The Tax Disputes and Litigation Review

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Editor
Simon Whitehead

The LawReviews

THE TAX DISPUTES AND LITIGATION REVIEW

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THE LAWREVIEWS

Chapter 3

BELGIUM

Caroline P Docclo[1]

I INTRODUCTION

Belgian tax procedures vary slightly depending on the type of tax. However, a common feature of Belgian tax procedures is that there is no fee or cost due to the tax authorities or to the courts. The taxpayer may defend itself before the tax authorities and the courts, and thereby avoid paying fees to counsel.

Tax procedures may be slow. The tax authorities may revisit taxpayers' files after several years, administrative appeals may take several months and the courts are under-resourced. Nevertheless, most misunderstandings are swiftly settled at the stage of an administrative procedure organised as a series of open discussions where the taxpayer has access to the tax authorities' files.

Special services have been organised within the tax authorities to serve as intermediaries between taxpayers and the services in charge of assessing taxes. The Ruling Commission was created to prevent disputes, while the Tax Conciliation Service was created to assist taxpayers in tax disputes.

This chapter focuses on income tax disputes and the procedure organised by the federal legislation.[2]

II COMMENCING DISPUTES

i Audit of the taxpayer's situation

Most taxes are assessed on the basis of tax returns filed by taxpayers.[3] Tax disputes most often commence with a review of tax returns.

In the absence of a timely return, a taxpayer subject to corporate tax is taxed on a minimum tax base of €34,000. If the infringement is repeated, the latter amount may be increased up to €68,000 (Article 342(4) CIR1992). Corporate taxpayers are expected to verify the deadline for filing their tax return in the website of the Treasury, although there is no legal provision that imposes that rule.

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2 The collection of taxes by the regions is subject to regional legislation (see the Flemish Tax Code in force since 1 January 2014).

3 Income tax returns must be filed within the six-month period following the closing of the relevant period. The calendar year is the relevant period for determining liability for individual tax. The fiscal year to which the annual financial statements of companies and other separate legal entities relate corresponds to the period over which their liability to corporate tax or to not-for-profit organisation tax is determined.

The tax authorities are allowed to adjust the taxpayer's income on the basis of any means of evidence, excluding oath (Article 340 of the Income Tax Code 1992 (CIR1992)).[4] They may investigate the taxpayer's situation for a period of three years from the beginning of the assessment year.[5] This period may be extended for an additional four years, provided that the authorities first notify the taxpayer in writing about any signs of a wilful attempt to defeat or evade tax related to the period under examination (Article 333 CIR1992). The taxpayer must be notified also when the authorities request information from other persons.[6] However, the consultation of databanks does not qualify as an investigation.[7] Signs of fraud are sufficient; the authorities do not need to demonstrate the wilful attempt to defeat or evade tax at the time of this notification.[8]

If the authorities receive information from a foreign country bound by an exchange of information agreement, they are allowed to further investigate for the purposes of establishing that the taxpayer omitted to report income that should have been reported within the five-year period before the year during which the information from the foreign country has been made available to them (Article 333/2 CIR1992).[9]

The tax authorities are also allowed a one-year time extension to investigate withholding tax on income from movable property if an investigation shows that the taxpayer misapplied that tax once over the previous five years (Article 333/3 CIR1992).

If a taxpayer files a complaint against a tax bill, the tax authorities may also conduct further investigations for the purposes of deciding on the taxpayer's grievances (Article 374 CIR1992). Investigations may thus be conducted long after the seven-year period during which taxpayers must keep their books (Article 315 CIR1992 and the Act of 8 June 2008).

The tax authorities may request that the taxpayer show them any document necessary to determine its tax liability (Article 315 CIR1992). The tax authorities may require the taxpayer to supply information within one month, or may allow a time extension if necessary (Article 316 CIR1992). Taxpayers who keep data in a computerised system must allow the tax authorities to access such information in the form that they require. The tax authorities may also access the premises where the taxpayer conducts a business during business hours (Article 319 CIR1992).

The tax authorities are allowed to keep the taxpayer's books and documents that they deem necessary to determine the amount of taxable income. They are not allowed to take books that are not closed (Article 315-ter CIR1992).

Information obtained on the occasion of the audit of a taxpayer may be used for the purposes of taxing other taxpayers (Article 317 CIR1992).[10] The tax authorities may also

4 The minutes of a VAT audit may be used to make presumptions for income tax purposes (see Cass., 21 June 2012).

5 The assessment year is the year during which the tax situation of the taxpayer is determined. This is the current calendar year with respect to withholding taxes; the year following the relevant period with respect to individual tax; and the year during which the fiscal year ends if it ends before 31 December, or the year thereafter if the fiscal year ends on 31 December.

6 Cass., 20 May 2016.

7 Cass., 12 February 2016.

8 Cass., 8 May 2009; Cass., 7 April 2016.

9 Seven year in case of wilful attempt to defeat or evade tax.

10 As an exception to this rule, information collected in a bank's books on the occasion of that bank's tax situation being examined must not be used to tax that bank's customers, unless a fraud mechanism is detected (Article 318 CIR1992).

request from any taxpayer information deemed necessary to determine the tax liability of any other taxpayer (Article 322 CIR1992). They may require bulk information on transactions of persons and groups of persons directly or indirectly involved in such transactions (Article 323 CIR1992).

The tax authorities may also request information from a bank with the purpose of taxing targeted customers if they suspect fraud or intend to impose a tax on the basis of evidence of wealth, unless the taxpayer (who must be informed of the intent to proceed with bank investigations) provides the requested information within one month. For the purposes of satisfying a request from another country, the tax authorities may investigate banks' files without giving prior notification to the taxpayer if the other country explicitly requests not to inform the taxpayer or if the other country demonstrates that it has already notified the taxpayer (Article 333/1 CIR1992).

The Supreme Court held that pieces of evidence obtained irregularly cannot be set aside unless the irregularity affects the reliability of the evidence or the right to a fair trial or if compelling formalities have been disregarded.[11] The Act of 24 October 2013 has embedded this dictum. The Supreme Court has expanded its dictum to pieces of evidence obtained by the tax authorities and used to establish a tax.

Information requested by or provided to foreign countries is not disclosed to the taxpayer before the investigation by the foreign country is closed (Article 337/1 CIR 1992).

ii Debates prior to assessment

If the tax authorities intend to adjust the taxpayer's tax liability, they must send it a notice of deficiency (Articles 346 and 351 CIR1992). The notice of deficiency, which is an invitation to discussion, must mention all the elements on which the intended adjustment is based. No tax can be imposed on elements other than those in the notice.[12]

The taxpayer is allowed one month to answer the notice of deficiency (this is not applicable in respect of withholding tax or if the rights of the Treasury are jeopardised). The one-month period starts running from the third working day following the sending of the notice of deficiency. The tax cannot be assessed before the end of this one-month period.

Before assessing the tax, the tax authorities must reply to the arguments of the taxpayer (notification of assessment) [13] (Articles 346 and 352 *bis* CIR1992). Although the assessment must be justified by elements mentioned in the notice of deficiency, the tax authorities may still change their legal analysis of the same elements. They may also use the same motives in the notification of assessment as in the notice of deficiency if the taxpayer does not submit new arguments.[14]

Despite the taxpayer's disagreement, the tax may be assessed and established as a debt.[15]

11 Cass. 22 May 2015; Cass., 10 February 2017.

12 There is no threshold amount or *de minimis* rule. The tax authorities may adjust the taxpayer's tax situation even if no supplement of tax is at stake for the period under examination (e.g., adjustment of operating losses or excess dividends-received deduction available for carry-forward).

13 A mere unsigned note is not akin to a notification of assessment (Cass., 5 January 2017).

14 See Cass., 21 November 2013.

15 See Cass., 18 October 2012.

iii Limitations on assessment

When the taxpayer files an accurate tax return in a timely manner, the tax must be assessed before 30 June of the year following the assessment year or six months after the filing of the tax return, whichever is later (Article 353 CIR1992).

However, if the taxpayer fails to file its return in a timely manner, or the tax authorities determine that the amount of tax due is higher than the amount resulting from the items reported in the return,[16] the tax may be assessed within three years of the beginning of the assessment year (Article 354 CIR1992).[17] This three-year limitation period is extended for a further four years in cases of wilful attempt to defeat or evade tax (Article 354 CIR1992). If the authorities do not need to further investigate during the additional four-year period, they are not required to notify the taxpayer signs of fraud.[18][19]

The tax may be assessed within the seven-year period even if the authorities did not firstly make use of the three-year period of Article 354 CIR1992 in the absence of a timely tax return.[20]

The tax may be assessed beyond these limitations in the following circumstances (Article 358 CIR1992):

a withholding tax on movable property income and PAYE unpaid during the five preceding years may be assessed during the year following the statement of the infringement;[21]

b if it appears from information received from a foreign country bound by an agreement on the exchange of information or from further investigation lead by the Belgian authorities that items of income have not been reported when they should have been reported during one of the five years (or seven years in case of fraud) preceding the year during which the information passed on by the foreign authorities is received by the Belgian authorities, the tax on such income may be assessed during a period of 24 months following the exchange of information;

c if a case brought before a court shows that items of income should have been reported within the five years before the year of the commencement of the proceedings, the tax may be assessed on such income during the 12 months after a court decision on the case has become final;[22] and

16 The tax authorities are not requested to demonstrate that the tax return is not correct (Cass., 20 February 2014; Cass., 2 December 2016).

17 A tax that is computed on the basis of the tax return must be assessed according to Article 353 CIR1992 even if the authorities later determine a deficiency within the time limit of Article 354 CIR1992 (Cass., 17 November 2016).

18 Cass., 12 February 2016.

19 If a taxpayer liable for corporate tax is dissolved and its directors, managers or liquidators do not reserve the moneys to satisfy the Treasury, they may be sued for five years after the publication of the closing of the liquidation.

20 Cass., 17 November 2016.

21 The time extension is not subject to investigations with third persons (Cass., 17 June 2016).

22 The Supreme Court held that the same provision allowed the tax authorities to tax, during the additional 12-month period, income that has not been reported after the commencement of the proceeding (Cass., 17 October 2013).

d when evidence shows that income should have been reported during the five years before the year during which the evidence became known to the tax authorities, the tax on that income may still be assessed during the 12 months following the time that the authorities obtained the information.

There is no time limit for adjusting the value of understated assets or overstated liabilities: they are deemed to be income of the year under examination unless the taxpayer demonstrates that they have already been taken into account to determine its tax situation (Article 361 CIR1992).[23]

The tax authorities may challenge the amount of deductible previous losses when they are used to offset taxable income. This means that they can challenge the profits and burdens of previous years that resulted in the losses carried over, regardless of the year to which they relate.[24]

If the tax director invalidates a tax bill further to a complaint filed by the taxpayer (see below) on grounds other than the statute of limitations, the tax authorities may assess an alternative tax computed on the same items as those on which the invalid tax had been computed within the three-month after the tax director's decision becomes final (Article 355 CIR1992).

If the taxpayer is convicted of tax fraud by a criminal court, the tax authorities cannot claim damages amounting to the tax evaded if the statute of limitations under the tax legislation has ended. The tax authorities cannot substitute a civil demand relying on the outcome of a criminal proceeding for a timely assessment.[25] The cause of a tax debt is not the wrongful behaviour of the taxpayer but the taxable transaction.[26]

iv Limitations on collection

The Treasury is time-barred if it does not collect taxes within five years of those taxes becoming undisputedly due. The statute of limitation is interrupted by the taxpayer's acknowledgement of its tax debt or by a writ of summons served by a bailiff or registered mail (Article 443 *bis* CIR1992).

The statute of limitations on collection is suspended pending an administrative appeal or a petition filed by the taxpayer.[27]

v Tax complaints

The taxpayer may bring a complaint against a tax bill before the tax director. The complaint is an administrative appeal against the tax, and is a prerequisite before bringing the dispute before a court (Article 1385-undecies of the Judicial Code).

The complaint must be filed within six months and three working days of the tax bill being sent (Article 371 CIR1992).

If the complaint is filed in a timely manner, the collection of the contested amount of tax is restricted for the period during which the proceeding is pending (Article 410 CIR1992).

23 The principle that items of income earned during a given period must be taxed separately with the other income of the same period is set aside by Article 361 CIR 1992 (Const. Court, 124/2011, 7 July 2011.

24 Cass., 12 September 1991.

25 Cass., 8 September 1999.

26 Cass., 2 March 2016.

27 Cass., 22 September 2011; Cass., 2 March 2017.

Despite the fact that the taxpayer may retain the payment of the contested tax, it will owe interest on the amount if it is unsuccessful. If the taxpayer pays the tax assessed (or if the authorities use a tax refund to offset the contested tax), interest will be paid to it if it wins the case (Article 418 CIR1992). The legal annual interest rate in tax matters was 7 per cent (Act of 5 May 1865 on interest-bearing loans). It will range between 4 and 10 per cent in favour of the Treasury, and between 2 and 8 per cent in favour of the taxpayer as from January 2018 (Articles 77 and 79 of the Law of 25 December 2017).

Before making a decision, the tax director, if so requested in the complaint, must invite the taxpayer to argue orally the points therein, and to consult the tax authorities' file. The tax director is expected to make his decision within six months of the filing of the complaint, or nine months in the absence of a tax return filed in a timely manner or in assimilated circumstances. Usually, the tax director takes much longer than six months to review a file; he may even take several years. In the absence of a decision after this six- or nine-month period, the taxpayer may bring its case before a court (Article 1385 *undecies* of the Judicial Code). In the absence of a decision six months after the filing of the complaint, interest stops running on the disputed tax debt until the case is brought before a court (Article 414 CIR1992).

The tax director cannot impose additional tax or use relief to offset any new deficiency that he may find (Article 375 CIR1992). Nevertheless, the tax director's interpretation of the facts presented by the tax inspector may support the assessment, provided that he does not make the taxpayer's situation worse. However, the fact that a taxpayer has filed a complaint does not hamper the tax authorities from further investigating the taxpayer's situation and adjusting the tax liability within the time limits mentioned above (see Section II.iii).

A complaint against tax assessed on the basis of contested elements amounts to a complaint against any tax assessed on the basis of the same elements (Article 367 CIR1992). If the complaint relates to the deduction of expenses made during a given taxable period, and such expenses cannot be fully deducted from the profit of that taxable period, the complaint also affects the taxes relating to subsequent periods during which the excess of these expenses have been deducted.[28]

An additional tax assessed after an adjustment of the taxable basis (understated or hidden items of income) is never considered as assessed on the same elements as those taken into account when determining the initial tax bill. If the taxpayer is time-barred to complain against the initial tax bill, it cannot rely on a complaint against the additional tax bill to obtain the invalidation of the initial one. However, it may criticise elements taken into account when computing the initial tax bill to obtain the rescission of the additional tax bill.[29]

If the tax authorities base an additional tax for an assessment year on elements that have already been taxed in another assessment year, the taxpayer may file a complaint against the previous tax bill based on the same elements within three months and three working days of the sending of the additional tax bill (Article 373 CIR1992).

The tax director is not required to apply Article 6(1) of the ECHR because the tax director is not an independent jurisdiction.[30]

28 Cass., 21 September 2012.

29 Cass., 11 May 1965.

30 Cass., 29 September 2017.

vi Tax rescission

The tax director may also rescind surtaxes resulting from clerical errors or misunderstandings of facts, double taxation or evidence that could not be invoked in a timely fashion for reasons beyond the taxpayer's power, provided that the surtaxes are brought to the director's attention within five years of 1 January of the year during which the tax was assessed, and he or she has not decided on a complaint against the contested surtax (Article 376/1 CIR1992). [31]

An error that results from a standpoint of the taxpayer when filling in the tax return is not a clerical error.[32] When the reported profit appears from the financial statements, the taxpayer cannot amend the results of a choice it made when establishing those statements, as opposed to an erroneous recording of a transaction.[33]

New legislation or case law cannot be viewed as new circumstances that may lead to rescission. However, if the Constitutional Court holds that a tax law provision conflicts with the Constitution, the taxpayer may request that a tax imposed by virtue of such a provision be rescinded even if the Constitutional Court's decision has been officially released within the six-month period allowed to file a complaint, and, therefore, the taxpayer was able to file a complaint (see Section II.v).[34]

The tax authorities admit that a ruling of the European Court of Justice stating that Belgian law is in conflict with EU law may also lead to rescission.

If a Belgian legal provision is annulled by the Constitutional Court the taxpayer may file a complaint against a tax imposed pursuant to the annulled provision although ordinary time limits have expired. The ECJ has been asked whether a ruling of the ECJ stating that a national provision conflicts with EU law amounts to a ruling of the Constitutional Court annulling a notional provision and, as a consequence, the same time limits would apply to contest a tax established pursuant to a provision criticised by the ECJ or pursuant to a provision annulled by the Constitutional Court.

The tax director may also rescind surtaxes that appear on the occasion of a mutual agreement procedure organised under a double tax treaty or a procedure provided by the EU Arbitration Convention (Article 376/3 CIR1992).

III THE COURTS AND TRIBUNALS

i Appeal before the tribunal

If the taxpayer is not satisfied with the tax director's decision, it may file an appeal before the court of first instance (the tribunal) within three months and three days after the decision has been sent. The director's decision is suspended during the appeal procedure and the period during which appeal can be lodged (Article 300 CIR1992).

The director's decision is irrevocable if the taxpayer does not file a petition against it.[35] If the tax director fails to render his decision within six months of the filing of the complaint (nine months in the absence of a tax return filed in a timely manner or assimilated circumstances), the taxpayer may bring its case before the tribunal.

31 A tax on tax may be viewed as double taxation (Cass., 2 January 2017)
32 See Cass., 19 January 2012.
33 Cass., 10 March 2016.
34 Const. Court, 54/2005, 8 March 2005.
35 Cass., 21 September 2012.

If the director annuls or rescinds the tax for any reason, a petition aiming at a revision of the motives for the annulment or rescission is not admissible; the only purpose of a petition is the annulment or rescission of the tax.[36]

Tax cases are handled by independent judges specialising in tax matters. Ordinarily, tax cases are submitted to a chamber of one judge.[37] Only in very specific circumstances a case can call for a chamber of three judges.

A tax appeal is not admitted if the administrative procedure has not been exhausted when such a procedure is organised by law.[38] When the law does not provide for any preliminary administrative review, the taxpayer may submit its case directly to the tribunal. For example, if the taxpayer fears the threat of an illegal assessment, it may protest to the tribunal, and request urgent and preliminary measures to avoid further damage.

In general, the Treasury is represented by the tax director who decided on the complaint, or his delegate. In specific circumstances, the Treasury appoints attorneys-at-law, which may mean additional costs for the unsuccessful taxpayer (see Section VI).

The parties usually submit a schedule to the court stating the date on which they will file their briefs of arguments, and request a date for the oral submissions. Because the tax courts are under-resourced, hearings are severely delayed.

The ordinary rules allow the taxpayer to present new claims in its brief of arguments, provided that they are supported by the facts stated in the initial appeal. If the taxpayer has extensively described the facts in its appeal, it may use them as the basis for arguments that were not advanced at the time of filing the original appeal but that have since become apparent to the taxpayer on reviewing the tax authorities' arguments and supporting documents.

The tribunal decides on the merits of the case, having regard to the formal and substantive aspects of the assessment. Because tax law is a matter of public policy, the tribunal must decide not only on the basis of the grounds alleged by the parties, but also on the grounds that it finds relevant. The tribunal is not bound by the brief of arguments of the parties, but it cannot grant a party more than has been claimed.

The tribunal's decision may be contested before the court of appeals. Appeals must be lodged within one month after the contested judgment has been served by a bailiff.[39]

If the tribunal decides to annul the tax bill wholly or partly for a reason other than the statute of limitations, the case remains pending before the court for an additional six-month period, during which the tax authorities may submit an alternative assessment based on all or part of the same elements as the annulled tax to the tribunal. In such cases, the parties' right to appeal against the tribunal's decision is suspended. If the tax authorities submit an alternative assessment, the deadline to lodge an appeal against the tribunal's decision starts running from the time the decision on the alternative assessment is served (Article 356 CIR1992).[40] However, a taxpayer may lodge an appeal before the end of the six-month waiting period and

36 Cass., 31 January 2014.

37 Tax cases are not necessarily referred to public prosecution.

38 See, however, *Metalgesellschaft*, *Hoechst* (C-397/98, 8 March 2001).

39 An appeal against a decision to which the taxpayer previously bowed is not admissible, even if the decision has never been served (Cass., 30 June 2016).

40 The alternative tax may be linked to an assessment year other than the assessment year to which the annulled tax was related (Cass., 17 October 2013).

it will be admissible.[41] The alternative assessment is allowed to the tax authorities provided that the court did not decide on the statute of limitation or the taxable basis when dismissing the case of the tax authorities.[42]

The tax authorities are not allowed to submit an alternative assessment if the tax director fails to decide on the complaint before the taxpayer brings the case before the tribunal.

ii Right to appeal

The court of appeal has full jurisdiction and it must revisit the case. The procedural steps are the same as those before the tribunal.

Unless the First President of the court of appeal decides otherwise in specific circumstances, the taxpayer is heard by a single judge.

iii Appeal on a point of law

The court of appeal decision may be challenged before the Supreme Court, but only on the grounds that the decision would be in conflict with the law or that it would infringe an essential procedural requirement.

If the Supreme Court quashes the court of appeal decision, the case will be submitted to another court of appeal, which will have jurisdiction only to the extent to which the dictum of the earlier decision has been invalidated.

iv Preliminary rulings

Tribunals, courts of appeals and the Supreme Court may refer tax issues for a preliminary ruling before the Constitutional Court or the European Court of Justice (ECJ).

IV PENALTIES AND REMEDIES

i Administrative penalties

Any understatement of income tax may give rise to administrative fines of up to €1,250 being imposed by the tax authorities. A fine of €12,500 applies in case of bad faith or wilful conduct and the same amount 'may' (i.e., '*peut/kan*') be doubled if the taxpayer reoffends. A flat penalty of €6,250 applies if the taxpayer omits to report information relating to the Cayman Tax (Article 445 CIR1992).

If income of at least €2,500 is not reported, the tax authorities may also impose proportional surtaxes depending on the type of infringement, and increasing in the event of repetition (Article 444 CIR1992). The surtaxes range from 10 per cent to 200 per cent. An infringement is repeated only if notice of a first infringement has already been given before the subsequent infringement is committed (Article 229 AR/CIR92). If the taxpayer correctly files four returns in a row, previous infringements are ignored (Articles 227 and 228 AR/

41 Cass., 30 March 2017.

42 Cass., 5 May 2017.

CIR92). The aggregate amount of tax and surtaxes cannot exceed the amount of unreported income (Article 444 CIR1992).[43] The tax authorities must restate the facts that justify the penalty, its legal ground and the justification of the amount of the penalty.[44]

In certain circumstances, a specific tax rate (100 per cent) applies to hidden earnings and insufficiently documented expenses made by companies and not-for-profit organisations ('secret fees') (Articles 219, 225, 246 and 247 CIR1992).

ii Criminal penalties

In addition to administrative penalties, the law also provides for criminal penalties, which are applied by the courts. Besides imprisonment, a taxpayer who has committed fraud or forgery may be sentenced to a fine of up to €500,000 (Articles 449 and 450 CIR1992). The amount of the fine to which the taxpayer is sentenced is multiplied by six (Article 457 CIR1992).[45]

V TAX CLAIMS

i Recovering overpaid tax

Refund of taxes and interest

Withholding tax on movable property income or professional income and early payments of tax are creditable against the final tax calculated upon assessment, and the excess is refundable. The final tax should be assessed by 30 June of the year following the assessment year or six months after the timely filing of the tax return. If the tax bill announces a refund, interest accrues in favour of the taxpayer from the third month after the period of limitations on assessment has run until the date of payment (Articles 359, 353 and 419 CIR1992). In certain circumstances, refundable amounts are credited against other outstanding amounts instead of being paid in cash. Refundable amounts may also be used to offset tax liabilities other than income tax, unless such other taxes are contested.[46]

With respect to withholding tax, the beneficiary of the income and the debtor are entitled to claim a refund of the withholding tax in the absence of a timely assessment, or if the tax was unduly withheld (Com CIR92, 366/3).[47] Unless the tax authorities have made use of the contested withholding tax to offset a tax debt, the period allowed to the taxpayer to claim the refund of unduly paid withholding tax is five years from 1 January of the year during which the withholding was paid to the Treasury (Article 368 CIR1992). If the claim for a refund is filed by the beneficiary of the income, interest accrues in its favour. On the other hand, if the debtor of the income claims the refund of the tax that it spontaneously withheld at source, no interest accrues (Article 419 CIR1992).[48] In specific circumstances,

43 The Constitutional Court held that the judge must be allowed to give conditional sentences (Const. Court, 55/2014, 27 March 2014).

44 Cass., 19 October 2012.

45 These penalties are applicable to offences committed since November 2012. Offences committed before November 2012 could result in imprisonment and fines of up to €125,000; the amount of these fines cannot be multiplied (old Article 457 CIR1992).

46 Article 334 of the Act of 17 December 2004.

47 The complaint against a tax unduly withheld is admissible even if the taxpayer does not report the income in his tax return (Cass., 14 January 2016).

48 See Cass., 24 October 1996.

the law excludes interest accrual on refundable amounts. Nevertheless, interest should accrue where withholding tax has not been credited as a result of a mistake by the tax authorities, such as a delay in the assessment of final tax.[49]

Interest is calculated at the legal rate on the amount of overpayment. This rate was 7 per cent until December 2017 (Act of 5 May 1865 on interest-bearing loans). It will range between 2 and 8 per cent as from January 2018 (Articles 77 and 79 of the Law of 25 December 2017).

The statute of limitation on the recovery of annulled taxes is ten years from the annulment.[50]

When a taxpayer is allowed a refund of taxes, this refund may be used by the authorities to offset debts of the same taxpayer vis-à-vis social security authorities or other Belgian governmental bodies (Article 334 of the Law of 27 December 2004).[51]

ii Challenging administrative decisions

The Belgian Constitution provides that a tax can only be levied and exemption can only be granted by an act of parliament ('no taxation without representation'). The Constitutional Court has repeatedly held that the power to decide on the principle of a tax and its essential elements belongs to the legislature.[52]

Therefore, the tax authorities and the courts are not allowed to relieve a taxpayer of its liability as stated by the law. As a consequence, an agreement between the tax authorities and the taxpayer cannot be binding if it settles a legal issue. A taxpayer cannot rely on its legitimate expectations if its understanding of its tax situation deviates from the law. Even *bona fide* does not help.[53]

However, a taxpayer may invoke a rule that supersedes an act, such as the Constitution, European legislation and the ECHR. A taxpayer may even claim the annulment of an act that conflicts with the Constitution before the Constitutional Court within six months of the official publication of the act.

Ordinary courts and tribunals are willing to discuss the compliance of a Belgian act with superior international rules and to set aside a non-complying act. Belgian judges do not always refer such cases to the ECJ, and decide themselves whether a contested Belgian provision complies with EU law.[54] However, they are often reluctant to decide on the compliance of an act with the Constitution, and will rather refer the issue to the Constitutional Court.

When a Belgian tax provision is held to be contrary to a superior rule by the Constitutional Court or the ECJ, the tax authorities defer to the case law before the contested provision is amended by the legislature, and even invite the taxpayers to behave as though such a provision has been amended.

49 Const. Court, 24/2008, 21 February 2008.
50 Cass., 29 January 2016.
51 Applicable from 1 January 2019 at the latest.
52 Const. Court, 72/2005, 20 April 2005; 32/2007, 21 February 2007.
53 Cass., 14 June 1999; Cass., 20 November 2006.
54 Even the Constitutional Court refused to submit to the European Court of Justice the issue of the euro-compatibility of the fiscal deduction of anti-trust fines imposed by the European Commission (Const. Court, 161/2012, 20 December 2012).

iii Claimants

Tax complaints and appeals must be filed by the taxpayer on whom the tax is imposed.[55] A tax imposed on a taxpayer cannot be challenged by another person, unless that person has succeeded to the rights and liabilities of the taxpayer. For example, in the case of a merger or a split-up, the company that inherits the liabilities of the absorbed or split company is entitled to file a complaint or an appeal against the tax bill assessed in the name of the latter. A company validly acts through its directors or managers appointed according to company law.

If a company is wound up, the person appointed as a liquidator is entitled to act in this capacity. The liquidator is also allowed to file a complaint in the name of the company whose liquidation is closed. Bankrupt companies are validly represented by the administrator in the insolvency.

A proxy holder may file a complaint in the name of a taxpayer. Tax consultants may act as proxy holders when filing a complaint, but they are not authorised to represent their customers before the courts. The tax authorities acknowledge that attorneys-at-law represent their clients when filing a complaint, as well as before the courts, and do not need to prove it (ComIR92, 366/9).[56]

VI COSTS

i Duty for listing a case

The tax on filing a petition or a further appeal before a court is no longer applied.[57]

ii Indemnities

As a reaction to the Supreme Court holding that the winner of a case brought before a court might also obtain damages corresponding to the cost of the assistance of an attorney in certain situations,[58] the legislature has provided that a fixed indemnity is due to the winner from the defeated party, to wholly or partly cover the fees due from the winner to his or her attorney; this prevents the winner from requesting indemnities in excess of the legally fixed amount (Article 1022 of the Judicial Code).

This legal indemnity is liquidated by the court on the basis of tables. The regular indemnity ranges from €180 to €18,000 when the amount at stake is at least €1 million.

The indemnity is only due when the winner has hired an attorney to assist him or her before the court. The tax authorities are also liable for indemnities when they lose their cases.[59]

55 However, tax claims and appeals against withholding taxes may be filed either by the taxpayer that earned the income on which the tax has been unduly withheld or by the debtor of income that unduly withheld taxes on such income.

56 See however Cass., 12 February 2016.

57 Const. Court, 9 February 2017.

58 Cass., 2 September 2004, 5 May 2006, 16 November 2006 and 28 March 2007.

59 Const. Court, 68/2015, 69/2015, 70/2015, 21 May 2015.

VII ALTERNATIVE DISPUTE RESOLUTION

i Advance rulings

The Act of 24 December 2002 has organised the current 'advance ruling' procedure. This procedure seems to meet the expectations of numerous taxpayers.

The federal tax authorities release advance rulings on any question relating to a tax they are in charge of, except questions relating to collection or proceedings. As a rule, the tax authorities cannot deliver a ruling regarding transactions with a low-tax country that does not cooperate according to the standards of the OECD, or transactions that have no economic substance in Belgium.

An advance ruling is a legal act by which the tax authorities determine how the legislation in force will apply to a situation or a transaction that has not yet triggered fiscal consequences. The Ruling Commission may therefore not intrude in tax disputes.

Advance rulings are effective for five years unless the taxpayer demonstrates that a longer validity period is appropriate. In addition, the ruling is cancelled when the requirements that it states are not satisfied, when the taxpayer has not provided an accurate description of the envisaged situation, when the legislation on which the ruling relied (including Belgian and EU law and treaties) is modified, or when it appears that the ruling conflicts with Belgian, EU law or treaties. In this respect, a memorandum has been concluded between the local services of the tax authorities to ensure that the latter would not challenge the legality of an advance ruling.

The Ruling Commission allows taxpayers (represented by a counsel) to file a preliminary request on a no-name basis. If it finds that it may satisfy the taxpayer's request, it invites the taxpayer to file a formal request. If it considers that it cannot satisfy the taxpayer, the taxpayer will simply not continue the procedure.

The cost of such a procedure mainly depends on the fees requested by tax counsels to assist clients, since the tax authorities are not allowed to charge fees to taxpayers.

ii Tax Conciliation Service

The Act of 25 April 2007 created the Tax Conciliation Service (TCS) to serve as an interface between taxpayers and the federal tax authorities. The TCS has been operating since 2010. Although it belongs to the tax authorities, it is independent from other services. By the same token, it has no authority to give instructions to other services. It may decline a request for conciliation.

The TCS acknowledges receipt of requests filed in writing (even by email) or orally. Even when the TCS cannot satisfy the taxpayer's expectations, its report on a case can be useful as supporting documentation before a court.

VIII ANTI-AVOIDANCE

According to the Constitution, no tax can be levied unless the legislature so provides. A taxpayer may choose to organise its transactions in a manner that triggers little taxation. The taxpayer must, however, accept all the consequences of its acts. The tax authorities must set aside disguised transactions and adhere to the legal reality created by the taxpayers.[60] Sham is a fraud.

60 Cass., Brepols, 6 June 1961; 29 January 1988; 22 March 1990; 4 January 1991.

The tax authorities may also ignore transactions conducted by a taxpayer that infringe a non-tax legal provision of public policy if its intent is to defeat or evade tax.[61] However, the tax authorities cannot rely on the economic reality or the concept of abuse of law to adjust the situation of a taxpayer.

The Act of 29 March 2012, introduced the concept of 'tax abuse' in Article 344/1 CIR1992. The provision reads as follows (free translation):

The tax authorities may disregard the legal act or a series of legal acts composing the same transaction if the tax authorities demonstrate by presumptions (or otherwise) and in the light of objective circumstances that tax abuse has been committed.

There is tax abuse when the taxpayer realises by his legal act or series of legal acts, one of the following transactions:

a a transaction allowing it to escape the application of a provision of the Income Tax Code or the decrees implementing that code, in violation of the goals of such a provision; or

b a transaction allowing it to claim a tax benefit provided by a provision of the Income Tax Code or the decrees implementing that code, while the grant of such a benefit would be conflicting with the goals of such a provision and the main purpose of that transaction is the grant of such a benefit.

The onus is on the taxpayer to demonstrate that the choice of this legal act or series of legal acts is justified by motives other than the avoidance of income tax.

If the taxpayer does not provide any evidence to the contrary, the taxable base and the computation of the tax are restored in such a manner that the transaction is subject to a levy complying with the goals of the law, as if the abuse never took place.

The Constitutional Court has held that this provision does not conflict with the constitutional principle according to which no tax can be levied in the absence of clear legislation. The Constitutional Court held that this provision only relates to the burden and administration of evidence in tax matters and does not affect the basis and the rate of taxes. The tax authorities must demonstrate the purpose of the legislature when asserting that a taxpayer acted in a manner that they view as an abuse.[62]

IX DOUBLE TAXATION TREATIES

Belgium has concluded around 100 double taxation treaties. Belgian-resident taxpayers may initiate in Belgium the mutual agreement procedure provided by double taxation treaties, and rely on the assistance of the central tax authorities to challenge a foreign tax at source. The outcome of such a procedure is, however, dependent on the best efforts of both the Belgian and the source country's authorities.

When interpreting a double taxation treaty, the Belgian tax authorities rely on the OECD Commentary on the Model, unless Belgium has made reservations on the Model or its Commentary. The Belgian tax authorities use the ambulatory method of interpretation. They even refer to the latest version of the OECD Commentary when it can be reconciled with the text of the relevant treaty and specific commentaries made on this treaty.

The Belgian tax authorities even agree that the interpretation of undefined terms used in treaties must be found in the source country's legislation when deciding whether income

61 Cass., 5 March 1999; 16 October 2009.

62 Const. Court, 141/2013, 30 October 2013.

has been taxed abroad according to the treaty. However, they use Belgian definitions when determining which method of elimination of double taxation must be used in Belgium (Article 23(A) of the OECD Model Tax Treaty, Article 22 of the Belgian standard treaty).[63]

X AREAS OF FOCUS

Since the law of 25 December 2017, the amount of income added to the taxable basis of a corporate taxpayer further to a notice of deficiency giving rise to a 10 per cent penalty cannot be offset by deductions ordinarily available, such as carried over losses.

XI OUTLOOK AND CONCLUSIONS

The current tax procedure is the result of a reform specific to the tax procedure in 1999 and a general reform of the judicial procedure in 2007. Those reforms were intended to speed up the process, but delays remain considerable. Reasons for such delays include a shortage of judges, the recent reform of the courts' structures and the length of time required by the central tax authorities to issue clear instructions to tax inspectors.

63 Circular No. AAF/2004/0053 (AAF 5/2004), 16 January 2004.

Appendix 1

ABOUT THE AUTHORS

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Caroline Docclo graduated from the law faculty of the Université Libre de Bruxelles (the ULB) in 1985, and earned her special degrees in tax law, economic law and criminology from the ULB in 1987. She holds an LLM in taxation from NYU (1994).

She is a professor of international tax law at both the ULB's law faculty and the Solvay Brussels School of Economics and Management, and also at the High School of Economics at the Université de Liège.

She has been president of the Belgian branch of the IFA, she currently is a member of the Permanent Scientific Committee of the IFA, and she is also a member of the board of editors of the *Journal de droit fiscal*.

She has been a member of the Brussels Bar since 1987 and she passed the exam to become a member of the Supreme Court's Bar.

Tax procedure is an important part of her practice with the Brussels office of Loyens & Loeff.

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