Information from cross-border

Belgium

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Obligation to transmit information to the tax authorities

- Belgian resident individuals and corporations
  - Obligation to report worldwide income (section 305 BIRC)
    - But for individuals :
      - Belgian WHT final tax for most income from movable property;
      - Special obligation to report all foreign bank accounts and foreign life insurances (section 307 BIRC)
      - Special obligation to report foreign *legal constructions* (section 307 BIRC)
    - For companies :
      - Special obligation to report direct or indirect payments over €100,000 per annum to countries non-compliant with the OECD standards on exchange of information or with a corporate tax rate of less than 10% (art. 307BIRC)

Obligation to transmit information to the tax authorities

- Belgian resident individuals can either opt for a hard copy or an electronic tax return;
- Belgian resident corporations are obliged to make their tax returns electronically;

Collection of information by the tax authorities : general principles

- **General principle** : the investigation rights of the tax authorities (art. 315-338bis BIRC) are to be interpreted restrictively. The tax authorities cannot use information obtained by unlawful means.
  - Information obtained by means of a promise that there will be no prosecution proceedings is null and void (*Supreme Court, 13 May 1986*).
  - If the tax authorities indicate that the submission of documents or information is obligatory when this is not the case, those documents are also null and void.

Collection of information by the tax authorities : general principles

- Important investigation instrument : the request for information (*'demande de renseignement/vraag om inlichtingen'*) can be made orally or in writing (art. 315 & 316 BIRC).
- If the request is put in writing, the taxpayer must reply within one month.
- **Subject**: basically everything which is necessary in order to investigate the taxpayer's tax situation.
  - However, according to settled case law it must be done with the necessary moderation.
  - No fishing expeditions!

Collection of information by the tax authorities : general principles

- Documents of a purely private nature with no (potential) connection with taxable income may not be requested.
  - Mixed documents may be requested, however.
- If the taxpayer does not reply or fails to reply in time:
  - estimated assessment (‘*imposition d’office/ambtshalve aanslag*’);
  - fine.
- **Time frame**: coincides with assessment periode : in principle, 3 years from 1 January of the tax year.
  - 7 years in the case of tax evasion;
    - In this case a preliminary notification must be sent to the taxpayer stating the indications of tax evasion.

Collection of information by the tax authorities : general principles

- There are also some special assessment periods, including in the case of information being obtained from abroad (section 358 § 1, 2° BIRC).

- The taxpayer has an obligation to cooperate.
- However, he or she also has a right to remain silent within the scope of art. 6 ECHR, but the scope of this right is currently still being disputed in Belgian case law.

Collection of information by the tax authorities : general principles

- Some courts take the view that if the tax authorities show an indication of tax evasion and hold out the prospect of a fine of 50%, the taxpayer can invoke the right to remain silent (*Liege, 31 March 2010*).
- Other courts take the view that a taxpayer cannot invoke the right to remain silent until it becomes clear that the tax authorities are going to lodge a criminal complaint (*Court of Mons, 8 January 2008*).

Collection of information by the tax authorities : general principles

- Furthermore, special stipulations also apply for professions (e.g. legal profession) subjected to professional confidentiality (client privilege) where usually the territorially competent disciplinary authority has to intervene.

Collection of information by the tax authorities : general principles

- The obtained information can also be used to tax others (art. 317 BIRC).
- However, the tax authorities are not allowed to pretend to investigate the situation of the taxpayer himself or herself when in reality they are looking for information to tax others (e.g. when investigating banks).
- But the tax authorities are allowed under the same conditions to ask others for information which they consider to be useful or necessary for taxing a different taxpayer.

Collection of information – international

- Basically, according to internal instructions of the tax authorities the international exchange of information must take place via the central tax authorities (with limited exceptions for France and the Netherlands) (Ci.R.9 DIV/460.792, 27 november 1996).
- If details from abroad are used to establish the assessment, the tax authorities must prove that they have observed the rules on international exchange of information correctly.

Collection of information – international

- European Directive 77/799 of 19 December 1977 has been incorporated into Belgian law in section 338 IRC.
- Furthermore, section 338b BIRC also provides for the exchange of information within the scope of the European Savings Directive (2003/48/EC).
- The new European Directive 2011/16/EU to replace the aforementioned directive of 1977 has now been implemented by the federation and all regions and has been in force since 1 January 2013.

Collection of information – international

- Belgium has signed the Convention on mutual administrative assistance in tax matters (25 January 1988), which entered into force in Belgium in 2000 (and Belgium also signed the Protocol to this convention on 4 April 2011).
- Furthermore, there is also section 26 of the double taxation treaties which Belgium has concluded and Belgium has now signed a whole series of TIEAs (19 of which are now in force).
- Finally, there is also the FATCA agreement with the USA, dated 23.04.2014.

Unlawfully obtained information

Unlawfully obtained evidence

- Unlawfully obtained evidence (in tax matters) is evidence which has been obtained by failing to recognise or ignoring:
  - a **substantive** or **procedural** law;
  - **general legal principles** or **fundamental rights**.

Unlawfully obtained evidence

- The tax authorities have specific circumscribed powers: a failure to recognise this leads to so called misuse of power and therefore to unlawfully obtained evidence.
- As regards the general legal principles, reference is made mainly to the **principles of sound administration** *(Supreme Court, March 27, 1992)***:**
  - This exclusion is based on the principle that the use of unlawfully obtained evidence by the tax authorities constitutes unsound administration, which, in the absence of sanctions, would constitute a failure to recognise the rule of law.

Unlawfully obtained evidence – principles of sound administration

- **Principle of due care**: This includes, for instance, evidence that has been obtained by the exertion of pressure (*Ghent, 20 April 2004*).
- **Principle of fair play**: Case law has judged that the principle of fair play is violated if the tax authorities make use of evidence which they themselves have obtained by committing a crime or if they are aware that the evidence has been collected unlawfully by a third party (*Antwerp, 8 April 2008*).

Unlawfully obtained evidence – principles of sound administration

- **The obligation to hear the tax payer and the right to a defence**: The obligation to hear and the rights of defence are violated particularly if it is not possible to verify the way in which evidence has been obtained or if the tax authorities refuse to show the taxpayer the relevant documents (*Brussels, 4 February 1999*).
- **The principle of reasonableness**: The duty to maintain a balance between the means applied and the objective to be achieved.

Unlawfully obtained evidence

- Unlawfully obtained evidence has been excluded for a long time (*Supreme Court, 12 March 1923*).
- However, there has been a drastic change in Belgian **criminal** law with the so called Antigoon case law *(Supreme Court, 14 October 2003)*. This stipulates that unlawful evidence may be excluded only if:
  - the reliability of the evidence is affected;
  - the use of that evidence is in contravention to the right to a **fair trial**; or
  - certain formal requirements under penalty of nullity have not been observed (*Supreme Court, 14 October 2003*).

Unlawfully obtained evidence

- Within the scope of this case law the Supreme Court has ruled that the courts deciding questions of fact can, when judging the **fair trial** concept, a.o. take account of the following elements:
  - The deliberate nature of the irregularity committed by the tax authorities.
  - The gravity of the crime far exceeds the irregularity committed.
  - The fact that the unlawfully obtained evidence concerns only the substantive element of the existence of the crime.
  - The fact that the irregularity has no effect on the right which is protected by the unrecognised standard.
- This Antigoon doctrine has now been confirmed by law (Act of 24 October 2013) as regards **criminal** law.

Unlawfully obtained evidence in tax law

- Initially, the old view was followed in tax matters, namely that unlawfully obtained evidence (i.e. evidence which had been obtained by breaking the law or violating the principles of sound administration) was excluded.
- This difference in criminal law versus tax law has given rise e.g. to the question as to what extent it was possible to use evidence obtained unlawfully in a criminal case in tax matters (see a.o. the so called KB-Lux cases).
  - Belgian case law is divided on this issue.

Unlawfully obtained evidence in tax law

- There is however an very recent important development through the ruling of the Supreme Court of 22 May 2015:
  - The facts concerned a V.A.T. exemption regarding intra-Community delivery of electronic material to a Portuguese company.
  - It emerged from information obtained from the Portuguese tax authorities that the so called deliveries to a Portuguese company were fictitious.

Unlawfully obtained evidence in tax law

- The Belgian tax authorities (or, to be precise, the central anti-fraud department or ‘BBI’) had requested information within the scope of the then European assistance directive of 19 December 1977.
- The taxpayer takes the view that this is unlawfully obtained evidence because the Belgian request should normally have been issued by the Finance Minister (or his or her representative).

Unlawfully obtained evidence in tax law

- Nevertheless, neither the court of first instance nor the Court of Appeal at Antwerp see any problem with this.
- The Supreme Court has confirmed the ruling of the Antwerp Court of Appeal on the following grounds:
  - Taxation law does not include a general stipulation which prohibits the use of unlawful evidence to establish tax liability.

Unlawfully obtained evidence in tax law

- Therefore, according to the Court, it is only necessary to test the case against the principles of sound administration and the right to a fair trial.
- This means that in taxation matters unlawfully obtained evidence can be rejected only if:
  - The evidence is obtained in a manner which is so clearly in conflict with what may be expected from a tax authority acting appropriately that this use must be deemed inadmissible in all circumstances.
  - This use impedes the taxpayer's right to a fair trial.

Unlawfully obtained evidence in tax law

- In its judgement the courts or tribunals deciding questions of fact can be guided to a considerable extent by the criteria which the Court had already given in previous criminal cases (see above), namely:
  - The purely formal nature of the irregularity.
  - The effect on the right which is protected by the transgressed standard.
  - The deliberate or unintentional nature of the irregularity committed by the tax authority.
  - The circumstance that the severity of the infringement committed by the taxpayer far exceeds the irregularity committed.

Unlawfully obtained evidence in tax law

- And so, the so called Antigoon doctrine now works mutatis mutandis also in tax law so that an exclusion of evidence is valid only in the following cases:
  - A breach of a prescribed legal stipulation under penalty of nullity.
  - A flagrant contravention of what should be regarded as a tax authority operating appropriately.
  - If the right to a fair trial is impeded.