

6 December 2023

The Cayman tax 2.1 according to the draft Belgian 2023 programme-law

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The so-called Cayman tax, an allusion to the Islands of the same name, a well-known tax haven, was created in 2015 on the initiative of Finance Minister (NVA) Van Overtveldt. It was intended to tackle two tax evasion phenomena by creating foreign constructions that were legal but that enabled individuals to avoid paying tax.

The first dates back to the Middle Ages. The trust was a deed by which the knight, leaving for the crusade, placed his assets in the hands of a trustee, for himself and, if necessary, if he did not return, for his wife and children. The assets thus separated from those of the settlor were exempt from income tax and inheritance tax if the trust was set up in an appropriate jurisdiction such as Liechtenstein. In Anglo-Saxon countries, on the other hand, this construction was normally taxed and frequently used.

Secondly, the tax was intended to target companies set up in tax havens where tax was zero or low. The law thus introduced the concept of a legal construction¹. The legal construction could be, firstly, a legal relationship created generally by an act of the founder by which assets were placed under the control of an administrator in the interest of beneficiaries, i.e. a trust. Secondly, any company or entity with legal personality and subject to tax of less than 15% of income determined in accordance with Belgian rules. This did not include entities established in the European Economic Area, for which it was later established by Royal Decree that they should nevertheless be subject to a tax equal to at least 1% of their income, again determined in accordance with Belgian rules. A third type of legal arrangement was added at a later date, namely an insurance contract linked to a legal arrangement.

An important exception had been provided for: undertakings for collective investment in transferable securities (UCITS) and public or institutional undertakings for alternative investment were exempted by way of derogation.

¹ CIT92, art. 2, § 1, 13°.

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However, this derogation did not apply if the rights in the body were held by a person or related persons, i.e. married persons, legal cohabitants or persons living at the same address, persons in the same family up to the fourth degree and persons, natural or legal, exercising common control over the body². Chain constructions were also covered³.

Tax transparency

This legislation, originally described as the Cayman 1.0 tax, was amended in 2017 and has since been called the Cayman 2.0 tax. It provided for tax transparency: income received by the legal construction was taxable in the hands of the founder as if he had received it directly. This mainly concerned dividends and investment interest⁴.

Excluded from the rule were constructions with legal personality established in a State that has concluded a tax treaty with Belgium and carrying out an effective economic activity other than the management of the private assets of the founder and having premises, persons and equipment related to this activity⁵.

Dividends

In addition, distributions from the legal construction were treated as dividends. If the construction was a company, this was governed by the common tax system⁶: distributions arising from liquidations or repurchase by a company of its own shares qualified as dividends to the extent they exceed paid-up capital relating to the transaction. Again by virtue of a general rule, income from liquidation surpluses or share redemptions by an investment company benefiting in its country from a tax regime that is exorbitant in relation to ordinary law was not considered to be income from movable property and therefore to be dividends⁷. In the case of trust-type constructions, distributions were also considered to be dividends⁸ except insofar as they could be set off against the initial investment made by the founder under LIFO computation.

Nor did income from movable property constitute income that was attributed by a legal construction but had already been taxed in Belgium by the founder, i.e., according to the administration, taxation by transparency of dividends and interest essentially⁹. The draft programme law tabled by the Belgian government¹⁰ introduces a number of changes to this system.

Family UCITS and alternative funds

As we have seen, from the outset the tax contained an "anti-family" provision stipulating that collective investment companies held by related persons would not be exempt from the application of the Cayman tax. As early as June 2023, the press, echoing the remarks of a report by the Cour des Comptes stigmatising cases of simulation where a family fund was held by a family and a few front

² CIT92, art. 2, § 1, 13°/1.

³ CIT92, art. 2, § 1, 13°/2, 3 and 4.

⁴ CIT92, art. 5/1, § 1.

⁵ CIT92, art. 5/1, § 3, b).

⁶ CIT92, art. 18, 1°, 2° and 2°ter.

⁷ CIT92, art. 21, § 1, 2°.

⁸ CIT92, art. 18, § 1, 3°.

⁹ CIT92, art. 21, § 1, 12°.

¹⁰ Doc. Chamber 55/3697/001 of 23 November 2023.

men holding an insignificant number of shares, announced the government's intention to remedy this situation. Practitioners were expecting regulations that would, for example, impose a third-party holding of 10%. The draft goes much further, imposing a 50% third-party shareholding. It thus introduces greater discrimination, undoubtedly unconstitutional because it runs counter to the equality of citizens before the law, between related persons and others, linked for example by friendship or work relationships, who create a fund. Family funds, like family holding companies, are common in practice. These funds have no option but to repurchase shares to Belgian residents and eventually to dissolve before 31 December 2023, which is undoubtedly the aim of the project. In addition, a presumption based on the existence of related persons will apply when the asset manager receives specific instructions from the shareholders of a sub-fund.

Intermediate companies

In the case of chain constructions, it will now be stipulated that the intermediate entity may not only be a legal construction but also a company or any other entity with legal personality. The Council of State wondered whether this provision might not create double taxation. Indeed, the income from the intermediate construction could be taxed both in the hands of the founder of the ultimate legal construction and in the hands of the intermediate construction if the latter is, for example, a company receiving distributions from the legal construction. The government amended a provision stipulating that income allocated or paid by an entity considered to be a legal construction or an intermediate construction during one of the three elapsed taxable periods would not constitute income from movable property if it had already been taxed in Belgium in the hands of the founder¹¹. Contrary to the answer given by the Government Delegate to the Council of State's question, this provision is not likely to exclude most cases of double taxation. If a company which is an intermediate construction receives a payment from a FUND which is a legal construction and redistributes it to its founder, the latter will have been taxed under the transparency rule and will have to be taxed a second time on the receipt of a dividend from a company.

Economic activity of a legal construction

Carrying on an economic activity is subject to a more restrictive definition: not only can it not be the management of the founder's assets, but it must also include offering goods or services to a specific market.

Exit tax

It was already provided that the undistributed profits of a legal construction were deemed to be paid to the founder when the economic rights, shares or assets of such a construction were contributed or transferred to a country that had not signed a tax treaty with Belgium¹². The text has been amended to include the transfer of the founder's residence abroad, thereby introducing for the first time in Belgium an exit tax on assets when a company emigrates.

Definition of a founder

The founder was already defined either as the natural person who set up a legal construction, or who contributed assets and rights to it, or who inherited from the previous persons or was intended to

¹¹ CIT92, art. 21, § 1, 12°.

¹² CIT92, art. 5/1, § 2.

inherit from them, unless it was established that neither they nor their successors could benefit from an advantage granted by the legal construction¹³. The draft adds that the persons listed in the UBO register as beneficiaries of the legal arrangement will be presumed to be its founders, unless proven otherwise.

Return

The obligation to report legal constructions also extended by the obligation to identify the legal arrangement, its manager, its income and its assets.

Additional taxable income

While income that has been subject to the Cayman tax is deemed to have been taxed in Belgium and will no longer be taxed as dividend when distributed, this will no longer be the case for income that falls outside the scope of the tax, such as private capital gains, or that is exempt under the Code or a tax treaty. A discrimination is thereby introduced between direct holders of capital investments and those who hold it through a legal construction subject to the Cayman tax.

¹³ CIT92, art. 2, § 1, 14°.