

GMS Flash Alert

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Belgium – Change Ending Discrimination of Married, Legally Cohabiting Taxpayers

With the publication of Circular Letter of 18 May 2017 (2017/C/31), Belgian tax authorities put an end to the discriminatory treatment of married and legally cohabiting taxpayers with dependent children, as opposed to those who are single or not legally cohabiting, in situations where the spouse with the higher employment income has income that is exempted from taxation in Belgium.¹

WHY THIS MATTERS

The surcharges on the tax-free allowances referred to in article 132 of the Belgian Income Tax Code (for example, the surcharge for dependent children) were automatically allocated to the spouse with the higher income. When this spouse enjoyed foreign-source employment income that is exempted in Belgium, some or all of the allowance was lost.

However, in contrast, individuals not legally cohabiting or single taxpayers can freely choose to which partner the surcharge on the tax-free allowance for their dependent children applies.

To end this discrimination embodied in the tax code, as from the 2017 assessment year and in cases of a joint assessment, the surcharges on the tax-free allowance will be allocated to the spouse with the higher income unless allocation to the other spouse would be more beneficial for both taxpayers – the calculation that is most beneficial for the taxpayers will be selected. The new rule will be applied regardless of whether the taxpayer has enjoyed a benefit abroad.

This could have important consequences for taxpayers having dependent children who have been filing joint returns for assessments levied from 1 January 2012.

Background

Various courts had ruled that the original provision was discriminatory and counter to the free movement of persons (a core European Union principle) and Belgium had been asked to amend its legislation.²

The administrative solution previously developed by the Belgian tax administration, whereby an additional tax reduction was granted under certain conditions, was rejected by a Court of Appeal of Antwerp in a judgment of 22 September 2015.³

Adaptation of Tax Calculation Program for Assessment Year 2017

In anticipation of a change in legislation, the Belgian tax administration will adjust the tax calculation program for the 2017 assessment year (2016 income year).

Starting with the 2017 assessment year and in cases of joint assessment, the surcharges on the tax-free allowance will be allocated to the spouse with the higher income unless allocation to the other spouse would be more beneficial for both taxpayers.

In practice, two calculations will be made:

- A first calculation in which the surcharge on the tax-free allowance is allocated to the spouse with the higher income; and
- A second calculation whereby the surcharges are allocated to the spouse with the lower income.

This double calculation is applicable in case:

- a joint assessment is applied;
- at least one spouse receives income that is exempted from taxation in Belgium on the basis of article 155 or 156 of the Belgian Income Tax Code;
- the taxpayers are entitled to one or more surcharges on the tax-free allowances referred to in article 132 of the Belgian Income Tax Code.

The calculation that is most beneficial for the taxpayers will be selected.⁴ It does not matter whether the taxpayer has enjoyed a benefit abroad (e.g., in the host country, an allowance for dependent children), whether fiscal or of another nature.

Also Applicable to Headquarters Agreements

The Belgian Ministry of Finance confirmed that the provisions of the Circular Letter also apply to internal officials working in Belgium for organizations for which "Headquarter Agreements" have been concluded with Belgium.

What about the Past?

The adjustment also applies for the previous assessment years in which taxpayers were in the same situation.

The publication of the judgments⁵ of the Court of Justice of the European Union and of the Constitutional Court provides grounds for taxpayers to file appeals⁶ (within six months) or request a rectification *ex officio*⁷. The latter will allow the taxpayer to go back five years.

In practice, this implies that the taxpayer can request a rectification *ex officio* for assessments levied from 1 January 2012, provided the assessment was not already the object of a protest that gave rise to a final decision.

KPMG NOTE

As a result of this Circular, taxpayers having dependent children and who have been filing joint returns for tax years going back to 2012, in which one or both spouses has exempt income, should review the tax assessments received to determine whether they may qualify for this concession and if they find that they do, file for a rectification *ex officio*.

FOOTNOTES:

1 Under application of article 155 or 156 of the Belgian Income Tax Code.

2 Judgment of 12.12.2013 of the Court of Justice of the European Union (C-303/12, Imfeld and Garcet) and the judgment of 24.04.2014 of the Constitutional Court (No. 68/2014).

3 Court of Appeal of Antwerp, 22 September 2015, case 2013/AR/2818.

4 Article 134, §4, 2° of the Belgian Income Tax Code.

5 Judgment of 12.12.2013 of the Court of Justice of the European Union (C-303/12, Imfeld and Garcet) and the judgment of 24.04.2014 of the Constitutional Court (No. 68/2014).

6 Article 371 of the Belgian Income Tax Code.

7 Article 376, §1 of the Belgian Income Tax Code.

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