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Reprinted from *Tax Notes Int'l*, April 16, 2012, p. 243

VIEWPOINTS

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Because of its position on bank secrecy rules, Belgium found itself on the OECD gray list of tax havens in 2009. Finance Minister Didier Reynders announced that Belgium would raise the level of information exchange and that his department would start negotiations with its foreign counterparts. At the same time, he announced that Belgium would opt for exchange of information under the EU savings directive.¹

Belgium's Ministry of Finance started accelerated negotiations with more than 80 states to sign new income tax treaties, protocols, or tax information exchange agreements that contain a provision for exchange of information that complies with the international standard of article 26 of the OECD model tax treaty.² By July 2009 Belgium had reached the threshold of 12 TIEAs required and was promoted to the OECD's white list.³ In total Belgium has signed 52 treaties and protocols.⁴

However, none of these treaties and protocols has entered into force even though quite a few have been approved by the Belgian Parliament, including the agreements with Andorra, Australia, Denmark, Finland, France, Luxembourg, Monaco, the Netherlands, Norway, San Marino, Singapore, and the United Kingdom.

In fact the entire treaty ratification process came to a halt in 2010 after the Council of State⁵ commented

on the bills for the ratification of these agreements and pointed out that these income tax treaties were "mixed" treaties.

Mixed Treaties

Traditionally, foreign affairs are reserved for the federal government. However, at the time of the 1993 constitutional reform, the authorities of the regions and the communities acquired powers for international cooperation and the right to conclude treaties for the matters for which they have competence (article 167 of the constitution). That means that the governments of the regions and communities have the power to sign treaties — provided they find a party willing to do so. These treaties are then submitted for approval to the parliaments of the regions and communities.

Mixed treaties are treaties that deal with matters for which both the federal and the regional governments are competent; a cooperation agreement of March 8, 1994, describes the procedure for signing and ratifying mixed treaties. A basic premise of the procedure is that during the negotiations the representatives of the federal and local governments are equal; both the federal and local parliaments must approve them, and it is the federal minister of foreign affairs who then exchanges the ratification documents with the contract parties.

That was not really a new issue. Income tax treaties have always dealt with the income from real property tax, and authority to levy the annual real property tax has been transferred to the regions. Moreover, the non-discrimination provision (article 24 of the OECD model tax treaty) forbids any discrimination based on nationality for any tax, not just income tax but also taxes levied by political subdivisions.

It was 17 years after the 1993 state reform that the Council of State raised the alarm. The treaties that

¹For an analysis of Belgium's adoption of automatic information exchange, see *Tax Notes Int'l*, Nov. 16, 2009, p. 489, *Doc 2009-24354*, or *2009 WTD 213-5*.

²For the final version of the OECD 2010 model tax convention, see *Doc 2010-19679* or *2010 WTD 174-23*.

³See *Tax Notes Int'l*, May 3, 2010, p. 395, *Doc 2010-8198*, or *2010 WTD 84-12*.

⁴The full list is available at <http://fiscus.fgov.be/interfafznl/fr/international/conventions/sign.htm>.

⁵The Council of State is an administrative court that can suspend and annul (individual and statutory) acts of public administration that are contrary to the legal rules in force. It is the administrative supreme court reviewing the legality of the decisions

(Footnote continued in next column.)

of lower administrative jurisdictions. The council also has an advisory role in legislative and statutory matters; it advises the federal and regional parliaments on draft bills.

were submitted to the Council of State included a provision for the exchange of information that has been drafted in accordance with article 26 of the OECD model tax treaty. That provision covers the exchange of information that is:

foreseeably relevant to the administration or enforcement of the domestic laws concerning *taxes of every kind and description* imposed on behalf of the Contracting States, or of their *political subdivisions* or local authorities. [Emphasis added.]

Not all 52 treaties that were signed in the last couple of years apply to taxes imposed by political subdivisions,⁶ but most of them do, and the Council of State noted that the provision relating to the exchange of information between tax authorities of different countries also applied to the taxes levied by political subdivisions (that is, the regions and communities) on their subjects.

Reynders was taken by surprise by the Council of State's position and tried to shrug it off with some legalistic arguments that ultimately failed to convince the Council of State.

The issue becomes all the more difficult to avoid since the regions are about to get more fiscal autonomy. They will be allowed to levy a percentage of

⁶For example, in the protocol signed with the United Kingdom, taxes for political subdivisions or local authorities had been explicitly excluded.

the income tax on top of the federal tax rate even if the federal state will continue to collect the tax on behalf of the regions.⁷

The appropriate procedure has been started to hold discussions between the regional and federal authorities, but that takes time. The problem has been noted, but this does not mean there is a solution. Part of the problem is that the international treaties should have been negotiated together by all the parties.

Does this mean that the negotiations must be started all over again? Or can the regional parliaments just rubber-stamp the signed treaties? These questions are not without urgency since these treaties include the 12 TIEAs that were required to get Belgium off the OECD's gray list.

And that would just correct the past. More importantly, the question will be how new treaties are to be negotiated. Will the federal negotiators receive a power of attorney to negotiate on behalf of the regional governments, or will they have to take along several colleagues from the communities and regions?

The Council of State may have raised the alarm, but the only effect seems to be that Belgium will be in a difficult position to negotiate any new income tax treaties. ◆

⁷See *Doc 2011-25982* or *2011 WTD 240-5*, under "Fiscal Autonomy."