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DUAL TAXATION ON INHERITANCE WHERE NO DOUBLE TAX TREATY APPLIES : HOW TO MIGITATE IT ? THE CORE PRINCIPLE OF CHOOSING THE LOWEST TAX ROUTE UNDER BELGIAN AND EUROPEAN LAW

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CHAPTER I : From Belgian inheritance tax point of view, Resident is taxed on a world-wide basis whereas non-resident is only taxed on real estate property located in Belgium

Section 1 : The Resident or the so-called "habitant du Royaume".

According to Belgian law, is resident the individual who has his or her domicile or his or her center of economic interest located in Belgium (Article 1 of the Succession Duties Code).

They are cumulative criteria.

Derks' Case law is symbolic

Section 2 : Taxation of the resident's world-wide estate – Taxation of the non-resident is limited to immovable property.

Provision 13 of the Protocol (no 7) on the privileges and immunities of the European Union states that for the application of several taxes (including death duties), officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Union.

Civil servant is either "resident" (2.1) or "non-resident" (2.2).

Once retired, Civil servant maintaining his domicile or the seat of his wealth in Belgium shall qualify as Belgian resident.

2.1 Taxation of the resident's world-wide estate

The tax base is particularly wide since inheritance taxes are levied on the value of assets transferred by succession (Article 1 of the Succession Duties Code and 2.7.3.1.1 of the Flemish Taxation Code).

Every asset, wherever it is located, is part of the deceased Belgian resident's tax base.

2.1.1 Extension of the notion of estate: the “fictions”

Inheritance tax codes expand the taxable estate to other transactions assimilated to taxable bequests.

Articles 7 and 8 of the Succession Duties Codes for instance. Other fictions can be found in Articles 4, 3° of the Brussels Code, which defines the notion of resident of the “*Région de Bruxelles-Capitale*”, 5, 9 and 10 and also in the Flemish Taxation Code.

Gifts of Belgian and foreign values made informally (indirect donations, manual donations) and donations made abroad (in the Netherlands, Switzerland or in Italy) that were not registered in Belgium and made within three years prior donor’s death, are assimilated to bequests et subject to tax.

2.2 Taxation of the non-resident limited to immovable property

The article 13 of the Protocol states that officials who, for the sole purpose of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their country of domicile shall be considered as having maintained their domicile in the country of origin.

2.3 Retired official

Retired officials can no longer invoke the benefit of Article 13 of the Protocol. Their succession will open at the place of their residence or domicile and will be subject to Belgian inheritance tax law when located in Belgium.

CHAPTER II : Multiple taxations : lack of direct taxes harmonization – multiplicity of connecting factors

Section 1 : Scarcity of double taxation treaties

Whether in civil law, there is a will and an instrument of harmonization, it's not the case in fiscal law.

However, there is an O.E.C.D. Model Convention on inheritance tax. Only two conventions have been signed by Belgium : the first one with Sweden on January 18th, 1956 and the second one with France on January 20th , 1959.

Section 2 : Multiple factors of taxation

States apply various factors to determine tax liability of taxpayers such the residence, the domicile, the nationality of the deceased and/or the beneficiaries.

Some states consider the location of property or the nationality of the holding company.

2.1 The deceased's residence criterion

This is the criterion used in our country to subject a succession to Belgian tax on the world-wide estate of the deceased.

A large number of States uses this criterion : Germany, France, Italy, South Africa, Luxembourg and the Netherlands.

The adoption of this criterion does not eliminate the risk of dual taxation.

Indeed, the concept of "residence" does not have the same meaning in every legislation.

2.2 The heirs' residence criterion

Other States choose to tax the assets received by an heir who is a resident of these States.

2.3 The deceased's nationality criterion

The vast majority of States choose to exercise their fiscal sovereignty according to territorial criteria.

Other States choose to use the nationality criterion. This is the case in United States, Sweden, Bulgaria, Greece or Poland.

The United States taxes estates (*Estate Tax*) of people having their domicile on the American territory and/or the American citizenship.

2.4 The asset's location criterion ("le situs"). The source state.

Beside the personal attachment criteria set out above which are intended to subject all assets of an estate to the inheritance tax of a given State, certain States also tax assets situated on their territory which are transmitted by succession.

Taxation in consideration of the location of the asset may, depending on the State, target both immovable and movable property.
As for immovable property, it's quite common.
As for movable property, it is less so, even if large states such as the United States, France, Germany, the Netherlands have adopted it.

2.5 Other criterion : the residence of the debtor of the capitals

In Spain for instance.

Spanish inheritance taxes affect assets deposited with Spanish banking institutions.

CHAPTER III: The mitigation of plural taxations - Choice of the lowest tax route.

Section 1 : Imputation of foreign tax

In Belgium, inheritance tax relating to an immovable property situated abroad is reduced by the amount of foreign inheritance tax levied on that building.

Article 17 of the Succession Duties Code sets the regime.

Section 2 : Are foreign taxes deductible as debt of the succession ?

As a rule, inheritance taxes owed by the heirs are not debts of the deceased.

There are exceptions.

The Flemish Administration (Vlabel) agreed to consider in a decision of the 9th November 2015 that the English "inheritance tax" is not an inheritance tax but a debt which is tax deductible.

Section 3 : The residence transfer

The residence transfer can lead to the absence of taxation.

Section 4 : Choice of the lowest tax route

4.1 The principle

The choice of the lowest tax route is the core principle in estate planning.

The taxpayer is entitled to choose the most tax-efficient structure for their commercial and patrimonial affairs said Belgian Supreme Court. It was the Brepols case (Cass., 7 juin1961, Pas., I, p.1483).

The principle of the choice of the lowest tax route is maintained.

This principle was recently dedicated in the Council's ATAD directive (anti taxavoidance) of the 12 July 2016 and its general anti-abuse measure.

4.2 What are the limits or should we be afraid of the anti-abuse measures ?

This principle was reiterated in the framework of anti-abuse measures adopted under Belgian law on 29 March 2012, which enshrined the concept of "fiscal abuse".

The aforementioned principle continues to apply except in cases of tax abuse.

Tax abuse implies that, by means of a single legal act or several acts linked together by the same intention, the taxpayer carries out a transaction and

1° falls outside the scope of a tax law that would impose him more heavily – it is legally avoiding

2° or benefits from a tax law that would advantage him (through a reduction or exemption of taxes, for example...) – it is placed oneself in the text to benefit from it.

and this is contrary to the objectives pursued by the tax provision in question.

4.3 The dynamics of fiscal abuse

4.3.1 There are two elements : one objective another subjective.

A) Objective element

It is necessary to fall outside the scope of a provision of the income tax Code/the Registration Fees Code/the Succession Duties Code /Flemish Tax Code or an implementing decree or to take advantage from it.

B) The subjective element : the intention to avoid or to take advantage

4.3.2 The taxpayer can prove otherwise

If there is fiscal abuse, the act or legal acts are not enforceable against the Administration, unless the taxpayer proves otherwise. Before the new provision, opposition to the anti-abuse measure required proof of "legitimate economic or financial grounds".

Today, the taxpayer can prove that his choice is justified by other reasons than the desire to avoid taxes.

This motive should no longer be financial or economic, it could be personal, religious or ethical. It could be an objective of protection of the heritage. The motive must no longer be legitimate.

4.3.3 Failing proof to the contrary

Failing proof to the contrary, the Administration taxes the transaction as if the abuse had not taken place and in accordance with the purpose of the law. The Administration will have to take into account the tax already paid.

4.3.4 Very few Belgian cases regarding Article 344 of the Income Tax Code. What perspective do we have ?

The VAT Code has an anti-abuse provision since 2006 in Article 1, §10.

This anti-abuse provision comes from the Sixth Directive VAT.

These provisions have already given rise to some very interesting case law.

And the preparatory work for the new anti-abuse measure refers explicitly to this anti-abuse measure and the relevant case law.

- **Judgment of the 22nd December 2010 of the European Court of Justice**

A company opted for a leasing transaction ("crédit-bail") rather than a direct purchase, which allowed it to spread its VAT burden.

The tax authority says : there is fiscal abuse. The result of the operation is a tax advantage, the granting of which is contrary to the objective pursued by the provisions of the Sixth Directive.

What does the Court say ?

[…] "*a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, taxpayers may choose to structure their business so as to limit their tax liability*."

The Court reaffirms the fundamental principle that the taxpayer has the right to choose the lowest tax route.

- **Judgment of the 22nd December 2010 based on the judgments Halifax and Part Services of the 21st February 2008**

Indeed, the Court said, the characteristics of the transactions and relationships that took place in this context have not revealed any evidence that could establish the existence of an artificial arrangement, devoid of economic reality and carried out for the sole purpose of obtaining a tax advantage.

The person concerned actually provided the services in question in the context of a real economic activity.

- **Judgment of the 15th June 2011**

The Brussels Court of Appeal ruled on the question of whether the recourse to an occupancy agreement and activity right concession agreement in comparison to an exempted, non-deductible lease could not constitute an abusive practice.

The Court decided :

- there is no fiscal abuse

- there is no conflict with the objectives pursued by the legislator, since within this case the lease agreement and the occupancy agreements are two separate legal acts with different legal consequences for which the purpose of the legislator was to provide for a different VAT system.

4.3.5 In heritage and planning matters

The anti-abuse measures in Articles 106 of the VAT Code and 18 of the Registration Fees Code (3.17.0.0.2 of the Flemish Taxation Code) are applicable but the matter makes it possible to justify that a transaction is not carried out primarily for tax purposes.

Ensuring the continuity of a company, an inheritance, avoiding its fragmentation, protecting heirs, obviating the conversions of usufruct, anticipating inheritance conflicts... are all non-tax reasons that can be invoked against the Administration.

*** A donation made abroad is not abusive per se. The same applies to informal donations.**

The legislator decided that only donations voluntarily presented for registration were registrable.

*** Using foreign heritage structures (Dutch A.K., Stichting, Anstalt, SPF, trust, …) is not**

abusive per se

They are tools that respond to the concerns of transmission and management of assets in order to ensure its sustainability.

*** Marriage contracts are also excellent ways of planning.**

*** Accretion clause relating to movable assets**

Federal Circular No. 5/2013 of 10 April 2013 includes the accretion clause in its "white list".

There are also other non-tax motives that justify using to these clauses including the protection of the survivor and the avoidance of property fragmentation.

CONCLUSIONS

The importance of assessing the situation.

A civil and fiscal assessment.

Am I a resident or not ? In which countries ?

What about other criteria ? Are there connecting factors to another taxation ? If it’s the case, how to mitigate it ?

The right to plan and optimize one’s succession is fundamental and is recognized in Belgian and European law.

There are many tools for planning.

Pay attention to fiscal abuses. A “ruling” is a way to secure your solution.

Gaëtan Van Elder.