

News Analysis: A Tale of 2 Belgian Tax Rulings

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The Belgian Constitutional Court recently upheld a 2011 law allowing tax authorities easier access to bank account details, ruling that the law contains adequate safeguards against the arbitrary breach of privacy rights. In a separate case, the Court upheld Belgium's disparate treatment of pensions under the tax treaty with the Netherlands, noting that the treaty does not guarantee that the taxpayer enjoys the most favorable tax regime of both contracting states.

De Gucht: Bank Secrecy and the Right to Privacy

The Facts

Karel De Gucht, the European commissioner for trade, is in a dispute with the tax authorities over whether he should have paid tax on profits made in 2005 from the sale of shares in a metal coatings company to a British company.

The issue is part of a wider investigation into De Gucht's bank records. The tax inspectors were interested in his finances related to the purchase of a house in Italy. They looked into his bank accounts and found undeclared income of €1.2 million from the sale of the shares. Because De Gucht sat on the company's board of directors from October 19, 2001, to July 2004, the tax authorities held that he received the shares in return for his work as a director and that any derived profits should be taxed. De Gucht stated that he had not received the shares at a discount but as part of a rights issue. (Prior coverage [📄](#).)

The commissioner initiated a court case against the tax authorities, claiming that the investigation was a violation of his privacy and disputing whether the tax authorities should have access to his and his wife's bank records. He asked the Ghent Court of Appeal to request a preliminary ruling from the Constitutional Court on whether the 2011 law allowing tax inspectors easier access to bank account details is contrary to privacy laws. (Prior coverage of the new bank secrecy law [📄](#) and [📄](#).)

The Constitutional Court, in Case 39/2013, was asked to decide whether the rules in question (articles 322(2)-(4) and 333/1 of the Income Tax Code) are compatible with article 22 of the Constitution ("Everyone has the right to the respect of his private and family life"), or with article 8 of the European Convention on Human Rights and article 16 of the Treaty on the Functioning of the European Union.

The Decision



The Constitutional Court on March 14 held that the rules pursue an objective of general interest because the correct assessment is necessary to ensure "the economic well-being of the country." However, interference with a taxpayer's privacy must be in accordance with the law and reasonably justified, the Court said.

The Constitutional Court held that the Belgian legislation establishes sufficient conditions for accessing a taxpayer's bank information: There must be concrete and consistent indications that declared income does not correspond to the taxpayer's level of prosperity, and there is a multistage procedure for accessing bank information. The tax administration must first ask the taxpayer. If there are suspicions that information was kept hidden or that the taxpayer refuses to disclose certain information, the administration can take further steps with the financial institution.

These procedural requirements constitute important safeguards against arbitrary interference in the private lives of the taxpayer and of the persons with whom he has had financial transactions, the Court said.

The Constitutional Court concluded that the interference with the exercise of the right to respect for one's private and family life was reasonably justified.

Obdeijn: The Belgium-Netherlands Tax Treaty

On March 7, in Case 32/2013, the Constitutional Court held that the law of December 11, 2002, ratifying the 2001 Belgium-Netherlands tax treaty is compatible with articles 10, 11, and 172 of the Constitution. (English translation of treaty ; French text )

Articles 10 and 11 state that all Belgians are equal before the law and that discrimination is forbidden. Article 172 states that no tax privileges, exemptions, or reductions can be introduced except by a law.

The Facts and the Law

Gerardus Obdeijn, a Dutch national, had been working in the Netherlands for a government-subsidized foundation for special educational needs. Upon retiring, Obdeijn took up Belgian residence in 1992. Part of his pension relates to his work for the foundation. This pension was taxed in Belgium for tax years 2004 and 2005.

The taxpayer appealed, arguing that under the Belgium-Netherlands tax treaty, his pension should be taxable in the Netherlands because it was derived from government service. Obdeijn said that a pension derived from employment with a foundation for special education should not be treated differently from a pension derived from government service that is taxable in the Netherlands since both pensions were funded (at least partially) by the Dutch government. Taxing his pension in Belgium is, therefore, discriminatory, he argued.

The Antwerp court of first instance and the Antwerp Court of Appeal held that the pension was derived from private employment. Under article 18(1)(a) of the treaty, pensions and other similar remuneration paid to a resident of a contracting state in consideration of past employment -- as well as annuities and benefits, whether or not periodic, arising from pension savings, pension funds, and group insurance funds -- that are paid to a resident of a contracting state will be taxable only in that state.

The Court of Appeal held that treaty article 19(2)(a) read in conjunction with point 23 of Protocol I does not lead to a different conclusion. Article 19(2)(a) states that pensions paid by a contracting

state or one of its political subdivisions or local authorities, either directly or out of funds created by them, to an individual for services rendered to that state or subdivision or authority are taxable only in that state.

Point 23 of Protocol I clarifies that a pension arising in the Netherlands falls under the scope of article 19(2), insofar as the pension rights were built up during public employment, irrespective of who pays this pension.

At the request of the taxpayer, the Antwerp Court of Appeal submitted a request for a preliminary ruling from the Constitutional Court on April 10, 2012.

The Decision

The Constitutional Court held that the treaty's treatment (article 19(2)(a) read together with point 23 of Protocol I) of pensions derived from a government service in the source state is in accordance with the rules of international courtesy and mutual respect between sovereign states. This means that the right to tax government pensions is reserved for the state that financed the pension buildup. The Court found that article 19(2)(a) corresponds to the OECD model convention (1992-1997).

Given the wide discretion the legislator has in tax matters, the Court did not consider it unreasonable that the legislator consents to a double tax convention that varies the state of residence principle and allocates taxing powers for government pensions to the source state while pensions that are not predominantly funded by the source state are taxable in the state of residence.

Finally, the Court held that the difference in treatment is not disproportionate because the tax treaty seeks to avoid double taxation of pensions but does not guarantee that the taxpayer enjoys the most favorable tax regime of both contracting states. Whether the tax treatment of the taxpayers is favorable or unfavorable is not determined by the chosen connecting factor but by the level of taxation in the competent state, the Court said. The Court referred to European Court of Justice case law, particularly the ECJ decision in *Gilly* (C-336/96, May 12, 1998, point 34).

In conclusion, the Constitutional Court referred the case back to the referring court, which must determine whether the buildup of pension rights occurred from private employment or from government service and to what extent the state was in charge of financing the buildup of those pension rights.

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