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DON'T THROW AWAY THE "*SOCIÉTÉ DE DROIT COMMUN/BURGERLIJKE MAATSCHAP*" WITH THE BATH WATER

I. SAGA OF THE SPLIT REGISTRATION: STANDPOINT NO. 15004

The saga of the split registration continues to make waves in the Flemish Region: this is due to the online publication on 26 April 2017 on the VLABEL website of the last update of Decision 15004, this time targeting the donation of the bare ownership of the shares of a *société de droit commun/burgerlijke maatschap* (i.e. a company without legal personality).

As a reminder, Article 2.7.1.0.7 of the Flemish Tax Code, hereinafter "FTC" (of Article 9 of the Inheritance Tax Code) contains a fiction according to which movable or immovable property acquired in usufruct by a person and bare-owned by the heirs of such person will be considered part of the succession of the usufructuary, unless it is proved that the acquisition did not disguise *per se* a benefit to the third party beneficiary. On the basis of an interpretation of the jurisprudence of the Court of Cassation, the administration had long admitted that contrary evidence was validly relied upon if the parties proved that a pre-donation (even from the parent to the child) had allowed this split acquisition.

It will be recalled, however, that this mechanism was included on the black list published by the Federal Administration in its circular of 19 July 2012 and was subsequently deleted in the circular of 10 April 2013.

However, the respite was short-lived, since by a decision of 19 April 2013, the administration considered that the contrary evidence required under Article 9 of the Inheritance Tax Code could not consist of a prior donation.

After being firmly called to order by the Minister of Finance, the administration finished by issuing a decision (RJ S9/06-07) on 18 July 2013 , according to which a prior donation can constitute contrary evidence under two conditions: (i) when the prior donation has been subject to the registration duties of the donation, or (ii) where it is demonstrated that the beneficiary of the donation could freely dispose of the assets; this would be the case, for example, if it were shown that the donation made by the acquirer of the usufruct was not specifically intended to finance the acquisition of the bare ownership of the split acquisition.

By a decision of 21 March 2016 (No. 15004), VLABEL took a position on the application of Article 2.7.1.0.7 of the FTC: with regard to the split purchase of movable or immovable assets, the position of VLABEL follows the aforementioned federal position. Nevertheless, a supplementary mention has been added, diverging fundamentally with the federal position concerning split registration.

In effect, VLABEL specifies that Article 2.7.1.0.7 is also applicable to split registrations of securities and financial investments. Evidence contrary to the presumption may be reported in the same manner as described for the split purchase of property.

In other words, VLABEL goes exactly against the federal position since, in the latter's decision, it is expressly stated that the decision on split acquisition does not apply by analogy to split registrations.

II. APPLICATION TO THE *SOCIÉTÉ DE DROIT COMMUN*

1. The shares of the *société de droit commun/burgerlijke maatschap* and the underlying assets

In its new version, VLABEL attacks the *sociétés de droit commun/burgerlijke maatschap*. As these do not have legal personality, they are - as VLABEL recalls - fiscally transparent. Accordingly, for VLABEL, when analysing the question of registration or inheritance taxes, the underlying assets need to be considered. Where the assets contributed to the *société de droit commun/burgerlijke maatschap* consist of securities or financial investments, the presumption of Article 2.7.0.1.7 of the FTC will apply. In the absence of the ability to provide proof of a previously registered gift (to reverse the liberality presumption), the registration of the underlying securities or investments that have been dismembered will be considered as a legacy.

This split registration will be either (i) material (as it appears in the Register of Shares or bank records) or (ii) legal (resulting from such acts as, for example, a gift with a usufruct reserve).

2. The income of the *société de droit commun/burgerlijke maatschap*

As regards the *société de droit commun/burgerlijke maatschap*, VLABEL goes a step further in its reasoning.

Thus, the presumption of liberality may also apply to the income generated from these securities and financial investments.

Indeed, if the income generated by these assets were themselves to be registered in bare ownership and usufruct (for the heirs, on the one hand, and the deceased, on the other) then Article 2.7.1.0.7 of the FTC would also apply to this income.

A summary table could be drafted as follows:

Pre-registered donation	Distributed civil fruits [income]	Use of the civil fruits by the usufructuary	Article 2.7.0.1.7
Yes	Yes	Full ownership	No application (attention, however, if the donation was made by the usufructuary in the three years preceding death: application of Article 2.7.1.0.5)
Yes	Yes	Usufruct-Bare ownership	Application upon the new dismemberment
No	No	-	Yes on the whole (pre-donation - civil fruits and other income).
No	Yes	Full ownership	Application on the entirety, including civil fruits but possibility of reduction
Yes	No	-	Application on the civil fruits but not on pre-donation or capital gains

3. Replacement of the initial securities and financial investments

Standpoint 15004 specifies that the replacement of financial securities and investments initially registered in a split manner by other securities and investments that are also split up is not considered as a new split-up registration. Consequently, to rebut the presumption in Article 2.7.1.0.7 of the FTC, it will suffice for the bare owner to demonstrate an absence of a disguised liberality only for the initial registration.

4. Entry into force

The taxation will take place if the usufructuary is a Flemish resident at the time of death, irrespective of the residence at the time of the split registration of the securities that took place from 1 June 2017.

This also applies to the civil fruits received from that date even if the donation of the "shares" of the *société de droit commun/burgerlijke maatschap* was made earlier.

III. CONCLUSION

Logically, the position of VLABEL is quite worrisome for several reasons.

As an initial matter, this decision (i) calls into question the enforceability of company contracts and (ii) will raise many questions as to the very notion of civil fruits.

Thus, as VLABEL confirms in an example under Standpoint 15004, capital gains are, in principle, not considered as civil fruits in the strict sense of the term, and are, by definition, not distributable. Moreover, there are still controversies concerning the attribution to the usufructuary of certain dividends. What, in practice, is the individualisation of these non-distributable incomes relative to the other types

of company income over the years? There is reason to fear that the inheritance tax may not be claimed for the entirety.

In conclusion, what solution can be envisioned for Flemish residents wishing to transfer their household effects to their heirs without departing from the effective management of these assets?

First, for donations already made in the past, to ensure the transfer of civil fruits, as a whole, in full ownership to the usufructuary from 1 June 2017.

Then, in the future, it will certainly be advisable not to use a dismemberment. It is not necessary to "throw the *société de droit commun/burgerlijke maatschap* out with the bath water". If split-up registration is to be left out, it is still possible to continue to manage these assets through the intermediary of this company. In this case, the transfer of securities and cash must have been granted in full ownership and with an annuity, for example, in order to avoid the application of Article 2.7.1.0.7 of the FTA, which, as we have seen, only applies to situations of dismemberment in bare ownership and the usufruct of securities and financial products.

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