

Separation of Powers in Belgium

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Preliminary observations

Belgium is a federal state, composed of two types of federated entities: communities and regions. Each entity has an own Parliament and Government with similar legislative competences.

The fiscal competence is a competitive competence. Article 170 of the Belgian Constitution attributes taxes to the federal authorities as well as to the federated entities. Article 170 §2, second indent of the Belgian Constitution, however, gives priority to the federal legislator in tax matters. The federal legislator can, if ‘necessary’, substract tax matters from the fiscal competences of the federated entities.

In this report, the interest goes to the federal tax legislation.

On the other hand, it should be pointed out here that the federated entities have fiscal autonomy as well. The decrees and – for the Brussels Region – the ordinances which they ordain, are on the same level as laws (same hierarchy).

PART I.

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

Legislative competence is regulated by the Belgian Constitution. Article 170 §1 of the Belgian Constitution prescribes that taxes to the benefit of the States can only be introduced by a law. Furthermore, no exemption or reduction of taxes can be introduced except by a law (art. 172, second alinea Belgian Constitution). Consequently, the legislator principally has to make the decision to introduce a tax. Any tax must have a firm basis in statutes approved by the Parliament, the state organ where electors and – by consequence – taxpayers are politically represented.¹ In other words, the Belgian Constitution explicitly formulates the principle of legality in tax matters, that is, the principle of ‘no taxation without representation’.

¹ M. BOURGEOIS, “Constitutional framework of the different types of income”, in B. PEETERS (ed.), *The concept of tax*, 2005 EATLP Congress, Naples (Caserta), EATLP International Tax Series, Volume 3, 2005, 158; B. PEETERS, “Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?”, in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007, 509-510; F. VANISTENDAEL, “Legal Framework for Taxation”, in V. THURONYI (ed.), *Tax Law Design and Drafting*, Washington D.C., International Monetary Fund, 1996, 16-19.

On the one hand, article 36 of the Belgian Constitution indicates that the federal legislative power is exercised jointly by the King, the House of Representatives and the Senate. As a consequence, the King, covered by the Federal Government, is part of the federal legislative power in Belgium. As a branch of the federal legislative power, the Government – as well as the House of Representatives and the Senate – has the right to propose legislation (art. 75, first indent Belgian Constitution), tax legislation included. These tax bills are mostly prepared by the policy cell of the Minister of Finance or by the tax administration. In addition, the King sanctions and promulgates (tax) laws (art. 109 Belgian Constitution).

On the other hand, the federal executive power also belongs to the King (art. 37 Belgian Constitution). In practice, it is exercised by the Federal Government. In this function, the King (i.e. the Federal Government) has no other powers than those formally attributed to him by the Constitution and by specific laws passed by virtue of the Constitution itself (art. 105 Belgian Constitution). One of those powers is that the King makes regulatory decrees and regulations that are required for the execution of laws, without ever having the power either to suspend the laws themselves or to grant dispensation from their execution (art. 108 Belgian Constitution). These are the so-called Royal or Ministerial Decrees.

Here, the question arises whether the Government only executes tax law by regulatory decree or if there is a delegation of legislative power. By virtue of the Belgian Constitution, only incidental and ancillary rules with respect to taxation may be delegated to the Government as executive power. The legislator has to establish the essential elements of taxation. These elements include, a.o., the identity of taxpayers, taxable events or objects of taxation, the tax basis, tax rates and exemptions or reductions.

Nevertheless, there can be exceptional circumstances that oblige the Government to determine an essential element of taxation. The legitimacy of such a delegation to the executive power depends essentially on four conditions, which are granted by the Belgian Constitutional Court:

- it is impossible for the legislator to establish all essential elements of the tax because of constraints of parliamentary procedure;
- the content of the delegation is explicit and unequivocal;
- the tax measure approved by the executive power must be submitted to the legislator within a short period of time and confirmed by it;
- regulatory decrees which are not confirmed by the Parliament become null and void.²

1.2. Does your Government draft tax bill proposals and present them to Parliament?

Yes, by virtue of article 75, first indent of the Belgian Constitution, the King (i.e. the Federal Government) has – as a branch of the federal legislative power, as well as the House of Representatives and the Senate – the right to propose legislation, tax legislation included (see 1.1.).

1.3. In case your answer to 1.1. and 1.2. is positive:

² Const. Court nr. 18/98, 18 February 1998; Const. Court nr. 105/99, 6 October 1999; Const. Court nr. 195/2004, 1 December 2004; Const. Court 16 March 2005, nr. 61/2005; Const. Court 28 July 2006, nr. 124/2006; Const. Court. nr. 83/2008, 27 May 2008, www.arbitrage.be. See also M. BOURGEOIS, “Constitutional framework of the different types of income”, in B. PEETERS (ed.), *The concept of tax*, 2005 EATLP Congress, Naples (Caserta), EATLP International Tax Series, Volume 3, 2005, 165-167; B. PEETERS, “Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?”, in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007, 537-540.

1.3.1 Does your Government usually exercise that competence?

As a branch of the federal legislative power, the Government regularly drafts tax bills, but less frequently than the members of the Parliament. However, in the case of governmental initiative, draft bills will be rarely defeated in general (there are no data available for taxation in particular). Almost every governmental proposal passes and becomes legislation. This can not be said of parliamentary draft bills. Consequently, it is fair to say that in Belgium, the Government has a factual supremacy on the Parliament (for data, see Part II, 1.2).

As a branch of the federal executive power, the Government often executes tax legislation, but mostly does not determine essential elements of tax, which is rather exceptional.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

Draft bills on taxation by governmental initiative are tabled with the House of Representatives and are then sent to the Senate (art. 75, third alinea Belgian Constitution). A draft bill may be adopted by a House only after an article-by-article vote. The House of Representatives and the Senate have the right to amend and to split the articles and amendments proposed (art. 76 Belgian Constitution). Articles 78 of the Belgian Constitution outlines the optional bichamber parliamentary procedure and the relations between the House of Representatives and the Senate. In this procedure, the Senate fulfills the role of reflection chamber. The Senate can evoke bills. If it does not intervene within fifteen days, the bill becomes law. The Senate can amend evoked bills, but the House of Representatives always has the final word. The latter can thus accept a law without taking into account the amendments proposed by the Senate. This means that both Houses have the opportunity to scrutinize carefully the many provisions of such laws in a parliamentary debate and to introduce changes.

Most federal laws, however, are discussed in the competent parliamentary Committee, where the main parliamentary work concerning legislation takes place. The Committees consist of a limited number of members of Parliament on the basis of proportional representation. The purpose is that legislation is discussed by members of Parliament who are more familiar with the matter or are gradually specialising in it. Committees can also request the assistance of external specialists and obtain advice for the preparation of the legislative work, organize seminars and hearings, and request the presence of the competent minister. Drafts and proposals of tax laws are discussed in the parliamentary Committee for Finance and Budget. In principle, the meetings of the Committees are public. Reports about their activities are made for the attention of the plenary meeting. The discussions in the Committee are decisive for the discussion in plenary meetings. The latter work on the basis of the text accepted by the Committee. The main problems have already been broached, the various arguments and viewpoints are known. Amendments or drafts which were rejected in the Committee can also be discussed during the plenary meeting.

In addition, in the case of a governmental initiative, there is a principal obligation to request judicial, linguistic and legistic advice of the Legislative Section of the Council of State about a bill for a reglementary decree or a draft bill of law, decree or ordinance. The Council of State can propose changes to the draft bills, but this advice is not binding. However, this obligation can be circumvented:

- by invoking the highly urgent character. Reglementary decrees do not need to be submitted to advice. Preliminary bills of law, decree or ordinance do, but the advice is limited to matters of competence. The Administration Section of the Belgian Council

of State can nullify a decree which has not been presented for advice to the Legislative Section, if the highly urgent character is not motivated strongly enough;

- by submitting a bill of law, decree or ordinance under the guise of a parliamentary proposal;
- by submitting a provision in a preliminary bill of law, decree or ordinance under the guise of an amendment;
- by motivating the highly urgent character, so that the Council of State has to give its opinion within a period of five days.

Nevertheless, it has been common practice for Belgian legislators since the 1970s to regularly assemble a bulk of unrelated rules modifying numerous existing statutes for budgetary purposes in one massive arrangement law.³ This happens at least once a year: at the end of the year, the Government submits on the one hand a budget draft and on the other hand a draft of arrangement law, which both are to come into effect before 1 January of the next year. Additionally, it happens that an arrangement law is approved in the middle of the year, within the framework of a budget control.

This kind of legislation undermines not only the quality of the law, but also the parliamentary debate. Arrangement laws may push the factual supremacy of the Government on the Parliament to the extreme. This legislation is introduced in Parliament under a time limit, too limited for the members of Parliament to carefully scrutinize the many provisions of such laws. There is no time for amendments, only those initiated by the Government are accepted. Consequently, parliamentary debate is reduced. Moreover, advice of the Legislative Section of the Council of State is avoided, either through urgency procedures or through amendments, which do not have to be submitted to advisory bodies.

Recently, in July 2008, some members of the Belgian House of Representatives submitted a draft bill to establish a Committee 'F' (for Finance).⁴ This new Committee should control the Government/Belgian Service for Federal Taxation when it prepares a draft tax bill. In particular, the compatibility of the tax draft bill with the constitutional principle of equality should be controlled in an early stage. The earlier, the better – as far as the initiators of the law proposal are concerned.

See also Part II, 1.3.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3.?

In Belgium, the constitutional principle of legality in tax matters is controlled ex ante by the Legislative Section of the Council of State and ex post by the Constitutional Court. As a consequence, this principle seems to be sufficiently respected in the phase of the genesis of the tax legislation. Due to the practice of arrangement laws mentioned earlier and to the tight timeschedule during which tax laws often have to be voted in Parliament, a *de facto* democratic deficit risks to be at stake.

Furthermore, the principle of legality in tax matters has to be respected in applying tax legislation. In that respect, the tax administration is not allowed, for instance, to add additional

³ See P. POPELIER, "Mosaics of Legal Provisions", *European Journal of Law Reform*, 2005, 47-57 and J. VAN NIEUWENHOVE, "Verzamelwetgeving in België", *RegelMaat* 2006, 153-166.

⁴ Law proposal for the regulation of the control of the Belgian Service of Federal Finance, 9 Juli 2008, *Parl. St. Kamer* 2007-2008, nr. 51, nr. 1341/001 and nr. 1348/001.

conditions which are not foreseen in the legislation at hand. In view of that principle, there is a tendency in Belgian doctrine to criticize the practice developed by the so-called Belgian Service of advance decisions in tax matters (the 'Advance Ruling Commission' (See also Part I. 3.4) which sometimes couples the deliverance of a positive ruling with the requirement that the taxpayer respects additional conditions which are not explicitly foreseen by law.⁵

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

Belgian tax legislation is detailed as well as vague. By virtue of the constitutional principle of legality for taxation (see 1.1.), most tax legislation is very detailed.

However, there is a trend in Belgium towards more vague tax legislation. Examples of vague concepts are 'legitimate financial or economic needs' of the Belgian anti-abuse provision in article 344 §1 of the Income Tax Code and 'abnormal or benevolent advantages' in article 26 of the Income Tax Code.

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

The answer is differentiated.⁶

Because today human and judicial relationships become more and more complex and varied, it is often difficult or even impossible, to apply the constitutional principle of legality very strictly. It is sometimes very difficult to introduce taxes by means of clear and precise tax legislation. In tax law, the necessity to react very quickly in order to neutralize tax avoidance, implies that the principle of legality must be considered as a dynamic principle. Nevertheless, in the beginning, the strict principle of legality was the taxpayer's pre-eminent constitutional source of legal certainty.

It may be observed that the legislator increasingly uses vague and indeterminate concepts in tax legislation. Although vague concepts do not serve the principle of legal certainty at first sight, they still have some advantages as well. They give a certain flexibility when applied in specific situations or in the future. They prevent the tax code from changing too much, which would also undermine legal certainty. Because of the use of indeterminate concepts in tax law, tax authorities and judges receive a greater discretionary power in the concrete application of the law. This evolution threatens to suppress the predictability of tax law which is another aspect of legal certainty. Therefore, vague and indeterminate concepts should be used only exceptionally. A balance between the interests of the taxpayer and the interests of the tax

⁵ B. PEETERS, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?", in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007, 553-562, with more references in footnote 174; T. AFSCHRIFT, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées », *Recueil Générale du Contentieux Fiscal*, 2008/6, p. 437-457.

⁶ B. PEETERS, T. WUSTENBERGHS, "De onverenigbaarheid van vage en onbepaalde normen met het fiscale legaliteits- en rechtszekerheidsbeginsel", *A.F.T.* 1999, 111-112.

authorities must be found. A (further) proliferation of vague and indeterminate concepts does not serve the interests or the legal certainty of the taxpayer. Furthermore, the principle of equality should not be suppressed by a too arbitrary interpretation of the tax administration and the Belgian domestic Courts.

To conclude, tax legislation has to be precise enough to be predictable and flexible enough to allow for application in specific or future situations.

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

Yes. On the one hand, Belgium has a Constitutional Court that is competent to control the tax law's compatibility with a series of constitutional fundamental rights as well as with other constitutional rules. In particular, the Constitutional Court can control the compatibility of tax laws, decrees and ordinances with the constitutional principle of legality for taxation set forth in article 170 and 172, second indent of the Belgian Constitution as well as the principle of equality (art. 172 Belgian Constitution). However, the Court is only obliged to control upon request. Taxpayers with a certain interest, can request the Constitutional Court to declare a specific tax law null and void. Domestic Courts are principally obliged to ask the Constitutional Court a prejudicial question about the constitutionality of tax legislation, if such a question has been raised before the domestic Court. The Constitutional Court is no part of the judicial power, but functions independently.

On the other hand, if with 'tax legislation' Royal or Ministerial Decrees are also meant (see 1.1, artt. 105 and 108 Belgian Constitution), two observations should be made.

Firstly, all independent domestic Courts only apply such general (or provincial or local) tax decisions and regulations provided that they are in accordance with the law (art. 159 Belgian Constitution and art. 259, first indent, 32° Code of Civil Procedure). This article implies the independent judicial review of the legality of the executive power. The judge is not only obliged to control the compatibility of regulatory decrees and regulations with the internal law, but he must control the compatibility with the Belgian Constitution and international treaties or EC law with direct effect as well.

Secondly, the Section Administrative Disputes (Bestuursgeschillen) of the Belgian Council of State makes decisions as an administrative court by means of judgments (art. 160, second indent Belgian Constitution). This Council can control, among other things, the constitutionality of general (or provincial or local) (but not individual) tax decisions and regulations and nullify them. The Council of State is no part of the judicial power, but functions independently.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

Recently, the Belgian Constitutional Court decided that a specific tax rule violated the constitutional principle of legality as mentioned in Art. 170, par. 1 of the Belgian Constitution for the reason that this rule did not contain criteria clear and detailed enough to determine the identity of the taxpayers and the amount of the tax⁷. Beside this decision, in 2004 the Belgian

⁷ Const. Court n°. 54/2008, 13 March 2008, www.arbitrage.be, considerations B.11-18. F. BOUHON, "Le juge constitutionnel et la fiscalité négociée: le maintien des effets d'une norme annulée, applicable une seule fois. Note sous l'arrêt n° 54/2008 de la Cour Constitutionnelle", to be published in : *Revue de la Faculté de Droit de Liège*, Decembre 2008, 32 p.

Constitutional Court examined also, the prejudicial question whether the Belgian anti-abuse provision (article 344 §1 Income Tax Code) is so vague as to give too much freedom to the tax administration, implying a general delegation for the determination of essential elements for taxation to the tax authorities.⁸ The Court answered however that the legislator gave enough indications and strict conditions for the tax authorities and, consequently, that there is no general delegation. Thus, in this case, the legal indeterminacy is not considered unconstitutional. Further more, the Section Administrative Disputes of the Belgian Council of State decided very recently that a tax decision of a local government was illegal for an imprecise and inaccurate determination of the taxable object⁹.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

In principle, article 84 of the Belgian Constitution prescribes that only the law can give an authentic (i.e. generally binding *erga omnes*) interpretation of a legislative instrument.¹⁰ In fact, this article excludes the courts from taking part in the rule-making process. The author of the legislation is considered its best interpreter. The Courts must act in accordance with an interpretative law.

Beside this constitutional provision (when there is no interpretative law), the Belgian Supreme Court ('Court of Cassation') has the final word about the interpretation of the law. In contrast to an authentic interpretation by a law, the interpretation of the Supreme Court is only binding *inter partes*.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

By virtue of article 147 of the Belgian Constitution, there is one Supreme Court for all Belgium. This Court has no competence over the substance of the case. Consequently, the Belgian Constitution affirms indirectly that the Supreme Court's task consists of interpreting the law. Furthermore, the articles 144 and 145 of the Belgian Constitution are considered the constitutional basis for the competence of the Supreme Court. Article 144 of the Belgian Constitution prescribes that disputes about civil rights belong exclusively to the competence of the courts. Disputes about political rights belong to the competence of the courts, except for the exceptions established by the law.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Within the boundaries of the constitutional principle of legality for taxation (see 1.1), regulations (Royal of Ministerial Decrees), general and individual administrative rulings

⁸ Const. Court 24 November 2004, nr. 188/2004, www.arbitrage.be.

⁹ Council of State, Section Administrative Disputes, n° 185.386, 14 July 2008, NV Elia Asset v. City of Louvain.

¹⁰ Article 133 Belgian Constitution prescribes the same for decrees of the federated states. See also M. ADAMS, "Precedent versus gravitational force of court decisions in Belgium: between theory, law and facts", in E. HONDIUS (ed.), *Precedent and the Law*, Brussels, Bruylant, 2007, 162.

(administrative circulars, advance tax rulings) and case law can clarify indeterminate legislation.¹¹

Tax authorities can only clarify how vague tax rules have to be applied in specific situations or can give ancillary executive rules to make an application of tax legislation possible.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

Firstly, the tax administration can issue a general administrative ruling, such as an administrative circular. These circulars mostly give an interpretation of tax law that will be applied by the tax administration on specific transactions. Only members of the tax authorities are bound by these circulars.

Secondly, a taxpayer can obtain – on his request – an individual advance tax ruling from the Belgian Service of advance decisions in tax matters (the ‘Advance Ruling Commission’).¹² The purpose of such an individual tax ruling is to increase legal certainty for taxpayers regarding the tax consequences of their transactions. In Belgium, an advance tax ruling is a unilateral decision that binds neither the taxpayer nor the courts. If the Ruling Commission issues a positive ruling, only the Belgian tax administration is bound by it. The tax administration, however, is not bound by the individual tax ruling if:¹³

- the conditions to which the transaction was made subject were not satisfied;
- the description of the envisaged situation or transaction was incomplete or incorrect;
- essential aspects of the transaction were realized in an other way than described by the taxpayer;
- the applicable international, European or domestic laws have changed;
- the advance decision is not compatible with international, European or domestic law;
- the consequences of the transactions, as a result of one or more subsequent transactions, have changed (drastically).

4. Relationship between the Tax Administration and the Domestic Tax Courts

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Yes. As mentioned in 2.3., article 159 of the Belgian Constitution prescribes that all independent domestic Courts apply general, provincial or local (tax) decisions and regulations provided that they are in accordance with the law. This article implies the independent judicial review on the legality of the executive power. On the basis of article 259, first indent, 32° of the Belgian Code of Civil Procedure, the Tax Chambers of the Courts of First Instance (and subsequently the Courts of Appeal and the Supreme Court) are competent to judge about disputes with respect to the application of tax law by the tax administration.

¹¹ F. VANISTENDAEL, “Legal Framework for Taxation”, in V. THURONYI (ed.), *Tax Law Design and Drafting*, Washington D.C., International Monetary Fund, 1996, 34-37.

¹² P. CAUWENBERGH, A. GAUBLomme, L. HINNEKENS, “Transfer Pricing in Belgium – Rulings and Practice”, *Bulletin for International Taxation* 2008, 390-392.

¹³ Article 23 of the Law of 24 December 2002 to reorganize the corporate law and to introduce a new system for advance rulings, *Official Gazette* 31 December 2002.

Moreover, by virtue of article 180, second indent of the Belgian Constitution, the Court of Audit of Belgium (Rekenhof) is, a.o., charged with the general supervision of the legality of operations of the tax administration for the establishment and the collection of the rights received by the State, tax income included. The Court of Audit may not intervene in individual tax files. Its purpose is to provide the Parliament with macro budgetary information about the development of the State's income and about the problems which can arise in this context. The control concerns the different phases of the revenues, i.e. the establishment of the taxable matter, the settlement and the collection of the taxes. A protocol about the way the supervision is exercised has been signed by the Minister of Finance and the Court of Audit.¹⁴ The Court of Audit is a collateral body of Parliament.

As mentioned in 1.3.2., some members of the Belgian House of Representatives recently submitted a draft bill to establish a Committee 'F' (for Finance).¹⁵ This new Committee would not only control the compatibility of the draft tax bills on governmental initiative with the principle of equality, but also the application of tax law by the tax administration. Taxpayers can address the Committee 'F' that can start an investigation about the equal treatment of taxpayers regarding general administrative rulings and comments. The purpose of this control is that the circular in question can be defeated or the law will be modified if this should prove necessary.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

As mentioned earlier in 3.4., domestic Courts are not bound by rulings and information from the tax administration in Belgium.

Those rulings could be very useful for the interpretation of the law by the Courts, however. Unfortunately, specific data are not available.

Furthermore, Courts can take into account the fact that the tax administration has made an administrative ruling. In other words, to solve a dispute between the tax administration and the taxpayer, the Court can take into account that the tax administration has – by means of an administrative ruling – created a legal expectation in the taxpayer that in his individual transaction tax law will be applied in this or that way. In the current state of the Supreme Court's jurisdiction, taxpayers' expectations based on *contra legem* rulings are not taken into account¹⁶.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

In general, the tax administration takes into account the decisions of the Belgian Supreme Court and the European Court of Justice. However, the tax administration is not obliged to do so (see 4.5).

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

¹⁴ Protocol of 22 December 1995, *Official Gazette* 31 January 1996.

¹⁵ Law proposal for the regulation of the control of the Belgian Service of Federal Finance, 9 Juli 2008, *Parl. St. Kamer* 2007-2008, nr. 51, nr. 1341/001 and nr. 1348/001.

¹⁶ Supreme Court (Cass.) 30 May 2008, see: S. VAN CROMBRUGGE, in: *Fiscoloog*, 2008, n° 1124, p. 6-9.

No, in Belgium such a principle is not known.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

No, only the parties to the case are bound by a judicial decision. In Belgium, previous court decisions do not have a legally binding nature or the ‘force of precedent’.¹⁷ Thus, the tax administration is not obliged to follow the decisions of the Belgian Supreme Court in later similar cases. On the basis of Art. 6 of the Belgian Code of Civil Procedure, the Courts may not, in the disputes submitted to them for judgment, make any decision by way of general dispositions qualifying as a rule. Moreover, one and the same specific claim can not be brought to a court at the same hierarchical level more than once (article 23 Code of Civil Procedure). This is the principle of the authority of court decisions or *res judicata*. This authority of court decisions thus only applies to parties of the specific case.

However, Belgian Supreme Court decisions have a certain ‘gravitational force’. This means that these court decisions are vested with a certain normative authority without actually making them formally (legally) binding. That’s the reason why the tax administration takes into account the decisions of the Belgian Supreme Court.

Regarding the decisions of the Belgian Constitutional Court and the European Court of Justice, the tax administration is not bound to an answer to a prejudicial question when it is not a party to the case. Even when the Constitutional Court answers that the law violates the Belgian Constitution, the tax administration may apply that law. The law still takes part in the Belgian legal system, until the Parliament has modified or removed the law.¹⁸ Only when the Constitutional Court nullifies a tax statute, this judgement is generally binding.

4.6. Does your Tax Administration circumvent your domestic courts’ case law?

Normally, the tax administration follows the Supreme Court decisions and the lower court’s case law that has become *res judicata*.

5. Relationship between different legal sources (legal pluralism)

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

Whereas the Belgian Constitution is the highest-ranking internal norm, Belgium has also recognized the system of legal monism (see 5.2), so that the internal and international/European legal systems form a unity.¹⁹

International law does not need to be translated into national law, before it takes material effects on the Parliament, the Tax Administration, the Courts or the taxpayers. Treaties take

¹⁷ M. ADAMS, “Precedent versus gravitational force of court decisions in Belgium: between theory, law and facts”, in E. HONDIUS (ed.), *Precedent and the Law*, Brussels, Bruylant, 2007, 150-151 and 160-162.

¹⁸ Questions and answers, *Parl. St. Kamer 2007-2008*, nr. 004, 160 (question nr. 48 of 22 October 2007).

¹⁹ L. HINNEKENS, J. MEEUSEN, “Fiscaal recht in de Europese Unie: een schets van het institutioneelrechtelijk kader”, in B. PEETERS (ed.), *Europees belastingrecht*, Gent, Larcier, 2005, 13-18.

effect only after they have received the approval of the Houses of Parliament on the basis of article 167 of the Belgian Constitution, however. This approval act is not considered normative. International law can be applied directly by a national judge, and can be invoked directly by citizens, just as if it were national law. A judge can refuse the application of a national rule if it contradicts an international rule, because the latter has priority. In Belgium, the principle '*lex superior derogat legi inferiori*' applies to all (Parliament, Tax Administration, Courts and taxpayers).

Consequently, the hierarchy of norms in Belgium implies that all types of national law (acts, regulations, decisions, ordinances, circulars, even the Constitution) – irrespective of their being issued by the legislative or executive power – can never be in conflict with international/European norms (primary or secondary law). The Courts also have to respect European Community case-law. In other words, Belgium has recognized the principle of primacy of international and Community Law as forged by the Court of Justice in the 1960s.

In order that the Belgian domestic judge can directly apply an international rule, which is not implemented in the internal law, the rule needs to have some direct effect. Therefore, according to the jurisprudence of the European Court of Justice, the international/European Community law must be precise, clear and unconditional and the law may not call for additional measures. Only then, primary and secondary law safeguard the rights of individual taxpayers to invoke an international or Community provision, irrespective of the existence of a national text. In other words, the international/European rule has to be 'self-sufficient'.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

The question about the relationship between international and national law is a question that should be answered in the Constitution of each country. However, the Belgian Constitution does not answer this question directly. Only article 34 of the Belgian Constitution determines indirectly that the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law. This article gives a constitutional basis for the transfer of sovereignty to international and supranational institutions.²⁰ The question whether the international law is immediately applicable in the Belgian legal system, or if this law must be implemented first, is not answered by the Belgian Constitution.

Therefore, in 1971, the Belgian Supreme Court recognized the primacy of every international or supranational rule over each internal law, as a consequence of the nature of the international law itself and on the condition that the international or supranational law has direct effect.²¹ The primacy of international and supranational law with direct effect has been recognized as a general principle.²²

Nevertheless, the Constitutional Court nuanced this judgment of the Supreme Court by stating that no international treaty can be approved contrary to constitutional law.²³ Despite this condition, the Constitutional Court can only control the compatibility of the approval act (see 5.1) – thus not the treaty itself – with a series of constitutional rules.

²⁰ K. RIMANQUE, *De grondwet toelicht, gewikt en gewogen*, Antwerp-Oxford, Intersentia, 2005, 106.

²¹ Supreme Court (Cass.) 27 May 1971, *Arr.Cass.* 1971, 959, *J.T.* 1971, 460 with concl. Ganshof van der Meersch.

²² Supreme Court (Cass.) 5 December 1994, *J.T.T.* 1995, 41; Supreme Court (Cass.) 17 January 2002, nr. 20020117-10, www.cass.be.

²³ Constitutional Court 3 February 1994, nr. 12/94.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

The principle of effective remedies in national Courts applies in Belgium. The effective enforcement of Community law in national Courts is guaranteed: as far as we know there are no different legal remedies for EC law or domestic law.

PART II

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? yes – no

In Belgium, the Parliament is competent to control the tax administration by questioning the Minister of Finance about his course of policy in plenary meetings or in the parliamentary Committee of Finances. This happens frequently, as can be derived from the frequency of written questions (from members of Parliament) and answers (of the Minister of Finance) in plenary meetings: during the 51st Session (2003-2007), the Minister of Finance had to answer about 770 questions.²⁴ Although not every question could be answered, the quantity shows that the Belgian Parliament controls the tax administration by questioning the Minister of Finance.

Moreover, the Committee of Finances and Budget interpellated orally the Minister of Finance 103 times during the same period, and put 1741 oral questions.²⁵ Furthermore, this Committee had 268 public meetings in this period. Finally, the Committee of Finances and Budget dealt with 37 draft tax bills on the initiative of the Parliament and with 165 draft tax bills on governmental initiative.²⁶

In conclusion, the Belgian Parliament controls the tax authorities, but it is not clear whether this control is efficient. Because the parameters for the evaluation of the effectiveness of the parliamentary control are unknown, this question cannot be answered.

See also I, 1.3.2.

1.2. Do tax authorities influence tax legislation to a major degree? yes – no

See 1.3.1.

During the period 2003-2007 the Government drafted 89 tax bills, while there were 143 proposals on the initiative of the House of Representatives. No specific data are available to give an idea which proposals in taxation have been passed. But in general (regarding the bicameral procedure), it can be seen that 86 of the 1244 draft bills on initiative of the Parliament passed in this period and became law, whereas almost all of the proposals on governmental initiative became law.²⁷ Consequently, the answer on the question is positive.

1.3. Does your Parliament

a) usually accept the bills provided by tax authorities? yes – no

²⁴ Bulletins of written answers and questions, www.dekamer.be.

²⁵ Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St. Kamer* 2006-2007, nr. 51, 007/001, 29 and 31.

²⁶ Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St. Kamer* 2006-2007, nr. 51, 007/001, 24.

²⁷ Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St. Kamer* 2006-2007, nr. 51, 007/001, 22-23.

For data: see II, 1.2.

b) refuse the bills provided by tax authorities? never - sometimes – often

For data: see II, 1.2.

c) improve the bills provided by tax authorities? never - sometimes – often

Specific data are not available

1.4. Is your Parliament able to discuss the bills thoroughly? yes – no

See I, 1.3.2.

1.5. Is there sufficient knowledge of tax law in Parliament? yes – no

It is no requirement, and neither is it a fact, that representatives in the plenary assembly of the Parliament have sufficient knowledge of tax law in Parliament.

But those representatives who are more familiar with tax matters or are gradually specialising in it become members of the parliamentary Committee specialised in Finances. These Committees can also request the assistance of external specialists and obtain advice for the preparation of the legislative work, organise seminars and hearings, and request the presence of the competent Minister.

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never – sometimes – often

See I, 2.1. and I, 3.3: tax authorities can only clarify how vague tax rules have to be applied in specific situations or give ancillary executive rules to make the application of the law possible. Statistics are not available.

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never – sometimes – often

See I, 1.1.: on the basis of the Belgian constitutional principle of legality for taxation, only incidental and ancillary rules with respect to taxation may be delegated to the Government as executive power. The legislator has to establish the essential elements of taxation. Delegation of essential elements is only possible in exceptional circumstances and always on the condition of control by the Parliament.

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation? yes – no

See I, 2.3. and I, 4.1.

2.2. If “yes”, do they control tax legislation: 0 ex ante or 0 ex post?

It should be remarked that the Legislative Section of the Belgian Council of State, which is not part of the judicial power, controls (tax) legislation *ex ante*, see I, 1.3.2.

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? yes – no

See I, 2.3.

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? yes – no

If the Belgian Constitutional Court nullifies a specific tax law on the ground of unconstitutionality, its decision applies *erga omnes*. Consequently, this specific tax law does not exist anymore in the Belgian legal system. The Constitutional Court has however the possibility to modulate the effect *ratione temporis* of that decision.

If the Constitutional Court, when answering a prejudicial question of a domestic Court, is convinced that a specific tax law violates constitutional rules, only the parties to the case are bound by this judgment. Here, only the domestic Court that put the prejudicial question is obliged to ignore the specific tax law. Because the law is still part of the Belgian legal system, others (tax administration, taxpayers, Courts) are allowed to apply the specific tax law – until the Parliament has modified or removed the law.

3. Relationship between the Tax Administration and the Domestic Tax Courts

3.1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration? yes – no

See I, 4.1.

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? yes - no

If "no", do the courts follow them in fact? never – sometimes – often – very often

Specific data are not available, see I, 4.2.

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? never – sometimes – often – very often

See I, 4.6.

Specific data are however not available

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? never – sometimes – often – very often

See I, 4.5. and I, 4.6.

Specific data, however, are not available.

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

Because there are no data available, the following answers are motivated by a subjective impression of the Belgian reporters.

- a) Does it accept the (from their point of view) wrong decision? never – sometimes – often – very often**
- b) Does it try in another similar case to convince the Court to decide in a different way? never – sometimes – often – very often**
- c) Does it try to influence the Parliament to change the law? never – sometimes – often – very often**
- d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? never – sometimes – often – very often**
- e) Does it try “to hide” such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? never – sometimes – often – very often**

On the basis of a simple query on the website www.fisconet.be of the Belgian Service of Federal Finances, it can be seen that not every final judicial decision is published. For example, in 2007 the Belgian Supreme Court pronounced 104 decisions in tax matters.²⁸ The website of the tax administration yields 18 results after a search for final decisions of the Supreme Court in 2007: this amounts to 17% published decisions. Fortunately, all decisions are published at the site of the Supreme Court (www.cass.be). The same exercise for the decisions of the Belgian Constitutional Court brings us to 30% (7 of 23) published decisions on the site of the tax administration. Again, all decisions are published on the website of the Constitutional Court (www.arbitrage.be).

This small research is merely an observation. It is difficult to assert that the tax administration consciously wants ‘to hide’ (from its point of view) ‘wrong’ decisions. The intention or motivation of the tax administration is unknown. However, in our opinion the tax administration should warn the users of the website that the list of final judicial decisions is far from complete.

²⁸ Annual Report Supreme Court 2007, 235.