on shares or cryptocurrency. This new route is known as the 'solidarity contribution'. Capital gains on shares falling within the scope will be taxed at a rate of 10%, with an exemption for the first €10,000 of realized gains. There will be exceptions for substantial shareholdings with a tiered system and lower rates (reduced progressive tax rates from 1.25% to 10%).

The precise computation of the capital gain (e.g. FIFO, LIFO) still needs to be confirmed. Moreover, capital losses on such assets can be offset against capital gains realized within the year, without the possibility of carry-forward of any excess capital loss.

The tax will apply only to gains realized after the introduction of the law, with historical gains being exempt. This means that the acquisition value of shares will be 'locked in' at the time the new law comes into effect, and only gains realized after that date will be taxed.

What can tax risk insurance bring to the table?

Tax risk insurance is a bespoke insurance solution that aims at reducing or eliminating the exposure of an identified tax risk from a successful challenge to the expected tax treatment of a proposed or historic transaction by the tax authorities, by transferring the risk from the taxpayer to an insurer, against a (one time) premium.

Traditionally and typically used in M&A transactions, today, tax risk insurance is a tool used in and outside an M&A context (and even if the case is already under audit or pending judicial proceedings), not only for businesses but also for individuals.

As such, in today's market in Belgium, Howden has placed numerous policies in which the tax uncertainty of the current regime of capital gains on shares is insured. Typically, these policies relate to the question whether or not a certain transaction or series of transactions can be deemed normal wealth management of one's private estate.

With the new solidarity contribution soon to be enacted, we are seeing a rise in taxpayers seeking to exit their positions under the current regime. Many of these investors seek to ensure that their gains are not speculative and are realized within the framework of normal wealth management and remain therefore untaxed. The insurance market is well aware of this issue and regularly incept tax risk insurance policies to eliminate the risk of taxation as miscellaneous income.

Going forward, we also expect a further increase of insured transactions once the new solidarity contribution regime has effectively been enacted, as several questions and concerns on the new regime currently remain. Among these factors of uncertainty are how the gain will be computed. For instance, it is currently unclear whether the calculation will be based on a FIFO or LIFO method or on an average value as well as which costs will be considered tax deductible. The notion of "acquisition value" will potentially also give rise to discussion: would this be the actual value on the moment the measure enters into force or would there be a reference period during which the highest value or an average value during that period is taken into account? Another point of uncertainty is the cumulation with and spillover risk into the other pre-existing capital gain tax regimes mentioned above. To the extent that at the time of enactment these questions and uncertainties would remain, tax risk insurance can also eliminate those risks.

How can we help

Howden CAP (Capital, Advisory and Placement) is a specialist division of the Howden Group created to meet increasing client demand for capital and insurance solutions that support their growth, optimise their capital and help achieve their strategic goals.

The Tax & Contingent Risks team combines in-depth understanding of specialist insurance markets with tax, litigation and structuring expertise from top tier law firms, investment banks and Big 4 to advise on the structuring and negotiation of innovative specific risk insurance solutions.

Speaking to Howden CAP and understanding what is possible is free of charge. Costs are only incurred if a decision is taken to purchase an insurance policy.

Contact the team

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