Belgium: Recent and Pending CJEU Cases

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1. Introduction

As in previous years, the CJEU has and still is dealing with quite a number of cases that relate to Belgian direct tax law.[1] In this contribution, we will discuss two recently decided cases that concern the taxation of income from real property in the hands of an individual[2] (Section 2.) and the taxation of a Belgian resident who works in Luxembourg[3] (Section 3.). The cases that are still pending relate to the exemption of pension income under a Double Tax Treaty ("DTT")[4] (Section 4.) and the interpretation of the Parent-Subsidiary Directive[5] ("PSD") (Section 5.).

2. Commission v Belgium (C-110/17)

2.1. Facts and legal background

Belgian resident individuals are taxable on their worldwide income, including income from real property. The taxable base generally depends on two questions, i.e. (i) what is the real property used for, and (ii) where is it situated?

If it is not rented out, the taxable income from real property situated in Belgium is equal to the indexed cadastral income (e.g. land) or the indexed cadastral income increased by 40 % (e.g. real property other than land). If the real property is situated abroad, the taxable income equals the rental value.

An exemption is available for a dwelling owned and occupied by a taxpayer, irrespective of its location.

If the real property is rented out to an individual who does not use it (wholly or partly) to carry out his professional activity, or to a legal person that makes it available to an individual for private purposes, the taxable income of real property located in Belgium equals the indexed cadastral income (e.g. land) or the indexed cadastral income increased by 40 % (e.g. real property other than land).[6] If the real property is situated abroad, the taxable income is equal to the total amount of rent and rental benefits.

The cadastral income is the annual net normal average income of a real property. It is an imputed income which is determined by the Belgian tax authorities ("BTA"). The rental value is the average annual gross rental income that the taxpayer would have received if he had rented out the real property. The total

1 This contribution was updated until 26 October 2018.
2 CJEU, 12 April 2018, C-110/17, *Commission v Belgium*, ECLI:EU:C:2018:250.
3 CJEU, 24 October 2018, C-602/17, *Sauvage and Lejeune*, ECLI:EU:C:2018:856.
4 CJEU, C-174/18, *Jacob and Lennertz*, Request for a preliminary ruling from the Tribunal de première instance de Liège (Belgium), lodged on 5 March 2018.
5 CJEU, C-389/18, *Brussel Securities*, Request for a preliminary ruling from the Tribunal de première instance francophone de Bruxelles (Belgium) lodged on 13 June 2018.
6 In case the real property is rented out to an individual who uses it to carry out his professional activity, or to a company, the taxable income equals the total amount of rent and rental benefits.

amount of the rent and rental benefits is the actual gross rental income that the taxpayer received when the real property was rented out. Both the rental value and the total amount of the rent and rental benefits are reduced by a 10 % (e.g. land) or 40 % (e.g. real property other than land) lump sum deduction in order to obtain the net income.

The three aforementioned concepts aim to tax the owner on the net income stemming from the real property. However, in practice, this objective is not met. The cadastral income for all real property situated in Belgium has not been updated since 1975, meaning that a large part of the real property located in Belgium still has a rather outdated cadastral income (that, for example, does not take into account the increase in value because the real property is located in a regenerated neighbourhood). To mitigate this imbalance, the cadastral income has been indexed since 1991, and increased by 25 % as from 1994 and, by 40 % for the years from 1997.

Although the cadastral income is indexed and increased, it still results in a rather modest net normal average income for real property located in Belgium (e.g. old real property located in a regenerated neighborhood for which the cadastral value has not changed since 1975).

Income from real property located abroad is in principle taxable in Belgium. The part of the total tax due by the Belgian resident individual that corresponds proportionally with the income stemming from real property located abroad, is reduced by half (i.e. 50 % rebate). However, if the real property is located in a state with which Belgium has concluded a DTT and Belgium is obliged to exempt the immovable income, the immovable income will still be taken into account for the purpose of calculating the applicable, progressive tax rate. Obviously, the applicable DTTs contain what is known as a "progressivity clause" that allows Belgium to take the foreign immovable income into account when calculating the applicable progressive tax rate.

From the foregoing, it follows that Belgian residents are taxed differently depending on the location of the real property, even if the real property is used in the same manner (e.g. real property other than land that is rented out). Although the Belgian legislature intended to tax the net income of real property located in Belgium and abroad, there is an important difference in practice because the cadastral value generally does not reflect the actual, annual net normal average income.

On 22 March 2012 the European Commission issued a reasoned opinion and requested Belgium to amend its legislation because of the differences in the method used to calculate the taxable income stemming from real property depending on the location thereof.[7] According to the Commission, the taxable income stemming from real property located abroad is substantially higher than the taxable cadastral income of Belgian real property.

7 European Commission, 22 March 2012, n° IP/12/282.

The Commission suspended the infringement proceedings because of a question for a preliminary ruling regarding this issue. On 11 September 2014 the CJEU ruled on the differences in the method for calculating the taxable income stemming from real property located in Belgium that is not rented out, and real property located in France that is not rented out.[8] According to the CJEU, this difference could restrict the free movement of capital (Article 63 of the TFEU) if the rental value of the real property located in France were higher than the cadastral income of a comparable property located in Belgium. Although the taxable income stemming from the real property located in France is not taxable in Belgium, the Belgian-France DTT allows Belgium to take the immovable income into account for the purpose of calculating the applicable progressive tax rate. Consequently, in such scenario the difference in the determination of the taxable income could lead to a higher overall tax rate on all taxable income, which results in the restriction of the free movement of capital.

Pursuant to this judgment, the Commission decided to continue the infringement proceedings and referred Belgium to the CJEU for failure to fulfil its obligations (Article 258 of the TFEU) because of the differences in the method used to determine the taxable income stemming from real property depending on the location thereof.[9]

Moreover, in 2016 the BTA issued an Administrative Circular (AAFisc 22/2016) allowing to determine the rental value of unrented real property located abroad by reference to a gross fictitious income determined by the foreign authorities, such as the French "*valeur locative brute*".[10] This amount would subsequently be reduced by the 10 % or 40 % lump sum deduction in order to obtain the net income.

2.2. The judgment

On 12 April 2018 the CJEU issued a judgment.[11] The CJEU first observed that the argument raised by Belgium, according to which the Administrative Circular (AAFisc 22/2016) would allegedly bring the Belgian legislation into line with the requirements of EU law, could not be accepted. The Administrative Circular was issued on 29 June 2016 whereas the question whether Belgium had failed to fulfil its obligations had to be assessed at the end of the period laid down in the reasoned opinion of the Commission, i.e. 26 March 2012.[12]

8 CJEU, 11 September 2014, C-489/13, *Verest and Gerards*, ECLI:EU:C:2014:2210.
9 European Commission press release, 18 June 2015.
10 Administrative Circular AAFisc 22/2016 (no. Ci.704.681), dd. 29 June 2016.
11 CJEU, 12 April 2018, C-110/17, *Commission v Belgium*, ECLI:EU:C:2018:250.
12 CJEU, 29 October 2015, C-589/14, *Commission v Belgium*, ECLI:EU:C:2015:736, para. 49.

The Court continued that the computation basis for unrented real property and real property rented to individuals who are not using it for professional purposes, or to legal persons that have made it available to individuals for private purposes, is determined in a different manner depending on the location of the real property. Therefore, the cadastral income, the rental value and the rent and rental benefits should have been compared in order to assess whether the different taxable base leads to a difference in treatment. Because the cadastral income is lower than the rental value and the rent and rental benefits of real property, the income of real property situated in a Member State of the EU/EEA other than Belgium was overvalued compared to such income stemming from Belgian real property. This overvaluation was also relevant in cases where Belgium could not tax the foreign immovable income to the extent the applicable DTT contain a progressivity clause. Consequently, the Belgian legislation at stake constituted a restriction on the free movement of capital (Article 63 of the TFEU). Because Belgium did not invoke an overriding reason in the public interest that could justify the restriction, the CJEU came to the conclusion that Belgium has failed to fulfil its obligations under EU law. The Commission's action was thus upheld.

3. Sauvage and Lejeune (C-602/17)

3.1. Facts and legal background

The recently decided *Sauvage and Lejeune*[13] case concerns the Belgian-Luxembourg DTT.[14] According to Article 15 (1) remuneration derived by a Belgian resident is in principle taxable in Belgium unless the employment is exercised in Luxembourg. However, if the Belgian resident (i) is present in Luxembourg for one or more periods that do not exceed 183 days in aggregate in any period of 12 months beginning or ending during the calendar year, (ii) the remuneration is paid by, or on behalf of, an employer who is not a resident of Luxembourg, and (iii) the remuneration is not borne by a Luxembourg PE of the employer, Belgium is still authorized to tax the remuneration (Article 15 [2]). Finally, Article 15 (3) provides for a specific rule that is applicable to remuneration from employment exercised aboard a ship, an aircraft or a railway or road vehicle operated in international traffic, or aboard a boat used in inland navigation in international traffic. Such remuneration may be taxed in the state in which the place of effective management ("POEM") of the enterprise is situated.

13 CJEU, 24 October 2018, C-602/17, *Sauvage and Lejeune*, ECLI:EU:C:2018:856.

14 Convention of 17 September 1970 between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and the regulation of certain other matters with respect to taxes on income and capital and the final protocol relating thereto, as amended by the supplementary agreement of 11 December 2002.

If Luxembourg is authorized to tax the remuneration, Belgium will avoid double taxation by exempting the income from Belgian taxes, notwithstanding the application of a progressivity clause to determine the tax rate applicable in Belgium (Article 23 [2] [1]).

The final protocol to the Belgian-Luxembourg DTT clarifies that, for the purposes of Article 15 (1) and (2), employment is exercised in a state when the employee is physically present in that state to exercise his employment.

Mr. Sauvage and Mrs. Lejeune have their tax residency in Belgium (i.e. residence state). Mr. Sauvage is an employee of a Luxembourg not-for-profit organization and performs his duties in Luxembourg (i.e. employment state). In the calendar years 2006 to 2008 (tax years 2007 to 2009), he received remuneration, that he reported in his annual tax return as foreign-sourced professional income that was taxable in Luxembourg. Consequently, he considered that Belgium should provide an exemption, save for the application of the progressivity clause.

According to the BTA however, part of the remuneration was subject to taxation in Belgium because Mr. Sauvage exercised his employment partly outside Luxembourg, i.e. in a state other than Luxembourg (including Belgium[15]). In accordance with Article 15 (1), Belgium only has to exempt the remuneration to the extent that the employment is physically exercised in Luxembourg. In other words, Belgium is authorized to tax part of the remuneration to the extent that the employment is not physically exercised in Luxembourg.[16]

Mr. Sauvage did not agree with the position of the BTA. On the working days that he was allegedly employed outside Luxembourg, he claimed that he was in fact only working for half a working day (e.g. a meeting in the morning in Brussels). The other half of the working day was spent on employment duties in Luxembourg (e.g. working at the Luxembourg office in the afternoon). According to Mr. Sauvage, such short business trips did not imply that Belgium was authorized to tax the corresponding remuneration in accordance with Article 15 (1).

The dispute was brought before the Tribunal of first instance of Liège (Belgium). In essence, it relates to the taxing power of the residence state where an employee does not exercise all of his employment duties in the state of employment. Although this question relates to the interpretation of the Belgian-Luxembourg

15 In 2006 22 of Mr. Sauvage's working days (incl. 15 days in Belgium) out of 220 working days were exercised outside Luxembourg. In 2007, 30 working days (incl. 18 days in Belgium) were performed outside Luxembourg. In 2009 Mr. Sauvage exercised his employment for 5.5 days outside Luxembourg.

16 On 16 March 2015 Belgium and Luxembourg concluded a mutual agreement in accordance with Article 25 (3) of the Belgian-Luxembourg DTT that provides for a 24-day tolerance regarding the taxation of working days that are performed outside the state of employment. According to this tolerance the state of employment maintains the full taxing power to the extent that the employee exercises his employment up to 24 days maximum in another state. If this rule had been applicable at the time the dispute arose, Luxembourg would have had the exclusive power to tax the remuneration of Mr. Sauvage.