Copyright tax in Belgium: what will change in 2023?

In recent years, the low taxation of copyright in Belgium has led to its integration into wage policy, beyond artists and performing arts professions (such as the IT sector). A law, which was adopted (with difficultly) at the end of December 2022, fundamentally changes the fiscal framework.

IN PRACTICE

- For **performers** (actors, stage artists): they are the first to be targeted by the regime, which they will be able to benefit from within the limits set by the law (caution in the case of recurring significant royalties).
- For **producers and composers**: they are also covered by the tax system, provided that they are the initial owner of the right in question, and within the limits set by the law (be careful in the case of large recurrent royalties).
- For the **IT sector**: the political statements surrounding the new regime have caused a great stir, as the Finance Minister's stated intention was to exclude the IT sector from the new regime, even though it made extensive use of the regime in its previous version. In our view, there are legal arguments for including software within the material scope of the new tax regime (to claim otherwise could be discriminatory). However, a case-by-case analysis will be required (including consideration of whether the software is internal to the company, whether it is replicated, what the effect of closed source code is, what part of the software is copyrightable).
- For **marketing**: Promotional material is copyrightable. In principle, this regime could be invoked, as the client remains free to decide not to use the designed material, without this calling into question the regime despite the conditions of effective use and communication to the public contained in the new law.
- For **freelance designers/creators**: this category of professionals could *a priori* benefit from the new regime for the part protected by copyright (excluding the functional and technical aspects of the object, which are not protected by copyright).
- For **writers, journalists and photographers**: even if, due to events beyond the control of the parties, the writings or photographs are not actually published, if these professionals are paid by a publisher who initially intends to publish what they have purchased, the new regime should apply. The Minister of Finance also confirmed that, in the case of authors who work for a press publisher under an employment contract, the intention to actually exploit the works produced can, in principle, be presumed.
- For **architects**: the new regime provides for a double condition (i) of the purchaser's intention to exploit or effectively use the transferred rights, and (ii) of the purpose of public use or reproduction. This double condition could be problematic in certain situations.
- For the **consultancy sector** (legal, etc.), which was already the subject of debate (and case law unfavourable to the taxpayer) under the old regime, the application of the new regime is subject to a number of additional conditions, in particular a public nature or reproduction. In particular, the author of publications could be covered by the new regime, provided that the limits set by the law are met.

THE PRINCIPLES

The regime resulting from the changes made at the end of December 2022 will be a **complex** one, with potential dangers and surprises arising from its application. There are a number of situations that may give rise to debate. The previous regime also generated discussions, resulting in an increase in the number of rulings requested to the dedicated service of the Belgian tax authorities. Given the complexity of the new regime, the discussions arising from that complexity and the discussions arising from certain statements about its scope, it is very likely that the ADS will receive a large number of requests from taxpayers seeking to obtain clarity as to whether, on paper, they are benefiting from this attractive tax regime.

In addition, the complexity of the new system may give rise to certain criticisms, particularly with regard to compliance with the principles of equality and non-discrimination. It is therefore not certain that it will pass a constitutional test.

1. MATERIAL SCOPE: WHAT RIGHTS ARE COVERED?

The new regime specifically targets two provisions in Book XI, Title 5, of the Code of Economic Law (CEL):

- Copyright of a **literary or artistic work** (Article XI.165 CEL)
- The performance of a an **artist** (Article XI.205 CEL)

This limitation to only these two articles (whereas the previous regime covered the entire part dedicated to intellectual property rights) is the main source of legal debate as to whether or not certain copyright-related professions are by their nature excluded from the copyright tax regime.

2. PERSONAL SCOPE: WHO CAN BENEFIT FROM THE REGIME?

The new regime has a more limited personal scope than the previous one: only the **original holder**, its heirs or legatees of the rights concerned can claim the benefit from the new regime.

3. WHAT INCOME IS COVERED?

As with the previous regime, the new tax regime is aimed at **the transfer** or **licensing of copyrights**. Proceeds from the sale of a work do not in themselves constitute a transfer of rights or the granting of a licence. Proceeds from the sale of a work of art by the artist or self-publishing by, for example, a writer/journalist/photographer would therefore potentially not qualify for the application of the copyright tax regime.

The new tax regime also applies to income collected through a "management organisation".

4. CONDITIONS

4.1 Exploitation or use

The tax regime requires that the purpose of the exploitation or actual use of these rights is "in accordance with the honest practices of the profession", unless there is an event beyond the control of the parties. It must therefore be possible to prove that the parties had the **original intention** of exploiting the copyright. The legal wording at this level raises a number of practical issues. However, it does highlight the need for concrete and explicit legal documentation from the outset, which will be useful in the event of an audit at this level.

4.2 Proof of the artistic work or the public use of the right

The rightholder must be in one of the following situations:

- Or have a certificate of artistic work (introduced by a new law of 16 December 2022, pending its entry into force, to be determined by Royal Decree deliberated in the Council of Ministers, by 1er January 2024 at the latest; in the meantime, the existing artist's cards are valid). In order to obtain a certificate of artistic work, an artist must be engaged in an artistic activity (including technical or ancillary activities) that is necessary for the creation or execution of an artistic work as part of a substantial professional activity;

- Either the transfer or licensing of the copyright to a third party is for the purpose of public exploitation (the law uses the following term: "for the purpose of communication to the public, public performance or reproduction"[1]). Several practical questions arise from the outset about this condition and its precise scope, including: the public counts how many people; is internal exploitation within a company (or private collection) potentially public? Are multiple copies required?

There is therefore an important distinction between holders, with specific requirements applicable for those who do not hold artist's card/certificate of artistic work. This difference in treatment between the two types of holders is questionable and may raise issues in relation to the constitutional principles of equality and non-discrimination.

5. THE LIMITS

5.1 Absolute limit: the ceiling amount

There is no change from the previous regime. Copyright income can only benefit from the favourable regime up to a ceiling of **EUR 64,070** (amount for **2022 income**; indexed amount for 2023 income not yet known).

[1] The parliamentary works state the following (informal translation): *"Communication to the public, public performance or representation may take different forms, in particular written, graphic, photographic, cinematographic, sound, be carried out on different media: material, digital or other, by different modes of transmission: editorial, radio, television, theatrical, scenographic, museographic, by computer network, digital platform, metaverse, etc. Communication to the public also includes the reproduction of works and services regulated by the provisions of Book XI, Title V, of the Code of Economic Law and includes the reproduction of works and services in any form or on any medium".* (Report, 3015/014, p.58).

Any copyright income in excess of this amount, and only in excess of this amount, will be taxed as professional income.

5.2 Relative limits: the double 30% rule and the 4 tax periods

The new regime includes two relative limits that complement the absolute limit of the ceiling mentioned above. These two relative limits, whose legal wording is complex, are as follows

- The copyright component may not exceed **30%** of the total remuneration, **if** the copyright transfer (or licence) is **accompanied by a performance**. This 30% limit does not apply to the remuneration for the subsequent transfer or licence, regardless of whether the initial remuneration also includes remuneration for the performance. As a transitional measure, the percentage is 50% for the tax year 2024 (income 2023), and 40% for the tax year 2025 (income 2024).

- The copyright tax regime will no longer apply in case of recurrence of significant royalties, through the 4 taxable periods rule. Under this rule, the **average amount** of royalties received during the **previous 4 tax periods**, **before** the application of the limitations (cap and percentage) must be determined. If the average (unrestricted) amount of these 4 periods exceeds the absolute ceiling, the royalties of the current year will be fully taxed as professional income (loss of the full copyright tax regime for that year). Only if the average amount received in the previous 4 tax periods does not exceed the absolute ceiling can the copyright tax regime be applied in the relevant tax period. In other words, any application of the absolute limit or the 30% rule in one period may result in the inability to benefit from the copyright tax regime in one or more of the following 4 tax periods.

  Example: The gross copyright income for the calendar year 2023 is EUR 40,000. The gross copyright income for the calendar years 2019 to 2022 amounts to EUR 120,000, EUR 100,000, EUR 80,000 and EUR 60,000 respectively.

  The average gross income for the four years preceding 2023 is 90,000 euros, which is higher thanove the limit of [64,070] euros applicable for the year 2023 (amount to be updated with the indexed amount for the tax year 2024, which is not yet known on the date of writing this information note).

  Consequently, the 40,000 euros received in 2023 will be fully taxable as professional income (with any withholding tax deducted from the tax due).

Taking into account these relative limitations, for rightsholders who have already received royalties in the past, any change in the ratio of royalties to total remuneration received should be justifiable for non-tax reasons and should correspond to reality.

6. THE TRANSITIONAL REGIME

The previous regime will continue to apply only for the tax year 2024 (2023 income) for taxpayers who benefited from the previous regime for the tax year 2023 (2022 income) and who are no longer eligible for the new regime. However, the limit of EUR 37,500 (before indexation; the indexed amount for 2023 income is not yet known at the time of writing) will be halved. The lump sum expenses will also be halved.

IT SECTOR CONSIDERATIONS

Article XI.165 CEL refers to literary and artistic works. This terminology comes from the Berne Convention of 24 July 1971, which provides a long description of the scope of these terms, without being exhaustive, as the Court of Justice of the European Union has stated (Levola Henglo judgment, C-310/17). Several European directives have also established that software is protected by copyright and is treated as a literary work. As a result, the legislator has enshrined the protection of computer programs in copyright law by assimilating them to literary works within the meaning of the Berne Convention in Article XI.294 ECL. In response to a parliamentary question, a former Minister of Finance confirmed that the scope of application of the tax law extended to computer programs in order not to create an "unjustified" and "discriminatory" difference.

To date, we have not been informed of any position taken by the Belgian tax authorities. The Ruling Committee will have to give its opinion, perhaps after an administrative circular, which is expected to be issued shortly, which will set out the position of the tax authorities.

The restrictive view of the Minister of Finance expressed and then debated

During the parliamentary process, the current Minister of Finance made several statements concerning the IT sector. For information purposes, we reproduce below some of his comments which are useful for understanding the debate, and sometimes the lack of coherence, surrounding the application of the copyright regime to the IT sector (informal translation):

- The Minister of Finance seemed to be open at first (in the Finance Committee):
  "As regards the distinction between a graphic designer and a video game developer, the Deputy Prime Minister points out that each situation must be examined in the light of the criteria set out in Article 17, § 1er, 5°, ITC92, as amended (...), in order to verify whether the income received by the beneficiary falls within the material and personal scope of this provision." (Report, 3015/014, p.56)

- Then the Minister of Finance (still in the Finance Committee) was more radical:
  "Since explicit reference is made to Article XI.165 of the Economic Code with regard to "literary or artistic works" and to Article XI.205 of the same Code with regard to "public performances by performers", only these articles can be taken into account for tax purposes. This means that "literary or artistic works" assimilated by law are not covered. Thus, for example, the assimilation referred to in Article XI.294 is not taken into account.

  With regard to the application of the Code of Economic Law, there is a view that Title 5 is a lex generalis but that Titles 6 and 7 constitute a lex specialis which should be partially included in Title 5. This line of reasoning is valid only in matters of general law, specifically in the context of the Code of Economic Law.

  When tax law refers to a specific part of other legislation, it is explicitly intended to include only that specific part within its scope and is not intended to incorporate other related provisions and interpretations into its legislation.

  Indeed, it is an important principle that tax law follows ordinary law, unless it explicitly departs from it. In this case, the tax law clearly departs from the ordinary law by including a restrictive reference to

Title 5 of Book XI of the Economic Code and to specific articles XI.165 and XI.205." (Report, 3015/014, p.60)

- He added:
  "By making specific reference to Articles XI.165 and XI.205 with regard to the qualification of "works" and "services", and to Title 5 of Book XI with regard to the qualification of copyright and related rights, the tax legislator expresses the will to take into account, in a restrictive sense, only the aforementioned articles and Title 5, without associating other articles or titles and provisions with the application of the tax law provisions in question." (Report, 3015/014, p.60-61)

- Finally, during the parliamentary debates of 21 December 2022, it was noted, with reference to a confirmation from the Minister of Finance, that the explanatory memorandum to this law does not contain any reference to a restrictive interpretation of the law:
  "The draft as presented does not include the concept of restrictive interpretation. (...) There is therefore no question of a restrictive reference to Title V of the Code of Economic Law which would limit the beneficiaries. Consequently, as always in tax matters, reference is made to ordinary law and to European law as interpreted by the Court of Justice."

LEGAL PROVISIONS

The legal text, as adopted and replacing the previous regime, is much more complex than the previous regime. Below, we compare the tax definition of the authors' rights that can benefit from the preferential tax regime, in its previous version and that resulting from the law of the end of December 2022 (Bill of 26 December 2022, published in the Belgian Gazette of 30 December 2022).

Below, we provide an informal translation of the legal text relating to the conditions of the new regime, as well as the text relating to taxation.

Definition of copyright as income from movable property

Article 17, §1, 5°, income tax code (ITC92): {Are income from movable property derived from copyright}

Before	*After*
income resulting from the assignment or granting of copyright and related rights, as well as legal and compulsory licences, as referred to in Book XI of the Code of Economic Law or in similar provisions of foreign law.	income: - resulting from the **assignment** or **licensing** by the original owner, his heirs or legatees, of copyright and related rights, as well as legal and compulsory licences organised by law, as referred to in Book XI, **Title 5,** of the Code of Economic Law or by similar provisions of foreign law; - relating to original **literary or artistic works** as referred to in **Article XI.165** of the Code of Economic Law or to **performances by artist** as referred to in **Article XI.205** of the same Code; - with respect to the **actual** exploitation or use, except in the case of events beyond the control of the contracting parties,

	of such rights in accordance with the honest practices of the profession, by the assignee, the licensee or a third party; **- provided that** the original holder of the aforementioned rights is in possession of an arts certificate as referred to in Article 6 of the Act of 16 December 2022 establishing the Arts Labour Commission and improving the social protection of workers in the arts, or in similar provisions or provisions having equivalent effect adopted by another Member State of the European Economic Area; **or** - failing that, that the rightholder, in the context of the assignment or licensing referred to in the first three indents, assigns or licenses those rights to a third party for the purpose of communication to the public, public performance or reproduction; as well as the aforementioned income collected by the aforementioned rightholder through a management organisation referred to in Article I.16, § 1, 4° to 6°, of the Code of Economic Law.

In the context of a professional activity, conditions to be met in order to maintain a regime of taxation of copyright as income from movable property

Art. 37, para. 2, ITC92 :

*"By way of derogation, the income referred to in Article 17, § 1, 5°, shall retain its status as income from movable property except in the event and **to the extent that**:*

*- the ratio between the total remuneration for the assignment or licensing of copyright and related rights and the total remuneration, including the remuneration for the services rendered, exceeds **30%;***

*- it **exceeds the amount of EUR 37,500**;*

***and** provided that the **average** income from copyright and related rights, determined before the application of the limits provided for in the preceding indents, which has been received during the **four** preceding **taxable periods**, excluding, where applicable, the period in which the activity started, **does not exceed the** maximum **ceiling** of EUR 37,500."*

Art. 37, para. 3 new, ITC92 :

*"Paragraph 2, **first indent**,*

*- shall apply only where the assignment or licensing of copyright and related rights is **accompanied by the** supply of **a service**;*

***- shall not** apply where the remuneration for the assignment or licensing of copyright and related rights is **received subsequently**, independently of the initial remuneration which also includes remuneration for the service, without prejudice to the application of the second indent of paragraph 2*

and the condition relating to the comparison of the income for the period with the average of the income received in the previous four taxable periods referred to in paragraph 2."

Taxation of copyright as income from movable property

Article 171, ITC92: are taxed at a separate rate,

"2° bis at the rate of 15 p.c.:

a) the income referred to in Article 17, § 1er , 5°, which is not referred to in Article 37, paragraphs 1er to 3;

b) the first tranche corresponding to the amount not exceeding 30% or EUR 37,500 as referred to in Article 37, paragraph 2, without prejudice to the application of Article 37, paragraph 3, or to the amount referred to in Article 551, of the income resulting from the assignment or licensing of copyright and related rights as referred to in Article 17, § 1er , 5°, or which is collected through an organisation referred to in Article I.16, §er , 4° to 6°, of the Code of Economic Law;"

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