

## Secret commissions taxation: again mitigation

The special taxation on secret commissions is a taxation of 309% which can be imposed on companies which cannot justify certain expenditure (fees, commissions, etc.) with the necessary tax documents. The last two years, different changes have been made to the regulation, first tightening it and afterwards introducing mitigations. At the end of June a new regime was entered into the law. A circular letter has further explained this mitigation.

### The new regime: two legal tolerances

The previous legal exception still applies: the taxation is not applicable if the company can prove that the beneficiary has declared spontaneously the commission or the benefit in kind.

A second tolerance is added now: no special taxation is levied if the beneficiary agrees that the commissions are taxed in his hands. Condition is that the normal taxation period of three years has not expired.

### More mitigations in the circular letter (1): costs are deductible

If the beneficiary has declared the income spontaneously, the costs are deductible for the company as professional expenditure.

In case the income is not declared spontaneously, but the tax authorities can still tax it (new tolerance), the expenditure (the costs made) are in principle not deductible. That is literally mentioned in the law. The Minister of Finance has however put this rule immediately in perspective. In other words: the new law is partly sidelined. When small errors or mistakes are concerned which are made in good faith, the costs remain deductible as professional expenditure. Only in case of clear bad faith, the law will be fully applied and the costs are no longer deductible.

### More mitigations in the circular letter (2): agreement of the beneficiary is not necessary

Apparently, the agreement of the beneficiary is not critical. It is of key importance that the beneficiary can be taxed within the legal period. In this respect it is of no importance (according to the tax authorities and the Minister) whether this taxation is with or without the consent of the beneficiary.

### More mitigations in the circular letter (3): also after the expiration of the three year period

The law states that the new mitigation only applies if the beneficiary can still be taxed within the normal three years period. Also this does not seem to be insurmountable. There are after all other legal taxation periods for special cases, i.e. five years (e.g. if new proof is obtained that certain income, e.g. the commissions of the beneficiary, are not declared) or seven years (e.g. in case of fraud). Also during these special five or seven year periods the beneficiary can still be taxed, so that the special taxation should not be imposed on the company.

**Conclusion: special taxation is an exception**

It shows from the new conduct of the Minister and the tax authorities that the special taxation can only be imposed in exceptional cases.