

# Transfer of assets: succession of liability for taxes?

*IFA Seminar*  
14 November 2017



## General background

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- ▶ Legislation in force for more than 20 years
- ▶ Important interplay between civil/corporate law and tax law rules
- ▶ Variety of questions in practice regarding scope and effect of successor provisions and possibility to contractually agree on division and succession
- ▶ Analysis of **partial transfers** (partial demergers, contributions and asset deals)



## Content of presentation

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1. Ut singuli vs. general transfer of A&L – civil and corporate law framework
2. Specific tax rules – content and scope
  - ▶ Outstanding tax debts
  - ▶ Unexpressed/deferred tax debts
  - ▶ Transaction related tax debts
3. Successive transfers
  - ▶ 4 case studies with partial carve-out followed by second transfer



## *Ut singuli* vs. General transfer of A&L



## Own characteristics and scope

### *Ut singuli* transfer

- ▶ “Cherry pick” assets & liabilities
- ▶ No automatic transfer of liabilities (including tax debts)
- ▶ Specific protection Belgian treasury – successor provisions (see *infra*)

### General transfer

- ▶ Universal and automatic\* transfer of (part of) an estate as a whole including all related A&L
- ▶ For contributions and asset deals: *branch of activity*
- ▶ Default for contributions and optional for asset deals

\* Quid *intuitu personae* contracts?



## Own civil and corporate law rules

### *Ut singuli* transfer

- ▶ Publicity rules
  - ▶ Per asset and per type
- ▶ Creditor protection
  - ▶ Transfer of liabilities requires approval creditor – novation
- ▶ Specific tax rules (see *infra*)

### General transfer

- ▶ Publicity rules
  - ▶ Single publicity rule
  - ▶ Publication deed of transfer
- ▶ Creditor protection
  - ▶ Default rule for non-allocated A&L:
    - ▶ Proportionate allocation assets but joint and several liability for non-allocated liabilities
  - ▶ Transferor remains jointly liable for outstanding debts transferred up to amount of net assets



## Tax Authorities: third party?

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- ▶ When does transfer become opposable?
  
- ▶ Protection of publicity rules vs. immediately opposable transfer
  - ▶ **Ut singuli transfer**
    - ▶ Tax Authorities not a third party; transfer immediately opposable (CoA Ghent 24 May 2006)
    - ▶ Deferred opposability under *lex specialis* possible (see *infra*)
  - ▶ **General transfer**
    - ▶ Tax Authorities are a third party but no protection of publicity rules art. 76 BCC (Cass. 2 September 2016)



## Content and scope of tax rules



## Ut singuli transfers – outstanding tax debts

### ▶ Specific successor rules

- ▶ **Default regime:** deferred opposability and joint and several liability of transferee
- ▶ **Optional Regime:** immediate opposability and no joint and several liability of transferee provided transfer is notified together with necessary tax certificates

### ▶ Which outstanding tax debts?

- ▶ Income Tax Code (art. 442bis)
- ▶ VAT Code (art. 93undecies)
- ▶ Flemish Tax Code (art. 3.12.1.0.14)
- ▶ *Pro memore:* identical rules for social security contributions



## Ut singuli transfers – which transactions?

### ▶ Transactions in scope:

- ▶ Transfer for consideration or not (*cf.* Fraudulent transfers) including sale, contribution, transfer upon liquidation etc.
- ▶ Transfer of more than 1 asset\*
- ▶ At least 1 asset that allows to “*maintain the client base*”
- ▶ Universality or branch of activity required? Not on the basis of the legislative provisions (e.g. CoA Ghent 19 May 2009)

### ▶ Excluded transactions:

- ▶ Transfers in framework of *Belgian* bankruptcy procedures
- ▶ General transfers\*\* –also partial demergers and transfer of branch of activity?
- ▶ Share deals

\* *Actio pauliana* for one asset - \*\* Not only tax neutral transactions



## ***Ut singuli* transfers – default regime**

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### ▶ **Deferred opposability:**

- ▶ Derogation to immediate opposability (see *supra*)
  - ▶ Opposable 1 month after the notification of the deed of transfer  
=> If no notification, 1 month waiting period not yet started!
  - ▶ Notification to each receiver (income tax, VAT and/or local Flemish taxes)
  - ▶ Possible actions of the Tax Authorities during waiting period:
    - ▶ Protective and executive measures on *assets transferred* only
    - ▶ No new privileges for Belgian treasury
    - ▶ Imposing taxes on transferor (extending scope of joint liability – see *infra*)
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## ***Ut singuli* transfers – default regime**

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### ▶ **Joint and several liability:**

- ▶ Following completion of 1 month waiting period, joint and several liability of transferee for all outstanding Belgian tax debts of transferor irrespective of their origin (i.e. no link with transferred assets required) and irrespective of whether contested or not
  - ▶ Outstanding tax debts at end of waiting period => fixed amount of tax debts and subject to statute-of-limitations
  - ▶ But actions Tax Authorities not limited to assets transferred (transferee's whole estate as collateral)
  - ▶ Non-deductible as professional expense for transferee (contested jurisprudence) but claim towards transferor (hence, no P&L impact)
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## ***Ut singuli* transfers – default regime**

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### ▶ **Joint and several liability:**

- ▶ Capped at purchase price\* or nominal value of shares\*\* => if no consideration, only deferred opposability
- ▶ Capped at purchase price in aggregate => potential concurrence among Tax Authorities
- ▶ No limitation on actions during period of non opposability and thereafter
- ▶ No specific privilege for the Tax Authorities towards the transferee
- ▶ Difficulties if transferee is based outside Belgium

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\* Irrespective timing of attribution or payment - \*\* quid for share premium?



## ***Ut singuli* transfers – optional regime**

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- ▶ Notification(s) of the deed of transfer together with tax certificates
- ▶ Certificates only granted if (i) no taxes are due, (ii) no tax audit pending or announced and (iii) no request for information has been sent to the transferor
- ▶ Obtaining certificates *condition precedent* but as such no impact, notifying deed with certificates *condition subsequent* and relevant
- ▶ Notification(s) of deed and subsequent new notification(s) of deed and certificates possible

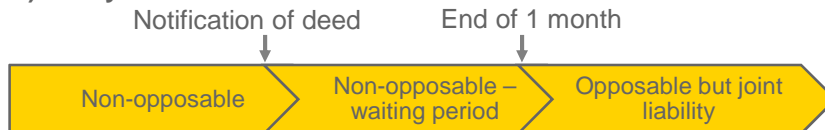


## Ut singuli transfers – 3 scenario's

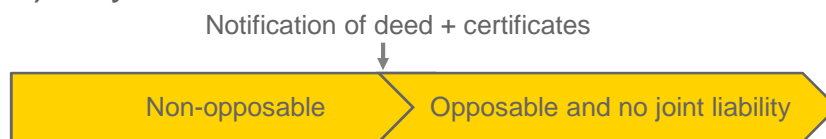
▶ 1) Do nothing



▶ 2) Notify deed of transfer



▶ 3) Notify deed of transfer and certificates



## Ut singuli transfers – unexpressed tax debts

- ▶ Tax liabilities inherent to transaction or income earned before opposability of transfer - unknown or not recorded
- ▶ No rights for Tax Authorities under successor rules
  - ▶ Application *actio pauliana* and/or anti-abuse rules not excluded
- ▶ Contractual arrangements possible but not opposable to Tax Authorities
  - ▶ Dependent on the type of transfer: cherry picking possible
  - ▶ No price adjustment but qualification as indemnity





## ***Ut singuli* transfers – transaction taxes**

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- ▶ Transaction taxes include capital gains taxes, fixed or proportionate registration duties, VAT etc.
- ▶ Specific provisions determine tax payer (transferee or transferor)
- ▶ Contractual arrangement possible but not opposable to Tax Authorities
  - ▶ Nature of taxes allows immediate price adjustment



## **General transfer – outstanding tax debts**

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- ▶ Transfer of outstanding tax debts linked to transferred estate
- ▶ Difficulty to split up tax debts for partial transfers because generally linked to legal entity
- ▶ Specific allocation recommended:
  - ▶ Default rule for non-allocated liabilities: joint and several liability for transferor and transferee and no cap on liability
  - ▶ Allocation proportionate to fair value of net assets of transferor and transferee? ~ default rule demergers (art. 399ter BITC)
  - ▶ Allocation may impact tax neutral treatment of transaction
  - ▶ Transferor remains jointly liable for outstanding debts transferred up to amount of net assets – no deviation in Tax Code



## General transfer – unexpressed tax debts

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- ▶ Principle of transfer of outstanding tax debts linked to transferred estate also applies for unexpressed tax debts
- ▶ Difficult/impossible to identify and allocate
- ▶ Specific rule applicable to partial demergers (art. 365 BITC)
  - ▶ *“Ingeval een vennootschap wordt overgenomen of gesplitst in het kader van een fusie, een aan een fusie gelijkgestelde verrichting of een splitsing als bedoeld in de artikelen 671 tot en met 677 van het Wetboek van vennootschappen, of een gelijkaardige vennootschapsrechtelijke verrichting onder buitenlands recht, wordt de aanslag met betrekking tot belastbare inkomsten behaald door de overgenomen of gesplitste vennootschap tot en met de voornoemde verrichting, binnen de termijnen bepaald in dit hoofdstuk, gevestigd ten name van de overnemende vennootschap of de verkrijgende vennootschappen zelfs op een tijdstip waarop de overgenomen of gesplitste vennootschap als rechtspersoon niet langer bestaat.”*



## General transfer – unexpressed tax debts

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- ▶ Meaning and scope of art. 365 BITC?
  - ▶ Allows Tax Authorities to deviate from allocation between transferor and transferee
  - ▶ No limitation on unexpressed tax debts potentially due by transferor or transferee
  - ▶ Preparatory works indicate purpose to allow taxation with transferee if transferor does no longer exist but wording not limited to such scenario
  - ▶ Advice *Conseil d'Etat/ Raad van State* specifies that contractual allocation should be opposable
- ▶ Contractual indemnity in case of application of art. 365 BITC for partial demerger recommended



## General transfer – transaction taxes

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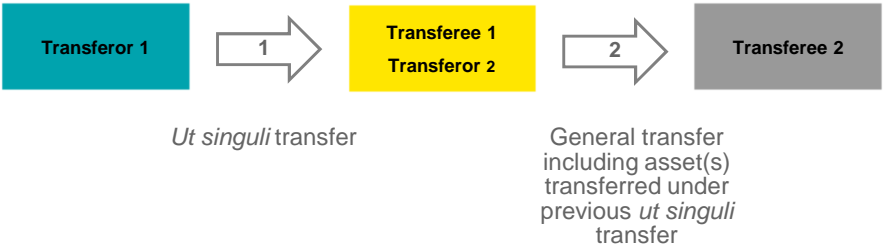
- ▶ Relevant for transactions that cannot benefit from tax neutrality
- ▶ Specific provisions determine tax payer
  - ▶ For partial demergers: application of article 365 BITC possible (“*met betrekking tot belastbare inkomsten behaald door de overgenomen of gesplitste vennootschap tot en met de voornoemde verrichting*”)
- ▶ Contractual arrangement possible but not opposable to Tax Authorities
  - ▶ Immediate price adjustment not always possible; indemnity may be required in view of unpredictable nature of taxation



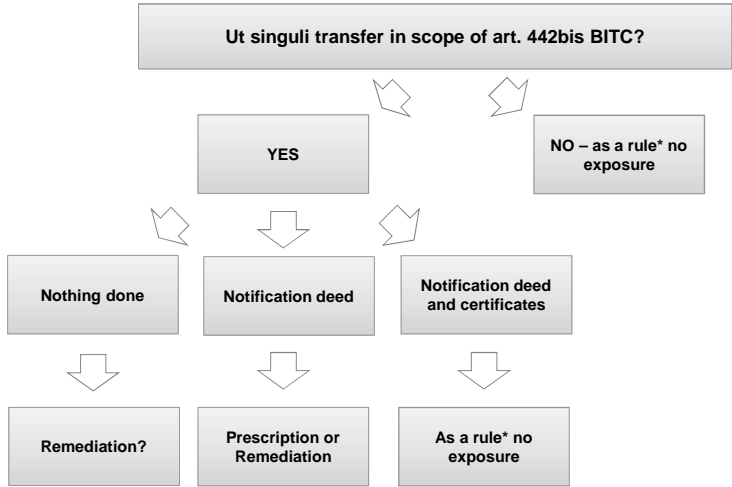
## Case studies - successive transfers



# Scenario 1: *ut singuli* transfer followed by general transfer



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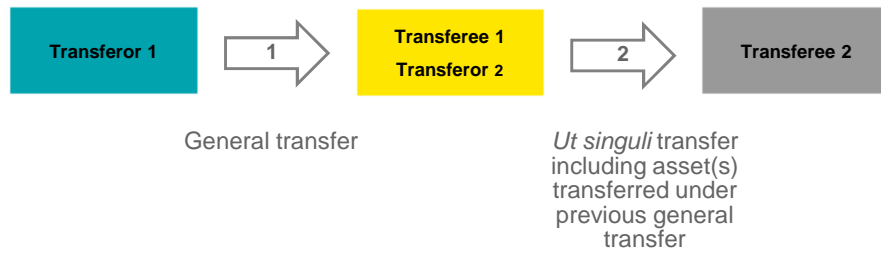


\* Actio Pauliana



## Scenario 2: general transfer followed by *ut singuli* transfer

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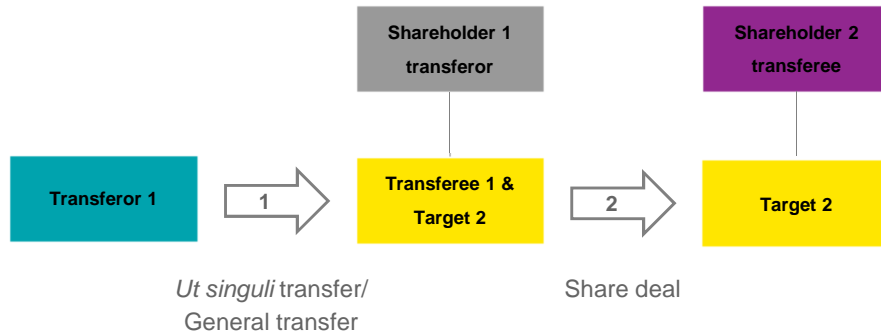
## Scenario 2: general transfer followed by *ut singuli* transfer

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- ▶ Verification allocation tax debts under first transfer
- ▶ Verification (due diligence) of all tax debts from transferor 2 necessary if *ut singuli* transfer in scope of art. 442bis BITC
- ▶ Possibility to apply optional regime art. 442bis BITC and exclude need for due diligence regarding tax debts transferor 2



### Scenario 3: general transfer or *ut singuli* transfer followed by share deal

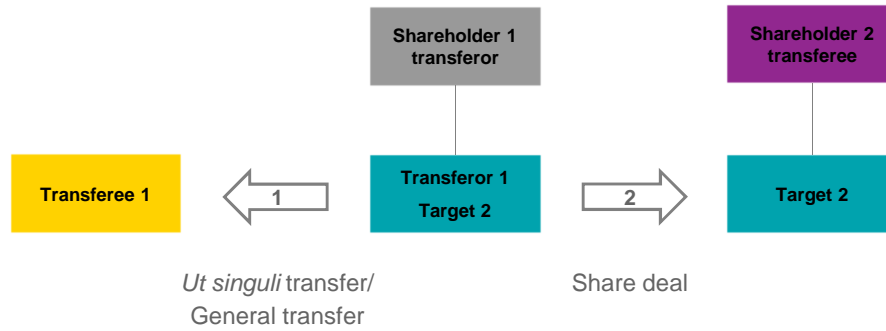


### Scenario 3: general transfer or *ut singuli* transfer followed by share deal

- ▶ Different focus of due diligence depending on nature of first transfer
  - ▶ *Ut singuli* transfer: verification of procedures
  - ▶ Share deal: verification documentation – allocation tax debts
- ▶ Remediation procedural formalities or involvement/ control over contractual arrangement for first transfer not often possible
- ▶ Contractual protection in documentation regarding second transfer often necessary
  - ▶ Indemnification of new shareholder – qualification as price adjustment



## Scenario 4: transfer of shares of transferor under first transfer



## Scenario 4: transfer of shares of transferor under first transfer

- ▶ Due diligence in such scenario necessary
  - ▶ E.g. if first transfer is a general transfer, joint and several liability may exist for non-allocated tax debts
  - ▶ Parent guarantees of first shareholder in relation to first transfer may require transfer to new shareholder

## Questions?



## Contact Details

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