https://doi.org/10.18778/8331-399-3.11

Caroline Docclo[1]

The Dissenting Interpretation of the Term "Immovable Property" in the Treaty of 1964 between Belgium and France and the Outcome of the Discussion in Their New Treaty

Foreign languages remain a stumbling block in international relationships. As a francophone, I expected to meet Professor Włodzimierz Nykiel for the first time in [Lots] when he invited me to attend a congress. A friend of mine who had Polish roots told me that I should pronounce [wutɕ] or [Wootch]. I managed to overcome the language barriers, landed in Łódź and met Professor Nykiel and his team.

In contrast, the Belgian and French authorities and judges seem to be unable to agree on the reading of their double tax treaty of 10 March 1964[2] although it is written in French, which is an official language of both countries. Let me illustrate this with the differences in interpretation of the term "immovable property" (*bien immobilier*) used in this treaty and the characterization of shares in French real estate companies for the purpose of the treaty.

---

[1] Prof. Caroline Docclo is a professor of international tax law at the Université de Liège and the Université libre de Bruxelles, an invited professor at the Royal University of Law and Economics of Phnom Penh; an independent person of standing appointed by the Belgian government for the purposes of EU Arbitration Directive and Arbitration Convention; a member of the Permanent Scientific Committee of the International Fiscal Association; and a member of the Brussels Bar.

[2] Convention between Belgium and France for avoidance of double taxation and establishing rules for reciprocal administrative and legal assistance in matters of income tax (*Convention entre la Belgique et la France tendant à éviter les doubles impositions et à établir des règles d'assistance administrative et juridique réciproque en matière d'impôts sur les revenus*).

1. Introduction

The nature of shares in French real estate companies matters when determining the tax treatment under the treaty between Belgium and France of dividends or capital gains obtained by shareholders who reside in the Kingdom of Belgium. Although the income tax treaty of 1964 between Belgium and France was not patterned after the OECD Model Convention,[3] it contains similar rules expressed in a different order. The question whether such dividends or capital gains qualify as income from "immovable property" has been submitted to the supreme courts of both countries and has been answered differently in the two countries.

2. Shares in real estate companies are personal property under general law

Belgium adopted the French Civil Code of Napoleon. Although the code has evolved differently in the two countries, it has retained the same definition of personal and immovable property. Article 529 of the Napoleon's Civil Code provides that claims and rights relating to shares or interest in financial, commercial, or industrial companies are personal property by determination of the law, even though real estate belongs to the companies.[4] A distinction must be made between the assets owned by a company and the shares that the same company issues.[5] Under both French and Belgian laws, shares are personal property by determination of the law and the partners who hold them are not the owners of the land and buildings belonging to the company.

Nevertheless, the French legislator has given specific features of quasi-transparency to companies called *sociétés d'attribution* whose sole purpose is either the construction or acquisition of buildings with a view to their division into fractions intended to be allocated to their members, or the management of these buildings so divided. Their hybrid status can be justified by their ephemeral purpose which is the acquisition or the

[3] In its latest version: OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris 2019 (2017 OCDE Model).

[4] Under the new Belgian Civil Code (in force since 1 September 2021), shares in comapnies remain personal property since they do not qualify as immovable property (Art. 3.46 to 3.49).

[5] FR *Conseil constitutionnel*, No. 2019-820 QPC, 17 January 2020, *Epoux K.*

construction of buildings. Those companies are intended to be dissolved as soon as their goal is achieved, and their partners' main purpose is not to share profits.[6]

3. Treatment of shareholdings in real estate companies under domestic income tax law

3.1. In Belgium

Under Belgian tax law, as a rule, an individual taxpayer is not taxable on the profits made by a company which is a separate legal entity.[7] However, any benefit received by a shareholder from such a company qualifies as a taxable dividend (Art. 18 of the income tax code (*Code des impôts sur les revenus 1992* – CIR 1992)). Individuals are not taxed on the gains that they realize upon the sale of shares unless the transaction exceeds the normal management of private wealth (Art. 90 CIR 1992).

The tax regime of income and capital gains derived by the shareholder is not determined by the nature of the company's assets. As a rule, the shareholders are not taxed on the company's income and they are not deemed to sell part of the company's real estate when they sell their participations. Under Belgian tax law, dividends and speculative gains on shares are the only taxable income that the shareholders can derive from a French real estate company.

3.2. In France

Under French tax law, real estate companies may be subject to different tax regimes.

A so-called *société d'attribution* is transparent for tax purposes. Its shareholders are regarded as if they had the rights and obligations of the company. Its shareholders are taxed on the company's income as if they received it themselves (Art. 1655 ter of the general tax code (*Code général des impôts* – CGI)).

[6] See: FR the report of Councillor Dagneaux, *Report before FR Cass. (ass.), 2 October 2015*, "Bulletin d'Information, Cour de cassation", No. 837, p. 13.

[7] Except for the application of the Cayman tax or in the exceptional cases referred to in Arts. 24 and 29 CIR 1992.

The ordinary *société civile immobilière* (SCI) is semi-transparent. The SCI is a subject of tax law. French tax law does not consider the partners to be the owners of the SCI's assets. However, the tax on the SCI's income is collected from each shareholder in proportion to his shareholding and the computation of his tax liability depends on his own characteristics. When the shareholding in the SCI is a private investment, the SCI's income is taken into consideration as a real estate income in the shareholder's tax bill. This regime applies whether the company distributes its profit or accumulates it. Besides, the distribution of dividends by an SCI is not a taxable event. Under this semi-transparency regime, the partners pay tax on the company's profits, but they are not deemed to obtain the income of the SCI, which has a separate personality. The semi-transparency is a matter of tax collection only.

An SCI may opt for the corporate income tax regime. If it does, there is no semi-transparency: the company pays tax on its profits and its shareholders are taxed on the dividends that it distributes.

The regime of capital gains realized on shares in real estate companies depends on the circumstances.

The tax regime of a French resident who alienates shares in a real estate company that he held as a private investment depends on the tax regime of the company itself. If the real estate company is "semi-transparent", the net gains derived from the transfer are subject to the same tax regime as capital gains realized on the transfer of real property (Art. 150 UB CGI). If the company has opted for corporate income tax, the capital gain realized on the sale of the shares it issued is subject to tax as a capital gain on the sale of personal property (Art. 150 0 A CGI).

When the seller is not domiciled for tax purposes in France, on the contrary, no distinction is made depending on the tax regime chosen by the company whose shares are sold. If the company's assets are mainly composed of real estate (*société à prépondérance immobilière*), whether semi-transparent or subject to corporate income tax, the capital gain realized by a non-resident on the sale of his shares is in principle taxable according to the capital gains regime applicable to real property (Art. 244 bis A CGI). The concept of *société à prépondérance immobilière* is specific to tax law. If non-resident taxpayers are taxed in France on capital gains realized on shares in *sociétés à prépondérance immobilière*, it is because the CGI considers that these capital gains are derived from a French source (Art. 164 B CGI) but it does not qualify the shares transferred as real property.

The CGI does not qualify shares in *sociétés à prépondérance immobilière* as real property, even though the capital gains they generate are taxed as if they were capital gains on real estate in many circumstances. If this were the case, the shares of SCIs subject to corporate income tax would change in nature depending on whether they are disposed of by residents of France or by non-residents.[8]

4. Treatment of shareholdings in real estate companies under the double tax treaty

Article 3 of the treaty of 10 March 1964 between Belgium and France deals with income from immovable property. Income from such property is taxable only in the contracting state in which the property is situated (Art. 3 Para. 1).

The income referred to in Art. 3 is identified in two steps: Paras. 2 and 3 determine the property from which it arises; Para. 4 determines the manner in which the income referred to arises.

Article 3 defines the term "immovable property" by referring to the law of the contracting state in which the property is situated. It specifies that the term includes rights to which the provisions of general law concerning immovable property apply, usufruct of immovable property and rights to variable or fixed royalties for the exploitation of mineral deposits, sources, and other resources of the soil (Art. 3 Paras. 2 and 3).

Article 3 applies to income derived from the use, letting or exploitation from immovable property, on the one hand, and profits resulting from the alienation of immovable property, on the other hand (Art. 3 Para. 4).

In 1977, France made a reservation to Art. 6 of the OECD Model Convention that is equivalent to Art. 3 of the treaty between Belgium and France:[9] "France wishes to retain the possibility of applying the provisions in its domestic laws relative to the taxation of income from shares or rights, which are treated therein as income from immovable property." France did not include such a possibility in its treaty with Belgium and Art. 3 remained unchanged since 1964.

Before 2003, the OECD Model Convention did not include any provision that gains derived by a resident of one contracting state from the alienation of shares or other interests in an entity may be taxed by the other contracting state if these interests derive a significant part of their value from real property situated on the territory of that contracting state. The treaty between Belgium and France does not include such a provision

[8] See, however: FR, *Tribunal administratif de Montreuil* (TA), 7 June 2019, No. 1705505.

[9] Paragraph 6 of the Commentary on Art. 6 of the 2017 OECD Model.

either. Belgium is not in favor of clauses such as Art. 13 Para. 4 of the OECD Model Convention as it reads since 2003. Accordingly, in 2005, Belgium made a reservation to this provision.[10] When Belgium agreed to include similar provisions in several treaties, it subjected their application to varying carve-outs. Belgium did not deviate from its policy when it signed and ratified the Multilateral Instrument (MLI).[11] When adopting Art. 9(1)(b) of the MLI, Belgium merely accepted to extend to interests in entities such as partnerships and trusts the scope of the existing provisions of the treaties it signed earlier and that were similar to Art. 13 Para. 4 of the OECD Model Convention.[12]

The only provision of the treaty between Belgium and France that alludes to a specific tax regime applicable to French real estate companies is point 2 of the protocol which supplements Art. 15 relating to dividends (Art. 15 of the treaty between Belgium and France is the equivalent of Art. 10 of the OECD Model Convention). Point 2 of the protocol covers *sociétés d'attribution* referred to in Art. 1655 ter CGI. As mentioned before, in France, these companies are transparent. Their shareholders are taxed on their income as if they had rights over the assets and operations of these companies. The protocol provides that Art. 15 does not prevent France from treating the shares of such companies as real property, but it also allows Belgium to tax its residents on the dividends derived from those shares as ordinary dividends. Point 2 of the protocol deviates from the above-mentioned Art. 15 only and does not concern the capital gains regime. However, in 1966, the Belgian administration had extended its application to capital gains on shares of *sociétés d'attribution* realized by Belgian residents, considering that France could tax them as well as Belgium.[13] In 1978, it revised its position and considered that France could tax them, while Belgium should exempt them.[14] The French Council of State (*Conseil d'Etat*), on the contrary, decided that point 2 of the protocol cannot be extended to capital gains on shares in real estate companies.[15]

---

[10] Paragraph 51 of the Commentary on Art. 13 of the 2017 OECD Model.

[11] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at Paris on 24 November 2016.

[12] BE Bill of 4 February 2019 assenting to the Multilateral Convention for the implementation of measures relating to tax treaties to prevent the erosion of the tax base and the shifting of profits and to the Explanatory Note, made in Paris on 24 November 2016 [*Projet de loi du 4 février 2019 portant assentiment à la Convention multilatérale pour la mise en œuvre des mesures relatives aux conventions fiscales pour prévenir l'érosion de la base d'imposition et le transfert de bénéfices et à la Note explicative, faites à Paris le 24 novembre 2016*], Doc. parl., *Chambre* (2018–2019), 54-3510/001, p. 49.

[13] BE Circular 920 of 18 August 1966, No. 21.

[14] BE Circular Ci.R9F of 15 March 1978.

[15] FR, C.E., 24 February 2020, No. 436392.

5. Interpretation of the treaty term "immovable property"

If shares in a French real estate company qualified as immovable property for the purposes of Art. 3 of the treaty between Belgium and France, dividends paid on such shares to a Belgian resident and capital gains realized on such shares by a Belgian resident should be taxable in France "only".

To identify the scope of that provision, reference should be made to the general rules of treaty interpretation. Belgium ratified the Vienna Convention of 23 May 1969 on the Law of Treaties. It applies to treaties signed by Belgium since 1 October 1992. However, since it codifies customary international law, Belgian courts apply its rules to all treaties, regardless of their date or whether the treaty partner is a party to the Vienna Convention.[16] France never signed the Vienna Convention. Nevertheless, French courts draw on the principles of this convention to interpret international treaties. In particular, they apply the principle of literal interpretation and seek the ordinary meaning of words in their context and the common intention of the parties.[17]

It is stated that a double tax treaty cannot be a legal basis for taxation since it only limits the fiscal sovereignty of the contracting states. A treaty applies to prevent a taxation provided by domestic legislation.[18] In view of the different scopes of domestic tax law and tax treaties, the *Conseil d'Etat* of France has formally introduced a "principle of subsidiarity of treaties", according to which the national judge must first ascertain the legality of a tax under French law before verifying its compliance with a treaty signed by France.[19]

The treaty between Belgium and France defines the term "immovable property" by referring to the laws of the contracting state in which the property in question is situated (Art. 3 Para. 2). More specifically, it refers to the provisions of private law relating to the ownership of such property (Art. 3 Para. 3). The context seems to indicate that the definitions under private law would prevail. However, in view of its generality, the expression "the law of the contracting state" may be

[16] BE, Opinion of AG Delange, before Cass., 27 January 1977, *Pasicrisie*, 1977, I, p. 574.

[17] Ph. Martin, *L'interprétation des conventions fiscales internationales*, "Revue de droit fiscal" 2013, No. 24, p. 320.

[18] C. van Raad, *Five Fundamental Rules in Applying Tax Treaties*, [in:] L. Hinnekens, *Liber Amicorum Luc Hinnekens*, Bruylant, Bruxelles 2002, p. 588.

[19] See: FR CE (ass.), 28 June 2002, No. 232276, *Schneider Electric*. The French Surpeme Court [*Cour de Cassation*] does not apply this principle (see: FR Cass. (ass.), 2 October 2015).

interpreted as including both tax law and civil law. It is also agreed that tax definitions are preferred when they deviate from definitions given by other branches of law.[20]

On the other hand, Art. 22 of the treaty between Belgium and France (that is the equivalent of Art. 3 Para. 2 of the OECD Model Convention) refers to national tax laws to provide the definitions missing in the treaty. Unlike Art. 3, it does not specify that the law of the country in which a property is located would take precedence in qualifying the property. Besides, it requires ensuring that the national tax definition used does not conflict with the treaty context.

6. Characterization of dividends paid on shares in a real estate company

The Supreme Court (*Cour de Cassation*) of Belgium has been called to decide whether dividends received by an individual residing in the kingdom as a return on his private investment in a French ordinary SCI were taxable in Belgium according to the distributive rules of the treaty between Belgium and France. It is remarkable that in France, this question does not arise since French law simply does not provide for the taxation of such dividends.

In a decision of 2 December 2004, the *Cour de Cassation* of Belgium decided as follows (free translation):[21]

"The dispute relates to the taxation of income distributed to the plaintiff, resident in Belgium, by a *société civile immobilière* under French law whose purpose, according to the findings of the judgment, is the management and letting of buildings of which it is the owner and not the allocation of its buildings to its shareholders and which is, as such, an ordinary *société civile immobilière* within the meaning of French law.

[20] With regard to Art. 6 of the OECD Model Convention, similar to Art. 3 of the treaty between Belgium and France, see: K. Vogel, *Klaus Vogel On Double Taxation Conventions*, 3rd ed., Art. 6, No. 22, Kluwer, London 1997; Ph. Baker, *Double Taxation Agreements and International Tax Law*, Sweet & Maxwell, London 1991, p. 112 et seq.; B. Peeters, *Double Conventions préventives de la double imposition – Commentaire 1991*, Ced-Samson, Diegem 1991, p. 84.

[21] BE Cass., 2 December 2004, "Pasicrisie" 2004, No. 584; C. Docclo, *Les divergences de vues du Conseil d'Etat de France et de la Cour de cassation de Belgique sur la qualification des revenus de parts de sociétés civiles immobilières françaises* – comments on BE Cass., 2 December 2004, "Journal de droit fiscal" 2004, No. 6–7, p. 233 et seq.

Under French tax law, companies of this nature are subject to a so-called semi-transparency regime according to which the company is deemed not to exist separately from its members, the latter are treated as if they were direct owners of the real estate to which the shares they hold entitle them and the income from these shares is considered as real estate income when, as in this case, it is attributed to individual shareholders who have not invested the shares in a business.

The [criticized] judgment finds that the income from the shares held by the plaintiff in a *société civile immobilière* in France was taxed in France as income from immovable property.

Article 3.1 and 2, of the treaty of 10 March 1964 between Belgium and France […] provides that income from immovable property shall be taxable only in the contracting state in which such property is situated and that the concept of immovable property shall be determined in accordance with the laws of that state; […]

By deciding that the Belgian tax authorities could tax such income, the judgment violates the above-mentioned provisions of the treaty concluded between Belgium and France."

This decision of the *Cour de Cassation* of Belgium seems to have confused semi-transparency and transparency under French law and relied on the fact that the tax bills that the French tax authorities send to the shareholders of ordinary SCIs mention real property income with respect to the profits made by the SCI. It induced from this that under French law, the shareholders would be deemed to have direct rights over the company's real estate and the income it produces.

Based on this holding, shareholders of ordinary SCIs considered that the income earned by the SCI reached them without changing its nature when dividends were distributed, and they claimed that the dividend should be exempt in Belgium. Belgian courts considered that the Belgian tax authorities could not tax SCIs' income, even on the occasion of a dividend distribution, on the grounds that such income would qualify as income from real estate property in France. Some taxpayers even reported the profits of the SCIs in which they had interests even though they had not received any dividend and even though they were not requested to report SCIs income under Belgian law.[22]

The Belgian tax authorities kept contesting the Supreme Court's ruling. In 2016, the Belgian *Cour de Cassation* overturned the decision of the Court of Appeal of Brussels of 10 September 2013, which had held that dividends from a SCI were covered by Art. 3 of the treaty between

[22] See: C. Docclo, *Le mystère belge de la translucidité des SCI françaises* – comments on BE Ghent, 29 April 2014, "Tijdschrift voor fiscal recht" 2014, p. 694 et seq.

Belgium and France and, for this reason, were taxable in France only.[23] By doing so, the *Cour de cassation* also overturned its own decision of 2004.

The *Cour de cassation* restated that ordinary SCIs are semi-transparent under French tax law and that their members are subject to income tax on a portion of the company's profits, accumulated or distributed, corresponding to their rights in such companies. Under French law, the share of each individual member in the company's profits is deemed to represent income from real property. However, it does not follow from these rules that shares in SCIs, which have a separate legal and fiscal personality, qualify as immovable property for the purpose of Art. 3 Para. 1 of the treaty between Belgium and France. The *Cour de Cassation* held that the Court of Appeal of Brussels violated Art. 3 of the treaty by considering that dividends paid on such shares were income from immovable property taxable in France only. The *Cour de Cassation* dared to say that it relied on the French rules "in the interpretation that they receive in France". We will see below that the interpretation given by the *Conseil d'Etat* of France may not be the one expected by the *Cour de Cassation* of Belgium.

In any case, under Belgian law, company shares are personal property. The treaty between Belgium and France does not determine that shares in French SCIs are situated in France. They are normally located at the place where the shareholder manages his wealth, i.e., at his domicile. Under Art. 3 Para. 2 and Art. 22 of the treaty, one may therefore refer to Belgian law to determine whether shares in SCIs held by a Belgian resident fall within the notion of "immovable property".

7. Characterization of capital gains on shares in a real estate company

When a taxpayer sells his shares in a company, the company does not make profits and the issue is not whether the company's income is attributed to the shareholder. Only the seller realizes a gain. However, the issue of the legal nature of the property from which the income is derived is the

[23] BE Cass, 29 September 2016, "Journal de droit fiscal" 2017, p. 65; P. Glineur, *Le Beaujolais de Crésus et la transparence fiscal*, [in:] S. Douénias, P. Minne (eds), *Fiscalité internationale et patrimoniale – Mélanges Pascal Minne*, Bruylant, Bruxelles 2017, p. 281 et seq. See also: BE Cass, 21 September 2017, "Tijdschrift voor fiscal recht" 2019, p. 92; C. Docclo, *La jurisprudence de la Cour de cassation sur le traitement des revenus des SCI françaises* – comments on BE Cass., 21 September 2017, "Tijdschrift voor fiscal recht" 2019, No. 554, p. 92 et seq.

same when characterizing a gain realized on the shares of a company and a dividend paid by a company from its profits.

Under Art. 3 of the treaty between Belgium and France, profits resulting from the alienation of immovable property located in France by residents of Belgium are taxable in France. Under Art. 18 of the same treaty, other capital gains realized by residents of Belgium may be taxed in Belgium only.

In 2012, the French authorities released a commentary on the treaty between Belgium and France where they considered that the notion of "immovable property" is not defined by the treaty and that shares in French real estate companies should therefore be characterized according to French law. They further considered that above-mentioned point 2 of the protocol is not limited to the *sociétés d'attribution* covered by Art. 1655 ter CGI and that, under French law, the shares of a company whose assets are mainly composed of real estate located in France (*sociétés à prépondérance immobilière*) should be immovable property. The capital gains realized on the disposal of these shares should therefore be taxable in France, although the transaction does not involve land or buildings or rights to such property.[24] The French authorities had already drawn the same conclusion in an instruction of 6 May 1966.

In France, an administrative doctrine expressed in instructions or in answers to parliamentary questions has legal value unless case law overrules it.[25] A circular is binding on the French authorities, while a taxpayer may challenge it in courts or even request its annulment.

In one case, a resident of Belgium who had held, as a private investment, shares in a French real estate company owning real estate located in France, sold them. The French authorities relied on the administrative commentary mentioned above to tax him on the capital gain he realized. The taxpayer requested the annulment of this instruction, but the French *Conseil d'Etat* dismissed his petition in a decision of 24 February 2020.[26]

The *Conseil d'Etat* of France first restated that point 2 of the protocol cannot be extended to other companies than *sociétés d'attribution*. Further, it considered that, when determining whether a property is immovable, Art. 3 of the treaty between Belgium and France refers to the law of the

[24] FR BOI-INT-CVB-BEL-10-10, "Bulletin officiel des finances publiques – impôts", 12 September 2012, 110 et seq.

[25] The basis of this rule is found in Art. 80 A of the FR Tax Procedure Book [*Livre des procédures fiscales*], which provides that when the taxpayer followed published instructions or circulars the authorities may not support a different interpretation.

[26] "Revue de droit fiscal", 2020/38, No. 374, with comments by C. Docclo, *Convention franco-belge – Définition des "biens immobiliers" selon le régime d'imposition en droit français des plus-values réalisées*, pp. 47–54.

state where the property is situated and, more particularly, to its tax law, unless the context requires a different interpretation, under Art. 22 of the same treaty. The high court decided that, since the above-mentioned Art. 244 bis A CGI treats in the same manner capital gains on land and buildings and those realized by persons residing outside France on shares in real estate companies, the contested commentary does not misinterpret Art. 3 Para. 4 of the treaty between Belgium and France.

Keeping in mind the principle of subsidiarity established by the *Conseil d'Etat* of France,[27] it is not surprising that French judges called upon to rule on the validity of the taxation in France of a capital gain realized by a resident of Belgium on shares in a real estate company, begin their examination by reviewing the conformity of this taxation with French law. Here, the *Conseil d'Etat* of France was not called upon to verify the validity of a tax assessment, but rather to verify the interpretation given by the French authorities to the treaty between Belgium and France in an instruction of general application. Its interpretation of the treaty nevertheless seems to be very much influenced by the tax regime of the income under review under French law.

In its judgment, the *Conseil d'Etat* blended Art. 3 Para. 2 and Art. 22 of the treaty to justify its reference to the provisions of the CGI and omitted to verify whether the context of the treaty would require another interpretation. In addition, these two rules refer to the national definitions given to a "notion" or "a term" or, in short, the vocabulary used. They do not allow to qualify shares as immovable property on the grounds that French law gives to the income that they generate a tax treatment similar to that of income from real property.[28] For example, in *Banque française de l'Orient*, the *Conseil d'Etat* of France decided that France could not qualify hidden income of a French company as a "dividend" within the meaning of Art. 10 of the treaty of 16 March 1973 between France and the Netherlands, even though such income is deemed to be distributed under French law, since it is not distributed by a company to its shareholders pursuant to a decision taken by a general shareholders meeting.[29]

---

[27] Cf. supra.

[28] See: K. Vogel, *Klaus Vogel…*, Art. 3, No. 62; K. Vogel, R. Prokisch, *General Report, Interpretation of double tax conventions*, "Cahiers" 1993, Vol. 78a, p. 115.

[29] FR CE. No. 190083, 13 October 1999, *Banque française de l'Orient.* The judgement of 27 July 2001 of the *Conseil d'Etat* of France illustrated the same principle. In order to characterize "interest" paid by a late debtor, it set aside the classification of interest given to it by the CGI and considered that because such income was not "derived from a debt claim" but was rather "an accessory element of the same nature as the principal debt itself, it was not an interest in the meaning of Art. 12 of the treaty of 9 September 1966 between France and Switzerland, as it read prior to the amendment of 22 July 1997" (FR CE, No. 215124, 27 July 2001, *Golay Buchel*).

If one must apprehend treaty terms with reference to French law, it must be noted that neither French general law nor French tax law classifies shares in real estate companies as real property. Art. 244 bis A CGI deals separately with real property and rights relating to such property, on the one hand, and shares or other rights in organizations, on the other hand, while the CGI does not provide a specific definition of real property.[30] If tax law does not define a term, it must be given the meaning it has in other branches of law.[31] Shares do not fall within the notion of real estate, neither in general law nor therefore in tax law. They have the nature of personal property under French law, as well as under Belgian law.

It is remarkable that Art. 164 B CGI mentioned above specifies that international treaties prevail. The CGI cannot be used to deviate from Art. 55 of the French Constitution that establishes the primacy of international treaties over French law. It is surprising that the *Conseil d'Etat* of France decided that tax law assimilates shares in *sociétés civile à prépondérance immobilière* to real property when they are alienated by a person who is not fiscally domiciled in France and validated the disputed administrative commentary.

The administrative court of Montreuil arrived at the same conclusion in a decision of 26 June 2018 in a case where a Belgian tax resident had sold all his shares in the company *Villa les Cigales 2*.[32] The Administrative Court of Appeal of Versailles refused to overrule this decision, for reasons obviously inspired by the judgment of the *Conseil d'Etat*.[33]

The case law of the administrative court of Montreuil shows how inappropriate the definition of the treaty term "immovable property" can be by referring to the national tax system, rather than to the nature of the property as the *Conseil d'Etat* recommended in *Banque française de l'Orient*.[34] In another case that it decided after the above-mentioned *Villa Cigale 2*, the court of Montreuil decided on the taxation in France of capital gains realized by tax residents of Belgium on the sale of their shares in the *SCI Arlique* subject to corporate tax in France. First, it found

[30] Article 150 UB CGI subjects capital gains realized by residents of France on shares of semi-transparent real estate companies *to the regime of* capital gains on buildings. Article 244 bis A CGI deals with capital gains realized by non-residents, as "*defined*" in "e bis and e ter under I of Art. 164 B"; but Art. 164 B CGI does not provide a *definition*: it merely *locates* in France capital gains derived from shares in *sociétés à prépondérance immobilière*.

[31] E. Krings, *L'interprétation des lois fiscales*, "Revue fiscale" 1965, p. 596; see in the same vein the above-mentioned report by Councillor Dagneaux, *Report before FR Cass…*, p. 17.

[32] FR TA Montreuil, 26 June 2018, No. 1703431; see also: FR TA Montreuil, 17 April 2017, No. 170414.

[33] FR CAA Versailles, 18 June 2020, 18VE03429-18VE03430.

[34] FR CE 13 October 1999, No. 190083, *Banque française de l'Orient*; see also: FR CE 27 July 2001, No. 215124, *Golay Buchel*.

that the taxation was provided for by Art. 244 bis A of the CGI. Second, it found that if the claimants had been French residents (which they were not), they would have been subject to the capital gain tax regime for the transfer of securities and corporate rights, since their company was fiscally opaque. This induced the court to decide that the claimants had realized a capital gain on personal property, exempt in France under the treaty with Belgium.[35] It is surprising how shares transferred by one taxpayer were characterized according to the regime that would have been applicable to another taxpayer.

8. Side note: diverging interpretations of the *Cour de cassation* of France and the *Conseil d'Etat* of France

On 2 October 2015, the *Cour de Cassation* of France ruled on the nature of the shares of a real estate company for inheritance tax purposes.[36]

Under French inheritance tax law, personal and real property, wherever located, of a deceased person who was domiciled in France or whose heirs are domiciled in France (and have been domiciled in France for at least six years over the last ten years) are subject to tax in France. The inheritance of a deceased person domiciled outside of France that reverts to heirs domiciled outside of France is subject to French transfer tax only for property located in France. Shares and units of unlisted companies or legal entities whose head office is located outside France and whose assets consist mainly of real estate or real estate rights located in France are considered as located in France, in the same proportion as the value of such assets bears in the total assets of the company. Shares in *sociétés à prépondérance immobilière* are thus considered as located in France, but not as real property.[37]

Furthermore, if the deceased person, alone or with members of his family, directly or indirectly controlled a company that owned a building, he is deemed to have indirectly owned the building. For inheritance tax purposes, one looks through the company.

Article 2 of the inheritance tax treaty of 1 April 1950 between France and Monaco provides that immovable property and immovable property rights forming part of the estate of a national of either of the two contracting

[35] FR TA Montreuil, 7 June 2019, No. 1705505.

[36] FR Appeal No. 14-14256.

[37] See: Br. Gouthière, *Les impôts dans les affaires internationales*, 9th ed., No. 48080 et seq., Francis Lefebvre, Paris 2014.

states are subject to inheritance tax only in the state in which they are situated. The question of whether a property or a right has the nature of immovable property must be solved according to the legislation of the state in which the property is situated.

Article 6 of the same treaty provides that shares and any other personal property left by a national of either state is subject to tax only in the state in which the deceased person was domiciled at the time of his death.

An exchange of letters dated 16 July 1979 between the administrations of the two states deals specifically with *sociétés d'attribution*.[38] According to this arrangement, immovable property and immovable property rights represented by shares in such companies are subject to inheritance tax only in the state in which they are situated.

The French tax authorities considered that, for the purposes of that treaty, the nature of a property was determined according to French law if the property was located in France and that a *société à prépondérance immobilière* was an immovable property under French law. They found support in the exchange of letters of 16 July 1979.

The *Cour de Cassation* of France has been called twice to decide on a case where a Monegasque real estate company named *Cogest* that owned land and buildings in France was part of the estate of a deceased person who was domiciled in Monaco. The *Cour de cassation* of France decided in a plenary session held on 2 October 2015[39] that the French tax regime applicable to shares in *sociétés à préponderance immobilière* does not give these shares the nature of immovable property.

The *Cour de cassation* of France and the *Conseil d'Etat* of France clearly do not share the same approach. The *Conseil d'Etat* of France also seems to have neglected the position of the *Cour de cassation* of Belgium.

[38] The *sociétés d'attribution* referred to in Art. 1655 ter CGI are transparent for the application of transfer duties, although they have legal personality. The application of inheritance duties to the property they hold in France is justified by the transparency that the legislator gives them.

[39] FR Cass. (Com.), 9 October 2012, appeal No. 11-22.033; FR Cass. (ass.) 2 October 2015, appeal No. 14-14.256.

9. Solutions found in the treaty of 9 November 2021

Belgium and France have signed a new tax treaty on 9 November 2021.[40]

Under the new treaty, a French company that is treated as semi-transparent in France because it is subject to tax in France and its members pay taxes on their shares in the company's profits will qualify as a resident of France for treaty purposes (Art. 4 Para. 4, Prot. 4). Income derived through such a company by a resident of Belgium will not be seen as income earned by the shareholder for treaty purposes (Art. 1 Para. 2, Prot. 1). Dividends distributed by a French SCI to an individual resident of Belgium will be taxable in Belgium.[41]

Regarding capital gains in *sociétés à prépondérance immobilière*, the new treaty includes a provision inspired by Art. 13 Para. 4 of the OECD Model Convention. Gains from the disposition of interests in a company or another organization whose value derives directly or indirectly for more than 50 per cent from immovable assets which are not used by such company in the conduct of its business, and which are situated in a contracting state may be taxed in that state if that state treats those gains as realized on immovable property. Shares listed on a regulated stock exchange in the European Economic Area are not covered by this provision (Art. 13 Para. 2).

The new treaty includes another provision that may apply to capital gains realized on shares in real estate companies. In 1977, France made a reservation to Art. 13 of the OECD Model Convention, stating that France wishes to retain the possibility of applying the provisions in its laws regarding the taxation of gains from the alienation of shares or rights which are part of a substantial participation in a company which is a resident of France.[42] The new treaty provides that gains derived by an individual who is a resident of a contracting state from the alienation of shares forming part of a substantial interest in a company which is a resident of the other contracting state may be taxed in that other state if he held those shares while he was a resident of that other state (Art. 13 Para. 4).

---

[40] The new treaty (*Convention entre le Royaume de Belgique et la République française pour l'élimination de la double imposition en matière d'impôts sur le revenu et sur la fortune et la prévention de l'évasion et de la fraude fiscale*. Convention between the Kingdom of Belgium and the French Republic for the avoidance of double taxation in income and capital tax matters and for the prevention of tax evasion and fraud) was not yet in force on 16 February 2024.

[41] The same dividend benefits from the dividend received deduction if the shareholder is a Belgian company (Art. 22 Para. 2, c, Prot. 4).

[42] Paragraph 36 of the Commentary on Art. 13 of the 2017 OECD Model.

References

Baker Ph., *Double Taxation Agreements and International Tax Law*, Sweet & Maxwell, London 1991.

Councillor Dagneaux, *Report before FR Cass. (ass.), 2 October 2015*, "Bulletin d'Information, Cour de cassation", No. 837.

Docclo C., *Convention franco-belge – Définition des "biens immobiliers" selon le régime d'imposition en droit français des plus-values réalisées*, "Revue de droit fiscal" 2020, Vol. 38, No. 374.

Docclo C., *La jurisprudence de la Cour de cassation sur le traitement des revenus des SCI françaises* – comments on BE Cass., 21 September 2017, "Tijdschrift voor Fiscaal Recht", 2019, No. 554.

Docclo C., *Le mystère belge de la translucidité des SCI* – comments on BE Ghent, 29 April 2014, "Tijdschrift voor Fiscaal Recht" 2014, No. 693.

Docclo C., *Les divergences de vues du Conseil d'Etat de France et de la Cour de cassation de Belgique sur la qualification des revenus de parts de sociétés civiles immobilières françaises* – comments on BE Cass., 2 December 2004, "Journal de droit fiscal" 2004, No. 6–7.

Glineur P., *Le Beaujolais de Crésus et la transparence fiscal*, [in:] S. Douénias, P. Minne (eds), *Fiscalité internationale et patrimoniale – Mélanges Pascal Minne*, Bruylant, Bruxelles 2017.

Gouthière Br., *Les impôts dans les affaires internationales*, 9th ed., Francis Lefebvre, Paris 2014.

Krings E., *L'interprétation des lois fiscales*, "Revue fiscale" 1965.

Martin Ph., *L'interprétation des conventions fiscales internationales*, "Revue de droit fiscal" 2013, No. 24.

OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris 2019.

Peeters B., *Conventions préventives de la double imposition – Commentaire 1991*, Ced-Samson, Diegem 1991.

Raad C. van, *Five Fundamental Rules in Applying Tax Treaties*, [in:] L. Hinnekens, *Liber Amicorum Luc Hinnekens*, Bruylant, Bruxelles 2002.

Vogel K., *Klaus Vogel On Double Taxation Conventions*, 3rd ed., Kluwer, London 1997.

Vogel K., Prokisch R., *General Report, Interpretation of double tax conventions*, "Cahiers" 1993, Vol. 78a.

Abstract

This contribution illustrates the inability of the Belgian and French authorities and courts to agree on the interpretation the term "immovable property" (*bien immobilier*) used in the double tax treaty of 10 March 1964 between Belgium and France when characterizing

shares in French real estate companies for the purposes of distributing the power to tax dividends or capital gains derived from those shares.

Keywords: immovable property, double tax treaty, capital gains