The Belgian Constitutional Court Annuls the Tax on Securities Accounts

by Marc Quaghebeur

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In this article, the author discusses a recent Belgian court judgment abolishing the tax on securities accounts and considers its consequences.

On October 17 the Belgian Constitutional Court (Cour constitutionnelle) ruled that the tax on securities accounts is unconstitutional (Decision 138/2019). For budgetary reasons the court did not make the decision retroactive. Taxpayers therefore must pay the tax for 2018 and 2019.

The Tax on Securities Accounts

The previous legislature enacted the tax on securities accounts on February 7, 2018. It was the third attempt to create a level playing field for workers and investors (capital) because the taxation of labor is much higher than the taxation of capital.

In 2013 a withholding tax rate of 25 percent was introduced on dividend and interest above €20,000 (the standard rate was 21 percent). However, a uniform rate of 25 percent was soon established for everyone, and later increased to 30 percent. Furthermore, a speculation tax was introduced in 2016. It was due on short-term capital gains from the sale of listed company shares made within six months of purchase. The tax did not survive past the end of the year.

Individuals who own certain financial instruments on one or more securities or brokerage accounts must pay the tax on securities accounts if the account has an average value in excess of €500,000 (€1 million for married couples and registered partners). Targeted financial instruments are stocks, bonds, rights in mutual investment funds or shares in investment companies, cash bonds, warrants, and trackers held.

But the tax is not due on savings or term deposit accounts, pension savings accounts, or so-called insurance wrappers (unitized life insurance policies linked to one or more investment funds). Also excluded are registered shares or registered bonds, real estate certificates, and stock options.

The tax is calculated at 0.15 percent of the average value of the financial instruments. The average is calculated on the stock price or the asset value of funds over the period from October 1 to September 30, recorded at the end of each quarter. In general, Belgian banks must report the average value of the relevant securities held as well as the tax due per account holder. They then deduct the tax from the account holder's account and pay it before December 20.

Overseas banks may (but normally don't) report and pay the tax via a fiscal representative based in Belgium. If they don't, Belgian resident account holders must simultaneously file a return with their income tax return reporting the value of the accounts. The tax is due by August 31 of the following year.

Unconstitutional?

The tax was criticized even while it was making its way through parliament. The Council of State, which advises the government on draft bills before they are filed, found that there was no objective reason to tax certain financial instruments while favoring others. For example, derivative financial products may be registered in a securities account, but they are not taxed.

In the months following the entering into force of the tax, seven annulment actions were filed with the Constitutional Court. In case 110/2018 of

July 19, 2018, the Constitutional Court dismissed one applicant's request to suspend the tax because the applicant could not demonstrate any concrete and precise facts about the challenged legislation that would cause him direct and unfavorable effects.

The actions for annulment of the tax were generally based on allegations that the tax infringed the principles of equality and nondiscrimination, articles 10 and 11 of the constitution. The actions furthermore raised the possibility that the tax violated articles 56 and 63 of the Treaty on the Functioning of the European Union, the free movement of services and capital.

The Decision

The court acknowledged that some constitutive elements of the tax, such as makeup of the tax base (financial instruments liable for the tax) and the tax base value, were unconstitutional in terms of the principles of equality and nondiscrimination and the principle of legality in tax matters, and that the tax violated EU law. The court therefore annulled it.

However, the Belgian government asked the court to take account of budgetary and administrative difficulties. Under article 8(3) of the Special Act of January 6, 1989, the Constitutional Court has the power to maintain the effects of an annulled provision for a period of time (usually the past two years). The court therefore ruled that the tax on securities accounts would be maintained for the tax years 2018 (January to September) and 2019 (October 2018 to September 2019). The court allowed the temporary maintenance of the tax after taking into account budgetary and administrative consequences, and potential litigation that would ensue if it were annulled retroactively.

And Now?

The decision is good news for investors. However, it quashes the hopes of taxpayers looking to recover the tax paid in 2018 and avoid paying it in 2019. The decision comes just after the end of the 2019 tax year (September 30), and Belgian banks will have to calculate the average value of the relevant account and charge the tax to their clients. Taxpayers who hold overseas accounts will have to report the average value of their securities accounts before filing their 2020 income tax return and pay the tax by August 31, 2020.

The court's reasons for temporarily maintaining the tax are the same as those of its March 1, 2018, fairness tax decision (Decision 24/2018).[1] However, they fail to convince: For tax year 2019, the banks and the taxpayers could still refrain from reporting and paying the tax. Furthermore, tax authorities would be spared the effort of recovering the unconstitutional tax.

However, there is the budgetary consequence — the tax brought in about €226 million in 2018. Nevertheless, every time a tax is declared unconstitutional it is unavoidable that there will be an effect on the budget. Maintaining an unconstitutional tax is giving legislators carte blanche to introduce politically motivated taxes, ignore warnings from the Council of State about unconstitutionality, and then levy the tax for two years until the Constitutional Court does or does not declare it unconstitutional.

Can Legislators Be Held Liable?

Can legislators try out taxes with impunity?

This would affect not only taxpayers but also third parties the legislator has charged with determining the tax base and collecting the tax. In this case, the banking sector had to make significant investment to meet its reporting obligations.

Can they hold the Belgian state liable and recover the tax or the cost of their investments?

In a similar case (Decision 93/2014 of June 19, 2014), in which the Constitutional Court had limited the effect of a tax on base transceiver stations, the Court of Appeal of Antwerp decided that the Belgian state could not be held liable because the Constitutional Court decision effectively legitimized the tax and dismissed the taxpayer's claim for an indemnity.

The Court of Justice of the European Union does not normally accede to requests by the Belgian state to limit the effects of its decisions to the future. Following the CJEU's decision in a case relating to withholding tax on payments of

[1] For prior coverage, see Marc Quaghebeur, "Constitutional Court Writes Obituary for Fairness Tax," *Tax Notes Int'l*, Mar. 12, 2018, p. 1097.

interest and dividends to overseas investment companies (*European Commission v. Kingdom of Belgium*, C-387/11 (CJEU 2012)), on June 19 the Brussels Court of Appeal decided that the Belgian state can be held liable when the legislature enacts a law that is contrary to European legislation. Maintaining a provision in the law that infringes European law is sufficient to hold the Belgian state liable.

The Belgian Supreme Court (Cour de cassation) cautiously moved the bar higher.

It confirmed that the state can make a mistake when enacting legislation. It said the courts must examine whether the state has acted as could be expected of a normally careful and prudent legislature. However, the Supreme Court was reticent to condemn the Belgian state, holding that it is not because the Constitutional Court has found that a provision in the tax law is not compatible with the constitution that the legislator has acted unlawfully and can be held liable. In other words, the courts must find wrongful behavior on the part of the legislator before they can hold him liable (Cour de cassation, *État belge c. C.*, RG F.09.0042.N (Sept. 10, 2010)).

In a decision on the infringement of a non-tax-related EU rule, the Supreme Court specified that "subject to the existence of an insurmountable error or any other ground for exemption from liability, the legislator is committing a tort when enacting a regulation that is contrary to a rule of Community law that obliges him to refrain from doing anything in a specific way, so that his civil liability is at risk if this wrong causes damage" (Cour de cassation, *Université Libre de Bruxelles c. S. et crts*, RG C.12.063.F (Apr. 30, 2015)). However, the Supreme Court found that the Court of Appeal had not found a tort that would result in legal liability of the Belgian state and overturned its decision.

This leaves the door open for claims against the legislator who wilfully enacts legislation in the full knowledge that it will be declared unconstitutional. It is likely that taxpayers will pay more attention to how the legislator acts when advised that a political bill is likely to be unconstitutional, and taxpayers who file an action for annulment will request a better justification for maintaining the effects of an unconstitutional tax. ■