Personal Income Tax – Rulings Committee

Tax residence of married couples or legally cohabiting partners

On December 19, 2023, the Rulings Committee issued a particularly interesting ruling concerning the tax residence of a married couple in a French-Belgian context (Ruling No. 2023.0887).

What can we learn from this ruling?

- Under Belgian law, tax residence is determined based on either the domicile or the seat of the assets;
- Belgian law primarily locates a person's tax residence at the place where their domicile is situated. For married couples or legally cohabiting partners, the tax domicile is the place where the household is established (i.e. domicile is determined jointly);
- If an individual has not established their domicile in Belgium, they can still be considered a Belgian tax resident if the seat of their assets is located in Belgium;
- For married couples or legally cohabiting partners, the seat of the assets must be determined on an individual basis, rather than jointly – at least where the couple's marital property regime allows for it;
- It is therefore possible that, for income tax purposes, members of a married couple or legally cohabiting partners whose household and hence their domicile are established abroad may each have a distinct tax residence – one in Belgium and the other abroad – based on the notion of the seat of the assets;
- In our view, a similar line of reasoning could be applied in the area of inheritance taxes.

1. REMINDER OF THE PRINCIPLES

In an international context, the Belgian tax residence of a person for income tax purposes is determined on two levels:

- at the national level, based on the criteria set out in Belgian tax legislation; and
- at the international level, based on the criteria of any applicable Tax Treaty.

1.1 Belgian Tax Law

A person is considered a **Belgian tax resident** (i.e., an inhabitant of Belgium) if their domicile is established in Belgium, and if they do not have a domicile in Belgium, they are still considered a Belgian tax resident if their seat of the assets is established there.

For tax purposes, the **domicile** of an individual is defined as the place where they actually and continuously reside (i.e., where they live and work). The determination of tax domicile is a question of fact, independent of an individual's nationality or the civil or administrative domicile they hold.

Regarding domicile, Belgian tax law provides for **two legal presumptions**:

- Firstly, persons registered in the **National Register of Natural Persons** are presumed to have established their tax domicile in Belgium, unless it can be proven otherwise.
- Secondly, the tax residence of **married couples** or legally cohabiting partners is irrebuttably presumed to be where the household is established, i.e. the center of family life or family interests, where the spouse and children reside (the family home).

It follows from this second presumption that the tax domicile of **married couples** or legally cohabiting partners is the place where the household is established. Consequently, with regard to the concept of domicile, married couples or legally cohabiting partners are either both considered Belgian tax residents or both considered non-residents, depending on where their household is established.

The **seat of the assets** is the place naturally characterized by a certain unity from which the assets are managed. It is not the location of the assets that make up the taxpayer's wealth, but rather the place where the owner – who manages or controls their management – has their principal place of business, patrimonial interests, or activities.

1.2 International Tax Law

Tax Treaties notably resolve residence conflicts arising from the domestic tax law of the States bound by the treaty, by formulating a series of cascading criteria.

The Rulings Committee reminds us that the determination of tax residence under the Tax Treaty concluded between Belgium and France is made on an individual basis. Consequently, marriage does not necessarily mean that both spouses have their tax residence in the same State.

In our view, this principle also applies to Tax Treaties based on the OECD Model.

2. RULINGS N°2023.0887

2.1 The facts

Mr. X and Mrs. Y are married under a regime of separation of property and have several children.

After both being Belgian tax residents for many years, they decided to settle primarily in France, where most of their family life will be conducted.

2.2 The Ruling decision

Considering the irrebuttable presumption related to the household, the Rulings Committee accepts that Mr. X and Mrs. Y's tax domicile is located in France.

However, the Rulings Committee reminds us that the seat of the assets criterion must be assessed on an **individual** basis. In particular, due to the regime of separation of property, Mrs. Y is considered to maintain her tax residence in Belgium, based on the following factors:

- She owns significant assets, whose ownership and organizational structure are entirely Belgian and located in Belgium;
- She serves on the board of directors of the companies in which she holds substantial shareholdings, which explains her regular presence in Belgium;
- She maintains a residence in Belgium, where she spends three to four days every two weeks;
- She has family and social ties in Belgium.

The Rulings Committee considers that this conclusion is not contradicted by the Tax Treaty concluded between Belgium and France, which places less emphasis on the 'attraction effect' than Belgian law attributes to the place of the entire family's stay. Moreover, the Rulings Committee notes that a tax ruling was obtained from the French tax administration regarding the maintenance of Mrs. Y's personal tax residence in Belgium.

3. COMMENTS

The main contribution of the ruling under discussion is that it confirms that the **irrebuttable presumption** relating to the household and applicable to married couples or legally cohabiting partners applies **only to the concept of domicile**. This irrebuttable presumption does not apply to the (subsidiary) concept of the seat of the assets.

It is therefore conceivable that, under Belgian income tax law, members of a married couple or legally cohabiting partners who have their household – and thus their domicile – established abroad could each have a different tax residence – one in Belgium and the other abroad – based on the concept of the seat of the assets.

In practice, such cases of different tax residences within married couples or legally cohabiting partners will be rare, given the existence of the Tax Treaties concluded by Belgium. It is true that, under these treaties, tax residence must be determined on an individual basis – even for married couples or legally cohabiting partners – which can lead to situations of a split tax residence within the couple. However, the family interests and patrimonial interests of most couples tend to coincide and are usually located in the same place; consequently, the conventional tax residence of most members of a married or legally cohabiting couple will be located in the same State. The situation of Mr. X and Mrs. Y is special: the importance of Mrs. Y's patrimonial situation outweighed the factors relating to her family life, so that, when determining tax

residence individually for each spouse with respect to the subsidiary criterion of the seat of the assets, it may be located in two different States.

The lesson from the ruling under discussion also seems to be useful in this other branch of tax law, namely the area of **inheritance taxes**:

- In the area of inheritance taxes, both domicile and the seat of the assets are used as criteria for locating the deceased's tax residence. However, the underlying material realities of **these concepts are the same** as those applied for income tax (even though the legal presumptions existing for income tax do not apply in inheritance taxes). For married couples or legally cohabiting partners, the seat of the assets, in inheritance tax matters, must be assessed on an individual basis for each spouse, at least if the couple's marital property regime and financial situation allow it.
- In the area of inheritance taxes, the domicile and the seat of the assets **are alternative criteria for locating** the deceased's tax residence. Consequently, in such matters, the tax administration may consider the seat of the assets as the sole and main criterion whenever the center of the deceased's business and professional activities is not located, at the time of death, in the same place as the center of their family life. However, with respect to inheritance taxes, Belgium is only bound by a Tax Treaty aimed at preventing double taxation with France and Sweden. Any potential residence conflicts involving other States will therefore not be resolved on the basis of a treaty instrument, increasing the risk of dual residence.

Contacts

+32 (0)2 891 80 55

www.advisius.law

www.linkedin.com/company/advisius/