EUR Research Information Portal

Open versus Closed Competence to Tax: A Comparative Legal Study of Municipal Taxes in Belgium and the Netherlands

Published in:
Intertax

Publication status and date:
Published: 01/01/2019

Document Version
Publisher's PDF, also known as Version of record

Citation for the published version (APA):
Jonckheere, MJM., Schep, A., & Monsma, A. (2019). Open versus Closed Competence to Tax: A Comparative Legal Study of Municipal Taxes in Belgium and the Netherlands. *Intertax*, *2019*(5), 468-489. http://hdl.handle.net/1765/115809

Link to publication on the EUR Research Information Portal

Terms and Conditions of Use
Except as permitted by the applicable copyright law, you may not reproduce or make this material available to any third party without the prior written permission from the copyright holder(s). Copyright law allows the following uses of this material without prior permission:

- you may download, save and print a copy of this material for your personal use only;
- you may share the EUR portal link to this material.

In case the material is published with an open access license (e.g. a Creative Commons (CC) license), other uses may be allowed. Please check the terms and conditions of the specific license.

Take-down policy
If you believe that this material infringes your copyright and/or any other intellectual property rights, you may request its removal by contacting us at the following email address: openaccess.library@eur.nl. Please provide us with all the relevant information, including the reasons why you believe any of your rights have been infringed. In case of a legitimate complaint, we will make the material inaccessible and/or remove it from the website.

Erasmus University Rotterdam
Making Minds Matter



ARTICLE

Open versus Closed Competence to Tax: A Comparative Legal Study of Municipal Taxes in Belgium and the Netherlands

Miguel de Jonckheere*, Arjen Schep* & Anneke Monsma*

This article describes and compares the possibilities under Belgian and Dutch law for taxation by local authorities. The most striking difference is that Belgian local authorities may decide on their own as to which taxes they wish to impose, save for interdictions imposed by law, whilst local authorities in the Netherlands can levy only those taxes allowed by national law.

The main purpose of this study is to enquire if the differences in tax competence are as substantial as one might expect at first glance. More specifically, the authors compare the existence, meaning and scope of some general principles and principles of tax law which are considered to limit the municipal tax competence.

The conclusion is that the scope of some principles and even their very existence seems to be affected to a considerable degree by the extent of the municipal tax autonomy. The Belgian open tax system has been widely constrained by general principles of tax law, that are absent or have less far reaching consequences in the closed tax system existing in the Netherlands. Further research is needed to determine whether the authors' findings can be extrapolated to other Member States who are operating systems of open or closed tax competence.

1 Introduction

This article compares the different frameworks under Belgian[1] and Dutch law that permit taxation by local authorities. The most striking difference between the Belgian and the Dutch municipal taxation system is that Belgium uses a so-called 'open system', whilst the Netherlands applies a 'closed system'. In Belgium, local authorities may decide on their own as to which taxes they wish to impose, save for restrictions imposed by law. Local authorities in the Netherlands may levy only those taxes that are explicitly mentioned by law. The main research topic of this article is to determine the extent to which this difference in fiscal autonomy influences the design, limitations and judicial control of municipal taxes.

Section 2 describes the constitutional setting in which Belgian and Dutch local authorities may levy taxes. The most significant legal constraints on municipal taxation and the monitoring of municipal taxes by the judiciary are considered, as well. Section 3 examines the distinction between municipal taxes, destination-based levies and fees in the two countries.[2] The authors present the definitions and differences between those categories of levies in Belgium and the Netherlands, and seek to determine if and to what extent these differences are influenced by the open or closed system of taxation. Section 4 examines some of the practical consequences of the divergent fiscal competences of local authorities in Belgium and the Netherlands. Also discussed are the control exercised by the judiciary on the municipal tax competences and several constraining rules and principles. It seems that the scope of some principles and even their very existence is indeed considerably affected by the extent of municipal tax autonomy.

2 Municipal competence for municipal taxation in Belgium and the Netherlands

2.1 *Constitutional Setting*

2.1.1 *Belgium*

Belgium is a federal state with a rather complex constitutional system. Besides the federal state, there are three

Notes

* Full professor of Tax Law at the Faculty of Law and Criminology, VU Brussels and Professor on Taxation by Local Authorities at the Erasmus University Rotterdam from 2011 till 2015. A.W. (Arjen) Schep is postdoctoral research fellow at the Erasmus Study Centre for Taxation by Local Authorities (ESBL). Mrs. A.P. Monsma is research fellow at the Erasmus Study Centre for Taxation by Local Authorities (ESBL). Emails: miguel.de.jonckheere@vub.be, schep@law.eur.nl and a.monsma@law.eur.nl.

1 Regarding Belgium, the allocation of competences to levy taxes and the comparison with the situation in the Netherlands based thereon takes the situation of the Flemish local authorities as a starting point. Small differences exist as regards Walloon local authorities and local authorities in the Brussels-Capital Region.

2 In this article, fees are to be understood as payments for services rendered by the government, by which the person concerned has enjoyed a personal benefit, and whereby the amount is in a reasonable proportion to the importance of the service performed. *See* s. 3.2.2 below.

© 2019 Kluwer Law International BV, The Netherlands

regions (the Flemish and the Walloon Region and the Brussels-Capital Region), three language communities (the Flemish, French and German community), ten provinces and 581 local authorities. The provinces and local authorities are so-called decentralized administrations, meaning they have proper powers and competences that in tax matters are nevertheless subject to the administrative supervision by the regions, which will be discussed later on amongst other restrictions.

In principle, the Belgian local authorities are competent for everything that is of municipal interest. This includes both matters which the local authorities themselves deem of municipal interest and which have not been removed from their sphere of competence, and matters which have been attributed to the local authorities by higher authorities. Amongst others, their competences are related to civil registration, population registers, public works, social welfare, law enforcement, housing, education, etc.

2.1.2 *The Netherlands*

The constitutional system of (the Kingdom of) the Netherlands has been referred to as a decentralized, unitary state. The Netherlands is regarded as one, indivisible country, as a result of which local policies have to fit in the policies of the country as a whole. In this concept, the central government prevails over the twelve provinces and the 380 local authorities. The isles of Bonaire, St Eustatius and Saba (so-called BES-isles) have the legal status of public entity[3] (special local authority) and maintain a specific tax system.[4] The idea of decentralization entails that some of the responsibilities of the central government are left to other public bodies and their agencies, which are more or less independent from the central government. *Territorial* decentralization entails that provinces and local authorities have general legislative and administrative powers. *Functional* decentralization means that one or more branches of central government issues (functions) are left to other public bodies, such as the 'water boards'.[5]

Provinces are hierarchically situated between the central government and the local authorities. They fulfil tasks which the central government finds hard to fulfil because it is too big, and local authorities find hard to fulfil because they are too small. In the Netherlands, provinces have many competencies regarding environmental planning.

Both the central government, the provinces, the local authorities and the water boards have their own independent competences to levy taxes. The taxes provinces, local authorities and water boards can levy, are determined by legislation that is incorporated in coordinating laws: the Provinces Law (*Provinciewet*), Local Authorities Law (*Gemeentewet*) and the Water Boards Law (*Waterschapswet*), respectively. These laws contain both tax and non-tax provisions.

2.1.3 Figures[6]

	Belgium[7]	*Netherlands*[8]
Inhabitants	11.35 million	17.02 million
Number of local authorities[9]	581	380
Total proceeds municipal taxes	8.7 billion	9.7 billion
Proceeds per resident (EUR)	778	565[10]
% own levies as part of total income	52.8%	16%

In budgetary terms, municipal levies in Belgium account for approximately EUR 8.7 billion, or approximately 5.5% of GDP. In the Netherlands, municipal levies amount to EUR 9.7 billion, corresponding to 1.4% of GDP. In per capita terms, this amounts to EUR 778 for Belgium,[11] compared to EUR 565 in the Netherlands. In Belgium, local authorities receive 52.8% of their income

Notes

3 NL: Art. 134 Grondwet (Constitution).

4 Based on the Law regarding finances of the public bodies Bonaire, Sint Eustatius and Saba (*Wet financiën openbare lichamen Bonaire, Sint Eustatius en Saba* or *FinBES*). It concerns, e.g., the tax on lands and surtaxes on the real estate tax (Arts 43–52); the taxes applying for tourists (Art. 53); the tax imposed on rental cars (Art. 54); a road tax (Art. 55); parking fees (Art. 56); an advertising tax (Art. 59) and a sufferance tax (Art. 60). This article will not pay any further attention to the levies imposed by the BES-isles in this article.

5 Dutch water boards (Dutch: *waterschappen*) are regional governmental bodies charged with managing water barriers, waterways, water levels, water quality and sewage treatment in their respective regions.

6 A. Erauw & A. Dessoy, *De financiële situatie van de Vlaamse/Waalse/Brusselse lokale besturen*, Budget 2017, Research Belfius Bank (2017), https://research.belfius.be/nl/lokale-financien/ (accessed 6 Feb. 2019). Dutch figures derived from Statistics Netherlands (www.cbs.nl) and C. Hoeben, J. G. de Natris, M. A. Allers & J. Veenstra, *Atlas van de lokale lasten 2018*, COELO (2018), https://www.coelo.nl/images/rapporten/Coelo_Atlas_van_de_lokale_lasten_2018.pdf (accessed 6 Feb. 2019).

7 Erauw & Dessoy, *supra* n. 6, figures of 2017.

8 Hoeben, De Natris, Allers & Veenstra, *supra* n. 6, figures of 2018.

9 The local authorities and inhabitants are divided as follows: Flanders has 308 local authorities and 6.4 million inhabitants, the Brussels Capital Region consists of nineteen local authorities and 1.1 million inhabitants, and the Walloon Region, is divided into 262 local authorities and houses 3.5 million inhabitants.

10 The average amount of municipal taxes for a multiperson household in 2018 is EUR 721. Hoeben, De Natris, Allers & Veenstra, *supra* n. 6.

11 Figures for the Flemish region. For the Walloon Region: EUR 697, Brussels-Capital Region EUR 996.

from taxes; in the Netherlands, this is about 16%. Belgian local authorities receive the majority of their tax revenues, about 85%, from surcharges on the personal income tax and on the property tax. Local authorities may decide only whether they will raise surcharges, and what the levels of these surcharges will be. Regarding the 'own' taxes levied by local authorities, 30% accrues from taxes on public cleanliness, 22% from taxes on economic activities, 21% from 'patrimonial taxes',[12] 12% from levies on the use of the public domain and 6% from taxes on all kinds of administrative services. In the Netherlands, property taxes account for 41% of municipal tax income, other taxes (for instance parking taxes) account for 15%; sewage and waste processing taxes account for 34%; fees for services account for the remaining 10%.

2.2 *Fiscal Competencies*

2.2.1 *Belgium*

As mentioned above, Belgium has a so-called open system regarding municipal taxes. The Belgian Constitution does not, contrary to its Dutch counterpart, state that 'the central government decides what taxes are to be levied by local authorities', but instead that 'the municipal council regulates everything of municipal interest'[13] and that 'no municipal tax shall be levied without a decision to that end by the municipal council'.[14] This means that Belgian local authorities may, in principle, introduce every kind of taxation one could think of. The only limitations to this tax competence are the legal exceptions introduced by federal law 'in case of apparent necessity',[15] the regional 'administrative supervision'[16] and of course the necessity to respect higher constitutional and international rules and general principles of law. Thus, Belgian local authorities may impose taxes on various economic activities (like breweries and newspaper sales, but also banking activities), on all kinds of movable or immovable property (factory premises, vacant or dilapidated buildings, bicycles, etc.), on municipal services or on certain aspects of wealth (swimming pools, tennis courts, etc.). As of today, about 100 municipal taxes exist in Flanders.

A consequence of this fiscal autonomy is that although they might bare the same name, taxes in neighbouring local authorities can have a completely different taxable fact, taxable person or calculation base. The fiscal autonomy indeed entails that every local authority decides what they will tax, who will be liable, which exemptions will be granted, what is the calculation basis and what are the rates.

Besides taxes, local authorities may also levy fees on services performed in their capacity as public authority to persons that particularly benefit from these services. However, the aforementioned fiscal autonomy allows local authorities to choose between a tax or a fee, so that fees for individual services rendered may be introduced as a tax.[17]

2.2.2 *The Netherlands*

Compared to the open system of municipal taxation in Belgium, the Dutch system can be described as closed. Local authorities may levy taxes only if and to the extent that the national legislature (defined in the Constitution as the Cabinet and Parliament acting in concert) has given them the power to do so.[18] This means that local authorities may introduce only those taxes that have been stipulated in a law and are subsequently bound by any restrictions set therein. Some of these restrictions will be discussed later in this article. Twelve Dutch municipal levies are based on the Local Authorities Law (*Gemeentewet*).[19] Two more municipal taxes have been made possible by special laws.[20] The taxes levied by water boards are based on the Water Boards Law (*Waterschapswet*) and the provincial taxes are based on several laws. Local authorities violate the principle of legality if they exceed their legally attributed competencies. In that case, the contested part of the tax regulation would be declared void.

The legal provisions usually are very brief in their description. Because of this, Dutch local authorities often have more freedom in drawing up their tax regulations than one might first think. After the major change in the Local Authorities Law in 1995, local authorities are

Notes

[12] These include various levies, such as a tax on used building parcels, taxes on second residences, on building and on remodelling and on vacant or dilapidated buildings.

[13] BE: Art. 41 Constitution, coordinated on 17 Feb. 1994.

[14] BE: Art. 170, § 4 Constitution.

[15] BE: Art. 170, § 4, 2° Constitution.

[16] BE: Art. 162, 2de lid, 6° Constitution.

[17] BE: Rb. Brussels, 30 May 2012, no. 2009/AR/1537, LRB, 2012, no. 3, 105.

[18] NL: Art. 132 Constitution, in conjunction with Art. 219 Local Authorities Law (Gemeentewet).

[19] These are taxes on immovable property (Art. 220-220h); taxes on movable property (Art. 221); taxes on commuting (Art. 223); a tax levied from tourists (Art. 224); parking taxes (Art. 225); dog license taxes (Art. 226); advertising taxes (Art. 227); sufferance taxes (Art. 228); sewing charges (Art. 228a) and fees on utility, pleasure and amusement rights (Art. 229).

[20] These are the waste tax in respect of the disposal of household waste, which is levied based on the Environmental Protection Law (*Wet milieubeheer*), Art. 15.33, and the BIZ-Contribution in BI-Zones (Business Investment Zones), based on the BI-Zones Law (*Wet op de BI-Zones*).

explicitly allowed to set the tax base and rate, if not yet laid down in this Local Authorities Law. Furthermore, using a municipal tax or fee as a policy instrument is allowed.

2.3 *Limitation of Municipal Tax Competences*

2.3.1 *Belgium*

As noted, Belgian local authorities may levy any tax, except for legal exceptions in case of apparent necessity, restraints following administrative supervision and the necessity to respect higher rules and principles.

2.3.1.1 Legal Exceptions in Case of Apparent Necessity

The legal exceptions in case of apparent necessity can be divided into three categories. The first category makes it impossible for local authorities to levy taxes *on matters already taxed by the federal government.* The most important provision in this respect is Article 464(1) of the Income Tax Law (*Wetboek Inkomstenbelastingen*), which prohibits local authorities from raising surcharges on the different income taxes introduced by the Income Tax Law, or from raising similar taxes on the amount or taxable bases of those income taxes (except for surcharges on the property tax). Likewise, local authorities are also prohibited from raising surcharges or similar taxes on matters subject to the gambling tax and to road taxes.

The second group of exceptions to the tax competence of local authorities prohibits taxes *of a certain nature* or taxes *on certain goods or services.* This includes for example the prohibition of octroy taxes,[21] taxes on cattle,[22] on funeral services,[23] on certain types of public entertainment[24] and on the use of the public domain by telecom operators.[25] This group also includes legal provisions prescribing the gratuitousness of certain operations, such as issuing certain administrative documents.

Finally, the third category consists of *subject oriented constraints*, causing certain subjects to be exempt from all or a limited number of municipal taxes. Examples include b-Post (Belgian Post Services) and the Vlaamse Radio- en Televisieomroeporganisatie (Flemish Broadcasting Services).

It is worth mentioning that under Belgian law, legal provisions allow local authorities to levy taxes that surpass their constitutional tax competences i.e. to levy taxes which they could not introduce based on their constitutional competencies. One example is the municipal tax on undeveloped building land. These provisions are the result of the widely supported view that local authorities do not have the power, under the Belgian Constitution, to introduce taxes that lack a primarily fiscal motive, as in this case (preventing land speculation). Without the aforementioned legal provisions, only the central or regional legislature would be allowed to introduce taxes that have a primarily non-fiscal motive.

2.3.1.2 Administrative Supervision

The constraints on municipal tax levying powers due to the administrative supervision entail that the supervising authority may assess whether municipal tax regulations are in accordance with the law and with the public interest. If a conflict arises, and depending on the region concerned, the supervising authority may either nullify the municipal tax regulations or refuse approval.

Since the state reforms of 2001, the regions are responsible for both organizing and executing administrative supervision. As a result, the form, content and procedure of administrative supervision differs, depending whether the local authority is part of the Flemish Region, the Walloon Region or the Brussels Capital Region. Whereas the administrative supervision on municipal taxes in the Flemish and Brussels Capital Regions takes place in the form of suspension and nullification, the Walloon Region has chosen a mechanism of supervisory approval. Regarding content, there is also a notable difference, as in the Flemish Region a specific definition was given to the concept of public interest, being any interest that is of higher importance than the local interest.[26] As a result, the supervising authority is no longer able to suspend or nullify a municipal tax regulation based on the assessment that the regulation would violate interests of the local authority itself. In other regions, however, this is still possible.

Notes

[21] Octroy taxes (in Latin, *vectigalia*) were municipal taxes collected on various articles brought into a local authority for consumption. They were abolished by Law of 18 July 1860 (*Wet van 18 juli 1860 betreffende de afschaffing van gemeentelijke octrooien*, B.S 18 July 1860).

[22] BE: Art. 464(2) Wetboek Inkomstenbelastingen [Income Tax Code].

[23] BE: Wet van 28 januari 1975 betreffende de gemeentebelasting op het lijkenvervoer, B.S., 4 Sept. 1975 [Law of 28 Jan. 1975 concerning the municipal taxes on funeral transport].

[24] BE: Wet van 24 Dec. 1948 betreffende de gemeentelijke en provinciale financiën, B.S., 6 Jan. 1949 [Law of 24 Dec. 1948 concerning local and provincial finances].

[25] BE: Wet van 21 maart 1991 betreffende de hervorming van sommige overheidsbedrijven, B.S., 27 Mar. 1991 [Law of 21 Mar. 1991 concerning the reform of certain public enterprises].

[26] BE: Art. 249 Gemeentedecreet [Local Authority Decree].

2.3.1.3 Higher Rules and Principles

The third constraint on the municipal tax autonomy is the necessity to respect higher rules and principles. From the very beginning of the Belgian state, legal authors and judges have raised questions on the reconcilability of municipal tax levies with constitutional provisions or with general principles of tax law. This concerns not only principles explicitly laid down in the Belgian Constitution (like the principle of equal treatment and the principle of legality), but also principles derived from the Constitution, such as the principle of territorial limitation and the principle of non-retroactivity. Municipal taxes, of course, must be in compliance with European law. Furthermore, there are other rules and principles that constrain municipal tax competences. In this category, one could think of the principle of *non bis in idem*,[27] the principle of tax exemption for goods used for public services, the necessity of a financial need and of a primarily fiscal goal, the prohibition of taxes levied on taxable facts that the local authority has caused itself,[28] the principle of proportionality, the principle of legal certainty and the principle of the (internal) economic and monetary union. These rules and principles do not only serve as an interpretation mechanism for municipal tax regulations, but also constrain the tax competencies of the local authority.

In comparison with the Netherlands, it seems fair to conclude that, because Belgian communities enjoy a very wide fiscal autonomy, stricter constraints have also been imposed on their competencies. Conversely, the criteria for levies to qualify as fees, which are essential in a system of closed tax competence such as in the Netherlands, are far less relevant in the Belgian open system. Because of the fiscal autonomy enjoyed by Belgian local authorities, if it cannot be a fee … it may be levied as a tax. This topic will be considered in section 3.

2.3.2 *The Netherlands*

With a system of open tax competence, as is the case in Belgium, a series of specific prohibitions and exceptions limiting the freedom of local authorities is necessary, as has been discussed above. In the Netherlands, the fiscal autonomy of local authorities is limited to an exclusive and exhaustive description of the possible forms of taxation in the respective laws. Further legal or non-legal restrictions on municipal tax competences are therefore relatively rare. These additional restrictions mainly concern the way in which local authorities can work out their municipal tax regulations in more detail.

In short, the limitation of the local competence to raise taxes in the Netherlands is threefold. First, as a consequence of the closed system, local authorities are bound by the principle of legality. Second, local authorities have to stay within the boundaries of higher legislation (such as laws, the Constitution and treaties) and – written and unwritten – principles of proper legislation and good administration (such as the principle of equality). Third, the assessment standard may not be made directly dependent of personal income, business profit or capital/wealth. The reach of these limitations will be discussed hereafter.

The requirement that municipal tax regulations should be approved in advance by the Crown was abolished in 1996.[29]

2.3.2.1 Principle of Legality and Higher Legislation

In the Netherlands, there are a number of overarching laws for imposing and collecting tax assessments and the forms of legal protection against them.[30] Therefore, the same rules apply, regardless of whether it concerns taxes imposed by the central government or by local authorities.[31] One important difference between taxes imposed by the central government and those imposed by local authorities, however, is that regarding the former, the material tax liability arises directly from the tax law, whilst regarding the latter, the material tax liability may arise only when laid down in local regulation, adopted by the legislative body of the local government (in the case of local authorities, this is the democratically elected municipal council). To be able to effectively levy a municipal tax, a local regulation (usually one for each tax levied) must be adopted, containing the so-called *essentialia*: a description of the taxable person, the subject of taxation, the taxable fact, the assessment standard, the rate, the starting and end date of taxation and other relevant aspects concerning levying and collecting the introduced tax.[32]

Notes

[27] With all the restrictions proper to this principle, as it does not apply for taxes of different governments, deliberate exceptions etc.

[28] For example no destination based tax can be levied on a sewage system built by the local authority without the necessary building permit.

[29] Previous to 1996, tax regulations were subject to approval by the Crown, which gave its opinion after receiving advice from the provincial Executive Council (*Gedeputeerde Staten*) and the Minister of Internal Affairs (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*), based on NL: Art. 218-218b Local Authorities Law (*Gemeentewet*).

[30] These are the General Administrative Law (*Algemene wet bestuursrecht*, Awb), the State Taxes Law (*Algemene Wet inzake Rijksbelastingen*, AWR) and the Collection of State Taxes Law (*de Invorderingswet 1990*, Inv).

[31] For local authorities, separate arrangements apply regarding certain aspects, for instance the prohibition to levy taxes based on income. This subject will discussed more elaborately below.

[32] NL: Art. 217 Local Authorities Law (*Gemeentewet*).

Under the principle of legality, the determination of the *essentialia* must stay within the boundaries set by higher regulation and principles. Stretching out the tax competence beyond these boundaries is not permitted and such municipal tax regulations will be declared void in court.

The prevailing view in Belgium that local authorities do not have the competence to introduce a tax with a primary non-fiscal motive, has not found a lot of support in the Netherlands. In fact, in the latest *grand revision* of the substantive municipal tax law provisions in the Dutch Local Authorities Law, the national legislature explicitly stated that a more instrumental approach of municipal taxes is not only permitted, but should even be stimulated.[33] This has explicitly been laid down in the Local Authorities Law, by stipulating that local authorities are free to determine the tax bases in their municipal tax regulation, save for explicit legal regulations or prohibitions.[34]

This municipal free choice of tax base and rate is of course, as indicated in Parliament, limited by general principles of law, such as the principle of equality and the principle of proportionality. Section 4.2.2 will return to this topic.

2.3.2.2 Prohibition of Taxation Based on Ability to Pay

Another constraint on the freedom of determination of the tax assessment standard and rate is the legal prescription that a municipal tax (levying standard and/or rate) may not be based directly on income, profit or capital.[35] Although Belgian municipal tax autonomy is apparently greater, Dutch case law provides for some freedom, as well. This will be discussed further in section 4.3.1.

3 TAXES, DESTINATION-BASED LEVIES AND FEES

3.1 *Introduction*

At first glance, the difference between an open and closed municipal tax system seems fairly simple. In a closed system, local authorities may levy only taxes allowed by the central legislature, while local authorities in an open system may introduce any non-prohibited tax. The choice for an open or closed system, however, entails other far reaching consequences, which can be illustrated by the relationship of taxes with fees and retributions.

3.2 *Belgium*

3.2.1 *Legal Basis and Importance of the Distinction*

The municipal competence to levy fees, rights or retributions is based on Articles 41 and 162 of the Constitution, which empower local authorities to regulate all matters of municipal interest, and on Article 173 of the same constitution. This provision states that: 'except for the cases explicitly excluded by law or decree, fees may be claimed from citizens only in the form of taxes on the benefit of the state, the community, the region and the local authority'.

This provision was included in the Constitution to prevent the government from using retributions to provide itself with means without having to comply with constitutional requirements applying on the process of obtaining fiscal resources.[36] From this provision, it can be deduced that fees should be distinguished from taxes, and that local authorities do have the competence to levy fees within the scope of their municipal interest. Furthermore, one can conclude that fees should be introduced as taxes – that is, with respect of the same Constitutional requirements, except for cases explicitly excluded by law or decree.

This last observation immediately highlights the most important legal consequence of the distinction between taxes and fees or rights. Although Article 173 of the Constitution is intended to prevent fees from being abused to escape the constitutional fiscal requirements, the exception still allows the federal or regional legislature to do otherwise. Because of this, the legislature may restrict itself to determine in which *cases* fees or rights may be levied, thus leaving the other regulating issues to the administration. The possibility that taxes are wrongly classified as fees – and therefore the possibility of the principle of legality being deliberately and falsely circumvented – remains therefore open.

In the absence of federal or regional law allowing municipal councils to delegate parts of the *essentialia* of fees to the executive authorities, this was a mainly academic observation with no real practical consequences.[37] This changed with the Decree of the Flemish Parliament

Notes

[33] NL: Documents of the House of Representatives 1989/1990, 21 591, no. 3, at 32–33, 65–67 en 77–78, http://www.statengeneraaldigitaal.nl (accessed 6 Feb. 2019).

[34] NL: Art. 219 (2) Local Authorities Law (*Gemeentewet*) as from 1995.

[35] NL: Art. 219 (2) Local Authorities Law (*Gemeentewet*).

[36] A. Alen & B. Seutin, *De staatsrechtelijke verdeling van fiscale bevoegdheden*, in *Actuele problemen van fiscaal recht*, XV postuniversitaire lessencyclus Willy Delva 1988-89, 341 (M. Storme & S. van Crombrugge eds, Kluwer 1989); B. Peeters, *De begrippen belasting, last en retributie in de artikelen 110 en 113 van de Grondwet*, Rechtskundig weekblad 241, 247 (1987/1988).

[37] Without delegating possibilities for fees, there is no difference in the way taxes and fees have to be decided by the municipal council.

of 23 January 2009,[38] which granted the Flemish Municipal Councils the possibility to delegate powers for setting the rate(s) and the collection procedures of fees to the executive municipal authorities.[39] This rule was recently amended by a Decree of 18 May 2018, stipulating that the power to determine the exemptions or reductions of fees may not be delegated.

3.2.2 *Concept of Fees*

Today, fees are primarily defined as payments for *services rendered by the government*, from which the *person concerned enjoys a personal benefit*, and whereby *the amount is in a reasonable proportion to the importance* of the performed service. A fourth criterion of voluntary use of the service that was set in a Royal Decree of 1819, is no longer considered a requirement for defining a fee by the judiciary.[40]

The criterion that a fee has to relate to a *service provided by the government* has never caused serious problems, as it has a broad scope. It also covers the administrative services provided by the government, like connecting a building on the municipal sewage network, as the compensation for non-compulsory fire interventions (like freeing a cat from a tree). The (exclusive) use of goods in the public domain of the local authority for the benefit of markets, fairs and construction works, is generally also considered services for which fees may be levied. The same applies for the use of port infrastructure and the use of swimming pools, sports facilities, libraries and museums.

The second condition traditionally held that the fee was collected only following an individual *service rendered to the concerned person.* The fee should, in other words, be paid directly and immediately in return for the service enjoyed by the concerned person, and that person must be the only or main beneficiary of the service.[41] This criterion has evolved into the present criterion of individual benefit from the service performed. The service may, in other words, not mainly be beneficial to a community as a whole. A processing plant for sewage has certain advantages for the pollutants, but processing waste is chiefly intended to serve the community as a whole, so the charges paid for these services cannot be categorized as fees.

Finally, there is the criterion of fair compensation for the services provided, or – as stated in the Royal Decree of 1819 – that the amount of the fee may take only the rendered services themselves in account. However, in case law, Belgian judges appear to pay no more than lip service to this criterion. The specific services for which a fee is specifically asked are almost never subject to any enquiry, and any data on the costs of these services appear to be completely irrelevant.[42]

The judiciary basically limits itself to the question as to whether it is manifestly unreasonable (marginal scrutiny) to claim that the fee constitutes a fair compensation for the service rendered. A typical example was the ruling of the Supreme Court that the 'fee for long-term parking', which was four times the aggregate amount of fees on short-term parking, 'still maintained a reasonable relationship with the rendered performance'.[43]

The traditional view, i.e. that the compensation may take only the services themselves into account, is no longer being adhered to. Many local authorities charge different rates for the same services depending on whether the person enjoying the service is an inhabitant of the local authority. Furthermore, the Flemish supervising administrative authority itself promotes the use of 'steering and policy supporting fees by, for example, determining the rate', and stating that 'the cost covering criteria for fees still allow some variations'.[44]

However, with regard to both the elimination of the requirement of voluntary use and the soft interpretation of the concept of fair compensation, the question arises whether this lenient interpretation has not been the result of the fact that until shortly the *essentialia* of both fee-regulations and municipal tax legislation had to be determined by the municipal council. The recently introduced possibility to transfer certain powers concerning municipal

Notes

[38] BE: Art. 43, 15° Municipal Decree of 15 July 2005 (now Art. 41, 14° of the decree local administration of 22 Dec. 2017), as amended by Art. 29 of the Decree of 23 Jan. 2009, which from now on only marks the right to 'establish the authority to levy fees and terms thereof' as non-delegable.

[39] BE: Gedr. St. Vl. P., 2008-09, no. 1946/1, 10.

[40] After discussions, *see* e.g. the literature: C. Ketelaer, Gemeentebelastingen, TBP, 1948, 82; J. Vandenbossche, *Handboek over de financiën en de comptabiliteit der gemeenten en gemeentebedrijven* 25 (West-Vlaamse School voor Bestuursrecht 1956); J. Van Der Borgt, *Iets over plaatsrecht van tafels en stoelen of uitstallen van waren op de openbare weg* 24–27 (T. Gemeenteontvangers 1948); R. Wilkin, *Les taxes communales* 31 (Bruylant 1943); M. Bourgeois, *Contribution à l'étude de la notion d'impôt en droit belge. Contours, singularité et utilité d'un concept juridique*, unpublished doctoral thesis, ULg (2007). *See also* case law of the Supreme Court: BE: Cass., 16 Feb. 1951, Pas., 1951, I, 390; BE: Cass., 20 Feb. 1972, T. Gem., 1973, 257; BE: Cass., 2 Feb. 1977, Pas., 1977, I, 601; BE: Cass., 20 Feb. 1986, FJF, 86; BE: Cass., 28 Jan. 1988, BE: Arr. Cass., 1987-88, 661; BE: Cass., 19 June 1972, Pas., 1972, I, 952 and the case law of the Administrate Dispute division of the Council of State: BE: RvS 10 Dec. 1963, Arr. RvS 10320 and *De Gem.*, 1964, 545; BE: RvS 10 May 1963, Arr. RvS 10018; BE: RvS, 8 Mar. 1973, Arr. RvS 15749; BE: RvS, 24 Mar. 1981, Arr. RvS 21061 & TBP 1981, 615.

[41] J. Velaers, *De Grondwet en de Raad van State afdeling wetgeving* 610 (Maklu 1999).

[42] A rare judgment which addresses the underlying performances is for example BE: Rb. Ghent, 17 Mar. 2009, no. 2008/AR/958 (Bruges), LRB, 2009, no. 2, 166 ('Finally, the plaintiff wrongly considers charges of EUR 30 disproportionate to the services provided by the government. The plaintiff has not submitted any evidence sustaining this view. In any case, it is clear that, when services consisting of parking space are provided, it is presupposed that the government has the required land at his disposal, performs the necessary works on infrastructure or has these works performed, provides the necessary signalling, works out regulations, commits staff to enforce those regulations, etc. This represents a total cost, sufficiently high to justify a fee of 30 euro in return for using a parking lot in a "blue zone" for more than 2 hours'.).

[43] BE: Cass., 10 Sept. 1998, no. C.97.0290.F/1 (Verviers), LRB, 1999, no. 2, 83; BE: Cass., 10 May 2002, no. C.01.0034.F (Verviers), LRB, 2002, no. 4, 224.

[44] *See also* Circular BA-2011/01 of 10 June 2011 on the coordination of instruction on municipal taxes, B.S. 04 Sept. 2011.

fees might well have, as a result, that the compliance rules for fees and the control of that compliance will be tightened in the years to come.

3.3 *The Netherlands*

Another consequence of the closed system of tax competences of local authorities being operated in the Netherlands is that, in principle, the legislature has decided whether a charge can be characterized as a general tax or as a fee. Local authorities cannot design a tax as a fee or a fee as a tax. With the exception of fees and taxes, Dutch legal scholars have distinguished an intermediate category of charges: destination based taxes.

3.3.1 *Tax Categories*

General taxes can be characterized as forced payments to the local authority, whilst the local authority does not offer any direct, individual performance in return. Revenues go to the general funds of the local authority and may be spent by the local authority as it sees fit.[45]

Fees (duties) can be distinguished from general taxes because they are levied regarding a specific, individual service rendered by the government, acting in its governmental capacity. There are no fees due when the government has not rendered any services. Furthermore, it is required by law that the rates are established in such a way that the projected benefits do not exceed the projected costs.[46] The term of fees covers many levies, based on enjoying municipal services or the use of municipal property.[47]

A *destination-based tax* can be distinguished from a general tax because the former entails a form of cost recovery. The costs of certain municipal facilities are allocated towards a group of benefiting taxable persons. Regarding destination based taxes, the service provided by the government does not, unlike fees, have to render any individual profit, and does not, unlike general taxes, have to render general profit, but it does have to render a profit for a group.[48] In this way, destination-based taxes are an instrument of allocation: the tax burden is distributed among those who benefit of the corresponding municipal service ('profit principle') or who cause municipal costs ('the polluter pays-principle'). Another characteristic is the relation between costs and the tax, which limits the rates: the tax income may not exceed the related costs.

In the Netherlands, the legislature defines by law the nature of a tax. Because of this, sometimes the nature of a tax as defined by law may also change. This recently occurred regarding sewage: previously, sewage *fees* were due; now, a sewerage *tax* is levied, because municipal sewage is experienced as a collective rather than as an individual service. Moreover, as a result of the amendment, the local authority can recover more costs than before: not only costs of collecting and disposing of sewage, but also costs regarding the water system (groundwater and rainwater), and replacement – and expansion investments can be recovered because of the conversion.

If the legislature changes the character of a levy, the side effect may be that local authorities try to off-set the changes by using another levy. After the so-called amusement tax was converted into an amusement fee,[49] a number of local authorities started raising taxes on staying in venues previously taxed by the amusement tax. The Dutch Supreme Court ruled that, in these cases, local authorities were not allowed to raise an amusement tax in disguise.[50]

However, a new line in case law has emerged recently, granting an exception from the principle that the legislature determines the character of the tax. In a judgment about dog licenses, the Dutch Supreme Court ruled that the local authority is free to limit a general tax (such as dog licenses) so that the revenues are used to meet the costs arising from keeping dogs and affiliated facilities.[51] In other words, the general tax – as intended by the legislature – of dog licenses can be restricted to a destination-based tax by the municipal council itself. In this case, the local authority had restricted the dog license tax to the built-up area of the local authority, because only in this area had the local authority erected facilities to counter the nuisance of dogs (feaces).

Based on this judgment, many local authorities in the Netherlands restricted advertising taxes to a certain area in the local authority, as well.[52] section 4.3.2 will

Notes

[45] Dutch local authorities can levy the following general taxes: taxes on immovable property, taxes on movable property, commuter taxes, tourist taxes, parking taxes, dog tax, advertising taxes and sufferance taxes.

[46] NL: Art. 229b Local Authorities Law (Gemeentewet).

[47] Fees levied in the Netherlands include: cleaning fees, funeral services fees, burial fees, fire department fees, fees for permits and official documents, harbour fees and market fees.

[48] Dutch destination-based taxes are the betterment levy (*baatbelasting*), the sewerage tax and the waste tax.

[49] NL: Art. 229 (1) (c) Local Authorities Law (Gemeentewet).

[50] NL: RvS, 30 Mar. 1983, no. 21.535, Belastingblad 1983, at 289; NL: RvS, 13 Jan. 1988, no. 25.129, Belastingblad 1988, at 132.

[51] NL: RvS, 21 June 2000, no. 33.816, ECLI:NL:HR:2000:AA6253.

[52] In this case, the proceeds of advertising taxes are paid into a 'fund', which is managed by the entrepreneurs from whom those taxes have been levied. These entrepreneurs can consequently use the means available for making collective investments in the area concerned. On this development, *see extensively* A. W. Schep, *Naar evenwichtig bijzonder kostenverhaal door gemeenten (Towards Balanced Cost Recovery by Local Authorities)*, dissertation Erasmus Universiteit Rotterdam (Kluwer 2012).

consider territorial differentiation of taxation by local authorities in further detail.

3.3.2 *Provisions for Fees*

Under Article 229 of the Local Authorities Law, fees can be charged both for services provided by the local authority and for using municipal property.

Most case law concerns the first category of service fees. Because of the principle of legality, the local authority may charge a service fee only if a *service* is provided. In the courts' decisions, a service is defined as (i) activities not involving the execution of public authority tasks and (ii) activities directly and predominantly related to service delivery for a benefit that can be individualized. As to be expected, this definition leads to many disputes. Significant judgments have been rendered about fees for European identity cards, requests for public information and extra safety screening in permit applications for escort service companies. In the case of the delivery of a European identity card, the Supreme Court judged it not to be predominantly in the individual interest of the applicant, but to be in the field of the execution of public authority tasks, as every citizen is obliged to be able to prove his identity in case asked by the authorities (for public safety reasons) and this European identity card is the indicated way to do so. The delivery of a European identity card therefore cannot be regarded service provision.[53] The same line of reasoning applies to the providing of public information on request: in that case, the Court held that public information itself should be free of charge, and only the costs of the requested way of providing (for example costs of copying) may be charged.[54] Also, the special safety screening for a permit for escort companies is considered to be the task executed by a public authority and, thus, cannot be seen as a service delivered by the local authority.[55]

A second topic in the case law on fees is the so-called 'non-profit-rule', expressed in Article 229b of the Local Authorities Law. Under this provision, 'the rate must be determined in a way the estimated revenue of the fees won't exceed the estimated related costs'. In recent years, judges have increasingly scrutinized the calculation of costs and benefits related to the fees charged. In a number of judgments, the Supreme Court has interpreted the way in which the judicial review of the non-profit-rule should be executed. First of all, the non-profit-rule should be applied to the Fee Regulation as a whole and not to separate services mentioned in the regulation. This means that cross-subsidization is allowed.[56] Second, the estimated costs and benefits should be the figures mentioned in the municipal annual budget, whereas these may be worked out later on in detail as long as the calculation follows the municipal budget.[57] The calculation of costs and benefits must be tested against the accounting rules for local authorities, which contain for example rules for making provisions.[58] Only attributable costs may be taken into account, those are both direct costs of the municipal services and indirect costs as far as they are more than marginally linked to the service (i.e. more than 10%).[59] The burden of proof is on the local authority to demonstrate that they correctly applied the non-profit-rule. The Supreme Court has developed a special scheme for the application of the burden of proof in fees' cases.[60] The ultimate consequence of the local authority's not fulfilling the non-profit-rule can be a void-declaration of the Fee Regulation by the court. This is the case only if the revenue of the fees exceeded the costs by at least 10% and the excess was obvious in advance.[61] In the case of smaller excess, the rate will be reduced by the court itself and the assessment will be reduced accordingly.[62]

Last but not least, the local authority is granted a wide competence to set the assessment standard and rate for its fees. For example a fixed rate is allowed, as well as a (digressive or progressive) rate dependent of the benefit or amount of service received. For building permits, a rate dependent on the building contract value or construction price is allowed and also (progressive and digressive) rate classes are allowed.[63] Also instrumental use (for example stimulating sustainability via lower rates) is accepted.[64] In the local authority of The Hague for example, a discount on building permit fees is given in case of fulfilling

Notes

[53] NL: RvS, 9 Sept. 2011, no. 10/04967, ECLI:NL:HR:2011:BQ4105.

[54] NL: RvS, 8 Feb. 2013, no. 12/00529, ECLI:NL:HR:2013:BZ0693.

[55] NL: RvS, 28 Oct. 2016, no. 15/05569, ECLI:NL:HR:2016:2426.

[56] NL: RvS, 14 Aug. 2009, no. 43.120, ECLI:NL:HR:2009:BI1943.

[57] NL: HR, 6 Jan. 2012, no. 10/03677, ECLI:NL:HR:2012:BR0689, no. 10/03697, ECLI:NL:HR:2012:BR0707 and no. 10/03676, ECLI:NL:HR:2012:BR0676.

[58] *Ibid. See also* NL: RvS, 16 Jan. 2015, no. 13/04173, ECLI:NL:HR:2015:67.

[59] NL: RvS, 4 Apr. 2014, no. 12/02475, ECLI:NL:HR:2014:777.

[60] NL: RvS, 24 Apr. 2009, no. 07/12961, ECLI:NL:HR:2009:BI1968 and NL: RvS, 4 Apr. 2014, no. 12/02475, ECLI:NL:HR:2014:777. For a nice example of applying the scheme of the Dutch Supreme Court, *see* NL: Hof. Arnhem-Leeuwarden, 16 Jan. 2018, no. 16/01084, ECLI:NL:GHARL:2018:398.

[61] NL: RvS, 10 Apr. 2009, no. 43.747, ECLI:NL:HR:2009:BC3691 and NL: RvS, 13 Apr. 2012, no. 10/03650, ECLI:NL:HR:2012:BU7248.

[62] NL: RvS, 3 Nov. 1999, no. 34.616, ECLI:NL:HR:1999:AA2917.

[63] NL: RvS, 30 June 2017, no. 16/05127, ECLI:NL:HR:2017:1174.

[64] NL: Documents of the House of Representatives, 1989-1990, 21,591, no. 3, at 65, http://www.statengeneraaldigitaal.nl (accessed 6 Feb. 2019).

special sustainability standards, such as the reuse of materials and energy-neutrality.[65]

3.4 *Conclusion*

In both Belgium and the Netherlands local authorities can, in addition to taxes, also charge fees, which are broadly defined in both countries as charges for individual services provided by the government. If a fee does not meet this definition and the criteria arising from it, the fee may be introduced as a tax in Belgium without any problem; however this is not possible in the Dutch closed system. In the Netherlands, local authorities have to exactly comply with the limits laid down in the law so that a charge will qualify as a fee; in Belgium, this is hardly an issue. Belgian local authorities have made taxes of a lot of retributions. Contrary to the Netherlands, in Belgium the specific formal tax rules concerning the levying and collecting of taxes do not apply on fees. By turning retributions into taxes, local authorities gain access to the formal tax legislation to assess, levy and enforce the charges that must be paid for services rendered.

The distinction between taxes, destination-based taxes and fees has a different importance in both countries. In the Netherlands, there is a strict separation, while the distinction is more flexible in Belgium. Consequently, this leads to a difference in the judicial review of both types of levies. It can be concluded that the strict distinction and the differences in the review in the Netherlands are the direct results of the closed system, and that the higher degree of flexibility for Belgian local authorities is the result of the open system that applies there. Furthermore, the situation in the Netherlands suggests that the amount of municipal tax autonomy decreases depending on the type of levy. The Dutch local authorities enjoy the most freedom in determining the tax rate and the spending of the proceeds with the so-called general taxes. Next in line are the destination-based taxes, where tax liability is linked to group profit and where the proceeds are labelled and must be used to cover the cost of certain facilities. For example the proceeds of the waste tax serve to cover only the costs of collecting and treating household waste. The proceeds may therefore not be added to the general funds of the local authority. When it comes to fees, Dutch local authorities do not experience much autonomy, as these may be levied only if the person charged gains an individual profit from the service performed. Moreover, the fee may not recover more than (direct and indirect) costs associated with the service for which the fee is being levied. The ultimate sanction for exceeding these standards regarding destination-based taxes and fees is that the tax regulation will be deemed (partially) void. Section 4.2 will consider judicial review more in detail.

4 Local fiscal authorities in practice: the relationship between local competencies and constraints on these competencies

4.1 *Introduction*

This section examines the degree of legal control on municipal taxation in both countries, as well as the (limiting) influence of so-called general principles of tax law on local fiscal autonomy. What consequences do they have in countries operating either an open or closed system of municipal tax competence? Is the Belgian system really so open that there are hardly any constraints on the competencies of the local authorities, or, on the contrary, has the fiscal autonomy of local authorities been limited firmly by the use of (real or perceived) constraining principles by the judiciary? And is the Dutch system effectively so closed that, on a local level, there is no margin for error, or is there still some discretionary margin for local authorities which is less examined by the judiciary, just because of the strict legal basis of municipal taxes?

Below, the authors first discuss how judicial control of municipal taxation has been organized, and what exactly the object of judicial scrutiny is. Next, they examine how constraining rules and principles in both countries are applied in practice.

4.2 *Judicial Control of Municipal Taxation*

4.2.1 *Belgium*

4.2.1.1 Organization of Judicial Control

As is the case in a lot of other state – and administrative affairs, the Belgian system of judicial control of municipal tax regulations and tax assessments is rather complicated. Legal control mechanisms can be divided into three categories depending on the aim or scope of the control mechanism, but also with regard to the competent jurisdiction. As with regards to the latter, one can distinguish between the competence to control the tax regulation itself, the competence to control the tax assessments and the competence to control the legal provisions that regulate municipal taxes.

Notes

[65] NL: Gemeente Den Haag, Korting op bouwleges krijgen, https://www.denhaag.nl/nl/vergunningen-en-ontheffingen/bouwvergunningen/korting-op-bouwleges-krijgen.htm (accessed 6 Feb. 2019).

Council of State

The Council of State (*Raad van State*, RvS) is the competent court for proceedings against the municipal tax regulations themselves. This concerns both the procedure to declare municipal tax regulations void, which every interested party may invoke within sixty days following publication of the tax regulation, and appeals of the local authorities against the annulment of a municipal tax regulation by the supervising governmental authority.[66] The Council of State nullifies a municipal tax regulation in the event of a breach of important rules of procedure, in case of *détournement de pouvoir* or when the local authorities exceeded their powers. The annulled (part of the) regulation is deemed to have never existed, so that each person (including others than those who initiated the legal proceedings) can reclaim paid taxes. When investigating whether local authorities have exceeded their powers, the Council of State examines the relevant municipal tax regulation in view of all possible higher standards, including general principles of law, constitutional rules and provisions of international law.

Ordinary Courts

Ordinary courts are competent for the actual tax assessments based on municipal tax regulations. The following courts are competent, in chronological order, the Courts of First Instance (*Rechtbank van Eerste Aanleg*, Rb.), the Courts of Appeal (*Hof van Beroep*, HvB) and the Supreme Court (*Hof van Cassatie*, Cass.). However, before a case can be brought before a Court of First Instance, the taxable person must first conduct an administrative appeal with the Mayor and the Executive Board (*College van burgemeester en schepenen*) which established the tax assessment. This must be done within three months following the notification of the individual tax assessment note. Within a period of three months following the decision concerning the administrative appeal or – if no decision was notified – after six or nine months following the administrative appeal, the case may then be brought before the Court of First Instance.

An appeal against the decision of the Court of First Instance may be made before the Court of Appeal within one month of the notification of the verdict of the Court of First Instance.

Finally, the Court's decision may be contested before the Supreme Court. This Court investigates whether the law has been applied correctly and whether the rules of procedure have been complied with; it does not give judgments on mere factual matters. Although the courts mentioned above essentially only verify the validity of tax assessments, a lawful tax assessment presupposes that the tax regulation is also valid. The judicial review therefore includes both the legality of the municipal tax assessment and the legality of the underlying tax regulation (Article 159 of the Constitution). If a court holds either of them unlawful, however, this concerns only the taxable person who has contested the tax assessment; other individual tax assessments are not affected.

Constitutional Court

Finally, Belgium also has a Constitutional Court (*Grondwettelijk Hof*, GwH). Though it does not rule on municipal tax regulations directly, it has a significant indirect impact. After all, this Court has the power to rule on the constitutionality of laws and decrees constraining or regulating the tax competencies of local authorities. Consequently, the Constitutional Court is also competent to judge whether a (given interpretation of a) constraint on a municipal competency is consistent with the requirements set out in Article 170 of the Constitution. Moreover, the Constitutional Court examines whether a constraint on municipal competency is consistent with the allocation of competences between the federal and regional authorities.

Although the three courts mentioned above each have distinct competencies on municipal taxes, all three of them can give their views on the interpretation of a certain legal provision affecting a tax levied by a local authority, without one of those views being dominant over the others. It has been shown several times in the past that this system leads to contradicting court rulings and lengthy discussions.

4.2.1.2 The Scope of Judicial Control Mechanisms

The scope of control mechanisms applied by the judiciary on municipal taxation can also be divided into three categories. A first form of control concerns the individual tax assessment.[67] Second, the validity of the tax regulation is assessed.[68] Finally, a third type of legal control concerns laws or decrees regulating the municipal tax competency.[69]

Reviewing Individual Tax Assessment

The most obvious form of legal control is the one concerning a proper application of the municipal tax regulation (and all matters explicitly or implicitly linked to it), after an individual tax assessment has been challenged. This is the kind of review made during the administrative appeal. In this kind of

Notes

[66] Unlike the Netherlands, municipal tax regulations in Belgium are still subject to administrative supervision, where the supervisory governmental authority is acting 'to prevent violations of the law or the public interest being harmed'.

[67] *See* section Ordinary Courts.

[68] This is done by all courts in Belgium (Council of State, ordinary courts and indirectly by the Constitutional Court). *See* s. 4.2.1.1.

[69] *See* section Constitutional Court.

review, the administration or the court assesses only the actions taken by the tax authorities; it does not give its views on an (alleged) unlawful provision in the tax regulation itself, or on its concordance with higher norms. This involves cases in which the administration has not applied the tax regulation correctly (taxable situation not being present, not granting a tax exemption where it was due, applying the wrong levying criterion), when disagreements arise on its interpretation (for example can a pharmacy cross-sign be considered as a form of advertising?),[70] but even cases in which the principles of proper public administration (principle of legal certainty,[71] proportionality,[72] fair play)[73] were not honoured.

From a broader perspective, this control mechanism also involves reviewing whether the tax authorities have acted in accordance with the Constitution, fundamental principles of tax law and other legal provisions, which must be considered incorporated in the tax regulation unless proven otherwise. Examples of misapplications of a municipal tax regulation include a discrimination caused by a faulty interpretation of the municipal tax regulation, granting an unlawful exemption[74] or applying the tax regulation on an extraterritorial or retroactive basis. As to the principle of equality, this principle is for example violated when a tax on vacant buildings is levied on involuntary vacant buildings or if the vacancy is caused by *force majeure.*[75] Finally, actions of tax authorities can be assessed in light of provisions of international law. Thus, based on the Treaty Establishing the European Economic Community (EEC) Protocol on the privileges and immunities of the EEC, taxes on second residences cannot be levied from EU officials who reside in Belgium, even though they do not have their main residence in the tax levying local authority.[76]

Reviewing Municipal Tax Regulations

When a dispute relates to provisions in the municipal tax regulation itself, legal control mechanisms are somewhat different. Disputes regarding the legality of a tax regulation are generally a matter for the Council of State, as mentioned above. However, in the event of a dispute, ordinary courts (both Courts of First Instance and Courts of Appeal) must examine the legality of a given tax regulation, as well – even *ex officio.*[77] The duty to do so arises from Article 159 of the Belgian Constitution, which states that the courts will apply municipal decisions only insofar as they are in accordance with the law. It is remarkable that, here as well, appeals to the Courts of First Instance must mandatorily be preceded by an administrative appeal to the Mayor and the Executive Board, although the latter does not possess the competence to judge the legality of the regulation, nor the competence to withhold the application of (a provision in) the tax regulation because of it is unlawfulness.

Regarding its scope, the control on alleged irregularities in a municipal tax regulation stretches quite far. The whole tax regulation is scrutinized thoroughly regarding its compliance with constitutional principles such as the principle of equality,[78] the principle of legality[79] and the principle of territoriality.[80] Furthermore, the tax regulation is examined in light of general (fiscal) principles such as the prohibition of retroactive taxation,[81] legal certainty,[82] the *non bis in idem* principle[83] and the principle of proportionality.[84] Finally, the tax regulation is reviewed in light of a range of other principles that have been recognized in case law regarding municipal taxes (for example the exemption of public buildings).

Notes

[70] BE: Rb. Antwerp, 20 Apr. 1999, no. 1997/BD/164 (Antwerp), LRB, 1999, no. 3, 157.

[71] *See* e.g. the reconsideration of the board on their commitment that tax on missing parking spaces didn't have to be paid. BE: Permanent Deputations (Best. Dep.) East-Flanders, 1 Oct. 1998, LRB no. 4.

[72] *See* e.g. the taxing of a starting company for the whole year and not in proportion to the activity in the starting year. BE: Rb. Antwerp, 5 Oct. 1999, LRB, 1999, no. 4.

[73] *See* e.g. submitting an incomplete administrative file, BE: Rb. Brussels, 15 Jan. 2008, LRB, 2008, no. 2, 93.

[74] BE: Rb. Hasselt, 12 Sept. 2007, no. 02/1457/A (Diepenbeek), LRB, 2008, no. 1, 24.

[75] BE: GwH, 14 June 2000, no. 67/2000 (Wallonia), LRB, 2000, no. 4, 198; BE: Rb. Brussels, 22 Oct. 2008, no. 2006/AR/3194 (Zelzate), LRB, 2009, no. 1, 68; BE: Rb. Ghent, 23 Mar. 2010, no. 2009/AR/1326 (Oostende), LRB, 2010, no. 1, 73; and BE: Rb. Bruges, 18 Jan. 2011, 09/3.245/A (Oostende), LRB, 2011, no. 4.

[76] BE: Cass., 17 Apr. 1986, RW, 1986-87, 900.

[77] Ex officio, so without it being raised by one of the involved parties.

[78] *See* e.g. the justification of a tax that only affects banking concerns. BE: Rb. Ghent, 20 Nov. 2012, no. 2012/AR/2487.

[79] BE: Rb. Liège, 18 June 2009, no. 08/2113/A & 24 June 2009, no. 08/3797/A (Liège), LRB, 2009, no. 4, 272; BE: Rb. Bruges, 24 Mar. 2003, 00/888/A (Bruges), LRB, 2003, no. 3, 154, regarding the relation between the principle of legal certainty and the principle of legality.

[80] BE: Rb. Brussels, 21 June 2001, no. 1997/BD/47 (Tubize), LRB, 2001, no. 4, 265; BE: Rb. Brussels, 17 Sept. 2003, no. 1998/BD/7 (Tubize), LRB, 2004, no. 1, 33; BE: Rb. Antwerp, 15 Mar. 2011, no. 2009/AR/2248 (Overpelt), LRB, 2011, no. 4.

[81] BE: Cass., 14 Mar. 2008, no. F.07.0067.F/1 (Lessines), LRB, 2008, no. 3, 219; BE: Rb. Ghent, 23 Feb. 2010, no. 2009/AR/619 (Oostende), LRB, 2010, no. 1, 69; BE: Rb. Antwerp, 9 Nov. 2010, no. 2009/AR/1574 (Schelle), LRB, 2011, no. 4; BE: Rb. Bruges, 4 Jan. 2012 (Koksijde).

[82] *See* e.g. BE: Rb. Mons, 5 Nov. 2003, LRB, 2004, no. 4 (regarding the minimum quantity of non-commercial texts a commercial magazine must contain to be exempt from tax).

[83] BE: Rb. Bruges, 4 Jan. 2010, no. 09/694/A (Province West Flanders), LRB, 2011, no. 1, 24 (provincial and municipal tax on secondary residences; BE: Rb. Antwerp, 7 Dec. 2010, no. 1998/BD/13 (Brasschaat), LRB, 2011, no. 4 (renewal of sewerage); BE: Cass., 11 Mar. 2011, no. F 10.0004.N (Antwerp), LRB, 2011, no. 4 (revocation and revaluation).

[84] *See* BE: Rb. Liège, 20 June 2001, LRB 2001, no. 4 regarding joint and several liability imposed on a tenant.

Because, as a rule, the Belgian local authorities are competent on fiscal matters, the courts will not examine whether a municipal tax regulation falls within the attributed competences of this local authority, but will examine if the given municipal tax regulation conflicts with (a limited number of) constraining provisions. Judicial review of municipal tax regulations in Belgium is therefore less focused on compliance with the law, and more on possible conflicts with constitutional provisions and general principles.

As a consequence, taxpayers in Belgium are still less inclined to examine municipal tax regulations in the light of international standards, although the number of tax disputes integrating European law is gradually increasing in the last years. Although there certainly are some cases in which the municipal tax regulation was held to be conflicting with rules of international[85] or European law[86] (of course, there are cases as well in which there was no conflict),[87] this is relatively rare, especially compared to the large number of procedures related to the compliance of municipal tax regulations as to national law.

Examining Authorizing or Constraining Provisions

A final type of judicial supervision concerns the supervision on provisions depriving local authorities of fiscal competencies. The Constitutional Court examines laws, decrees and ordinances in light of the competence issues, rights and freedoms as set out in the Constitution, and a number of other constitutional provisions, such as the principle of fiscal legality. Laws and decrees that restrict or regulate the municipal tax authority can therefore be properly assessed and be held (un)lawful.

For example the Constitutional Court handed down a judgment regarding whether a certain interpretation of Article 464 of the Income Tax Code (*Wetboek Inkomstenbelastingen*) was reconcilable with the constitutional principle of equality. This Article prohibits local authorities from levying taxes on a basis similar to that of the income tax. According to the contested interpretation, Article 464 contained a prohibition to tax any activity based on gross profit, except for displays and entertainment. The Constitutional Court ruled that such an interpretation was discriminatory.[88] However, no discrimination could be found in the fact that local authorities have to pay for collecting the additional municipal tax on the person's income tax, whereas regions were not held to do so for the same service.[89] More recently, the Constitutional Court ruled that the interpretation according to which mobile network operators were exempt from *all* municipal taxes conflicts with the constitutional provision stating that the legislature may limit municipal tax authority only in the case of apparent necessity.[90]

The Constitutional Court has, in many cases, not restricted itself to the answer as to whether a given interpretation violates the Constitution. If such a violation is ascertained, the Court usually presents an 'alternative interpretation' that does not violate the Constitution.[91]

Just as in the Netherlands, the Belgian Court of First Instances and Courts of Appeal can review tax provisions in respect of international law. However, cases in which a provision regulating municipal tax competencies is held to be in conflict with international law are scarce. One example is the ruling of the European Court of Justice (ECJ) that a calculating method regarding the additional municipal tax on the persons income tax (*aanvullende gemeentelijke personenbelasting* (AGPB)) was in conflict with European law, because the additional tax was levied on dividends for non-residents, which was not the case for residents (who paid only a withholding tax).[92]

4.2.2 *The Netherlands*

4.2.2.1 Organization of Judicial Control Mechanisms

Dutch (procedural) tax law provisions are laid down in a number of uniform laws, which apply for both taxes levied by the state and those levied by local authorities. In the Netherlands, tax law is considered to be a special part of administrative law. Therefore, provisions of procedural administrative law have been standardized as much as possible. Just as substantive tax law, procedural tax law can be characterized as a closed system. In short, an administrative appeal and an appeal before court regarding an individual tax assessment are possible only if the type of tax assessment concerned has been listed in a law.

Notes

[85] *See* e.g. the conflict between a tax on incoming flight passengers with the Treaty of Chicago on Civil Aviation. BE: RvS, 3 May 2005, no. 144.081 (Zaventem), LRB, 2005, no. 3, 207.

[86] *See* e.g. the conflict of tax on satellite dishes with the freedom to provide services: BE: ECJ, 29 Nov. 2001, Case C-17/00, *De Coster*, ECLI:EU:C:2001:651.

[87] *See* e.g. the alleged conflict between tax on mobile telephone base stations and the European freedom to provide services. BE: ECJ, 8 Sept. 2005, Case C-544/03, *Mobistar and Belgacom Mobile*, ECLI:EU:C:2005:518.

[88] BE: GwH, 16 Feb. 2012, no. 2012/19.

[89] BE: GwH, 4 Mar. 2008, no. 44/2008 (Flemish Region), LRB, 2008, no. 1, 41; BE: GwH, 31 July 2008, no. 118/2008, LRB, 2008, no. 4, 257.

[90] BE: GwH, 15 Dec. 2011, no. 2011/189.

[91] BE: GwH, 22 July 2004, no. 134/2004, LRB, 2004, no. 4, 265; BE: GwH, 6 Nov. 2008, no. 155/2008, LRB, 2009, no. 1, 69; BE: GwH, 15 Dec. 2011, no. 2011/189; BE: GwH, 16 Feb. 2012, no. 2012/19.

[92] BE: ECJ, 1 July 2010, Case C-233/09, *Dijkman and Dijkman-Lavaleije,* ECLI:EU:C:2010:397.

Legal proceedings start by means of an administrative appeal. The procedure has to be initiated within six weeks of the imposing date of the individual tax assessment and is handled by the authority that imposed the tax assessment itself. The tax levying officer of the local authority is therefore the competent authority regarding municipal taxes. After an administrative appeal has been completed, parties may decide to continue legal proceedings at a Court of First Instance (once again within six weeks). After that, parties may decide to address a Court of Appeal and, finally, the Dutch Supreme Court (*Hoge Raad*) at The Hague. The Supreme Court examines only whether the Court of Appeal judgment is sufficiently justified and/or conflicts with standing jurisprudence; it therefore does not render a judgment on mere factual matters. Tax law procedures are usually treated by specialized tax chambers.

Currently, there are eleven courts of First Instance (*Rechtbank*, District Court)[93] in the Netherlands and four courts of Appeal (*Gerechtshof*, Hof.),[94] each with their own jurisdiction.[95] Regarding municipal taxes, the competency of a given Court depends on the location of the tax levying authority and, therefore the local authority concerned. In the Netherlands there is, contrary to Belgium, no Constitutional Court. This is partly because of the prohibition laid down in the Constitution to test laws against the Constitution (*see* section 4.2.2.2).

The aforementioned courts have no jurisdiction to review decrees and ordinances in a direct procedure; they are non-contestable and are exempt from an independent appeal.[96] Therefore, one could argue that the legality of tax laws and decrees is not assessed directly. This, however, is overcome by permitting the judiciary review the tax assessment. In the legal proceeding against the tax assessment, the legality of the tax laws and decrees on which the assessment is based, can be questioned and will thus be tested by the judge.

4.2.2.2 Scope of Judicial Review

Regarding judicial review of municipal taxes, three control mechanisms can be distinguished, namely (i) reviewing the legality of tax laws, (ii) reviewing the legality of a municipal tax regulation and (iii) reviewing the execution of a municipal tax regulation.

The third control mechanism features two aspects: on the one hand, the court examines whether the tax assessment is consistent with the tax regulation; on the other hand, the court investigates if general principles of proper administration have been respected. This combination of a closed system of municipal taxation, a closed system of judicial review, the inability to examine the constitutionality of laws and decrees directly and the absence of preventive supervision means that the validity of (i) tax laws and (ii) municipal tax regulations may be reviewed only in a dispute regarding a specific tax assessment, based on the municipal tax regulation concerned (which, in term, is based on an authorizing tax law). The meaning of each control mechanism is considered in more detail below.

Examining Tax Laws

Courts are limited in their possibilities to examine the law. It is up to the legislature to draft laws and up to the courts to give rulings based upon those laws. Courts may therefore not assess the intrinsic value or fairness of the law.[97] Moreover, as mentioned above, in the Netherlands, courts are not allowed to examine whether laws and international treaties are in accordance with the Constitution. For the sake of completeness, bear in mind that this does not apply to subordinate legislation such as municipal tax regulations (*see* section Examining Municipal Tax Regulations). However, this impossibility can largely be circumvented by testing out laws against norms that outrank laws, such as human rights treaties, as many of the rights guaranteed by the Constitution have also been laid down in international treaties. For example the principle of equality (Article 1 of the Dutch Constitution) is guaranteed as well by the European Convention on Human Rights (ECHR, Article 14) and the International Covenant on Civil and Political Rights (ICCPR Article 26). Dutch courts are authorized to review laws in light of these treaty provisions. Finally, laws may be reviewed in light of unwritten general principles of law.

If a provision in a law is declared void, that provision can no longer be applied. Any subordinate legislation based on it will share its fate, effective immediately after the court's judgment. After all, the legal basis for the subordinate legislation no longer exists (in part or in whole). Decisions taken by public authorities and individual tax assessments remain legally binding, unless a procedure of administrative appeal or a procedure at a court of first instance is still pending. Local authorities may, of course, decide for themselves to repay the damage.

A striking example of courts examining laws in light of treaties is the following. The National Law on Assessment

Notes

[93] From 1 Apr. 2013 these are the judicial districts Amsterdam, Den Haag, Limburg, Midden-Nederland, Noord-Holland, Noord-Nederland, Oost-Brabant, Overijssel, Gelderland, Rotterdam and Zeeland-Wet-Brabant.

[94] From 1 Jan. 2013 these are the courts of Amsterdam, Arnhem-Leeuwarden,'s-Hertogenbosch and Den Haag.

[95] In 2013, several judicial districts were merged, so they've become larger than before.

[96] NL: Art. 8:2, in conjunction with Art. 7:1 Awb [General Administrative Law Act].

[97] NL: Art. 11 Wet algemene bepalingen [General Provisions Law].

of Real Estate (*Wet waardering onroerende zaken*, WOZ); the tax assessment, as a *WOZ-beschikking*, used to contain a threshold for taxpayers seeking administrative appeal. This meant that the valuation was considered to be established correctly if the difference with the actual value fell within certain, preset ranges. This meant that small valuation differences could not lead to a revision of the valuation of immovable property. The local authority did have discretionary powers to reduce the value of the property concerned, but this could not be enforced by taxpayers. The Dutch Supreme Court ruled that this system constituted a breach of Article 1 of the First Protocol to the ECHR.[98] More specifically, the provision was judged to be conflicting with the 'principle of lawfulness', because it firmly prevented taxpayers from challenging the legality of the *WOZ-beschikking*, while this assessment created the levying criterion for a number of taxes. Therefore, the Supreme Court urged local authorities and courts to set the threshold aside.[99]

Limitations by European or international law may be derived only from legally binding provisions in treaties and resolutions of international organizations,[100] as long as the application of these provisions is assured in a sufficiently clear and precise manner and the provisions assign rights to individuals. The European Charter of Local Self-Government (signed by the Member States of the Council of Europe) cannot be classified as such according to Dutch courts. The Administrative Jurisdiction Division of the Council of State stated, in the first place, that the Dutch government explicitly made a reservation for some of the provisions of the Charter when signing. And second, they judged that the provisions in the Charter are not sufficiently clear and precise enough to be able to assign specific rights to the taxpayer.[101] The Dutch Administrative High Court ruled that, assuming the provisions were binding, a violation would not be easily proven, as the provisions leave a certain space for the legislature to implement regulations for local authorities.[102]

Regarding municipal taxation, a remarkable proceeding was conducted against the state by the Association of Netherlands Local Authorities (Vereniging van Nederlandse Gemeenten).[103] The Dutch government had abolished the property tax on dwellings levied on residents and restricted the annual rate increase of remaining property taxes. VNG argued this abolition to be a breach against Article 9 of the Charter of Local Self-Government, as it constrains the power of raising tax income and hinders local authorities from obtaining a substantial and significant part of their own revenue by imposing municipal taxes. The District Court of The Hague declined these objections, by judging that Article 9 of the Charter is not legally binding on the Dutch state, as it is formulated in a generic way and not unreservedly applicable as objective law in the Dutch legal order.

Examining Municipal Tax Regulations

The provision that courts are not allowed to test out laws against the Constitution (*see* section Examining Tax Laws; hereinafter the examining ban) does not apply to municipal tax regulations. Whilst the Dutch Local Authorities Law itself may not be tested out against the Dutch Constitution,[104] there is no examining ban on testing out municipal regulations.[105] Furthermore, regulations may, just like laws, be reviewed in light of treaties and general principles of law.

If a court voids a (provision of a) municipal tax regulation, this officially affects only the disputed individual tax assessment itself. The tax assessment will consequently be reduced or voided, depending on whether the regulation is considered non-binding in whole or in part. The verdict has no direct effect on third parties or other taxable persons; other tax assessments that are based on the voided municipal tax regulation and have gained legal force, remain valid. Other taxpayers may claim the ineffectiveness of the municipal tax regulation only if they initiate (administrative) appeal themselves. However, there are also examples of case law in which taxpayers enforced *ex officio* reduction or voiding of tax assessments based on evidently unbinding tax regulations although the assessments had gained legal force.[106]

Notes

[98] NL: RvS, 22 Oct. 2010, no. 08/02324, ECLI:NL:HR:2010:BL1943. *See also* A. P. Monsma, *Ontwikkelingen op het gebied van de lokale belastingen*, Weekblad fiscaal recht 214 (2011); A. P. Monsma & M. J. M. de Jonckheere, *Nederlandse bezwaardrempel in strijd met Europees eigendomsrecht*, Lokale & Regionale Belastingen 1 (2012).

[99] For a comprehensive analysis of reviewing Dutch and Belgian municipal taxes against the European right of property, *see* A. P. Monsma & M. Delanote, *Lokale belastingen en het Europese eigendomsrecht*, in *Jaarboek lokale en regionale belastingen 2011-2012* 179–212 (Die Keure 2013).

[100] NL: Art. 94 Grondwet (Constitution). The same applies to European Directives. *See* ECJ case law: NL: ECJ, 5 Feb. 1963, Case C-26/62, *Van Gend en Loos/Administratie der Belastingen*, ECLI:EU:C:1963:1; IT: ECJ, 22 June 1989, Case C-103/88, *Fratelli Costanzo v. Comune di Milano,* ECLI:EU:C:1989:256.

[101] *See* Dutch case law: NL: RvS, 29 July 2011, no. 201011757/14/R1, ECLI:NL:RVS:2011:BR4025; NL: RvS, 7 Dec. 2011, no. 201107071/1/H1, ECLI:NL:RVS:2011:BU7093; NL: RvS, 2 May 2012, no. 201105967/1/R1, ECLI:NL:RVS:2012:BW4561; NL: RvS, 30 Aug. 2017, no. 201700214/1/A1 and 201609961/1/A1, ECLI:NL:RVS:2017:2318 and 2331. *See also* NL: RvS, 25 Sept. 2002, no. 200101205/1 and 200102037/1, ECLI:NL:RVS:2002:AE7993 (regarding water authorities: according to the judge they are excluded from application under the reservation made by the Dutch government when signing the Charter).

[102] *See* Dutch case law: NL: Centrale Raad van Beroep (CRB)[Central Board of Appeal], 8 July 2013, no. 12-1381 WWB, ECLI:NL:CRVB:2013:CA4026; NL: CRB, 9 Feb. 2017, no. 15/2638 WSW, no. 15/2641 WSW, no. 15/2640 WSW, no. 15/2642 WSW and no. 15/6878 WSW, ECLI:NL:CRVB:2017:480, 481, 484, 486 and 487.

[103] NL: Rb. The Hague 18 Apr. 2007, no. 262391 – HA ZA 06-1068, ECLI:NL:RBSGR:2007:BA3438.

[104] *See* e.g. NL: RvS, 12 May 1999, no. 33.286, ECLI:NL:HR:1999:AA2760.

[105] *See* e.g. NL: RvS, 20 Sept. 1995, no. 30.567, ECLI:NL:HR:1995:AA3102.

[106] NL: RvS, 8 July 1993, no. 15.028, *NJ* 1995, 73 (Pollution levy decree of water board Limburg), J. A. Monsma, *Toetsing van belastingverordeningen en gemeentelijke autonomie,* dissertation Erasmus Universiteit Rotterdam, 130–31 (Kluwer 1999).

Concerning local regulations, the method of review is twofold. First, courts examine whether the regulation concerned complies with authorizing provisions laid down in a law (legality test). Second, if and to the extent that local authorities enjoy autonomy in applying the levy, the choices made are reviewed in light of higher norms, including general principles of proper legislation. This will be explained more in detail below.

Principle of Legality

Due to the 'closed' system, a municipal tax regulation will be declared void if the local authority exceeds their legislative power given by the corresponding law. One example is expanding the dog license fee so as to include cats, but there are countless other examples.[107]

Higher Norms

Local authorities have the freedom to choose the so-called *essentialia* (such as the taxable person and the taxable object) of a municipal tax themselves. This applies in particular since 1995 regarding the levying criteria and the tax rate. Local authorities may decide upon these issues for themselves, unless the solution chosen by a local authority conflicts with the Constitution, with a Law, with general principles of law or with the prohibition to levy municipal taxes based on income.[108] This is the so-called new freedom of local authorities, as mentioned above. Case law shows that courts test out decisions made by local authorities against the constitutionally guaranteed right of free speech,[109] against the principles of equality and proportionality,[110] and against various treaties[111] and human rights.[112]

Examining the Application of Municipal Tax Regulations

In addition to testing out tax regulations and laws against higher norms, courts can also examine the correct application of a tax regulation. The consequences of a court's ruling that the regulation has not been executed correctly are limited to the disputed tax assessment itself. The court will reduce the assessment concerned or declare it void, on the same basis as mentioned above.

The most common form of judicial review looks to whether the amount of tax payable has been calculated correctly (in accordance with the provisions in the regulation). If, for example, different rates apply for different taxpayers, taxable events or taxable objects within one regulation, courts may investigate if the correct rate has been applied. An example is a different rate for single and multi-person households in the waste disposal tax.

Furthermore, the application of the municipal tax regulation by the levying officer may be tested against general principles of good administration. Possible yardsticks are the principle of equality,[113] the majority-rule as elaboration of the principle of equality, the principle of legitimate expectations[114] and the principle of carefulness or the principle of fair play.[115]

4.3 The application of competence constraining principles

4.3.1 *Interpretation of Legislative Provisions: Taxation Based on Income*

In order to assess the local fiscal autonomy, one also has to look at the application of rules and principles that may limit the competence of local authorities. An open system, in which exceptions to the leeway of fiscal competence are relatively comprehensive, does not necessarily have to be more autonomous than a closed system, where a broad interpretation of the taxes exhaustively described by law is accepted.

It is noteworthy in this context, for example, whether and to what extent local authorities in Belgium and the Netherlands may levy taxes on income, revenue or gross profit. As for taxes on income, legislative provisions are fairly clear. Article 464(1) of the Belgian Income Tax

Notes

[107] Like the forbidden expansion of advertising tax to objects on which advertisements are attached instead of the advertisement itself (NL: RvS, 7 Oct. 1998, no. 33.553, ECLI:NL:HR:1998:AA2314), betterment levy for other 'facilities' than meant by the legislature (NL: RvS, 8 Aug. 2003, nos. 36.766, ECLI:NL:HR:2003:AE2298, 36.769, ECLI:NL:HR:2003:AE2304, 36.777, ECLI:NL:HR:2003:AE2310, 36.778, ECLI: NL: HR:2003: AE2312, 36.779, ECLI:NL:HR:2003:AE2313) and fees for activities that do not qualify as 'service' (*see* s. 3.3.2).

[108] NL: Art. 219 (2) Local Authorities Act.

[109] NL: Hof. Amsterdam, 21 Nov. 2000, no. 98/3076, ECLI:NL:GHAMS:2000:AA9105.

[110] *See* e.g. NL: RvS, 10 Dec. 2004, nos. 36.776, 36.804, 37.041, 38.291, 38.292 and 39.178, ECLI:NL:HR:2004:AF7505, AF7508, AF7514, AR7336 and AF7523; NL: RvS, 13 May 2005, no. 38.402, ECLI:NL:HR:2005:AF7525; NL: RvS, 2 Dec. 2005, nos. 39.273 and 39.275, ECLI:NL:HR:2005:AU7345.

[111] For example, NL: Rb. Zutphen 12 Aug. 2009, no. 07/1879, ECLI:NL:RBZUT:BJ5438 (Switzerland–Netherlands treaty for avoiding double taxation); NL: RvS, 10 July 2009, no. 42.475, ECLI:NL:HR:2009:BG5918 (Art. 49 Treaty of the EU and two European Directives); NL: RvS, 6 June 2008, no. 41.769, ECLI:NL:HR:2008:BD3159 (NATO Status Treaty, diplomatic exemptions).

[112] For example, NL: Hof. Leeuwarden, 4 July 2008, no. BK-80/07, ECLI:NL:GHLEE:BD6626 (principle of equality Art. 14 ECHR); NL: RvS, 29 Oct. 2010, no. 09/02654, ECLI:NL:HR:2010:BM9232 (European right of property, Art. 1 First Protocol ECHR) after PL: ECtHR, 22 Feb. 2005 & 19 June 2006 (Grand Chamber), no. 35014/97, *Hutten-Czapska/Poland.*

[113] NL: RvS, 17 June 1992, no. 26.777 & 27.048, BNB 1992/294 en 295 (property tax); NL: RvS, 13 July 2012, no. 11/00162, ECLI:NL:HR:2012:BV0264 (declaration taxes like the amusement retribution in Amsterdam) and NL: Hof. Leeuwarden, 9 Mar. 2001, no. 00/00537, Belastingblad 2001, at 557, LJN: ECLI:NL:GHLEE:2001:AB0521 (parking tax, arbitrary assessment).

[114] NL: Rb. Amsterdam 28 July 2005, no. 05/553, ECLI:NL:RBAMS:2005:AU2493 (cleaning fee rate).

[115] NL: Rb. Haarlem 17 Aug. 2011, no. AWB 10/7050, ECLI:NL:RBHAA:2011:BU6938 (building permit fee rate).

Code prohibits local authorities and provinces to levy supplementary tax on the various income taxes. It also prohibits levying similar taxes on the taxable base or on the sum of income taxes, except for income from immovable property. However, local authorities may levy an additional municipal tax on the person's income tax (AGPB). As for the Netherlands one has to look at Article 219(2) of the Dutch Local Authorities Law (*Gemeentewet*). This provision states that municipal taxes may be levied upon criteria (assessment standards)[116] determined in tax regulations, provided the tax will not directly depend on income, profit or capital. Dutch local authorities may therefore determine their own levying standards and rate, as long as they are not based on the financial capacity of the taxpayer directly. Tax standards relating more indirectly to income, profit or capital, such as the market value of immovable property for example, are not prohibited.

As a result, it is impossible in both countries to levy municipal taxes based on the amount upon which the national income tax is calculated. With regard to the question if local authorities may levy taxes on gross profit, both countries seem to have differing case law.

4.3.1.1 *Case Law in Belgium*

The question as to whether the legal prohibition in the aforementioned Article 464(1) of the Income Tax Code also includes a ban on levying municipal taxes based on revenue or gross profit was not raised in Belgium until recently. Until the mid-1990s, only one indirect decision from the Council of State (RvS) can be found on this issue, concerning a municipal tax on chip shops. The Council of State decided that 'as neither the gross profit, nor the amount of due income tax was taken into account, the prohibition provision of the Income Tax Code was not violated'.[117] Yet, local authorities did not refrain from levying taxes on displays and entertainment as they had always done in the past, i.e. as an indirect tax based on the sum of gross revenue.

Due to a number of quick successive rulings and judgments by the turn of the millennium, the stance was quite suddenly taken that Article 464(1) of the Income Tax Code also prohibited levying municipal taxes on gross profit. The judiciary decided that a municipal tax based on the prices charged by exploiters of parking lots,[118] as well as the taxation of hotel rooms based on a percentage of the gross income of their rental,[119] and the levied taxes on displays and entertainment based on revenue,[120] all were in conflict with Article 464 of the Income Tax Code. The reasoning was that realized revenue is an essential part of the person and corporate income tax, and therefore should fall under the legal prohibition as intended by the legislature. While there were still some proponents in both legal doctrine[121] and jurisprudence[122] that specifically believed it should be possible to levy municipal taxes on displays and entertainment based on admission fees, the argument seemed to have been settled by a judgment of the Supreme Court on 10 December 2009. After all, at that time, both the Council of State and the Supreme Court had made pronouncements indicating that they were in favour of the view that Article 464(1) of the Income Tax Code prohibited municipal taxes on gross profits. This included the prohibition of taxation on displays and entertainment based on admission fees.[123]

Since then, the legal debate seems to have heated, as the Council of State revoked its earlier view. In a verdict on 12 January 2010[124] it stated that it *should* be possible for local authorities to base a tax on displays and entertainment specifically (and exclusively) on entrance fees. In reply to the inevitable question about the reconcilability of this interpretation of Article 464(1) of the Income Tax Code with the principle of equality, the Constitutional Court decided on 16 February 2012 that the interpretation given by the Council of State violated the principle of equality. However, in their own interpretation of Article 464(1) of the Income Tax Code, the Constitutional Court expressed that the prohibition clause covers only 'the final amount on which the income taxes are calculated'. This

Notes

[116] Unless specific tax standards are set in the Tax Act.

[117] NL: RvS, 8 Feb. 1993, FJF, 93/126.

[118] BE: Rb. Brussels, 24 Sept. 1998, 1995/BD/78, LRB, 2000, 37.

[119] BE: Rb. Brussels, 5 Feb. 2004, no. 2000/BD/68 LRB, 2004, 187; Cass. 05 May 2011, no. F 10.0006.F (Liège), LRB, 2011, no. 4; BE: Rb. Ghent, 13 Dec. 2011, no. 2010/AR/2700 (Ghent), LRB, 2012, no. 1.

[120] BE: Rb. Brussels, 18 May 2001, no. 1997/DP/115, LRB, 2001, 196 and Tijdschrift Fiscaal Recht (TFR), 2001, 1042; BE: Rb. Brussels, 27 Jan. 2008, Fisc.Koerier, 2008/413; BE: Rb. Antwerp, 19 Feb. 2008, FJF, 2009/180; BE: Rb. Ghent, 22 Feb. 2005, no. 2002/AR/1896 (Ghent), LRB, 2005, no. 2, 133; BE: Rb. Antwerp, 18 Jan. 2011, no. 2009/AR/2652 (Ghent), LRB, 2011, no. 4; BE: RvS, 22 May 2008, no. 183.202; Cass 10 Dec. 2009, no. F080041.

[121] J. Kirkpatrick, *La légalité des règlements communaux établissant des taxes sur les spectacles*, Revue Générale du Contentieux Fiscal (RGCF) 198–201 (2009); E. van Dooren, *note to Trib. Brugge 02-11-2004*, TFR 632 (2006); E. Van Dooren, *Belastingen op vertoningen en vermakelijkheden: agonie of revitalisatie*, in *Jaarboek lokale en regionale belastingen 2005-2006* 373–403 (M. De Jonckheere & K. Deketelaere eds, Die Keure 2006); V. Sepulchre, La taxe communale sur les spectacles et les divertissements, Rev.dr.commun. 23–29 (2008); V. Sepulchre, *Taxes locales sur les spectacle's*, Rev.dr.commun. 92–99 (2010).

[122] BE: Rb. Antwerp, 25 May 2004, no. 2003/AR/1333 (Antwerp), LRB, 2004, 193; BE: Rb. Bruges, 2 Nov. 2004, TFR, 2006, 632 with a note by E. van Dooren. *See also* BE: Rb. Liège, 26 Oct. 2005, Rev.dr.commun., 2008, 18.

[123] BE: RvS, 22 May 2008, no. 183.202; Cass. 10 Dec. 2009, no. F080041.

[124] BE: RvS, 12 Jan. 2010, no. 199.454. *See also* BE: RvS, 12 Jan. 2010, no. 199.455.

interpretation leaves room to levy municipal tax based on gross income for every economic activity.

Thus, the top three Belgian courts of law take a different view on the interpretation of the most significant competence constraint on municipal tax autonomy, namely Article 464(1) of the Income Tax Code. Several recent decisions show that the Supreme Court retains its earlier point of view,[125] to which most Courts of Appeal adhere.

4.3.1.2 *Case Law in the Netherlands*

In the Netherlands the prohibition against the levy of municipal taxes based on tax-bearing capacity appears to be interpreted – primarily – restrictively, as it does not prevent local authorities from calculating taxes on gross profit. The Dutch Supreme Court (*Hoge Raad*) ruled that a tourist tax levied as a percentage of the nightly rate, was not in conflict with the ban on a charge based on financial capacity. The Dutch Supreme Court held that the used assessment standard was indeed an objective criterion that did not have more than an indirect connection to the income of the guest or profitability of the hotel. Therefore, no prohibited differentiation to income, profit or capital, as referred to in Article 219(2) of the Dutch Local Authorities Law, was made.[126] A tax for the use of public ground on behalf of gas stations calculated on the quantity of sold gas was also found not to be in conflict with the prohibition to levy municipal taxes based on financial capacity, according to the Dutch Supreme Court.[127] The Advocate General concluded that the connection between gross revenue and income or profit is of a too indirect nature, to be considered in violation with the prohibition to levy taxes based on tax bearing capacity. Also, setting the market value of immovable property as a taxing standard for municipal levies like the sewerage levy[128] and the commuter tax[129] is permitted.

4.3.1.3 *Conclusion: Income-Based Taxes*

Both the Netherlands and Belgium have restrictions regarding levying municipal taxes based on income, revenue and/or gross profit. Remarkably, the closed Dutch system seems more flexible than the open Belgian regime. In Dutch case law, a distinction is made between a direct and indirect connection with income or profit. No conflict with the prohibition to levy taxes based on financial capacity exists if a levy is based on the gross profit, like the tourist tax founded on a percentage of the price of accommodation. In Belgium however, such a levy *is* considered to be in violation of the prohibition.

The authors believe that this is caused by a wider reach of the principle of equality in the Belgian open system, where the possibility for a tax on gross profit for a specific group would immediately trigger the question concerning similar taxes for other groups. In the Netherlands, the principle of equality does not reach further than the levy in dispute. A legal judgment about a possible conflict with tourist tax and the principle of equality affects only that type of tax. As for this subject, a broader fiscal autonomy therefore exists for Dutch local authorities as opposed to Belgian local authorities. Another reason for the more restrictive Belgian point of view, is that the combination of a possibility to tax gross profit with an open tax system that allows every imaginable tax, would indeed easily allow the interdiction to levy taxes on income to be completely eroded. It would indeed not be that hard to turn a combination of taxes on gross profit into taxes on net profit using tax rates that reflect the gross/net ratio.

4.3.2 *The Interpretation of Constitutional Rules: Equality and Differentiation Within Local Authorities*

In both Belgium and the Netherlands, it is possible for local authorities to limit the territorial scope of their taxation. Tax is then due only in a certain part of the local authority or the amount of the tax differs among areas of the local authority. The principle of equality plays a central role in this territorial delimitation. When tax or more tax is due in a particular part of the local authority than in another part, a violation of the principle of equality arises. Territorial tax differentiation therefore is permitted only when an objective and reasonable justification exists. The open and closed municipal tax systems in Belgium and the Netherlands may account for the difference in meaning and consequences of the principle of equality that can be observed in both countries.[130]

Notes

[125] BE: Cass., 24 May 2012, no. F.11.0053N; BE: Cass., 19 Sept. 2013, no. F.12.0171.N; BE: Cass., 20 Sept. 2013, no. F.12.0084.F; BE: Cass., 13 Feb. 2014, no° F13.0059N; BE: Rb. Ghent, 28 Oct. 2014, nr. 2013/AR/223 LRB, 2014, no. 3, 38; BE: Cass., 20 Apr. 2018, no° F.16.0132.F.

[126] NL: RvS, 3 Oct. 2003, no. 38.185, ECLI:NL:HR:2003:AL6974.

[127] NL: RvS, 28 June 2002, no. 36.969, ECLI:NL:HR:2002:AD8550.

[128] NL: RvS, 13 May 2016, no. 15/05264, ECLI:NL:HR:2016:841.

[129] NL: RvS, 15 May 2009, no. 07/13148, ECLI:NL:HR:2009:BD5477.

[130] For a more detailed overview on this subject, *see* L. de Meyere & A. Schep, *Territoriale differentiatie binnen gemeentebelastingen,* in *Jaarboek Lokale & Regionale Belastingen 2011-2012* 75–116 (M. de Jonckheere ed., die Keure 2012).

4.3.2.1 *Territorial Differentiation in Belgium*

In Belgian law, the fiscal principle of equality is phrased as follows: 'no privileges with regard to taxes shall be introduced'.[131] This abstract description has been clarified in literature and by the judiciary: 'The constitutional rules of equality and non-discrimination does not rule out a difference in treatment between certain categories of people, as long as that difference is based on objective and reasonable criteria. When assessing the existence of such a justification, one has to take into account the purpose and consequences of the disputed provision, as well as the nature of the principles in question. The principle of equality is violated when there is no reasonable and proportional connection between the applied resources and intended goal'.[132] Marginal scrutiny is used when testing municipal taxes against the principle of equality.[133] To be considered an objective criterion that can justify a potential unequal treatment, the criterion must be impersonal and must be based on ascertainable facts rather than on sentiment or prejudices.[134] Although paraphrased, this definition of the principle of equality also applies in the Netherlands.

In Belgian court decisions and literature, it is acknowledged that tax-levying governments may also use their tax competence for non-fiscal purposes (for instance, objectives with an economic, social, aesthetic or environmental purpose). However, the main objective of the tax must always be of a fiscal nature. This refers to the budgetary function of the tax or the fact that the reason for or the level of taxation is related to, for example, the magnitude of the costs, the financial capacity of the people involved or the advantages received.[135]

As Belgian general municipal taxes have a purely budgetary purpose, it will not be possible to limit these taxes to only a specific part of the local authorities' territory, as no justification of such unequal treatment exists. Why should a person from one part of the town pay more than another if the municipal tax applies to all and is justified only by budgetary reasons?

For other types of taxes, such as destination-based taxes for services rendered in a specific part of the local territory, territorial differentiation is possible. Additional, non-fiscal objectives could provide justification for unequal treatment of taxpayers. These will have to be explicitly expressed by the municipal tax authorities to allow testing of the differentiation against the sought after non-fiscal purpose. The motives behind these objectives must be observable (which the dossier can prove), they must be correct (they must correspond to reality) and finally they must be 'load bearing' (they must effectively justify the decision).[136] An example of a territorially differentiated taxation in Belgium, is the destination-based tax for the construction and equipment of roads, sewers, footpaths etc. It is a direct tax meant to recover the costs of those services, from the owners of adjoining property, who are considered to irrefutably benefit from this particular service. This levy can be characterized between general taxes and fees and shows a lot of similarity with the Dutch betterment levy (*see* below). This tax will apply only to owners of property adjoining roads where equipment was installed, and can therefore be described as territorially limited. One significant difference with the Dutch situation, however, is that in Belgium the destination-based tax must apply to the entire local authority: if similar works are carried out in another part of the territory of this same local authority, this tax will necessarily also apply there.

4.3.2.2 *Territorial Differentiation in the Netherlands*

The Dutch betterment levy has been formulated by law so that it can be limited to a specific part of the local territory. The betterment levy regulation applies only to the indicated served area. The decision to introduce a betterment levy to recover construction costs for particular facilities and to apply this to the benefiting property only applies to this area. If similar provisions are made in other parts of the local authority, the Dutch local authority is – unlike Belgian local authorities – not legally required to introduce a similar betterment levy. In Belgium, not introducing a betterment levy in another part of the local authority whilst concerning similar facilities, would be considered arbitrary and thus in conflict with the principle of equality. This difference between Belgium and the Netherlands is a direct result of the respectively open

Notes

[131] BE: Art. 172(1) Coordinated Constitution (Gecoördineerde Grondwet) of 17 Feb. 1994 which constitutes a clarification or special application of the principle of equality in accordance with Arts 10 and 11 of the Belgian Constitution. BE: Constitutional Court (Arbitragehof), 4 July 1991, no. 20/91, FJF 1991, no. 91/142.

[132] BE: GwH, 13 Jan. 1994, no. 1/94, B.s. 1 Feb. 1994, 2000; BE: Cass., 5 Oct. 1990, RW 1990-91, 328; BE: RvS, 25 Apr. 1990, FJF 1990, no. 90/118.

[133] The discretion of tax-levying authorities is being acknowledged here. BE: GwH, 4 July 1991, no. 20/91, FJF 1991, no. 91/142, B.10; BE: Cass., 28 June 2001, s.e. A.R. F000024F; BE: Cass., 10 Dec. 2009, F.08.0020.N/9; BE: Court of Antwerp 13 Nov. 2001, LRB, 2002, no. 1, 35; BE: Court of Antwerp 29 June 2001, TFR 2001, 1159.

[134] S. Van Crombrugge, *De gelijkheid in het fiscaal recht*, in *Actuele fiscale thema's* 23 (S. Van Crombrugge ed., Biblo 2007).

[135] For Belgian case law, *see* BE: Cass., 19 Oct. 1986, *Pas.* 1896, I, 287; BE: RvS, 23 Dec. 2002, FJF 2003, no. 2003/239. For more, *see ibid.*

[136] P. Van Orshoven, *Uitdrukkelijke motivering van (fiscale) bestuurshandelingen* 506–09 (Fiscale Koerier 1991).

and closed states of their tax systems. If the possibility of unequal treatment has been deliberately enshrined in law by the national legislature, Dutch courts seem to consider themselves unable to oppose this at a later stage. In the Belgian situation, however, where the tax system is not legally enshrined, the principle of equality applies without limits to the entire municipal territory.

Another Dutch example of a creative approach to the closed system concerns the introduction of an advertising tax in only a portion of the local authority's territory. It is accepted in case law that this tax – classified as a general tax – may be limited by a particular local authority to a portion of its territory, provided this has an objective and reasonable justification.[137] As a local authority may also choose how to spend the proceeds of a general tax, these proceeds moreover may be spent on activities and provisions within a specific area of its territory. This freedom means that many Dutch local authorities levy an advertising tax only within the (shopping) centre area, while the proceeds are recycled as subsidies for taxpaying entrepreneurs. It is then up to those entrepreneurs to spend the proceeds on joint activities or provisions within the shopping district. This practice is referred to in the Netherlands as entrepreneurial funds and is somewhat similar to business improvement districts in the United Kingdom and the United States. Within the courts decisions, there is considered to be an objective and reasonable justification behind the limitation of taxation to the shopping centre area, if the local authority can reasonably assume that those who would profit from the proceeds of this taxation are also subject to the levying thereof.[138] Consequently, more freedom for local authorities also exists here in the closed system of tax levying, than would be possible in the open Belgian system due to the limited scope of the principle of equality.

4.3.3 *The Recognition of Fiscal Principles: Tax Freedom for Public Goods*

4.3.3.1. Tax Freedom for Public Goods in Belgium

A last peculiarity of the Belgian open municipal tax system is the manifestly easier recognition of fiscal principles limiting the fiscal authority. Exemplary is the *principle of tax freedom for public goods*, which means that goods of the actual government,[139] of the public domain or of the private domain but intended for public utility are exempted from municipal and provincial taxes.

Until 1881, the highest courts of justice of Belgium shared the opinion that the state, even for its public domain goods, was subject to municipal taxes, because there was not any law granting a tax exemption.[140] Soon afterwards, the Supreme Court assembled in United Chambers recognized the principle of tax freedom of the state.[141] The dispute concerned the possibility for the city of Brussels to tax the construction of several public buildings, including the 'palace of justice', the most important court building in Belgium. After the Court of First Instance authorized the tax exemption in first instance,[142] the Court of Appeal altered the decision in taxability[143] and finally, the Supreme Court decided for the first time that municipal tax freedom of the state for public goods is a general principle.[144] However, the Court of Appeal in Ghent – to which the case was referred – did not accept this view, and decided in favour of the tax levied by the city of Brussels.

A second decision by the United Chambers of the Supreme Court – which made the verdict binding for all other courts – reconfirmed the principle of tax freedom.[145] The principle of tax freedom for state goods of the public domain and for goods of the private domain but intended for public use has been confirmed many times in subsequent years,[146] and is still applied today.[147] It was even recently reconfirmed by the Supreme Court in a decision

Notes

[137] BE: Cass., 21 June 2000, no. 33.816, ECLI:NL:HR:2000:AA6252.

[138] BE: Cass., 11 Nov. 2011, no. 10/04446, ECLI:NL:HR:2011:BR4564.

[139] I.e. the central government, the communities and regions, the provinces and local authorities. Property of 'parastatal' agencies, institutions, associations, or public bodies only are granted a municipal tax exemption when they're explicitly considered equivalent to actual government regarding municipal taxes in their establishing statutes.

[140] BE: Cass., 10 Mar. 1881, Pas., 1881, I, 153.

[141] *See* BE: Judicial Code (Ger.W) current Arts 1119–1121.

[142] BE: Rb. Brussels, 13 Aug. 1888, *s. l.*, as quoted by J. De Becker & A. Balsacq, *Guide pratique de la fiscalité communale*, luttre, Office International d'Editions, 1926 28.

[143] BE: HvB. Brussels, 22 Dec. 1888, Pas., 1889, II, 109.

[144] BE: Cass., 1 July 1890, Pas., 1890, I, 252.

[145] BE: Cass. (United Chambers), 11 Apr. 1894, Pas., 1894, I, 167; *see also* BE: Cass. (United Chambers), 28 June 1910, Pas., 1910, I, 373, regarding goods of the private domain intended for use of public value.

[146] BE: Cass., 1 Feb. 1890, Pas., 1890, I, 252; BE: Cass., 16 Jan. 1905, Pas., 1905, I, 83; BE: Cass., 29 Nov. 1909, Pas., 1910, I, 18; BE: Cass., 7 June 1910, Pas., 1910, I, 335; BE: Cass., 20 Mar. 1911, Pas., 1911, I, 167; BE: Cass., 30 Nov. 1911, Pas., 1912, I, 21; BE: Cass., 17 June 1915, Pas., 1915-16, I, 348; BE: Cass., 1 Apr. 1946, T. Gem., 1951, 197; BE: Cass., 16 Feb. 1951, T. Gem., 1951, 198; BE: Cass., 14 Mar. 1961, T. Gem., 1962, 69; BE: Cass., 29 Sept. 1964, T. Gem., 1965, 4. *Indirectly see* BE: Cass., 12 Oct. 1954, JT, 1955, 194; BE: Cass., 3 May 1968, RW, 1968-69, 409; BE: Permanent Deputations (Best. Dep.) Namur 10 Dec. 1992, FJF, 93/228.

[147] *See* e.g. BE: Rb. Brussels, 21 Jan. 1999, no. 1997/BD/84 (Brussels), LRB, 1999, no. 2, 84 (regarding taxation on temporary occupation of the public road because of construction or renovation work, where the Flemish Parliament owned the renovated building).

of 23 February 2018.[148] However, for certain taxes (such as vacancy taxes), the exemption for public goods is being questioned by some courts.[149]

4.3.3.2. No Tax Freedom for Public Goods in The Netherlands

In the Netherlands, no such municipal tax freedom for public goods exists. In principle, 'own' municipal institutions are taxable and all public buildings are valued on the basis of the WOZ (National Law on Assessment of Real Estate). A remarkable example is the valuation of the Royal Palace Huis ten Bosch, one of the palaces of the formal queen in The Hague.[150] Other governments, like the state, the province and the water board, may be subject to municipal taxes, as well. However, concerning the WOZ, several valuation exemptions for real estate are applicable, of which no value need be assessed. Such immovable property often are owned by the aforementioned governments. Amongst others, these are nature reserves, public land-, water- and railways, works for defending and managing water (such as dykes and pumping stations) and works for depolluting waste treatment.

It should also be mentioned, that although the local authority is taxable for its own taxes, this does not mean the taxes are actually being collected. To prevent administrative costs, local authorities are allowed to omit imposing and collecting tax assessments in this case.

This example shows again the bigger tax autonomy of Dutch local authorities over the Belgian local authorities.

5 Conclusion

This article has analysed the freedom of Dutch and Belgian local authorities to levy taxes. The most striking difference between these two countries is a closed system versus an open system through own taxes. The authors conclude that an 'open system', whereby the exceptions on fiscal competence are relatively comprehensive, does not necessarily have to be more autonomous than a closed system, where a broad interpretation of the taxes exhaustively described by law is accepted.

Dutch local authorities may levy taxes only if explicitly mentioned so in the law. Except for some specific regulations and general principles of proper legislation, local authorities in the Netherlands may choose the tax base themselves. There is no preventive supervision of the tax regulation before the introduction of a tax. Taxpayers do not have remedies against the municipal tax regulation itself; administrative appeal and appeal is possible only after receiving a tax assessment. When reviewing the tax assessment, however, courts may examine whether the municipal tax regulation, and/or the execution thereof, complies with the legal terms laid down in the Local Authorities Law, the Constitution, general principles of law and treaties.

Belgian local authorities can levy any tax they want, except for some legal exceptions, administrative approval and respect of general fiscal principles. This open system has led to the existence of well over 100 different municipal taxes. Judicial control takes place on three levels: the individual assessment, the tax regulation and the Constitutionality of the legal provisions. Furthermore, the number of principles that bounds the tax autonomy in Belgium is broader than in the Netherlands. These principles do also have a wider reach.

Both in the Netherlands and in Belgium there is, in judicial review as well as in practice, a distinction made between taxes and fees. Destination-based taxes form an intermediate category of charges. The distinction between taxes, destination-based taxes and fees has a different importance in both countries. In the Netherlands, there is a stricter separation, while the distinction is more flexible in Belgium. In Belgium, it is possible to transform a fee into a tax. After this 'fiscalizing', Belgian local authorities gain access to the formal tax legislation to enforce the payment of charges for rendered services, such as investigation powers and penalties, which can't be used for fees.

In the Dutch system, the only way to design a fee as a tax is when the national legislature changes the character of the fee. However, it is possible, and this happens often in practice, that a general tax is introduced by local authorities as a destination-based tax: the revenue is destined for a specific target and the taxation is based on a presumed group profit. Moreover, in the Netherlands the same collecting and taxation powers apply for both taxes and fees. However, the judicial control between those levies are different in the Netherlands. Especially fees have a comprehensively judicial examination. It can also be concluded that the strict distinction between the levies and the way judicial control happens in the Netherlands, are the direct result of the closed system and the legal regulations of the distinguished levies. The higher degree of flexibility for Belgian local authorities is the result of the open system that applies there.

Nevertheless, at some points there is more freedom in the closed Dutch system than in the open Belgian system. In this article, this is illustrated on the basis of three situations:

Notes

[148] BE: Cass., 23 Feb. 2018, nr. F16.0102.N

[149] BE: Rb. Leuven, 9 Dec. 2011, no. 11/279/A (Leuven); BE: Rb. Liège, 11 May 2007, FJF 2009, no. 3, 339; BE: Rb. Mons, 7 July 2011, FJF 2012, no. 10, 1197. *Contra* BE: Court of Mons, 28 June 1994 FJF 1995, 45.

[150] BE: Cass., 2 Dec. 2005, nos. 39.631 en 39.632, ECLI:NL:HR:2005:AQ7121.

- Regarding levying municipal taxes based on income, revenue and/or gross profit, it seems that the closed Dutch system is more flexible than the open Belgian system. In Dutch jurisprudence, a distinction is made between a direct and indirect connection with income or profit. No conflict with the prohibition to levy taxes based on financial capacity exists if a levy is based on the gross profit. In Belgium however, such a levy is considered to be in violation of the prohibition.
- The second example, about the possibilities for local authorities to differentiate with their taxes within the territory, shows again that local authorities have more freedom in the Netherlands. This is on the one hand because the main objective of the tax must be of a fiscal nature in Belgium, and on the other hand because of the reach of the principle of equality. Territorial restricted taxes will therefore be considered illegal if another part of the territory is in the same circumstances. In the Netherlands, the principle of equality has a more limited scope, and a levy can be limited to a specific part of the local territory on multiple occasions.
- The open Belgian system is among other things limited as to the result of specific tax principles. One of these fiscal principles is the tax freedom of public goods. Such a principle – and the resulting restriction of the local authorities' tax autonomy– does not exist in the Netherlands.

Overall, the difference between the two systems appears to be much more subtle than one might expect at first glance. In the Belgian open system, municipal tax autonomy appears to be constrained in a comprehensive manner, because of limitations in laws and preventive and judicial scrutiny at various levels. Regarding the more substantive provisions, the Belgian municipal taxation system has been widely constrained by general principles of tax law. In the Netherlands, the opposite is true. The closed system shows a limited number of constraints as regards to judicial scrutiny in comparison to the Belgian situation. Remedies against the tax regulation itself do not exist; nor is the tax regulation preventively being assessed at a higher level. Less principles of tax law apply, and those that do have less far reaching consequences than in Belgium.

This study was exploratory by nature, because the municipal tax autonomy of only two countries within the European Union was compared. Further research is needed to determine whether the authors' findings can be extrapolated to other Member States who are operating systems of open or closed tax competence.