

FOREIGN TRUSTS AND THE BELGIAN TRANSPARENCY TAX:

NEW JURISPRUDENCE CONCERNING DISCRIMINATION

Please find below a overview of the most recent Belgian jurisprudence concerning foreign trusts and the Belgian transparency tax.

1. Non applicability of the transparency tax due to double tax treaties between Belgium and other countries

On March 11, 2020, the Brussels Court confirmed an agreement between a Belgian tax resident and the Belgian tax authorities that double tax treaties have priority over the internal Belgian law, including the transparency tax.

The case concerned a Canadian trust and the Belgian-Canadian double tax treaty. However, this case is a landmark case concerning the Belgian transparency tax, and the position of the Belgian tax authorities in this matter.

This case must be applied to any “offshore” situation targeted by the Belgian transparency tax, if a double tax treaty is signed between Belgium and the country of residence of the foreign legal structure, whether it is a trust or an offshore company.

2. Distributions made by a trust

Article 18, 3° of the Belgium Income Tax Code 92 provides that each distribution made by a trust to a Belgian resident is considered a dividend, taxable in the chief of the beneficiary, Belgian resident, at a tax rate of 30%.

There are two exceptions to this qualification.

- Any income that has already been taxed in the chief of a Belgian resident (via the transparency tax) cannot be taxed again at the time of distribution by the trust.
- All distributions of capital that have been contributed by the founder of the trust to it. Capital "repayments" are not taxed by the transparency tax at the time of liquidation of a trust.

Based on Belgian internal law, the distributions made by these trusts when the trusts are liquidated and when you are still a Belgian resident, will be taxed as a dividend at a rate of 30%. Only the initial capital value of these trusts will be exempted from this taxation.

However, if it is demonstrated that the income received by the structure, has been subject to a taxation of at least 15% in the state of residence of the structure, the transparency tax will not apply.

This proof, however, can as a principle only be delivered if the offshore structure in question is a structure of type 2 (low or non-taxed corporations). The defining criteria is here whether or not the off shore structure has legal personality or not. A trust has, in general, no legal personality. As such, based upon the Belgian tax law, this proof cannot be provided for trusts. This means that the income received by trusts will always be taxed transparently in the chief of the Belgian founder, regardless of whether or not the income was already taxed in the country where the trust is situated.

On January 28, 2021, the Belgian Constitutional Court decided that the difference of treatment between an “offshore” corporation and between a foreign trust, concerning the non-applicability of the Belgian transparency tax if the entity is subject to an income tax of at least 15%, constitutes a discrimination in the chief of the beneficiary of foreign trusts.

As such, (income received by and) distributions made by foreign trusts, including distributions made following the termination of a foreign trust, should not be targeted by the Belgian transparency tax if the trust was subject to an income tax of at least 15% in the country of residence.

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It is not yet know how the Belgian government will react to this jurisprudence, especially with regards to the judgment of the Constitutional Court of January 28, 2021. It remains to be seen if and how the Belgian transparence tax will be modified in order to address this discrimination. Nevertheless, the court decision should be applicable in any comparable case.

Please do not hesitate to contact us, if you have any questions about this new jurisprudence.

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