

New administrative comments on secret commission tax

The secret commission tax has set a lot of tongues wagging during the last years. According to the legislator that tax can only be imposed in exceptional cases. In a circular letter of 2015 the tax authorities somewhat opposed to the more flexible position of the legislator. In a new circular letter the tax authorities clarify their position and comply with the vision of the minister.

The secret commission tax since tax year 2015

Since tax year 2015 the secret commission tax is **less severe**. The taxation is no longer a punishment, but a **compensation**. Additionally, the tax can only be imposed in exceptional cases.

This philosophy is translated in the rule that **no special taxation** is imposed ...

- When the income is reported in a tax return in due time by the beneficiary. This can be a **Belgian or a foreign tax return**.
- When the beneficiary can be **identified unmistakably** within two years and six months starting on 1 January of the applicable tax year.

In the meantime, the tax rates were drastically reduced. The 'monster fine' was reduced from 309% to **103%** (payments to individuals for which no payment slips were made) or **51,50%** (payments to legal entities).

The special taxation remains deductible as professional expenditure, except for the non-reported payments.

Tax authorities do not (fully) follow the liberalization

Shortly after the change of the law, the tax authorities published a circular letter, mainly ignoring the new supply position. Most remarkable in the circular letter is the exception in case of **unmistakable identification**. According to the tax authorities this identification only excludes the special taxation in case of an explicit **written agreement of the beneficiary** to be taxed after all. **This condition is not foreseen in the law** and is added unjust by the tax authorities.

Additionally, the tax authorities write that the 51,50% rate for payments to legal entities only applies when the **company can prove that the ultimate beneficiary is a legal entity**. In essence the tax authorities ask that the company proves that the legal entity did not transfer the received secret commission to an individual. But also, this is not foreseen in the law.

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A new circular letter in 2017: a new vision?

In April 2017, the tax authorities published a new circular letter on this topic.

The tax authorities still refer to the **written agreement by the beneficiary**. Luckily this time this is more nuanced by adding the words "for example". The unmistakable identification can "for example" be made by a written agreement of the beneficiary. This sole word means that a written agreement is only one way to come to the unmistakable identification. Other possibilities exist. Therefore, the written agreement is no longer absolutely necessary. The tax authorities have changed their position on the vision which was already earlier defended by the minister of Finance in the Chamber.

The circular letter confirms that the secret commission tax remains deductible as professional expenditure, but adds that in case false or fictitious invoices are used to withdraw sums from the companies, the costs which are not accounted for should be reported under the disallowed expenses.

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