



Tax abuse in the Flemish real estate market

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Tax abuse - a term that was not really known until recently, but is now appearing more and more often, especially in the context of Flemish sales law, also known as "mutation law." This article clarifies what tax abuse means in real estate transactions and how it can affect your real estate purchase in Flanders.

Tax abuse - The basics

First, it is crucial to distinguish tax abuse from tax evasion. Tax evasion is illegal and constitutes fraud. Tax abuse, on the other hand, falls under the category of tax avoidance, which is generally allowed. Tax avoidance involves legally minimizing your tax liabilities by choosing the least taxed route. However, tax abuse is an illegal form of tax avoidance and occurs when a taxpayer, through a legal act or series of acts, does any of the following:

- creates a tax benefit that is contrary to the intended purpose of the tax provision in question; or
- places itself outside the scope of a tax provision.

Flemish sales tax on purchase of sole owner-occupied home

The basic rate for Flemish registration fees was 10% for a long time, but a significant change took place with the Flemish Program Decree of Dec. 23, 2021. This decree increased the rate to 12%. While an additional 2% may not sound like much, it can have a significant impact. To mitigate this increase, the existing reduced rate of 6% for the purchase of the sole owner-occupied home was reduced to 3% as of Jan. 1, 2022.

However, this reduced rate comes with certain conditions:

- the purchase must be made by a natural person;
- the property must be located in the Flemish Region;
- the transaction must involve a real payment;
- the buyer must acquire full ownership of the property;
- within 3 years of the authentic purchase deed, the buyer must register in the local population register.

So far, these conditions seem reasonable. However, there is an additional requirement: the buyer must not have "foreclosing possession." This means that the buyer cannot have full ownership of another property or building plot, in Belgium or abroad. However, ownership of an undivided share in another property or building plot is not considered.

We have now reached the point where creative buyers think they can get away with it.

Potential pitfall: tax abuse

This is where it gets complicated. Some creative buyers have tried to evade these restrictions. What if a potential buyer quickly gets rid of his foreclosing property, at least in part? Or what if a buyer makes sure that at the time of purchase he has only an undivided share in another property? What if a buyer has only the usufruct of a property at the time of purchase of another property?

Could the Flemish Tax Administration (Vlabel) successfully prove tax abuse in such cases? It certainly seems that these transactions were done to artificially place the buyer within the scope of the new rules and thus reduce the rate from 12% to 3%. The potential tax savings are significant. But appearances can be deceiving.

Precedent - Tax Abuse Rulings

In a recent ruling (Precedent Ruling No. 22019 of June 20, 2022), a taxpayer, Mr. X, planned to purchase a new home while retaining full ownership of his current home. To take advantage of the new 3% rate, Mr. X decided to gift part of his current home (in bare ownership) to his spouse. The couple was married under the system of separation of assets. The question arose: was this a tax abuse?

Vlabel argued that Mr. X's intention was clear - to significantly reduce the amount of tax by first gifting a portion (in this case 10%) of the bare ownership home and then quickly acquiring a new home, thus artificially falling below the 3% rate. Vlabel regarded this as tax avoidance and assessed it as tax abuse. The non-tax motive cited specifically was brushed aside, since the sequence of legal acts showed the opposite.

In another ruling (Advance Decision No. 22052 of Oct. 24, 2022), a couple planned to buy an existing home instead of building on their own land. To accomplish this, they donated the land, subject to usufruct, to their young child. This ruling followed a similar pattern, with Vlabel viewing this as a tax abuse because of the alleged tax avoidance. The non-tax motives were literally thrown to the (building) ground by Vlabel.

Conclusion

The concept of tax abuse has made its appearance in real estate transactions. Vlabel closely investigates such cases and strictly adheres to the intentions of the legislature. While it can be

tempting to explore creative ways to minimize tax, it is essential to stay within the bounds of the law.

As honorary notary Eric Spruyt suggests, a more cautious approach is advisable. The Flemish Tax Codes (VCF) include a provision that allows the buyer to claim the 3% rate in the deed of sale while committing to renounce the encumbering property within two years. However, the transaction must be a true sale, donating is not an option.



Eveline Smet *senior manager legal*
e.smet@atern.io

Source: E. Spruyt, Het Vlaams 3%-
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