Chapter 2

Belgium: Interpretation of the Government Services Article, Delineation with the Employment Income Article*

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2.1. Introduction

The cases discussed here deal with the allocation of tax jurisdiction with regard to remuneration paid to government officials, and the delineation between the general rule on employment income (article 15 of the OECD Model Convention) and the special rule on employment income earned by government officials (article 19 OECD Model). This shows how an incorrect court decision in one of the contracting states to a tax treaty (here, France) affects both the case law in the other state (here, Belgium) and an interpretative mutual agreement between the two states.

2.2. Facts of the case

A Belgian national and resident of Belgium was employed by the French government or a French public legal entity (not carrying on a commercial or industrial activity) and worked in France. Accordingly, the taxpayer was a government official deriving French-source employment income in respect of services rendered in France to the French government or to a French public legal entity. The employee claimed to be exempt in Belgium on his remuneration under a combined reading of articles 10 and 11 of the 1964 Belgium-France income tax treaty (the Belgium-France treaty). According to the Belgian tax authorities, the remuneration was taxable in Belgium under article 18 (Other Income) of the Belgium-France treaty. This treaty deviates in many respects from the OECD Model, even from the 1963 version of the OECD Model.

* BE: SC, 27 January 2011 and 17 March 2011.

The relevant provisions of the Belgium-France treaty were as follows:

– Article 11(1) (Employment Income): "Subject to the provisions of Art. 9, 10 and 13 of this convention, salaries, wages and other similar remuneration shall only be taxable in the Contracting State in which the personal activities giving rise to such income, are exercised".

– Article 10(1) (Government Services): "Remuneration in the form of salaries, wages, emoluments, allowances and pensions paid by one of the Contracting State or by a legal entity, organized under the public law of that State which does not carry on industrial or commercial activities, shall only be taxable in that Contracting State".

– Article 10(3) (Government Services): "However, the above provisions shall not apply where remuneration is paid to residents of the other State who are nationals of that State".

– Article 18 (Other Income): "In so far as the preceding provisions of this convention do not provide otherwise, the income of a residents of one of the Contracting State shall only be taxable in that State".

In 1987, the French Council of State (*Conseil d'Etat*, the supreme administrative court) had already ruled on this issue.[1] According to the Council of State, it follows from the combined reading of articles 11(1) and 10(1) and (3) of the Belgium-France treaty that the pertinent income comes within the scope of article 18 of such treaty and, thus, it is not taxable in France.[2]

The Belgian tax authorities traditionally took the view that the income is carved out from article 10 by article 10(3) of the Belgium-France treaty and that, accordingly, it is included under article 11(1). As the taxpayer performed his services in France, in the view of the Belgian tax authorities, his remuneration was taxable in France. The obvious result of the jurisprudence of the French Council of State and the traditional view of the Belgian tax authorities is that remuneration derived by a Belgian national and resident of Belgium for services rendered in France to the French government escapes

1. FR: CE (*Conseil d'Etat*), 9 Nov. 1987, case 51 075, available at www.legifrance.gouv.fr.

2. This judgment does not seem to accord to the French reservation on art. 19 of the OECD Model, paras. 11 and 13. According to this reservation, France reserves the right to specify in its treaties that remuneration paid by a contracting state or a public legal entity of that state is taxable in the paying state only if the beneficiary thereof is "a national of both Contracting States". As the beneficiary of the remuneration is a national of Belgium, one of the contracting states to the treaty, under this reservation France sees no obstacle to tax the person.

taxation in both countries. In early 2000, the Belgian tax authorities changed their position and henceforth have applied the case law of the French Council of State. This gave rise to a series of cases before Belgian tax courts. As from 2006, both countries negotiated an interpretative agreement by virtue of article 24(2) of the Belgium-France treaty, which is comparable to article 25(3), first sentence of the OECD Model. This agreement endorses the case law of the French Council of State, and is applicable as from 1 January 2007. The agreement provides that it should also be used to resolve pending litigation, even if the assessment were made before 1 January 2007.[3]

The recent case law of the lower Belgian tax courts, caused by the fact that the Belgian tax authorities applied the ruling of the French Council of State, is divided on the interpretation of the Belgium-France treaty. In 2008, the Tax Court of First Instance of Brussels[4] and in 2009, the Court of Appeals of Mons[5] each refused to follow the case law of the French Council of State and thus held the remuneration to be taxable in France. According to these courts, the text of articles 10 and 11 is clear and unambiguous and the French Council of State rendered an incorrect interpretation of those provisions for which the Council of State did not offer any justification. However, in 2009, the Tax Court of First Instance of Mons held that the remuneration is taxable in Belgium.[6] In 2009, the Court of Appeals of Mons also handed down a similar ruling, applying the interpretative agreement retroactively (assessments of 1997 and 1998).[7]

Both conflicting judgments of the Court of Appeals of Mons of 2009 have been appealed to the Belgian Supreme Court (*Hof van Cassatie/Cour de Cassation*).

3. The exact date of the agreement is unclear. The text of the agreement was published in a Circular Letter of the Belgian tax authorities (CI.R.9 F/596.979 (AOIF b. 11/2009)) of 5 Mar. 2009. Before the Tax Court of First Instance of Brussels, the Belgian tax authorities alleged that the agreement was signed on 18 February 2008. However, they did not submit the agreement to the Tax Court, and the Court refused to apply it.
4. BE: Tax Court (TC) of First Instance of Brussels, 20 Mar. 2008, commented upon by L. de Broe and D. van Bortel, *Kroniek Internationaal Belastingrecht* 2009, T.R.V. (2010), at 142.
5. BE: Court of Appeal (CA) of Mons, 1 Apr. 2009, commented upon by De Broe and van Bortel, supra n. 4, at 129.
6. BE: TC First Instance of Mons, 16 Mar. 2009, commented upon by De Broe and van Bortel, supra n. 4, at 140. The Court did not apply the interpretative agreement, but interpreted the Belgium-France treaty along the lines of the French Council of State.
7. BE: CA of Mons, 19 June 2009, 2006-RG-940, available at www.fiscalnet.be.

2.3. The Court's decisions

In two identical judgments of 27 January 2011 and 17 March 2011, the Belgian Supreme Court decided to follow the jurisprudence of the French Council of State, although without referring to that court's decision.[8] In very brief decisions, the Supreme Court stated that:

> It follows from a combined reading of articles 11(1) and 10(1) of the [Belgium-France treaty] that article 11 does not apply to remuneration paid by a Contracting State or a public legal entity of that State that does not carry on an industrial or commercial activity. Article 10(3) of the [Belgium-France treaty], on the other hand, excludes the application of article 10(1) when such remuneration is paid to residents of the other State that are nationals of that State. In this case, as the preceding provisions do provide otherwise, the remuneration is taxable only in the State of residence of the beneficiary pursuant to article 18.[9]

In its decision of 17 March 2011 (i.e. the appeal against the judgment of the Court of Appeals of Mons of 19 June 2009, which relied in part on the interpretative agreement between Belgium and France) does not refer to the interpretative agreement. The Supreme Court reached its decision solely by interpreting the provisions of the Belgium-France treaty.[10]

2.4. Comments on the Court's reasoning

It is hard to agree with the judgments of the Belgian Supreme Court and the French Council of State. In the author's opinion, they offer an incorrect interpretation of the relevant provisions of the Belgium-France treaty.

Article 11 of the Belgium-France treaty (in its general principles corresponding to article 15 of the OECD Model) is the *lex generalis* for remuneration derived in respect of employment, regardless of whether the employment is in the private or public sector. This follows from the expression at the beginning of article 11(1), "Subject to the provisions of Art. 9, 10 and 13". There is a similar expression in the corresponding article 15(1) of the OECD Model "Subject to the provisions of Art. 16, 18 and 19". Articles 9, 10 and 13 of the Belgium-France treaty (articles 16, 18 and 19 of the OECD Model)

8. BE: SC, Cass. 27 Jan. 2011, Pas., I, 2011, 325; BE: SC, Cass. 17 Mar. 2011, Pas., I, 2011, 832.
9. Id. (author's translation).
10. In his opinion in the case decided on 27 Jan. 2011, however, the Advocate-General referred with approval to the interpretative agreement. He also pointed out that subsequent to the litigation it was submitted to the judgment of the Supreme Court.

are *leges speciales* covering special types of employment and income derived therefrom which are further defined in such articles.[11] It follows from the exception at the beginning of article 11(1) of the Belgium-France treaty that, as a matter of principle, remuneration derived from any type of employment activity is included in article 11 and that, pursuant to article 11(1), such remuneration is taxable in the work state, unless it falls within the special provisions of the Belgium-France treaty (i.e. article 9, 10 or 13). Article 9 of the Belgium-France treaty corresponds in its principles to article 16 of the OECD Model and applies to director's fees. Article 10 of the Belgium-France treaty corresponds in its principles to article 19 of the OECD Model and covers remuneration and pensions from employment in government service. Finally, article 13 of the Belgium-France treaty deals with income earned by professors and teachers. To sum up: article 11(1) of the Belgium-France treaty (article 15(1) of the OECD Model) is an umbrella provision covering all types of remuneration derived from employment, regardless of whether private sector or public sector employment, unless such remuneration falls under one of the *leges speciales* to which article 11(1) of the Belgium-France treaty (article 15(1) of the OECD Model) explicitly refers.

It is not disputed that the employees concerned were employed by the French government or by French public legal entities (not carrying on an industrial or commercial activity) and that they had been physically working in France. As a result, their remuneration is covered by article 10(1) of the Belgium-France treaty (article 19(1) of the OECD Model) and thus excluded from the general rule of article 11(1) of the such treaty.

Pursuant to article 10(1), the remuneration is – as a matter of principle – taxable only in the state that pays the remuneration (i.e. France). However, the complicating factor is that the employees have Belgian nationality. Accordingly, the third paragraph of the same article 10 becomes relevant. It provides that: "However, the above provisions shall not apply where remuneration is paid to residents of the other State who are nationals of that State". Article 10(3) of the Belgium-France treaty sets aside "the above provisions". As article 10 deals with remuneration earned by government officers, this can only mean that the first and second paragraph of article 10 of the treaty are not applicable to Belgian nationals employed by the French government or by a French public legal entity.

11. Art. 17 of the OECD Model carves out from art. 15 remuneration derived by artistes and sportsmen.