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Taxation of Immovable Property Income in Belgium

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Abstract:

For decades, the Belgian personal income tax distinguished between income from foreign and domestic immovable property. Whereas for foreign immovable property the tax base attended to reflect real market values, income from domestic immovable property was determined on a lump sum basis, deducted from a market value of the immovable property in 1975 and subsequently indexed. As the lump sum estimation was substantially lower, the tax base for domestic immovable property income was reduced and hence investing in foreign immovable property was discouraged. Although already a decade ago the European Commission addressed Belgium on this distinction, it still took three convicting judgments of the European Court of Justice, before Belgium changed its legislation. Instead of leaving aside its outdated historical and heavily criticized lump sum estimation of domestic immovable property, the Belgian tax legislator opted to extend this regime and installed a similar historical evaluation for foreign immovable property referring to 1975. The new regime was installed as of tax year 2021. The following article describes the Belgian approach, explains why it was chosen and criticizes remaining issues and difficulties.

Keywords: immovable property income tax, lump sum estimation of tax base, historical evaluation, foreign immovable property, free movement of capital, Belgium, new legislation

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1. Introduction

A question each income tax system has to overcome is the definition of the taxable 'income'. When distinguished from capital gains, 'income' can be determined as benefits generated from the "*ius fruendi*" of an asset: income generally is the benefit produced from an asset without affecting the asset itself.[2] This asset can be both labor or wealth. Regardless whether benefits from income producing assets are obtained in cash or in kind, they are evaluated to calculate the tax base of a taxpayer submitted to income tax. This general description seems rather clear for benefits obtained from a professional activity, a share, bond or an intellectual right offering a taxpayer a turnover, a salary, a dividend, interest or royalty payments. Immovable property on the other hand only clearly pays off, when it is provided to a third party paying rent. Such rent can arise from a professional activity of the lessor reintegrating the income to the previous list.

However, when an owner places their immovable property at another person's disposal, outside of a professional activity, different reasons might nonetheless explain why the requested rent is not the most appropriate benchmark to reflect the real income producing capacity of the immovable asset.[3] It even becomes all the more complicated, when one is simply enjoying from one's own immovable property. This does not generate any additional income at all. It only avoids the necessity to pay the cost of a rent to have the same property at its disposal. This saving could be qualified as a benefit in kind, but might be even harder to evaluate: each immovable property is different, and similar property might not be available on the market for renting. In case the property is affected to a professional activity the taxpayer will evaluate his property and effect amortizations or express his costs differently in order to declare his net income obtained from this activity. A correct evaluation can subsequently be controlled by the tax administration, when these estimations are used for income tax purposes. However, when no commercial incentive exists, an evaluation is almost entirely left to the public administration.

Hence, immovable property not being affected to a professional activity has to be evaluated, if a tax legislator considers the saving of a rent to be

[2] 'Capital gains' fall outside of this definition, but will very often be reintegrated in an income tax system as the ultimate income generated from a particular asset. Hence also this income might be taxed, although often tax favors will be integrated to deal with its particular character of ending the future ius fruendi for the tax payer realizing the capital gain.

[3] One could e.g. think of personal relations between owner and tenant, hard to value benefits in kind of having a particular tenant located, …

income from an immovable asset, comparable with income from other assets such as labor or capital.[4] Besides from substantial renovations, the evolution of its value also depends on market conditions (demand vs offer), the degrading or maintaining of the general condition of a building, as well as more generally inflation of the financial market. The yearly repetitive single evaluation of each property would hence cause, besides economic difficulties, a high administrative burden, inevitably to be left over to locally decentralized offices capable to follow up these evolutions. The alternative is working with a lump sum based evaluation of immovable property which however risks to substantially deviate from its real income generating possibilities. The tax treatment of immovable property as an income producing asset could hence largely differ from the tax treatment of other assets.

The case of Belgium is an interesting case to describe as it combined both approaches. With regard to income from immovable property, not affected to a professional activity, Belgium for decades distinguished between foreign and domestic immovable property. Whereas for domestic immovable property the lump sum approach reigned based on an evaluation of 1975, for foreign immovable property the tax legislator referred to an evaluation of present market conditions. Although long time being criticized by the European Commission, it took not less than three convictions (including a periodic penalty payment) of the Court of Justice before Belgium recently changed this approach. And even at present the legislator chose for a lump sum evaluation based on an evaluation of immovable property in 1975, whereas still differences in the treatment of domestic and foreign immovable property seem to appear.

This article tends to illustrate the Belgian evolution, explains why difficulties could not be easily overcome and also highlights some of the remaining legal questions after the last reform of the immovable property income taxation. As a large reform is being prepared for the Belgian personal income tax in general (domestic) criticism is once more raised against the fundamental option to choose for a lump sum evaluation of immovable property income based on a historical evaluation of almost half a century ago. Is it, one year after changing the system, already again time for a huge reform?

[4] Other tax regimes imposing a tax on capital as such also face the same challenge to evaluate the value, if immovable wealth is included.

2. Historical Taxation of Income from Domestic and Foreign Immovable Property

2.1 Domestic Immovable Property: Historical Lump Sum Evaluation of the Tax Base

In order to understand the Belgian income tax on immovable property as it exists today, one inevitably needs some notions of the historical defederalization of Belgium as a previous unitary state. From a centralized state, with local provinces and municipalities, the Belgian territory has evolved into a double division of 3 autonomous Regions[5] and 3 autonomous Communities.[6] In particular with regard to immovable property income taxes the Regions also gathered an important role.

From its unitary start Belgian income taxes were levied by the federal authority. The collection of this general income tax is however preceded by a collection of withholding taxes[7], that were subsequently credited against the income tax due after the expiration of a taxable period. Hence, at the start of each taxable period, a withholding tax on immovable property income is withheld on *domestic* immovable property. The immovable property withholding tax subsequently serves as starting ground to calculate municipal and provincial taxes, levied as surcharges on this withholding tax.[8] When the tax year expires each tax payer is subsequently taxed on the total amount of his taxable income, including the income from immovable property. Also with regard to this general income tax as applicable to natural persons, municipalities and provinces once more levy additional supplementary taxes for their residents as a percentage on the income tax debt.[9]

With regard to domestic immovable property, the tax base for both the withholding tax, as well as the personal income tax (and hence also municipal and provincial surcharges on both taxes) is a lump sum evaluation. The taxes are calculated on a fixed amount representing the estimated net income that could be realized in a year if this property were leased. This amount is called the “kadastraal inkomen” (cadastral income). With regard to immovable property

[5] A Flemish region, a Walloon Region and the capital Region of Brussels.

[6] The Dutch speaking community, the French Community and the German Community. The territory of Brussels is a bilingual territory belonging both to the Dutch and French community, immediately dividing Belgium also into 4 language areas.

[7] This is still represented in art. 1, §2 Belgian Income Tax Code 1992 (BITC ’92).

[8] Art. 464/1 BITC ’92.

[9] Art. 465 BITC ’92.

belonging to natural persons the lump sum calculation of the cadastral income is used for a tax payer's own dwellings, as well as for immovable property rented out for housing purposes. Immovable property rented out for professional purposes of the tenant is taxed on the gross renting income with a lump sum deduction for expenses[10], whereas immovable assets of a taxpayer affected for its proper business activities are not considered as taxable income.

As mentioned withholding taxes levied on immovable property were initially credited against the ultimate income tax due.[11] They were considered an advanced payment. However, under the Belgian defederalization process, this coherent treatment changed gradually as the tax competence to levy withholding taxes on domestic immovable property went to the Regions, each providing different rates, exemptions and further deviating modalities or facilities. Also with regard to the exercise of their taxing powers, the cadastral income plays a role, whereas in some cases reductions or exemptions depend on a maximum cadastral income in order to support particular owners of immovable property of lower value. Being transmitted as a competence to the Regions, the withholding tax on domestic immovable property can hence no longer be credited against the federal income tax (levied after the expiration of a tax year) and has become an additional separate tax only levied on *domestic* immovable property. This tax only remains a mere deductible cost from the gross income from professional activities of both natural persons and separately taxable entities when determining their tax base for income tax purposes[12], if the immovable property is affected to their professional activity. With regard to non-professionally earned immovable income from immovable property rented out for other than housing purposes of the tenant a lump sum deduction of 40 % is granted for expenses, but the withholding tax can no longer be deducted in addition. When a natural person is finally taxed on a cadastral income, this is considered to determine his net income. Hence, a deduction of the withholding tax is neither granted.

This short overview illustrates the importance of the estimated yearly net income of an immovable property, the so-called 'cadastral income'. It determines the federal income tax for immovable property not affected for a professional activity of the owner or tenant, but also limits the maximum deductible lump sum cost for deductible expenses when it is (not professionally) rented out by

[10] These expenses are calculated at a lump sum of 40 % for buildings and 10 % for vacant terrains. The lump sum of 40% is limited at an indexed amount of 2/3 of the cadastral income. (Art. 13 BITC '92).

[11] Art. 277 and 278 BITC '92.

[12] Art. 52, 1° and 198, §1, 3° BITC '92.

the owner and used for professional activities of the tenant. It serves as the tax base for the regional withholding tax on immovable property, conditions the granting of particular tax favors, and indirectly defines some of the most important income taxes for municipalities and provinces (surcharges on both the immovable property withholding tax, as well as the personal income tax). Finally also the tax rate for, as well as discounts on registration fees depend on the cadastral income of an immovable property when it is being sold. The height of this 'cadastral income' is hence of outmost value. It is determined by the administration for each separate lot, but the calculated value can be disputed by the taxpayer under a particular procedure shortly after this determination.[13]

Though, whereas other countries regularly estimate the economic value of immovable properties[14], Belgium does not. Although meant to be repeated each decade[15], the last general assessment of all immovable property, the so-called perequation, dates back from 1975. Given its heavy administrative burden no new general perequation has ever taken place: every new Belgian immovable property created ever since has to be evaluated at its value on January 1, 1975. This avoids a repetition of the evaluation of all domestic immovable property in Belgium. An evaluation only has to be made for new immovable property or after substantial renovations affecting its value.

The historic evaluation of 1975 however became less and less representative to estimate the yearly net income. Hence, starting from 1992, the federal legislator decided to index this amount, based on a general index of consumer prices of goods. This might to some extent take into consideration monetary inflation, but remains inadequate, if the goal of a lump sum evaluation is to approach to some extent the market value of immovable property. After all, this index is calculated based on the rising cost of a general basket of goods and services consumed in a regular household. The rising of house prices however does not keep pace with this general index, but substantially transcends it,

[13] Art. 497 *ff* BITC '92. This procedure only considers the estimated value. It does not consider the establishment of taxes, based on this cadastral income. Cf. Supreme Court 12 December 2008, nr. F.07.010.N, www.juportal.be. This procedure has to be initiated within two months after the determination has been notified. The mere fact of buying an immovable property does not reopen a new possibility for the future owner to discuss a determined "cadastral income" when the previous owner would have let expire this delay. This limitation for a subsequent buyer was not considered to be unconstitutional. (Cf. Constitutional Court 25 March 2021, nr. 51/2021, www.const-court.be)

[14] E.g. in the Netherlands, the so-called "waardering onroerende zaken" is (since 2007) determined each consecutive year, based on the value of an immovable property one year before the start of the calendar year for which the value is determined. (Cf. art. 18, paragraph 2 Wet WOZ). This not only causes a high administrative burden for local authorities, but also leads to frequent court proceedings disputing the determined value given its influence on tax debts.

[15] Art. 487 BITC '92.

given the rising shortage of available space. Hence, even after being indexed, the lump sum evaluation of the cadastral income still favors owners of domestic immovable property as their estimated net income from this property is in most cases substantially beneath the real market possibilities. In addition this correction does not take into account local changes of the environment, inevitably also affecting the value of individual immovable property. Income from immovable property is hence no longer correctly reflected in the lump sum evaluation. Its tax base is in most cases substantially underestimated, leading to a much more favorable tax treatment than income from movable assets or labor, even without any particular tax favors. This makes non-professional renting out of Belgian immovable property for housing purposes a lucrative activity, as the lessor is being taxed on a substantially favorable lump sum evaluation of the tax base. Especially in periods of low interest expectations from financial products, wealthy persons therefore tend to invest in additional immovable property.[16]

2.2 Foreign Immovable Property: Mark to the Market

Foreign immovable property is not submitted to a Belgian withholding tax (and hence neither to local surcharges of Belgian provinces or municipalities). However, as a Belgian resident tax payer is progressively taxed on his worldwide income, foreign immovable property is taken into consideration to determine the yearly income tax. As for a long time, no (Belgian) cadastral income was determined, the legislator referred to the market value to determine the tax base. Foreign immovable property not being rented out was, until recently, valued on its "rental value", whereas in case of property rented out in a non-professional way, income taxes were based on the obtained rental price and additional benefits, regardless of its use by the tenant.[17] The tax administration did not yearly determine the rental value, but generally adhered to the value declared by the domestic tax payer in his annual tax return. This also avoided substantial administrative burdens for the tax administration, but charged the individual taxpayer. The declared value could subsequently be challenged, based on questioning of the tax payer or further investigations of the tax administration.

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[16] A second consequence is the integration of this benefit in selling prices. This effect hence puts the market prices under pressure for younger persons looking to buy their first own house. However, one of the goals of the Belgian tax legislator is exactly to stimulate the obtaining of one's own immovable property, exempting this home from income taxation.

[17] Art. 7, §1, 1°, b) and §2, d) BITC '92.

Determining a rental value could however be a thorny issue, given the lack of knowledge of the tax administration on local market conditions. How to determine rental value for an entire year of immovable property situated in e.g. a ski-resort that would only be visited during the ski season ? How to look for comparable properties when an immovable property was never meant to be rented to third parties and hence clearly differently equipped ? [18] Although not linking to a lump sum evaluation, inevitably some practical feasibility issues raised for both the tax payer (to comply with his declaration duties), and the tax administration (in the verification process).

Besides overcoming the practical evaluation issues the calculated tax base for foreign immovable property under the yearly personal income tax, always referring to present market values, was, compared to domestic immovable property, usually higher.

However, with regard to income taxes on *foreign* immovable property, one also has to take into account two additional factors reducing the Belgian income taxation.Firstly, Belgium has concluded over 100 double tax conventions generally based on the OECD Model tax convention. Except for some minor exceptions, Belgium always opts for the exemption method to avoid double taxation, but adds the possibility of a progression reserve, which is effectively used for resident natural persons.[19] Accordingly foreign immovable property income is taken into account to determine the applicable progressive tax rate, but this income, evaluated from the real market value of an immovable property, is subsequently exempt from taxation.[20] Secondly, the Belgian income tax for resident natural persons with regard to their foreign immovable property located in a country with which Belgium has not concluded a double tax convention, is reduced by 50 %.[21] This reduction is also granted with a progression reserve, first taking into consideration the entire income base to determine the applicable

[18] See also: M. VAN KEIRSBILCK, "Hoe moet de huurwaarde van een niet-verhuurd buitenlands onroerend goed worden bepaald (voor de toepassing van art. 7 § 1 1° b) WIB 92 iuncto art. 13 WIB 92) ?", *Fisc.Koer*. 2011, afl. 9, 294–300.

[19] Art. 155 BITC '92.

[20] Sometimes this exemption only applies if the income is "taxed" in the source state. The content of this condition depends on the exact wording of the double tax convention in particular. For some conventions, in order to obtain this exemption, it suffices that the taxing capacity is granted to the source state, for other conventions the source state should deal with this income in particular (by way of taxing or exempting the income), while the most severe tax treaties require the immovable income to be effectively submitted to income taxes in the source state (subject to tax clause). However, even if the source state would also apply a lump sum evaluation to tax the immovable property income, the condition of being taxed still seems to be fulfilled, as long as the reason to tax is linked to the ownership of the immovable property as such.

[21] Art. 156, 1° BITC '92. Whereas under double tax conventions additional conditions apply regarding source state taxation, this reduction for foreign immovable property income is not submitted to any such condition.

progressive tax rate, and then halving the tax debt linked to the income from foreign immovable property.

2.3 Conclusion: Different Evaluations for Second Residences

For both domestic and foreign immovable property the Belgian tax legislator avoided having to follow up local market conditions to yearly estimate the value of every individual immovable property. For domestic immovable property the taxable income is estimated from evaluation of the value of a building in 1975. New buildings, renovations and building techniques have to be reevaluated to determine their value in a period where some used materials (e.g. solar panels, heat boilers, …) or applied construction techniques simply did not exist yet. The obtained amount is subsequently indexed with a non-suited index mostly leading to under-evaluation. Foreign immovable property is yearly evaluated at its present market value, but the estimation is left to the taxpayer upon possible verification of the tax administration.

Finally, a general exemption (without progression reserve) from the yearly personal income tax exists for what is fiscally considered a person's "own home".[22] This is legally defined as the house on which a person has a right *in rem*, in which he is living[23] and which is not being used for his professional purposes or the professional purposes of one of his family members.[24] As this house does not need to be located in Belgium, the exemption can apply for both domestic or foreign immovable property, but only to one single house. When located in Belgium the house is hence only taxed under the withholding immovable property income tax (as well as provincial and municipal surcharges).

3. Violation of Free Movement of Capital

3.1 European Commission Complaints in 2007

In 2007 the European Commission wrote a letter of formal notice to the Belgian government that it considered the Belgian distinction in the determination of the tax base for personal income taxation of immovable property a violation of the free movement of capital. It compared the domestic reduction of 50 % for foreign immovable property (resulting in a tax base of 50 % of the market

[22] Art. 12, §3 BITC '92.

[23] Unless this would not be possible because of professional reasons, legal or contractual impossibilities, social reasons or because the building is still under construction not being able yet to be moved into.

[24] Art. 2, §1, 15° BITC '92 *jc* art. 5/5, §4, 2–8

value) with the (indexed) cadastral income for domestic immovable property (according to the Commission mostly resulting in a tax base between 20 and 25 % of its market value).

Whereas Belgium first declined the Commission's position, finally on 22nd March 2012 the Commission in a reasoned opinion formally asked Belgium to amend its taxation regime.[25] Belgium confirmed acting accordingly, but did not achieve a political majority to adapt its tax legislation. However, as a Belgian Court of Appeal launched a preliminary question to the European Court of Justice[26], the Commission suspended its actions, awaiting the outcome of this case.

3.2 A Condemnatory Preliminary Ruling in 2014

The first judgment of the European Court of Justice[27] considered natural persons having a second holiday house in France, that was not rented to other persons. Because Belgium has concluded a double tax agreement with all other EU Member States, as explained, the Belgian residents had to declare the rental value, but this would only influence the progressive tax rate on their other income taxable in Belgium. The Court nonetheless concluded that if "*the taxable income of Belgian residents who own immovable property situated in a Member State other than Belgium that is not rented out is therefore liable to be subject to a higher rate of tax than that applicable to the income of Belgian residents who have a comparable property in Belgium*", this would "*dissuade Belgian residents from making immovable property investments in Member States other than Belgium, which is such as to give rise to a restriction on the free movement of capital, prohibited, in principle, by Article 63 TFEU*".[28] Although the ultimate Belgian tax debt on income from foreign immovable property would be lower, the applicable tax rate on other income of a Belgian taxpayer was negatively influenced, because of the higher estimation of the income from foreign immovable property. As Belgium chose to apply the progression reserve, income from foreign immovable property was treated equally as domestic immovable property and hence no distinction could be made. Because no other justification was put forward, the Belgian tax regime violated the free movement of capital.

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[25] Cf. European Commission, press release "Taxation: European Commission asks Belgium to revise its taxation of property income from abroad", https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_282.

[26] Court of Appeal Antwerp 3rd September 2013, *TFR* 2014, afl. 455, p. 163.

[27] CJEU 11th September 2014, C-489/13, Verest en Gerards, www.curia.eu.

[28] CJEU 11th September 2014, C-489/13, Verest en Gerards, www.curia.eu, considerations 23 and 24.

Belgium did not change its legislation, but after the outcome of this judgment in an administrative circular the Belgian tax administration facilitated the estimation burden for resident tax payers. It accepted they could make use of foreign lump sum values, existing for domestic tax purposes in other countries[29], to estimate the rental value of foreign immovable property, as to be declared for Belgian tax purposes.[30] However, clearly this response could not satisfy the CJEU: as long as a foreign evaluations were higher than the Belgian 'cadastral income' foreign immovable property still had a higher impact on the tax rate of other Belgian taxable income, disfavoring persons opting to invest in foreign immovable property. Whereas other countries estimate the real market value or even apply a lump sum, these evaluations still transcend an indexed local market value of 1975.

3.3 Convicting Infringement Procedure in 2017

Noticing the useless awaiting for further legal modifications, the European Commission recontinued its action against Belgium and launched an infringement procedure. It reacted against the legal evaluation of both rented and not rented out foreign immovable property.[31]

The Court refused to consider the Belgian changes granted by the administration in its Circular of 2016.[32] It repeated that whereas to determine the income from *foreign* immovable property the Belgian tax legislator referred to a market value on the foreign market, for the income from *domestic* immovable property the Belgian tax legislator referred to a cadastral income, being lower than its rental value on the Belgian market. Hence, as this influences the tax rate applicable on other taxable income of Belgian residents, "*this is liable to discourage Belgian residents from making investments in immovable property in Member States of the European Union or the EEA other than the Kingdom of Belgium*"[33]. As no justification could be accepted, this violated the free movement of capital, being protected under both art. 63 TFEU and art. 40 EEA-Agreement.

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[29] E.g. Spain, Italy, France, Luxembourg and the Netherlands apply a legal evaluation to determine the rental value of immovable property.

[30] Circ. AAFisc 22/2016 (nr. Ci.704.684), www.fisconet.fgov.be. In the past the use of these foreign flat rate values had been refused in Belgian jurisprudence. See e.g. Court of First Instance Antwerp 17th November 2010, *Fisc. Koer*. 2011, p. 293 ff.

[31] CJEU 12 April 2018, C-110/17, Commission vs Belgium, www.curia.eu

[32] CJEU 12th April 2018, C-110/17, Commission vs Belgium, www.curia.eu, considerations 38 and 39. One could however doubt whether this would have made any difference given the remaining differences in the evaluation of immovable property. At best, only the burden to evaluated foreign immovable property had been lowered.

[33] CJEU 12th April 2018, C-110/17, Commission vs Belgium, www.curia.eu, consideration 53.

3.4 Judgement of Non-Compliance in 2020

Even after the second judgment of the ECJ, Belgium still did not change its legislation. Hence, the Commission started a procedure asking the Court to confirm that Belgium did not fulfill its obligations to execute the result of the previous judgment of 2018, and to impose a fine, as well as an additional penalty payment for each day of non-compliance to this new judgment. The Court followed and concluded to set this fine at 2.000.000 EUR and combined it with a penalty payment of 7.500 EUR for each day Belgium omitted to bring its tax legislation in conformity.[34]

On 17th February 2021, Belgium finally adapted its legislation in order to comply with its European obligations.

3.5 Three Further Remarks

a) Political, social and administrative barriers to a legal tax reform

In each of the three mentioned cases, the Court decided to proceed to judgment without an opinion of the advocate general.[35] Already when responding the European Commission in 2012 Belgium confirmed that its legislation conflicted with the European prerequisites. The simplest solution, at first sight, seems to be to reconsider the lump sum evaluation of cadastral income in order to bring it more in line with actual market values.

However, as illustrated, the cadastral income fulfills many roles for Belgian tax purposes on different levels. Hence, not only the income tax charged would raise, but this would also increase the (separate) immovable property withholding tax, as well as local surcharges on both taxes. Whereas benefits are often granted to owners of immovable property beneath a certain cadastral income, also these thresholds would come under pressure. In addition, when looking in particular at personal income tax of favored immovable property investors with additional Belgian immovable property, their number is substantially higher than the number of disfavored natural persons with additional foreign immovable property. When they invested in secondary immovable property, these tax favors have probably also been taken into consideration to calculate the return on investment. When renting their property for housing purposes of tenants, raising tax charges would probably also be charged to tenants. This would only

[34] CJEU 12th November 2020, C-842/19, Commission vs Belgium, www.curia.eu

[35] Three different advocate generals have been appointed (N. Jääskinen; E. Sharpston and M. H. Saugmandsgaard Øe), all following the same reasoning.

further distort their access to a rental market, which is already under pressure. Hence, the political choice to adapt the cadastral income towards a real market value for taxing income from Belgian immovable property was not easy to make, unless it were supported with lots of accompanying measures.

From a mere practical level, even when choosing to maintain a lump sum evaluation, a correct reevaluation could not be simply reached by raising the index coefficient, as this does not take into account local influences on immovable property of evolved local markets. Hence, despite several cries for a huge reform[36], moving to a reevaluation of all immovable property would first cause an immediate administrative burden, and subsequently increase the number of procedures contesting the admitted value, given its many consequences for different tax aspects.

Another approach mentioned in legal doctrine to overcome the barrier of free movement of capital would be to simply no longer take into account foreign immovable property in the calculation of personal income tax.[37] In most cases, based on Belgian double tax conventions, this would only reduce the tax rate applicable on other income. However, the choice to generally apply a progression reserve is exactly to take into account a persons contribution capacity, when levying a personal income tax. Hence, in a period of economic crisis, the Belgian legislator was not willing to give an additional tax benefit to owners of secondary foreign immovable property.[38]

b) No grandfather application

Whereas the Court concluded that Belgium violated the free movement of capital, as guaranteed under art. 63 TFEU and art. 40 EEA-Agreement, the effect of these judgments should not necessarily be extended to immovable property situated in third countries. According to art. 64, 1 TFEU "*the provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31st December 1993 under national … law*". The Belgian tax legislation, however, existed long before this date as the coordination

[36] E.g. also the Belgian Court of Audit (a financial institution serving the Belgian Parliament) twice demanded to actualize the calculation of the Belgian cadastral income. Cf. Court of Audit, "Herschatting van het kadastraal inkomen van woningen na verbouwing" Brussels December 2006 and Brussels, February 2013, https://www.ccrek.be/EN/index.html

[37] W. HEYVAERT, "Het debat over de belasting van inkomsten uit buitenlandse vastgoed", *TFR* 2021, 63–66 and W. VERMEULEN & R. VAN GAAL, "De nieuwe belastbare grondslag voor inkomsten van buitenlandse onroerende goederen, een Belgisch compromis" in *Fiscaal praktijkboek Directe belastingen 2021-2022*, Wolters Kluwer, Mechelen 2021, p.243.

[38] W. HEYVAERT en V. SHEIKH MOHAMMAD, "Het nieuwe belastingregime voor inkomsten van buitenlands onroerend goed: Errare humanum est, sed perseverare diabolicum", *TFR* 2022, nr. 615, 122.

in the BITC '92 repeated a rule already figuring in the previous income tax code of 1964.[39] Nonetheless, the new installed regime is similarly applicable for all foreign immovable property, whether or not located in the EU or EER.

c) A difficult comparison of foreign and domestic immovable property

A last remark considers the difficulty to avoid comparing apples and oranges. First of all the administrative possibilities to evaluate the estimated income from immovable property differ. If a lump sum estimation in line with market values would nonetheless be made for both domestic and foreign immovable property, the Belgian legislator has to take into account further local particularities of each foreign market. An all-encompassing lump sum estimation would hence be far from easy.

But even regardless whether or not the lump sum evaluation tends to approximate market values, the entire Belgian tax treatment differs depending on the location of immovable property.

As mentioned, *domestic* immovable property is also submitted to a withholding immovable property tax, which can no longer be credited against personal income tax. Only when the immovable property is affected for professional purposes of its owner[40], this withholding tax is qualified as a deductible cost.[41] Even when a tenant uses immovable property for professional purposes and the lessor is taxed on the acquired renting price and renting benefits, his withholding tax is still not deductible. The lessor is taxed on the gross income, with a lump sum deduction of 40 % to cover "maintenance and repair costs".[42]

Foreign immovable property is not subject to an additional withholding immovable property tax in Belgium. The Belgian resident owner might however also undergo foreign particular immovable property taxes, in addition to foreign income taxes in the source state as a non-resident. Until recently, although legally uncertain, the situation was much more favorable with regard to these foreign taxes: the Belgian tax administration always accepted the deduction of foreign taxes, although a clear legal reasoning for this approach was lacking.[43] Even when a 40% lump sum deduc-

[39] Cf. C. BUYSSE, "Buitenlands vastgoed mag niet leiden tot hogere PB dan Belgisch vastgoed", *Fiscoloog* 17 September 2014, nr. 1398, 1. *Contra*: W. HEYVAERT en V. SHEIKH MOHAMMAD, "Het nieuwe belastingregime voor inkomsten van buitenlands onroerend goed: Errare humanum est, sed perseverare diabolicum", *TFR* 2022, nr. 615, 113.

[40] This might be the exercise of a professional activity in the building, as well as renting out the building as a professional activity.

[41] Art. 53, 2° and 5° ; and art. 198, §1, 1° and 3° BITC '92 *a contrario*.

[42] Art. 13 BITC '92. In case of renting out a terrain the lump sum deduction is reduced to 10 %.

[43] See further B. PEETERS, "Buitenlandse belastingen in internrechtelijke inkomstenbelastingen" in X., *Liber Amicorum Bernard Peeters*, Knops Publishing, Herentals 2022, 60 ff.

tion for costs was applied in Belgium, the deduction of foreign taxes was still accepted in addition.[44] The only condition for a deduction was that these taxes affected the immovable property as such and not e.g. the tenant living within the property. It is remarkable that, although the new legislation was not more explicit about the deduction of foreign taxes, the Belgian administration nonetheless decided that these taxes were no longer deductible. Even when the taxable income is still (as previously) determined on real renting prices[45], the administration no longer accepts this deduction.[46]

However, in the European analysis only the personal income tax treatment was taken into consideration to compare foreign and domestic immovable property. The comparison was made between the determination of a tax base according to the market value estimation (reduced by 50 %) and a (in most cases) substantially lower lump sum evaluation. Other taxes were not taken into account. Neither did the advantage of being able to deduct other taxes from this tax base influence the Court's opinion: one (small) favor cannot compensate in general other inconveniences, that are barriers to the free market in itself.

4. The Belgian Solution

As mentioned, with a law of February 17th, 2021[47], the Belgian legislator intervened. The option was made to maintain the lump sum estimation for domestic immovable property and elaborate a similar advantageous valuation regime for foreign immovable property. As of 1st January 2021 both immovable property receives an estimated value of the net income on 1st January 1975, which is subsequently indexed with an index based on the price evolution of general household consumption.

A difference is applied between wasteland and buildings. As for *foreign* wasteland, the Belgian cadastral income is estimated at 2 EUR/10.000 m².[48] This is the lowest value possible for domestic wasteland. A further upward correction

[44] For years the administration calculated the lump sum deduction of 40 % on the rental income, after deducting foreign taxes. However, the Supreme Court rejected this approach, considering that the lump sum deduction of 40 % could not be reduced previously. Whether this judgment also considers the administrative acceptance to deduct foreign taxes illegal, is however not clear from the judgment. Cf. Supreme Court 3 September 2021, no. F.17.0117.F, www.juportal.be

[45] This is e.g. the case for immovable property rented out for an economic activity exercised by the tenant.

[46] Circular no. 2021/C/21 of March 1, 2021 over de wijziging van het Wetboek van de inkomstenbelastingen 1992 op het vlak van de in het buitenland gelegen onroerende goederen, no. 3.2, https://eservices.minfin.fgov.be/myminfin-web/pages/public/fisconet/document/6ea4f97a-38df-4fba-b1c5-cff5916d57ed

[47] *Belgian Gazette* 25th February 2021.

[48] Art. 482/1 BITC '92.

based on market conditions is not integrated for foreign terrain. Hence, neither the administration, neither the taxpayer is confronted with further evaluation duties. For foreign buildings 4 different methods to calculate the tax base are foreseen, legally in a hierarchical order.[49] If the net renting value on 1st January 1975 is known, this is directly applied. If it is not known, but the building can be compared with similar buildings (in a similar area) already disposing of a cadastral income, a comparison with these buildings will be the start to calculate an indicative value. If no renting value in 1975, nor a comparison with similar buildings can be made, the cadastral income is the selling value of the property in 1975 multiplied by 5.3 %. The fourth legal method starts from the present selling value[50] recalculated with an index to the selling value of 1975 for subsequently applying the mentioned third method.[51] Hence, the most advantageous aspect of the evaluation (an indexation of the net value on 1st January 1975), will henceforth also apply to foreign immovable property. However, economical comparisons have already shown that applying this regression method on sold Belgian immovable property would lead to a higher tax base, compared with the existing cadastral income. Will this difference hence still be considered to violate the free market ?

In order to correctly apply this legislation all Belgian taxpayers natural persons are henceforth obliged to spontaneously inform the Belgian tax administration within four months when they acquire or sell (legal rights on) a foreign immovable property.[52] Non declaration can be sanctioned with a fine between 250 and 3.000 EUR. The initiative for a correct evaluation still lies with the taxpayer, but his task is more formalized and less linked to real market conditions.

5. Conclusion

The Belgian income tax treatment of immovable property not affected for a professional business seems an interesting example for legal comparisons. For domestic immovable property it applies a strange logic to continuously recalculate immovable property values to their value on 1st January 1975

[49] Art. 477 and 478 BITC '92. This order was also already applied to domestic immovable property, although the fourth method has been added with the new legislation. In practice however the administration seems to start from a present selling value (fourth method) and use any others in case of counterproof by a tax payer that not the right value has been used.

[50] However, contrary to the legal text, the tax administration also accepts to use a selling value of a previous time, and circulated separate indices for each year following 1975.

[51] Art. 478, 3 BITC '92.

[52] Art. 473 BITC '92.

and subsequently index the amount with a less suited (but advantageous) index. Only after an immense European pressure the tax regime for foreign immovable property was changed to come to the same historical calculation. For *domestic* immovable property this technique led to difficulties to evaluate the historical value of newly developed building techniques or materials. For *foreign* immovable property such discussions formally seem to have been avoided by starting calculations from the actual selling value, corrected with an index. However, if this recalculation method leads to different results and still comes out to a higher estimation of foreign immovable property, Belgium is simply awaiting a new judgment from the European Court of Justice. Comparisons of Belgian actual sale prices of immovable property (recalculated to 1975) with the cadastral income of these buildings seem to already prove remaining differences.

The administrative advantage of an indexed lump sum evaluation is clear. Only new (or renovated) immovable property has to be evaluated for income tax purposes. Neither the tax administration (for domestic immovable property), nor the individual taxpayer (for foreign immovable property) is required to verify market conditions annually to keep pace with market values. However, the longer an evaluation has been passed, the lesser these market conditions are reflected in the evaluation, which inherently also integrates discriminations between older and newer (or renovated) buildings when general market or local environment conditions influence the market selling value at a certain estimation moment. One could also wonder whether recalculating a historical value from a recent selling value (in applying fixed indices) to subsequently re-index this historical value (with a different index) to obtain an estimated net income to be taxed, is the most coherent calculation of a net income value.

Finally, domestic tax payers are subject to additional declarations. This not only applies when they buy or acquire foreign immovable property, but also when this immovable property is sold again. Both declarations are added besides the regular income tax declaration. A non-specialized resident taxpayer might lose this declaration out of sight, as there is no necessary interaction of Belgian professional service providers. Will each taxpayer be aware of this obligation, even if selling his immovable property is not needed to determine a cadastral income ?[53]

[53] Cf. W. VERMEULEN & R. VAN GAAL, "De nieuwe belastbare grondslag voor inkomsten van buitenlandse onroerende goederen, een Belgisch compromis" in *Fiscaal praktijkboek Directe belastingen 2021-2022*, Wolters Kluwer, Mechelen 2021, 272.

Was this complex and costing regime the best way to deal with this topic ? Taking into account the exemption of foreign immovable property for most foreign immovable property held by Belgian taxpayers, in most cases it only influences the average tax rate on their other taxable income. Besides both domestic and foreign immovable property are still treated favorably by the Belgian tax legislator in comparison to other sources of income. A comparison with other countries seems to prove that the Belgian approach can at least be called “unique”.

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