Tax law in light of civil law: a positive and prospective study of the Belgian income taxation for social enterprises

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THEORETICAL FRAMEWORK

CIVIL LAW

Social enterprise (SE) – EU “operational definition” (EC & EMES network)

Four legal forms are especially analyzed:

- Non Profit Associations
- Accredited Cooperatives
- Social Purpose Companies
- Foundations

“Legal speciality principle”: legal restrictions on the capacity of the legal entity (through activities or and purposes)

“key elements” of civil law – link between legal speciality principle and the three dimensions of EU definition

1. Entrepreneurial dimension/activity: engagement in continuous economic activity?
2. Social dimension/purpose: primary and explicit social purpose?
3. Governance dimension/purpose: existence of mechanisms to “lock in” the social goals of the organization?

TAX LAW

Attention drawn to the income taxation system for the operating SE:

- > indirect taxation (value added tax – hereafter VAT, registration fees, inheritance taxes)
- > incorporation and liquidation of the entity (except allocation of the liquidation bonus)

CURRENT SITUATION

- No special tax status for SEs:
- Corporation tax (CT) or Tax on legal entities (TLE)
- "one taxpayer, one tax" principle (> mixed of and partial liability for VAT)
- Only focus on the source of income
- Different regimes (i.a.)

<table>
<thead>
<tr>
<th></th>
<th>CT</th>
<th>TLP</th>
<th>TLP versus CT</th>
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<tbody>
<tr>
<td><strong>TAX BASE</strong></td>
<td>active AND passive income</td>
<td>ONLY passive income</td>
<td>LIMITED BASE</td>
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<tr>
<td><strong>RATES</strong></td>
<td>39.99% (except reduced rates)</td>
<td>Specific and lower rate for each income</td>
<td>LOWER RATES</td>
</tr>
</tbody>
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- Sometimes TLE heavier than CT (e.g. no imputability of withholding tax for TLE taxpayers)

LEGAL AND FISCAL FRAMEWORKS FOR SEs

- Legal recognition of SEs = essential condition for developing the “sector”.
- Definition of the identity of SEs allows policy makers to design and implement specific public policies (including tax measures)
- An enabling fiscal framework that takes into account the social mission of SEs is required (OECD 2013 & EU 2015)

WHAT RELATIONS ARE/SHOULD BE MAINTAINED BETWEEN TAX LAW AND CIVIL LAW?

First part: what relations are maintained between tax law and civil law (de lege lata)?

- clarify the links between civil law and tax law and the influence towards each other through a historical approach
- make possible the edification of proposals to clarify the current tax treatment

Second part: what relations should be maintained between tax law and civil law (de lege ferenda)?

- propose a new model of taxation. Should we tax these entities; if so, why, how and to achieve what purposes?
- two opposed working assumptions:

TOMORROW, OPPORTUNITY TO CHANGE THE PARADIGM?

GOVERNANCE DIMENSION

Limits on distribution of profits and/or assets
Organizational autonomy
Inclusive governance

SOCIAL DIMENSION

An explicit and primary social aim
Sphere of non-profit organizations

ENTREPRENEURIAL DIMENSION

Continuous economic activity
Sphere of mainstream enterprises

Social enterprises (SEs)

REAL OPPORTUNITY?

- National constraints: equality and non-discrimination
- EU constraints: will the European Court of Justice accept that SEs are not comparable or that a different tax treatment can be justified on the difference on profit distribution? (State Aid Law)