Belgium: Tax Treatment of the Pension of a Retired School Teacher and the Social Security Benefits for Work Incapacity under the Belgium-Netherlands DTC

Edoardo Traversa/Gaetan Zeyen

1. Introduction[1]

The case discussed in this chapter concerns the qualification of pensions and social security benefits under the Belgium-Netherlands Income and Capital Tax Treaty (2001) (hereinafter: Belgium-Netherlands Tax Treaty).[2]

The main issue was whether a pension resulting from the exercise of an activity as a teacher in a school financed and controlled by public authorities but within the formal framework of a *private employment* can also constitute a "public sector" pension under article 19 of the Belgium-Netherlands Tax Treaty.

Another issue dealt with differences as regards the tax treatment of certain social security allowances between the *old* and *new Belgium-Netherlands* Tax Treaties.

2. Facts of the Case and the arguments of the parties

The taxpayers were a husband and wife both Dutch nationals resident in Belgium. Before his retirement, he was active as a high school teacher in Tilburg (The Netherlands).

The school was a *private* organization, which was financed and controlled by the Dutch government. After his retirement, he moved to Belgium. He received a pension from the "Algemeen Burgerlijk Pensioen Fonds" ("general public retirement fund" hereinafter: ABP), one of the largest pension funds in the Netherlands, which provides pension arrangements for civil servants and teachers.

His wife received a social security benefit based on the so-called "Wet op de Arbeidsongeschicktheid" ("Law on work incapacity", hereinafter: WAO*)*, because during her active years she became partially incapacitated and unable to perform her job. However, after she became partially incapacitated, she took another job and received remuneration therefrom.

According to the Belgian tax authorities, both the ABP-pension and WAO-benefits were subject to tax in Belgium: the ABP-pension was taxable in Belgium as a *private* pension according to article 18[3] of the *2001* Belgium-Netherlands Tax Treaty (because the pension rights were granted in relation to a *private* employ-

1 BE Hof van Cassatie/Cour de cassation [Supreme Court], 19 Apr.2018,F.16.0062N.

2 Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (5 June 2001), Treaties IBFD [hereinafter Belgium-Netherlands Tax Treaty].

3 Article 18(1)(a) and (b) of the *new* Belgium- Netherlands Tax Treaty states:
"(a) Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment, as well as annuities and benefits – periodic or not – arising from pension savings, pension funds and from group insurance funds, which are paid to a resident of a Contracting State, shall be taxable only in that State.
(b) Pensions and other benefits, periodic or not, paid under the social security legislation of a Contracting State to a resident of the other Contracting State shall be taxable only in this latter State."

ment), whilst the WAO-benefits were taxable in Belgium according to article 18(1) of the latter convention (because the conditions of article 18(6) were not met in the present case).

According to the taxpayers, the ABP pension had to be regarded as a "government pension" in accordance with article 19(2)[4] and, therefore, taxable in the Netherlands, whilst the WAO-benefits would not be taxable in Belgium, by virtue of article 18(6) of latter treaty, according to which " (…) the benefits paid under the social security legislation of a Contracting State to an individual who is in paid employment in this State and who is a resident of the other Contracting State, because this person, due to an illness, partial inability to work or because he is redundant, is unable to exercise effectively or completely this employment, may be taxed during a maximum period of one year or as long as the individual continues to receive remuneration in respect of the actual exercise of this employment, in the Contracting State where the remuneration received in respect of the effectively exercised employment is taxable." Such a provision was not contained in the "old" Belgium – Netherlands Tax Treaty.

3. Court's Decision

As regards the ABP pension, the Belgian Supreme Court started its reasoning by referring to article 23 of Protocol I to the new Belgium-Netherlands Tax Treaty. This provision contains an additional condition for pensions to be considered as "public" under article 19(2), namely that they have to be established within the framework of a paid public employment ["(…) insofar as the right to this pension was established within the framework of paid public employment, irrespective of the debtor of this pension.[5]"]

This particular condition refers to a formal employment relationship with the public authorities.

The Belgian Supreme Court then referred to the VCLT[6] and to its provisions governing the interpretation of treaties (and in particular to its general rule of interpretation, namely article 31[7]).

4 Article 19(2)(a) of the *new* Belgium-Netherlands Tax Treaty states: " 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 in respect of services rendered to that State or subdivision or authority shall be taxable only in that State."

5 Art. 23 of the Protocol I to the Belgium-Netherlands Tax Treaty.

6 Vienna Convention on the Law of Treaties (23 May 1969) [hereinafter VCLT].

7 Article 31 of the VCLT states:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

It results from the wording of article 23 of the Protocol I to the new Belgium-Netherlands Tax Treaty that the contracting parties intended to give a special meaning to the expression "pensions paid in respect of government services for the purpose of Article 19, (2)", and more specifically for such pensions derived from the Netherlands.

As a consequence, only pensions established within the framework of public services fall within the material scope of application of article 19(2). In contrast, pensions built-up within the framework of a private employment are excluded from the scope of application of article 19(2), even if the pension was paid by the government or through a fund that was created by the government.

Consequently, the Belgian Supreme Court upheld the Belgian tax authorities' position and concluded that the ABP pension was taxable in Belgium according to article 18(1) of the *new* Belgium-Netherlands Tax Treaty.

As regards the WAO benefits, the Belgian Supreme Court confirmed the position of the Belgian tax authorities, namely the application of article 18(1) of the *new* Belgium-Netherlands Tax Treaty. According to the Belgian Supreme Court, the conditions for an application of article 18(6) were not met. In particular, the Supreme Court ruled that from the wording of article 18(6), it cannot be inferred that the exercise of *another* employment after following the one that was exercised at the time the employee became sick or partially incapacitated suffices to apply article 18(6) of the *new* Belgium-Netherlands Tax Treaty.

---

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

4. Comments on the Court's Reasoning

4.1. As regards the ABP pension

The Supreme Court's decision to apply article 18(1) (i.e. governing *private* pension income) rather than article 19(2) (i.e. governing *public* or *government* pension income) of the *new* Belgium-Netherlands Tax Treaty is correct and is based on a strict and literal interpretation of said article 19(2), as completed by article 23 of Protocol I to the DTC in question.

This strict, literal and formalistic reading and interpretation (based on the VCLT) of article 19 is *in line* with the position of some legal scholars.[8]

From a Belgian perspective, "public sector" must be interpreted strictly and encompasses solely the Belgian state itself, as well as its political subdivisions or local authorities, namely the Regions and Communities, the Provinces and Communes/Municipalities, but excluding in principle institutions or enterprises of public law[9], such as for example the [public] railways[10], harbours or radio and TV broadcasting entities.[11]

This decision clarifies the Supreme Court's position. In a 2004 judgment[12] concerning the interpretation of article 19(2) in the context of the *1970* Belgium-Netherlands Tax Treaty[13] and more specifically with the expression "services rendered to a State", the court had adopted a rather *extensive* interpretation,

8 See Rodistating that "It might be considered at best whether non-profit institutions which are fully supported by public means should be treated equally to institutions of public law (…). Even then, however, treatment equal to that of a political subdivision or local authority would not come into question rather with other legal bodies of public law which article 19 [of the OECD Model Convention] does not include." [M. Rodi, *Article 19: Government Services* in *Klaus Vogel on Double Taxation Conventions*m.no. 14b (K. Vogel ed., 3rd ed., Kluwer Law International, 1997]. According to Ismer& Blank, "Services provided to other bodies corporate under public law, as well as in bodies corporate under private law, are a priori excluded from the scope of Article 19 (1) OECD (…) even if such bodies act in the public interest, receive public funds and are subject to State control. (…) This formalistic approach is consistent with the idea of fiscal neutrality and prevents qualification conflicts that could arise if the Contracting States had to agree on what can or cannot be considered a service in the 'public interest'." [R. Ismer& M. Blank, *Article 19: Government Service* in *Klaus Vogel on Double Taxation Conventions* m.no. 28 (E. Reimer & A. Rust eds., 4th ed., Kluwer Law International, 2015, p. 1881.]

9 In a Belgian-US context, see for example Administrative Guideline AFZ 3/2013 (AFZ/97-0380), 5 Feb. 2013, n°241.

10 *Contra:* Article 19(2)(a) of theBelgium-Germany DTC, encompassing *expressly* in the material scope of application the Belgian national railway or the National Bank of Belgium (See Article 19, (2), al. 2, sub a)).

11 S. Janssens, *Artikel 18. Overheidsfuncties* in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar* m.no. 1187 and 1188 (P. Bielen & S. Janssens eds., Larcier 2018).

12 BE: Hof van Cassatie/Cour de cassation [Supreme Court], 4 Mar. 2004, FJF, 2004/215, 715.

13 Convention between the Kingdom of the Netherlands and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and for the Settlement of some other Questions on Tax Matters (19 Oct. 1970), Treaties IBFD [hereinafter Belgium-Neth. Tax Treaty].

considering that it also encompassed– besides the exercise of a *formal* employment within a public authority – services rendered in the framework of a *formal* occupation within a *private* institution, but *financed* and *controlled* by the state[14] (or one of its political subdivisions or local authorities).

The Belgian Supreme Court confirmed this point of view in a subsequent case dated 10 October 2014[15], dealing with the application of the Belgium-Portugal Tax Treaty.

As a result, a Dutch [ABP] pension allowance paid to a Belgian tax resident previously employed by a Dutch public authority or school may be subject to a different tax regime in Belgium (either exempted with progression or taxed in the standard manner to which Belgian residents are normally subjected taxed), depending on the legal nature of the working relationship. In the context of the *new* Belgium-Netherlands Tax Treaty, the Belgian Constitutional Court ruled in 2013 that such a difference did not constitute discrimination as such nor did it violate articles 10[16], 11[17] and 172[18] of the Belgian Constitution. According to the Constitutional Court, [fehlt Text?]

Given the wide margin of appreciation of the legislature in tax matters, the latter did not act unreasonably in approving a double taxation treaty which, with regard to public pensions, derogates from the principle of residence and entrusts taxation to the State which has financed the means by which these pensions were constituted, unlike pensions which have not – or not mainly – been constituted by means from the State of the source of the income. In fact, the link between taxpayers and the state in which they have worked and where pension rights have been established is greater in the first case than in the second. The difference in treatment at issue does not have disproportionate effects since the tax treaty seeks to avoid double taxation of pensions, but does not guarantee that the taxpayer can benefit from the most advantageous tax regime of the two States. The favorable or unfavorable nature of the tax treatment of the taxpayers concerned does not properly derive from the choice of the connecting factor, but from the level of

14 S. Janssens, *Artikel 18: Overheidsfuncties* in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar* m.no. 1192 (P. Bielen & S. Janssens, Larcier 2018).

15 BE: Hof van Cassatie/Cour de cassation [Supreme Court], 10 Oct. 2014, F.12.0128N; *contra* (i.e., adopting a less extensive interpretation):BE: Hof van beroep/Cour d'appel Antwerpen [Court of Appeal of Antwerp], 10 Apr. 2012 , n° 2011/AR/899, analyzed and commented by C. Buysse, *Nouvelle CPDI: les 'services rendus à l'Etat' plus étroitement définis?*, Fiscologue International 343, p. 1 and 2 (2012).

16 Article 10 of the Belgian Constitution states: « *No class distinctions exist in the State. Belgians are equal before the law; they alone are eligible for civil and military service, but for the exceptions that can be created by a law for particular cases. Equality between women and men is guaranteed.* "

17 Article 11 of the Belgian Constitution states: "*Enjoyment of the rights and freedoms recognised for Belgians must be provided without discrimination. To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities.*"

18 Article 172 of the Belgian Constitution states: « *No privileges with regard to taxes can be introduced. No exemption or reduction of taxes can be introduced except by a law.* "

taxation of the competent State (see, in the same sense, ECJ, 12 May 1998, C-336/96, Gilly, paragraph 34).

> Moreover, it is not without a reasonable justification to take into account, within the framework of international agreements aimed at combating double taxation, the rules of international comity between States, all the more so when they are codified within international organizations.
>
> For the rest, it is up to the competent judge to decide to what extent the constitution of pension rights is based on private salaried employment or on public salaried employment and to what extent the State has undertaken the financing of the constitution of these pension rights.[19]

According to the Belgian Constitutional Court, referring to ECJ case law,[20] such a difference in treatment is not disproportionate, as a tax treaty only intends to prevent double taxation, but without guaranteeing that the taxpayer will be able to benefit from the most advantageous tax regime of the two countries.

4.2. As regards the WAO benefits

In the context of the *old* Belgium- Netherlands Tax Treaty, medical allowances beyond 52 weeks (granted on the basis of the Dutch "Wet op de Arbeidsongeschikheid"*)* were usually governed until 2008 – according to Belgian case law[21]– by the "other income" provision (namely, article 22 of latter treaty), rather than by its article 15 (although there were arguments in support of its application).

As from 2008, and still in the context of the *old* Belgium- Netherlands Tax Treaty, the Court of Appeal of Antwerp changed its position and considered that medical allowances paid after 52 weeks had to be regarded and treated either as "public remuneration" in accordance with article 19,[22] or as "Business Profits"[23] (article 7) rather than "Independent Personal Activities" (article 14) [in a case concerning a self-employed hairdresser].

19 BE:Grondwettelijk Hof/Courconstitutionelle [Constitutional Court], 7 Mar. 2013, 32/2013, B.7.

20 FR: ECJ, 12 May 1998, Case C-336/96, *Gilly*, [1998] I-02793, ECJ Case Law IBFD.

21 BE: Hof van beroep van Antwerpen/Cour d'appel d'Anvers [Court of Appeal of Antwerp], 10 Feb. 2004, 2003/AR/433. See also A. Huyghe, *De kwalificatie van vergoedingen voor tijdelijke arbeidsongeschiktheid onder de dubbelbelastingverdragen (inzonderheid het verdrag met Nederland) en de rol van artikel 3, § 2 hierbij*, Tijdschrift voor Fiscaal Recht; n° 177, pp. 238–245 (2000).

22 BE: Hof van beroep van Antwerpen/Cour d'appel d'Anvers [Court of Appeal of Antwerp], 4 Nov. 2008, 2009/76.

23 BE: Hof van beroep van Antwerpen/Cour d'appel d'Anvers [Court of Appeal of Antwerp], 7 Feb. 2012, 2012/60; commented by D. Mussche, *De kwalificatie van vervangingsinkomsten voor een zelfstandige dienstbetrekking onder het Oude en het Nieuwe Belgisch-Nederlands dubbelbelastingverdrag*, in Tijdschrift voor Fiscaal Recht (T.F.R.), n°430 of November 2012, pp. 941–947; see also M. Wauman, *Revenu de remplacement: qui peut prélever l'impôt?*, in Fiscologue International 341, p. 1 (2012).

As medical allowances in particular and social security allowances in general had given rise to recurring interpretation difficulties and uncertainties, the *new* treaty specifically addressed the tax treatment of such items of income[24] [i.e. "(…) other allowances, periodic or not, paid in execution of the social legislation of a Contracting State."] in its article 18(1)(b).[25]As a general principle, income or items of income falling within the material scope of application of article 18(1) are taxable in the state of residence. However, they may also be –exceptionally– taxable in the state of source.

Where a particular tax treaty does not specifically address such social security payments or allowances, the latter should fall – in principle – under the material scope of application of article 15[26]of the OECD Model or, as the case may be, under its article 21[27].

In contrast to some Belgian tax treaties(see above the Belgium-Netherlands Tax Treaty and the Belgium-Germany Tax Treaty), article 17 of the Belgian Model only addresses actual/effective "pension and other similar remuneration"[28]. Medical allowances in particular and social security allowances in general are not addressed under article 17 of the Belgian Model.[29] As a result, they are covered in principle by article 14 of the Belgian Model of June 2010 (income from employment).

5. Conclusion

The solution adopted by the Supreme Court in its decision of 19 April2018 is correct and in accordance with the international principles of interpretation (i.e.the VCLT), as well as being consistent with the OECD principles.

However, the decision shows that distinctions based on purely formal legal elements or characteristics – such as for example in the public or private nature of the past employment relationship– may lead to very different outcomes for the same taxpayer as regards the state of taxation, i.e. in the state of (previous) activity for pensions from the "public" sector (i.e. article 19 of the OECD Model) and in the state of residence for pensions from the "private" sector (i.e.article 18 of the OECD Model). Although those differences may not necessarily be considered as discriminatory today, as the Belgian Constitutional Court has acknowledged, it

24 This is also the case in article 19 of the the Belgium-Netherlands Tax Treaty.
25 BE:Administrative Guidelines Ci.n°AAF/2002-0097 (AAF5/2003), 14 Mar. 2003.
26 BE:Administrative Guidelines Ci.n°AAF 2005/0652 (AAF 08/2005), 25 May 2005.
27 *OECD Model Tax Convention on Income and on Capital: Commentary on Article 18* para. 26 (22 July 2010).
28 Belgian Model Tax Convention on Income and Capital, 2010, www.fisconetplus.be.
29 P. Bielen, *Artikel 17: Pensioenen*, in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar* m.no. 1164 (P. Bielen & S. Janssens eds., Larcier 2018).

remains to be seen whether they will constitute good tax policy in the future, or whether a more consistent (and predictable) approach should be preferred?